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Carl Bogus

Roger Williams University School of Law

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Recommended Citation

"The Hard, Simple Truth about Gun Control," in *Guns in Law*, edited by Austin Sarat (Amherst, Massachusetts: University of Massachusetts Press, 2019)

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The Hard, Simple Truth about Gun Control

Carl T. Bogus*

Gun control can be extremely effective at significantly reducing homicides, suicides, and gun-related robberies, assaults, and injuries. There is substantial evidence supporting that conclusion. However, the simple, hard truth is that only one form of gun control has been shown to be effective – namely, anything that significantly reduces the number of handguns in general circulation. The implications of that argument are enormous. In 2008, the United States Supreme Court held that individuals have a constitutional right to have handguns in their homes, and therefore a system of regulation designed to reduce the number of handguns in American homes would be unconstitutional. Gun control advocates faced political obstacles before that ruling. Rather than acknowledge the simple, hard truth, they opted instead to advocate so-called common sense measures, even though there is little evidence suggesting modest measures are likely to be effective. That strategy led to Pyrrhic victories. The strategy was counterproductive for public opinion over the long run, and it may well have misled Supreme Court justices into believing that their Second Amendment decision had no adverse public health consequences. It is, therefore, important to be clear about the choice before us. The choice is not whether America will have effective gun control today. It can't. The choice is whether America will have effective gun control in the future. While public opinion, politics, and constitutional law currently bar the way, all three are malleable. The public, politicians, and judges can all be educated. That must begin, however, with telling the simple, hard truth about gun control.

* Distinguished Research Professor, Roger Williams University School of Law. The author thanks Hannah Pfeiffer for her superb research assistance, and Sandra G. Mayson and participants in a seminar for the Department of Law, Jurisprudence, and Social Thought at Amherst College for their insightful comments on earlier drafts of this chapter.

The Hard, Simple Truth about Gun Control

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I.

There are two kinds of people: those who divide the world into two kinds of people and those who don't. That old joke gets at the heart of the simple truth about gun control. The general consensus today is that society is divided into two kinds of people: those who can be trusted with guns and those who cannot. The goal is to devise a system of firearm regulation that allows responsible people to own guns and denies them to irresponsible people. Both gun control advocates and opponents implicitly accept that basic approach, even though they passionately disagree about how to implement it. Elected officials, who have little time to study the issue and rely on what advocacy groups on their side of the ideological divide tell them, also accept the consensus model. The problem with that model, however, is that it stems from fantasy. Society is not divided into two kinds of people; things are far more complicated than that. Moreover, even to the extent that there may be some kind of division between the trustworthy and the untrustworthy, it is not possible to devise a regulatory scheme that can effectively distinguish between the two. Nor will that ever be possible. The implacable obstacle to the consensus model is human nature, and that is not going to change.

That does not mean effective gun control is impossible. It is possible, and in fact, it has long existed in other affluent nations. Rhetoric about American exceptionalism notwithstanding, human beings in America are not different than human beings elsewhere. As we shall see, what makes the United States different from other affluent nations is not its level of violence, but its level of lethal violence – and that difference is due to the prevalence of guns. Other nations are horrified by the level of lethal violence we tolerate. If we regulated guns the way other countries do, we would save more lives and avoid more injuries than U.S. Armed Forces experience in wars.

Why do Americans accept so much unnecessary carnage? For some Americans, the choice is a conscious one. They are willing to pay the price of living in a society with more gun-related homicides, injuries, robberies, assaults, and suicides in order to have what they perceive to be freedom. The Founders, they believe, bequeathed us a sacred Second Amendment right. But for most Americans, the choice is largely unexamined. Because they don't hear people advocating for a different model, they assume that no other model is possible. They are not sure whether it is unavailable as a matter of constitutional law, politics, or sociology. They haven't thought it through far enough to ask whether another

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model is possible. Quite understandably, what they consider is framed by what they hear, and what they hear from all sides involves some variation of the good guy/bad guy model.

Gun control advocates routinely say that we must adopt “common sense” measures that keep guns out of the hands of criminals, the dangerously mentally ill, and potential terrorists while allowing responsible citizens to own guns.¹ That, pretty much, is what everyone believes. The principal difference is that the gun control supporters stress keeping guns out of the hands of the irresponsible while gun control opponents stress allowing the responsible to own and carry guns. For example, Hillary Clinton’s official presidential campaign platform stated that she “has a record of advocating for commonsense approaches to reduce gun violence,” and favored keeping “guns out of the hands of domestic abusers, other violent criminals, and the severely mentally ill.”² Meanwhile, in his official presidential campaign platform Donald Trump said:

Here’s another important way to fight crime – empower law-abiding gun owners to defend themselves. Law enforcement is great, they do a tremendous job, but they can’t be everywhere all of the time. Our personal protection is ultimately up to us. That’s why I’m a gun owner, that’s why I have a concealed carry permit, and that’s why tens of millions of Americans have concealed carry permits as well. It’s just common sense. To make America great again, we’re going to go after criminals and put the law back on the side of the law-abiding.³

To say that both sides agree on the same basic model is not to say that both sides are in basic agreement. They are not. Gun control advocates want more rigorous restrictions on gun ownership and gun control opponents want either no more restrictions or want to relax existing restrictions. The issue that Trump mentioned – concealed carry permits – is a particular case in point: gun-rights organizations want private citizens to be able to carry concealed weapons on the public streets while gun control opponents do not want them to. This may be a significant detail, but it is a detail nonetheless. Whether or not citizens should be able to carry concealed handguns on the streets, both sides implicitly accept the same fundamental model that good guys should be able to possess handguns and bad guys should not.

What other model is possible? While it isn’t possible to meaningfully divide people into two clear categories, it is possible to do that with gun control models. The two fundamental models are these: (1) everyone may possess a handgun except those who cannot; and (2) no one may possess a handgun except those who can. Note, first, that I have focused on handguns, not all guns. I shall, in due course, explain why the difference between handguns and long guns – that is, rifles and shotguns – is so important. The second thing to note is that despite the symmetry in descriptions, these are two fundamentally different models. The first model allows anyone to possess a handgun unless he or she demonstrably falls into a

¹ A search in the Westlaw news data base for articles that contain the phrase “common sense” within ten words of the phrase “gun control,” conducted on January 13, 2017, found more than three thousand such articles. Typically, those advocating for “common sense gun control” are gun control advocates, but occasionally gun control opponents also use the phrase. For example, in his official campaign platform Donald Trump supported

² <https://www.hillaryclinton.com/issues/gun-violence-prevention/>

³ https://assets.donaldjtrump.com/Second_Amendment_Rights.pdf (This document accessed by hyper-jump from <https://www.donaldjtrump.com/policies/constitution-and-second-amendment.>)

prohibited category, such as being a convicted felon, mentally ill, on a terrorist watch list, or the like. The second model allows no one to possess a handgun unless he or she falls into an exempted category, such as being a law enforcement officer, a member of the military, a security guard, or having a special need to own a handgun. Who among the general public has a special need to own a handgun? Although it may be a bit dated, my favorite example is Salman Rushdie, following the fatwa issued by the Ayatollah Khomeini calling for Rushdie's execution.⁴ A more pedestrian example might be women who reasonably fear attack from a stalker.⁵ Once again, while the details are not unimportant, they are details nonetheless. The basic difference between the two models is that the first presumptively grants a right to own a handgun to everyone, except those who demonstrably fit into special categories. The second model presumptively grants a right to own a handgun to no one, except those who demonstrably fit into special categories. The most consequential difference between the two models is that there will be far fewer handguns in general circulation under the second model than the first. That, as we shall see, makes all the difference in the world, for there is one kind of gun control that works – and only one kind that works – and it is this: anything that significantly reduces the number of handguns in general circulation.

That last sentence may bring some readers up short, for they immediately realize the terrible implications of my argument. In 2008, the United States Supreme Court held that the Second Amendment of the United States Constitution grants individuals a right to keep handguns in their homes.⁶ Would a gun control program specifically designed to reduce the number of handguns in general circulation be unconstitutional? And am I arguing that only a program designed to accomplish that objective would be effective? The answers to both questions, broadly speaking, are yes. That is the hard, simple truth about gun control.

Why, then, read on? Do you really want to learn that the only kind of gun control that will be effective cannot be enacted into law? Suffice it say, for now, that I think you should read on. To reduce the gun carnage in America, we need to be clear-eyed about the facts. And, ultimately, we can in fact reduce the gun carnage.

II.

Donald Trump mentioned concealed carry because it is currently a hot political issue, so let's start with the ability to carry handguns in public places. There are two different modes of handgun carry – open carry and concealed carry, depending upon whether one is carrying a visibly displayed handgun, most commonly in a holster on one's hip, or whether

⁴ See Salman Rushdie, *The Disappeared: How the fatwa changed a writer's life*, *The New Yorker*, Sept. 17, 2012, available at <http://www.newyorker.com/magazine/2012/09/17/the-disappeared>.

⁵ I say "might" because there are different kinds of stalkers, some more dangerous than others, and there would have to be a determination that an applicant for gun permit reasonably fears physical attack. It is indisputable, however, that stalking threats are serious and widespread. Each year in the U.S. about 3.4 million people are victims of stalking. Katrina Baum, et al., "Stalking Victimization in the United States," Bureau of Justice Statistics, Jan. 2009, 1, available at <https://victimsofcrime.org/docs/src/baum-k-catalano-s-rand-m-rose-k-2009.pdf?sfvrsn=0>. Nearly a third of stalking victims fear bodily harm, a quarter fear that child or some other family member will be hurt or kidnapped, and about nine percent fear being killed. *Ibid.*, 7. All too often, these fears are not groundless: 39,000 people in the U.S. are raped or sexually assaulted and 52,000 are seriously injured by stalkers. *Ibid.*, 8. About three percent of stalking victims get a gun for self-protection. *Ibid.*, 6.

⁶ *D.C. v. Heller*, 554 U.S. 570, 628-30 (2008).

one is carrying a handgun concealed somewhere on one's person, often in a pocket or in a holster under a jacket. Only five states and the District of Columbia absolutely prohibit the open carrying of handguns.⁷ Of the remaining forty-five states, about one-third require a license or permit to openly carry a handgun and two-thirds do not require a license or permit.⁸

Open carry has long been legally permitted in most states. It has never been much of an issue because so few people do it. Legal restrictions on open carry have been largely unnecessary because there is a strong cultural deterrent to openly carrying handguns: people are afraid of other people that they see walking around in public places with a handgun strapped to their waist. Restaurants, stores, and office buildings will ask gun-toting individuals to leave their premises. Those that don't do so are likely to see patrons quickly depart. Some people call the police when they see someone carrying a gun in a public place, and some police forces actively discourage open carry of weapons, even where it is permitted by law. A spokesperson for the Philadelphia, Pennsylvania police department declared that someone openly carrying a handgun should expect to be "inconvenienced" by, for example, being ordered to lay on the ground while police checked his permit, a process that might take some time as the first police officer on the scene might not approach the person he has – at gunpoint – ordered to the ground until backup has arrived.⁹ An organization named OpenCarry.org is dedicated to trying to make open carry socially acceptable by encouraging gun owners to openly carry guns more often.¹⁰ Its motto is "A Right Unexercised is a Right Lost." A visit to its website suggests OpenCarry.org is struggling. Its events draw few participants, and its website complains that even Utah police find ways to charge people who are openly carrying firearms with disorderly conduct.¹¹ However, even if these activists persuade police departments not to deliberately inconvenience people who are openly carrying handguns in jurisdictions where that is legally allowed, the public is not likely to be blasé about gun-toting people mingling with them in supermarkets, movie theaters, libraries, and the like, and social pressure will continue to stop open carry from becoming more common.

Because of the cultural impediments to open carry, the National Rifle Association (NRA) and other pro-gun groups have focused on expanding concealed carry.¹² In the past,

⁷ The five states are California, Florida, Illinois, New York, and South Carolina. See "Open Carrying: Summary of State Laws," Lawyers Center to Prevent Gun Violence, <http://smartgunlaws.org/gun-laws/policy-areas/firearms-in-public-places/open-carrying/#state>.

⁸ A few states have mixed regulations. Pennsylvania, for example, requires a license to openly carry a firearm in the City of Philadelphia, but does not require a license to do so elsewhere in the state. In North Dakota, someone without a concealed weapons permit may openly carry an unloaded handgun during daylight hours while someone with such a permit may openly carry a handgun during the day or night. Ibid.

⁹ Stephen Clark, After Altercation, Philadelphia Police Say They Won't Look the Other Way on Open-Carry Gun Owners, Fox News, May 21, 2011, available at <http://www.foxnews.com/politics/2011/05/21/altercation-philadelphia-police-say-wont-look-way-open-carry-gun-owners.html>. An open-carry gun activist who was inconvenienced in this manner sued Philadelphia and won a \$25,000 judgment. <http://www.newsworks.org/index.php/local/philadelphia/35164-25000-judgment-in-suit-against-philly-over-permitted-gun>.

¹⁰ <http://www.opencarry.org/>

¹¹ <http://www.opencarry.org/is-open-carry-disorderly-conduct/>

¹² <https://www.nraila.org/articles/20170113/national-concealed-carry-reciprocity-lies-an8.d-the-lying-liars-who-tell-them>

most states either prohibited concealed carry entirely or had restrictive permitting systems.¹³ Many states had “may issue” permit laws that gave the chief of police or other law enforcement official the discretion to issue a concealed carry permit to individuals who had special reasons to be armed. Chiefs of police typically granted few permits. The NRA, therefore, started lobbying states to enact “shall issue” permit laws that require the chief of police to issue a concealed carry permit to all applicants who do not fit into specified categories, such as having a record of criminal convictions or mental illness. The NRA lobbying effort got a big assist in 1997 when two economists, John R. Lott and David B. Mustard, published a paper in which, using complex econometric models, they claimed to have found an inverse statistical correlation between shall issue concealed carry laws and violent crimes.¹⁴ The following year Lott expanded his thesis into a book titled *More Guns, Less Crime*.¹⁵ Lott wrote:

Allowing citizens to carry concealed handguns reduces violent crimes, and the reductions coincide very closely with the number of concealed-handgun permits issued. Mass shootings in public places are reduced when law-abiding citizens are allowed to carry concealed handguns.¹⁶

Notice the term “law-abiding citizens.” It is the good guy/bad guy model that implicitly explains Lott’s findings. The idea is that we can indeed sort out the good guys. Most obviously, police run a criminal records check on people applying for concealed carry permits, and criminals have criminal records. But, of course, that last statement cannot be completely true, if only because some criminals have not yet been caught. But, I suggest, there is another assumption lurking here, albeit unexamined: only good guys apply for concealed carry permits. That is not how bad guys behave (even bad guys without rap sheets).

Lott argued that concealed carry effectively deters violent crime because criminals are hesitant to rob or attack people who may be armed. When criminals realize that some significant fraction of potential victims are armed, but they cannot tell who is armed and who is not, they make a rational decision to change their behavior. The Lott-Mustard model showed that concealed carry laws were associated with a rise in property crime; Lott suggested this was because criminals, finding it more risky to rob people who may turn out to be armed, turned to safer alternatives such as auto theft and other non-violent property crimes.¹⁷

The Lott-Mustard paper, and Lott’s book, created a sensation.¹⁸ They supercharged NRA lobbying efforts for concealed carry laws. By 2014, forty-one states had shall issue concealed carry laws or allowed citizens to carry concealed weapons without a permit or

¹³ Dennis A. Henigan, *“Guns Don’t Kill People, People Kill People” And Other Myths About Gun Control* (Boston: Beacon Press 2016), 122.

¹⁴ John R. Lott and David B. Mustard, “Crime, Deterrence, and the Right-to-Carry Concealed Handguns, *Journal of Legal Studies* 26:1 (1997).

¹⁵ John R. Lott, *More Guns, Less Crime* (Chicago: U. Chicago Press 1998).

¹⁶ *Ibid.*, 19.

¹⁷ *Ibid.*, 19 and 54.

¹⁸ For example, on August 2, 1996, USA Today ran a prominent story about the paper titled “Fewer Rapes, Killings Found Where Concealed Guns Legal.” Dennis A. Henigan, *supra*, at 130.

license.¹⁹ In 1999, 2.7 million Americans had concealed carry permits. By mid-2014, that had increased to 11.1 million people.²⁰

There are two big problems with Lott's "more guns, less crime" thesis. First, other researchers discredited his econometric analysis. Lott compared change in crime during the period 1985 to 1991 between states that adopted shall issue laws and those that did not; he claimed to find that smaller increases in crime in the first group than in the second group. This was a period of time during which crime was rising nationally. Criminologists believed that, in at least significant part, the rise was due to a skyrocketing use of crack cocaine, especially in poor neighborhoods of large cities.²¹ However, the two groups of states were very different in this regard. For example, states that enacted shall issue laws included Maine, Idaho, and Montana while those that did not enact such laws included New York, California, and New Jersey. John J. Donohue and Ian Ayres, researchers at Stanford University and Yale University, respectively, extended the Lott-Mustard analysis through 1997. Donohue explained their dramatic findings as follows: "When the Lott and Mustard statistical model is run for the period in the 1990s when the spikes in crime reversed themselves, suddenly shall-issue laws are associated with uniform *increases* in crime."²²

Later, Donohue and Ayres extended their analysis still further to 2006, a period of continuing decline in crime generally, and got similar findings.²³ Donohue and Ayres also found coding errors in the Mustard-Lott model that, when corrected, eliminated the claimed effect of concealed carry laws on robbery.²⁴ Meanwhile, Dan A. Black, an economist at the University of Chicago, and Daniel S. Nagin, an economist at Carnegie Mellon University, found that if the single state of Florida, where crime statistics were usually volatile, was removed from the Lott-Mustard econometric model, all of the claimed effects of concealed carry laws on violent crime disappeared.²⁵ A host of other researchers, including the most prominent pro-gun criminologist, found serious problems with Lott and Mustard's work. The consensus was that conclusions could not reliably be drawn from the Lott-Mustard econometric analysis.²⁶

The second problem with the "more guns, less crime" thesis is easier to grasp for those of us untrained in econometric analysis, namely, the actual results of the expansion in

¹⁹ Robert J. Spitzer, *The Politics of Gun Control* (Boulder: Paradigm Publishers, 6th ed. 2015), 68.

²⁰ Justine E. Johnson-Makuch, Comment, "Statutory Restrictions on Concealed Carry: A Five-Circuit Shoot-Out, 83 *Fordham Law Review* 83:2757, 2758 (2015).

²¹ John J. Donohue, "The Impact of Concealed-Carry Law," in *Evaluating Gun Policy: Effects on Crime and Violence* (Jens Ludwig & Philip Cook, eds., New York: Oxford U. Press 2003), 289. The price of powdered cocaine was falling sharply during the late 1980s, and by 1991 crack cocaine was found in of more than 60 percent of people arrested in Manhattan. Franklin E. Zimring, *The City That Became Safe: New York's Lessons for Urban Crime and its Control* (New York: Oxford University Press 2012), 96-99.

²² *Ibid.* (original emphasis). See also Ian Ayres & John J. Donohue, "Shooting Down the 'More Guns, Less Crime' Hypothesis," *Stanford Law Review* 55:1193 (2003).

²³ Ian Ayres and John J. Donohue, "More Guns, Less Crime Fails Again: The Latest Evidence from 1977-2006," *Econ Journal Watch* 6:218 (2009).

²⁴ Donohue, "The Impact of Concealed-Carry Law," *supra* note 17, at 293.

²⁵ Dan A. Black and Daniel A. Nagin, "Do Right-to-Carry Laws Deter Crime?" *Journal of Legal Studies* 27:209 (1998).

²⁶ See generally David Hemenway, *Private Guns, Public Health* (Ann Arbor: University of Michigan Press 2004), 101-04.; Henigan, 130-31; Robert J. Spitzer, *The Politics of Gun Control* (Boulder: Paradigm Publishers, 6th ed. 2015), 70-74. The pro-gun criminologist is Gary Kleck of Florida State University.

concealed carry. For example, in September of 2013, one car tailgating another in Michigan led to a road rage incident in which both drivers drove to a parking lot, got out of their cars, pulled out handguns, and shot each other dead.²⁷ Both men had valid concealed carry permits. Aside from the reciprocal-murder aspect, this incident was not unusual. The Violence Policy Center (VPC) has been trying to track the number of people who were killed by someone with a concealed carry permit since May of 2007. This is a difficult undertaking because there is no official database of such killings. In fact, some states make it unlawful for law enforcement to reveal such information. VPC must, therefore, rely principally on news accounts, and its count includes only a fraction of the actual total. As of this writing, VPC identified 921 people who were killed by concealed carry permit holders.²⁸ That number includes homicides, suicides, and accidents but excludes the very small number of shootings made in self-defense. These killings occurred in forty states and the District of Columbia. Seventeen victims were law enforcement officers. The incidents include thirty-one mass shootings that took the lives of 147 victims. It is also worth noting that except for suicides, where the lethality rate is very high with guns, there are many more shootings than killings because some victims who are wounded survive.

One might think that the NRA would be satisfied with its enormous success in persuading forty-three states to pass shall issue laws or otherwise liberally allow the carrying of concealed handguns.²⁹ Not so. It is currently lobbying for passage of federal legislation known as the Concealed Carry Reciprocity Act of 2017.³⁰ This was one of the first bills introduced in the 115th Congress, and presently has 132 cosponsors. It would require every state to honor a concealed carry permit issued by another state, even if that state does not allow concealed carry by its own citizens.

III.

Let us next turn to mass shootings. Although mass shootings are not responsible for the largest share of gun carnage in America – casualties from more prosaic shootings involving one or a few victims far exceed those from mass shootings – mass shootings receive a great deal of news coverage and are especially terrorizing.

We can begin on August 1, 1966, the day that an engineering student and former U.S. Marine named Charles Whitman killed his wife and mother, and then, armed with rifles and other guns, climbed to the top of The Tower at the center of campus of the University of Texas at Austin, and from that perch shot students and others traversing the campus. Before he was killed by Austin police, Whitman murdered a total of eighteen people and wounded thirty-two more.³¹ I have vivid memories of that event. I was then eighteen-

²⁷ Johnson-Makuch, 2758.

²⁸ This was the count as of January 13, 2017. Violence Policy Center, “Concealed Carry Killers,” available at <http://concealedcarrykillers.org>.

²⁹ According to the NRA, only seven states – California, Delaware, Hawaii, Maryland Massachusetts, Rhode Island, New Jersey, New York – deny concealed carry to most citizens. See <https://www.nraila.org/gun-laws.aspx>.

³⁰ H.R. 38, 115th Congress (2017-18). See <https://www.congress.gov/bill/115th-congress/house-bill/38?q=%7B%22search%22%3A%5B%22Concealed+Carry+Reciprocity+Act+of+2017%22%5D%7D&r=1>

³¹ I include Whitman’s wife and mother, whom he killed earlier that morning, and three individuals he killed in The Tower. It does not include Whitman himself.

years-old and going off to college in a month. You might think the Whitman massacre would have made someone like me and my family anxious, but I don't remember it creating anxiety. This was then the worst shooting massacre in the U.S. history.³² Mass shootings before this time were, in fact, rare in America.³³ The entire nation was stunned and horrified, of course, but we assumed that it was a bizarre event, an anomaly. No one realized that Charles Whitman was the harbinger of a new normal.

Here is an abbreviated list of some of the more memorable mass shootings:

McDonald's, San Ysidro, CA	1984	22 dead, 19 wounded
Cleveland Elementary School, Stockton CA	1989	6 dead, 30 wounded
Luby's Cafeteria, Killen TX	1991	24 dead, 20 wounded
Columbine High School, Littleton CO	1999	15 dead, 23 wounded
Virginia Tech, Blacksburg VA	2007	33 dead, 17 wounded
Safeway Parking Lot, Tucson, AZ	2011	6 dead, 13 wounded
Sandy Hook Elementary School, Newton CT	2012	28 dead
Inland Regional Center, San Bernadino CA	2015	14 dead, 14 wounded
Emanuel A.M.E. Church, Charleston SC	2015	9 dead
Pulse Nightclub, Orlando FL	2016	50 dead, 53 wounded
Las Vegas, NV	2017	59 dead, 441 wounded
Sutherland Springs, TX	2017	26 dead, 20 wounded ³⁴

There is plenty of national anxiety now. My wife and I work in different settings – she in a government agency and I in a university – but we have both been required to undergo active shooter training by our employers, and surely this has become routine nearly everywhere. Americans feel very much at risk of finding themselves in a massacre. The general feeling, I believe, is not only that no place is safe, but that eventually there will be a mass shooting just about everywhere. Because some of the worst massacres have occurred in elementary schools, even small children are not spared from worry. Reminders of vulnerability are ever-present. My university, for example, has just installed on all classroom doors fancy new locks with a red button on the inside side of the door that, when depressed, locks the door without need of a key. No one has explained why the new locks have been installed – no one needs to – and those red buttons will remind us constantly of potential threat. In case you are wondering, to the best of my knowledge no shooting has occurred at my university, though there was concern when a former student sent obliquely menacing emails to a dean and several faculty members (including me), and then refused to open his apartment door to talk to police who came to have a chat with him, making it clear he was

³² See History News Network, *The Deadliest Mass Killings in American History by a Single Shooter*, June 17, 2016, <http://historynewsnetwork.org/article/153325>.

³³ The impression that mass shootings were rare before 1966 is confirmed by criminologist Grant Duwe, who has studied more than 1,300 mass shootings occurring from 1900 to 2013. See N.R. Kleinfield, et al., "Killers Fit a Profile, but So Do Many Others," *New York Times*, Oct. 14, 2015, 1.

³⁴ Data for all entries except the last two were taken from Violence Policy Center, "High-Capacity Ammunition Magazines are Common Thread Running Through Most Mass Shootings in the United States," http://www.vpc.org/fact_sht/VPCshootinglist.pdf. Data for the last two entries (Las Vegas and Sutherland Springs) were taken from <http://www.gunviolencearchive.org/mass-shooting?page=1>.

armed. No weapon was ever fired, but there was a standoff that lasted awhile, an arrest, and after some weeks, a release. It feels part of a new normal.

There is no universally accepted definition of “mass shooting.”³⁵ How many victims does it take to qualify as a mass shooting? Should we count the total number of casualties, both killed and wounded, or just fatalities? Should shooters who die at the scene be included in the number of fatalities? Researchers and news organizations use different definitions, which often makes apple-to-apple comparisons difficult. Gun Violence Archive (GVA), an organization that defines its mission as providing independent, verified data about gun violence to researchers and the public-at-large through its website, defines mass shooting as a single event resulting in four or more people being shot and/or killed, not including the shooter.³⁶

Depending upon how one defines the term, mass shootings may now, on average, be occurring at a rate of about one-a-day in the United States. The *New York Times* counted 358 mass shootings with four or more casualties (including killed and wounded) in 2015. GVA counted 275 mass shootings in 2014 and 333 in 2015. At the time I happen to writing this, Sunday morning, January 22, 2017, GVA has already counted twenty mass shootings this year.

Near the end of 2015, the *Washington Post* looked at mass shootings in the United States over the past fifty years.³⁷ For this purpose, it defined mass shooting as an event in which four or more people were killed. It excluded gang killings and killings stemming from other crimes such as robberies but included the perpetrator in the number of fatalities. The *Post* identified 124 such events, in which a total of 814 people were killed, for an average of seven fatalities per event. These mass shootings occurred in forty states. With only three exceptions, all of the shooters were male. The most common venues for the massacres were, in declining order, workplaces, retail stores and restaurants, and schools. Shooters brought an average of three guns apiece to each shooting, for a total of 243 guns in all incidents. Most of the weapons were handguns. It was possible to determine how the shooters acquired 180 of the guns used, and of those 141 – 78.3 percent – were acquired legally. We also know that most mass shooters kill a former or current intimate partner, often at the beginning of their rampage.³⁸

Can we create a system that will keep guns out of the hands of potential mass shooters while still allowing them to trustworthy individuals? The conventional wisdom is that mass shooters suffer from serious mental illnesses, and that we might be able to drastically reduce

³⁵ See generally Christopher Ingraham, “What makes a ‘mass shooting’ in America?” *Washington Post*, Dec. 3, 2015, available at https://www.washingtonpost.com/news/wonk/wp/2015/12/03/what-makes-a-mass-shooting-in-america/?utm_term=.3f98ff6118fd.

³⁶ See <http://www.gunviolencearchive.org/>. For definitions used by the organization, see the Methodology section of its website.

³⁷ For purposes of its survey, the *Washington Post* defined mass shooting as an event in which four or more people were killed by a lone shooter or, in three instances, by two shooters. Bonnier Berkowitz, et al., “50 years of mass shootings in the U.S.,” *Washington Post*, Dec. 13, 2015, A10.

³⁸ During one four-year period, 57 percent of mass shooters killed a current or former intimate partner, together with others. Philip J. Cook & Kristin A. Goss, *The Gun Debate: What Everyone Needs to Know* (New York: Oxford University Press 2014), 50.

these events by making improvements in the mental health system.³⁹ However, according to Michael Stone, a forensic psychiatrist at Columbia University, only twenty percent of mass shooters are suffering from serious mental illnesses such as schizophrenia, delusions, or psychoses.⁴⁰ The rest of them may have personality or sociopathic disorders, and while they may exhibit rage, an extreme lack of empathy, humiliation, or paranoia, they know what they are doing. According to Stone, this second group can neither be reliably identified nor helped by the mental health system, no matter how well it is improved. Other researchers agree. James Alan Fox, a criminologist at Northeastern University, says that most mass killers are depressed, not delusional.⁴¹ A group of three psychiatrists, a social worker specializing in mental health, and a sociologist-economist specializing in gun violence who together studied gun violence and mental health note that epidemiological research shows that people with mental illness are responsible for only a small proportion of violence in America. They go on to write:

The very small proportion of people with mental illnesses who are inclined to be dangerous often do not seek treatment before they do something harmful; they therefore do not acquire a gun-disqualifying record of mental health adjudication (or criminal record, either) that would show up in a background check. Psychiatrists, using clinical judgment, cannot accurately foresee which patients will be violent.⁴²

Mass murderers, of course, are not the average guys. Experts tell us mass murderers are often socially isolated. They don't fit in and often come from communities where fitting is considered very important. They are often frustrated and externalize blame, says James Alan Fox. "Nothing is ever their fault...They see themselves as good guys mistreated by others."⁴³ Those who commit family massacres, says Fox, are typically "vengeful" but not mentally ill.⁴⁴ But risk factors such as anger, frustration, alienation, and even some degree of paranoia are not useful in identifying people who should be denied firearms. Those characteristics are all too common.

While it might be possible to develop an algorithm to assess an individual's risk to become violent, such a tool is unlikely to be useful for regulatory purposes. Many studies have, for example, found that alcohol abuse is a major risk factor for all types of gun violence.⁴⁵ We know other factors such as gender, age, impulsivity, and lack of family support are stronger predictors of violent behavior than is mental illness. John Monahan, a psychologist at the University of Virginia, developed a software program that uses 106 risk factors to predict the potential for violence for patients being discharged from psychiatric hospital units.⁴⁶ The model shows promise: only ten percent of those who were deemed low-

³⁹ Sixty-three percent of Americans blame mass shootings on failings in the mental health system. See Michael S. Rosenwald, "Most mass shooters aren't mentally ill," *Washington Post*, May 19, 2016, A1.

⁴⁰ *Ibid.*

⁴¹ See Kleinfeld, et al. (quoting Fox).

⁴² Jeffrey W. Swanson, et al., "Preventing Gun Violence Involving People with Serious Mental Illness," in *Reducing Gun Violence in America: Informing Policy with Evidence and Analysis* (Daniel W. Webster & Jon S. Vernick eds., Baltimore: John Hopkins University Press 2013), 33, at 36.

⁴³ See Kleinfeld, et al., *supra* (quoting Fox).

⁴⁴ *Ibid.*

⁴⁵ David Brown, "No easy task to identify a mass killer," *Washington Post*, Jan. 4, 2003, at A1.

⁴⁶ *Ibid.*

risk committed a violent act over the next six months while 49 percent of those deemed high-risk did so. Nevertheless, such a model will have little utility for regulatory policy. It might be helpful in determining whom to release from a mental-health facility, but it will never stop people without criminal or mental-health records from purchasing guns. There is, first, the practical problem of getting the data. Monahan acquired his information in extensive interviews of patients prior to discharge, but how would the government learn that someone in the general population sometimes has five drinks in a row or does not have good relationships with family members? Second, there are legal barriers. The Supreme Court has held that individuals possess a constitutional right to own handguns for self-defense. The courts are likely to continue to allow a regulatory system that denies firearms to felons and people who have been adjudicated a danger to themselves or others, but they are not going to sanction algorithms of the kind Monahan has developed.

The good guy/bad guy model is widely accepted though generally unexamined.⁴⁷ Occasionally, however, those who examine the data and think hard about the issue realize that it cannot work. There is a strong incentive not to reach this conclusion – not even to consider it, in fact – because it leads to pessimism, even despair. But occasionally people who examine the data and think hard about the options do realize the futility of the good guy/bad guy model. In October 2016, the *New York Times* published an extensive examination of the issue that began on the front page and took up two full interior pages. Titled “In 130 of Worst Shootings, Vision of Porous Gun Laws,” the story contained this observation:

[A]n examination of high-casualty shootings emphasizes not only how porous existing firearm regulations are, but also how difficult tightening them in a meaningful way can be....The findings are dispiriting to anyone hoping for simple legislative fixes to gun violence. In more than half the 130 cases, at least one assailant was already barred by federal law from having a weapon, usually because of a felony conviction, but nonetheless acquired a gun....Of the remaining assailants, 40 percent had never had a serious run-in with the law and probably could have bought a gun even in states with the strictest firearm control.⁴⁸

The hard truth is that the possibility of reducing mass shootings by improving the mental health system or the records used for background checks run into four implacable problems. First, most perpetrators of gun violence do not suffer from serious mental illness. Second, among the perpetrators of gun violence that do suffer from mental illness, few seek treatment. Third, among people who do seek help for mental illness, psychiatrists and other mental health professionals cannot distinguish between those who are dangerous and those who are not. Fourth, people who have been identified as dangerous and barred from purchasing a gun may prevail on someone who can pass a background check to serve as a “straw purchaser,” that is, to purchase the gun for him. Police sting operations have shown that some licensed gun dealers readily sell a gun to A even when they know all of the following three things: A is serving as a straw purchaser for B, B is legally barred from

⁴⁷ For example, Philip Cook and Kristin Goss, use the terms “good guys” and “bad guys” to describe the U.S. model and recognize that other nations employ the other, more effective model, but nevertheless restrict themselves to making proposals to improve the fatally-flawed model. Cook & Gross, 55, 118, and 214-20, respectively.

⁴⁸ Sharon LaFraniere & Emily Palmer, “In 130 of Worst Shootings, Vision of Porous Gun Laws, *New York Times*, Oct. 22, 2016, at A1.

purchasing a gun, and B intends to use the gun to commit a crime.⁴⁹ And, of course, there are grossly irresponsible private, unlicensed sellers too. The two teenagers who committed the Columbine High School massacre, and were a year too young to legally purchase long guns, recruited an eighteen-year-old to purchase two shotguns and a semiautomatic rifle from a private seller at a gun show for them.⁵⁰

IV.

We shall now more broadly examine gun violence in America.

There were, according to the FBI Uniform Crime Reports, 13,455 murders in the United States in 2015.⁵¹ The most commonly-used weapons were firearms; they accounted for 9,616 – 71.5 percent – of all murders in the U.S. And the most commonly-used type of firearm were handguns. In fact, handguns were used to commit at least 6,447 murders – 67 percent of all firearm homicides and 48 percent of all homicides. I say “at least” because we do not know what type of firearm was used for 2,648 murders. We do know that long guns – shotguns and rifles – were used to commit 521 murders, which represent less than four percent of all homicides. If we assume the division between handguns and long guns for the category “other guns or type not stated” in the FBI’s Uniform Crime Reports is in the same proportion as when the type of firearm used was known and reported, then handguns accounted for about 61 percent of all murders in the United States. The next most commonly used weapons are knives or cutting instruments, which account for approximately 11 percent of all murders in the U.S. That is followed by personal weapons (hands and feet) and blunt objects, which, respectively, are used to commit roughly four percent and three percent of all murders. Other weapons combined – including poison, explosives, being pushed or thrown out of a window, and fire – account for well under one percent of all murders. This has long been the U.S. pattern.⁵² So handguns are, by far, the instruments most commonly used to commit murder in the United States.

In what types of situations do handgun-related murders occur? According to the FBI, about 17 percent of all handgun murders in 2015 occurred in connection with a felony or suspected felony – such as robbery, rape, and narcotics violations – while about 23 percent occurred during arguments or brawls.⁵³ These were followed by juvenile gang killings and gangland killings, which, respectively, constituted about nine percent and two percent of handgun-related homicides. Law enforcement did not know the circumstances in which about 38 percent of all handgun-related murders were committed. For these purposes, however, we cannot reasonably assume that the circumstances in the unknown category mirror those in the known categories. Perhaps a higher proportion of murders that occurred in unknown circumstances arose from robberies and other felonies than from arguments, brawls, and romantic triangles than was the case when police were able to discern the

⁴⁹ Hemenway, *Private Guns, Public Health*, 142-43.

⁵⁰ Henigan, 36-39.

⁵¹ FBI, “Crime in the U.S. 2015,” Expanded Homicide Data Table 9. The full report is available at <https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015>.

⁵² See Carl T. Bogus, “Gun Control and America’s Cities: Public Policy and Politics,” *Albany Government Law Review* 1:440, 447 (2008) and sources cited therein.

⁵³ FBI, Crime in the U.S. 2015, Expanded Homicide Data Table 11.

circumstances of the killing. A reasonable guess might be that there is a roughly equal division between handgun murders that occur during other crimes and those that arise out of arguments, brawls, romantic triangles, and the like.

The FBI also reports that, among all of the 13,455 murders in 2015, 1,721 victims (12.8 percent) were family member of the perpetrator, 1,013 (7.5 percent) were a friend, boyfriend, or – most commonly – a girlfriend of the perpetrator, and 2,801 (20.8 percent) were an acquaintance of the perpetrator.⁵⁴ These three categories – relative, friend, and acquaintance – are all somewhat larger than the numbers suggest because in many instances the police are unable to identify the perpetrator. The rough rules of thumb used by criminologists and sociologists familiar with these data is that in about half of homicides the perpetrator and victim knew each other, about a quarter of all female victims are killed by husbands and boyfriends, and about one-third of all homicides arise from arguments.⁵⁵

The largest category of gun violence is suicide. According to the Centers for Disease Control and Prevention (CDC), there were 21,334 suicides by firearms in the United States in 2014 (the latest year for which the CDC has supplied data).⁵⁶ While the CDC does not report the type of firearm, handguns are almost always the type of firearm used, both because they are more prevalent and because of the physical difficulty of using a long gun to shoot oneself.

The smallest category of gun fatalities are accidents. About six-hundred people die annually from unintentional shootings.⁵⁷ But while a relatively small category in terms of the total number of fatalities, it is a poignant category nonetheless because it includes, on average, 62 children age 14 or younger per year.⁵⁸ Many of these are quite young – children who find a parent’s handgun in a nightstand drawer or under socks in a bedroom dresser and accidentally kill themselves, siblings, and playmates.

Of course, many shootings are not fatal. In 2010, hospital emergency rooms treated 73,505 nonfatal gunshot injuries.⁵⁹ These include gunshots resulting from murder attempts, robberies, assaults, accidents, and suicide attempts. Firearms, therefore, impose a heavy financial cost on the U.S. health care system. Firearms were also used to commit 123,358 robberies and 170,941 aggravated assaults in the U.S. during 2015.⁶⁰ That accounts for about 41 percent all robberies and nearly a quarter of all aggravated assaults.⁶¹ Guns, therefore, have an impact on American life that extends well beyond the numbers of people who are killed and injured.

So far we have been examining the cost side of the ledger. Let’s now turn to the benefit side: how often handguns and other firearms are used in self-defense. This is a subject

⁵⁴ FBI, Crime in the U.S. 2015, Expanded Homicide Data Table 10.

⁵⁵ See, e.g., Anthony A. Braga & Philip J. Cook, “The Criminal Records of Gun Offenders,” *Georgetown Journal of Law & Public Policy* 14:1, 7 (2016).

⁵⁶ <https://www.cdc.gov/nchs/fastats/suicide.htm>

⁵⁷ See Cook & Goss, 34 (reporting that 606 unintentional firearm-related killings in 2010), and Henigan, 71-72 (reporting “almost 3,800” accidental gun fatalities from 2005-2010).

⁵⁸ Henigan, 72 (reporting data from a six-year CDC study).

⁵⁹ Cook & Goss, 34.

⁶⁰ FBI, Crime in the U.S. 2015, Table 15.

⁶¹ FBI, Crime in the U.S. 2015, Robbery Table 3 and Aggravated Assault Table.

of hot debate. The NRA and its allies claim that guns are frequently used for self-defense and prevent many crimes – most often by merely brandishing a gun and frightening a robber or attacker away. That is a convenient claim because it largely relies on unverified stories by gun owners. For example, a gun owner says that he heard someone attempting to break into his home at night. He got his gun and shouted, “Come in at your own risk. I am armed!” He then heard footsteps running away. Or a gun owner claims he was walking alone at night when a menacing-looking individual crossed the street in his direction, apparently bent upon robbery. The gun owner drew his previously-concealed handgun from its holster and displayed it to the approaching individual, who promptly turned tail and ran away. Such stories are legion. Even assuming good faith by a story-teller, how do we know whether he was mistaken about the intent of the person he frightened away? To take a famous situation, George Zimmerman may have been convinced in his mind that he was a law-abiding citizen and Trayvon Martin was a dangerous criminal, yet things surely appeared quite different to Trayvon Martin. In a study conducted by a researcher at the Harvard School of Public Health, a panel of judges reviewed incidents in which gun owners said they fired a single shot in self-defense. The judges concluded that in a majority of those incidents the action was not, in fact, a legitimate act of self-defense.⁶²

We do, however, have hard data that can give us a better idea about how often guns are used in self-defense, namely, the number of justifiable homicides in which handguns were used. Unlike unverified stories about brandishing a gun, when someone is shot and killed there is a dead body and a police investigation. According to the FBI, private handguns were used in 215 justifiable homicides in 2015.⁶³ (Long guns were used in just 21 justifiable homicides.) Justifiable homicides occur when someone reasonably believes it is necessary to use deadly force in defense of himself or someone else. Of course, not every use of handgun for self-defense results in a fatality. It is reasonable to assume that the rule of thumb that there are five to seven non-fatal injuries for every fatal gun injury applies.⁶⁴ And there are surely occasions when merely brandishing a weapon is, by itself, an effective mode of self-defense. Nevertheless, comparing the number of justifiable handgun homicides to handgun murders is extremely useful in making a cost-benefit analysis of handguns in America. To repeat the figures, there were 215 justifiable homicides and 6,447 murders committed with handguns in 2015. Thus, 96.8 percent of all of the killings committed with handguns were murders. This is, of course, not the whole story; but it gives us a solid apple-to-apple comparison.

Also on the benefit side of the ledger are the feelings of security that handguns give their owners. It must be noted, however, that as comforting as those feelings may be, they provide gun owners with a false sense of security. Most Americans who own handguns do so for self-defense. Undoubtedly, they believe they are making a prudent decision to protect themselves and their families, but data suggest otherwise. Another study has shown that for each incident in which a gun in the home was used to shoot an intruder, there are four accidental shootings of members of their households or their guests, seven criminal assaults or homicides, and eleven attempted or completed suicides.⁶⁵ Having a gun at home increases

⁶² See Cook & Goss, 19-20 (describing a study conducted by David Hemenway).

⁶³ FBI, Crime in the U.S. 2015, Expanded Homicide Data Table 15.

⁶⁴ Spitzer, 54.

⁶⁵ Henigan, 116-17.

the chance of successful suicide in that home by a factor of five.⁶⁶ Teenagers are especially at risk. Many teens go through periods of angst and depression, and a gun is all too easy to grab and use in a moment of even brief despair. Moreover, once the trigger is pulled, there is no turning back as sometimes happens when someone swallows pills or sits in a running automobile in a closed garage.

The gun lobby has long argued that guns in the home deter home invasions or “hot burglaries,” i.e., burglaries occurring when homeowners are present. The theory is that burglars do not want to be confronted by armed homeowners. Thus, burglars seek to avoid neighborhoods where they believe there are a higher proportion of armed homeowners, work harder to ensure the home is unoccupied before burglarizing it, or are more likely to take up other lines of work in states and regions with high rates of gun ownership. The theory may be superficially appealing, but it is not supported by the data. First, guns in the home are rarely used against intruders. In one study, researchers working with the police found that in only three out of 198 instances (1.5%) of unwanted home entries that occurred in Atlanta over a three-month period were handguns used in self-defense.⁶⁷ Second, according to one study, hot burglary rates increase rather than decrease along with the prevalence of gun ownership.⁶⁸ A ten-percent increase in gun ownership appeared to increase burglary rates by three to seven percent.

I suspect that even if gun owners knew all of these data, many would nonetheless feel confident that owning a handgun is a prudent decision for them and their families. Tragedies happen to less careful people. Just as ninety percent of all drivers believe they are better than average, most gun owners must surely believe that they are more trustworthy than the average gun owner.⁶⁹ Jamie Gilt, a 31-year-old gun activist in Jacksonville, Florida, may have been just such a person. Jamie maintained a Facebook page titled “Jamie Gilt for Gun Sense,” on which she ridiculed the idea of relying on the police for protection instead of owning a gun.⁷⁰ Her whole family knew how to shoot, Jamie noted, adding, “Even my 4-year-old gets jacked up to target shoot the .22.” On Monday, March 7, 2016, while Jamie was driving a pickup truck, her four-year-old son who was sitting in the backseat accidentally shot Jamie with a handgun. The bullet entered Jamie’s back and exited the front of her torso. A police officer quickly came to the rescue when he observed Jamie behaving frantically inside the truck. Fortunately, Jamie survived.

V.

We shall now examine the existing system of firearm regulation in the United States.

⁶⁶ Ibid. See also Matthew Miller, et al., Firearm and Suicide in the United States: Is Risk Independent of Underlying Suicidal Behavior? *American Journal of Epidemiology* 178:946, 951 (2013)(finding that “higher rates of firearm ownership are associated with higher rates of overall suicide, but not with nonfirearm suicide.”)

⁶⁷ Henigan, 116-17.

⁶⁸ Ibid., 105-06 (describing study by Cook and Ludwig)..

⁶⁹ Daniel Kahneman, *Thinking Fast and Slow* (New York: Farrar, Straus and Giroux 2011), 259-60 [273 of Nook version].

⁷⁰ Joe Daraskevich, “Woman tells Putnam County deputy that son, 4, shot her in back while she was driving,” *Florida Times Union*, March 8, 2016, available at <http://jacksonville.com/2016-05-02/stub-3>.

Federal law requires that people wishing to purchase a firearm – handgun, rifle, or shotgun – from licensed gun dealer fill out a Firearms Transaction Form and have their names run through the National Instant Criminal Background Check System (NICS), which is operated by the FBI. In the main, the system is designed to prevent sales to people who have been convicted of a felony; people who have been convicted of domestic violence misdemeanor or are under a restraining order; people adjudicated to be “a mental defective” or involuntarily committed to a mental institution; drug addicts; aliens unlawfully in the U.S.; fugitives from justice; and people dishonorably discharged from the armed forces.⁷¹ In the good guy/bad guy model, these are the bad guys. Everyone else over 18 years of age may purchase a long gun, and those 21 or older may purchase a handgun. Under federal law, background checks must be completed within three days although nearly all checks are completed within just seconds. There are some additional state restrictions – most notably, about a dozen states require a license or permit to own a handgun.⁷²

For political reasons, the system has enormous loopholes. Most significantly, only sales by licensed gun dealers are covered. Private sales are exempt under federal law. These include, notoriously, sales made by private sellers at the 4,000 gun shows that are held annually across the country. Private sellers constitute between a quarter and a half of all gun sellers at gun shows.⁷³ No one really knows what portion of all firearm sales are private and therefore take place without background checks. According to a rather old survey, 40 percent of all gun sales are private. In a more recent survey of prison inmates who used a gun in their most recent crime, only one in nine (11%) said they bought the gun from a store or a pawnshop, which are general the venues licensed gun dealers. Only sixteen states require background checks for private handgun sales, and only six states require background checks for private sales of all firearms, including long guns.⁷⁴

Another strange aspect of federal law is that all federal records background check records, including the Firearm Transaction Form filled out and signed by the purchaser, must be destroyed within twenty-four hours of a completed gun sale.⁷⁵ The reason for the requirement is that the NRA is adamantly opposed to any records of gun ownership so that, should the government fall into tyrannical hands, it would not have records to aid it in gun confiscation.⁷⁶ However, destroying these records makes it all but impossible to prosecute purchasers who lie on those forms in order to buy guns.

Moreover, federal firearm laws have been deliberately designed to make research about gun regulation in the United States by criminologists, public health experts, and others more difficult. In 1995, Congress directed that \$2.6 million that had been budgeted for gun-related research by the Center for Disease Control and Prevention (CDC) be used instead for other purposes, and it has since repeatedly instructed that no CDC research money may be “used

⁷¹ 18 U.S.C. § 922(g). For good descriptions of the system, see Cook & Goss, 101-18; Henigan, 143-46 and 205-06; Spitzer, 158-64.

⁷² Cook and Goss, 107.

⁷³ *Ibid.*, 81.

⁷⁴ *Ibid.*, 144.

⁷⁵ Henigan, 144-46.

⁷⁶ For more about the view that the Second Amendment exists as a check on government tyranny, see Carl T. Bogus “Heller and Insurrectionism,” *Syracuse Law Review* 59:255 (2008).

to advocate or promote gun control.”⁷⁷ Note that Congress’ direction was not evenhanded; it did *not* say, for example, that CDC funds could not be used to advocate for or against gun control, or to promote any position regarding gun control. Not only CDC but researchers based at universities who routinely obtain federal grants to study crime or public health issues got the message: stop doing research related to firearms or risk forfeiting federal research grants of all kinds. This effectively stopped federally-sponsored gun research for more than a decade.

In 2009, the National Institutes of Health (NIH) began to make small but regular research grants related to guns. At the behest of the NRA, Congress also passed legislation designed to foreclose another promising area of research related to ATF traces of guns used in crimes. When police recover a gun at a crime scene, ATF initiates a trace, using the weapon’s serial number, to follow the gun from manufacturer, to distributor, to dealer, to the person who purchased the gun from the dealer. Using trace data, researchers discovered that a disproportionate number of crime guns were being sold by a relatively few gun shops. In fact, the data were astonishing: one percent of licensed gun dealers were selling nearly 60 percent of the guns ultimately used in crimes.⁷⁸ This presented a new area of inquiry: could gun crimes be reduced by eliminating “bad apple” dealers or otherwise improving the distribution chain? Continuing its three-monkey approach – see no evil, hear no evil, speak no evil – Congress, in 2003, enacted legislation that effectively prohibits ATF from disclosing trace data, even non-individual aggregated data, to the public.⁷⁹

The NRA, and thus Congress, wants as weak and ineffective an ATF as possible. Congress expressly prohibits ATF from conducting more than one unannounced visit of a gun dealer per year – no matter how questionable the history of the dealer – and the funding that Congress provides is barely sufficient to allow ATF to visit a gun dealer, on average, every five years.⁸⁰ Congress forbids ATF from computerizing trace data; all traces have to be conducted by hand. And Congress prohibits ATF from requiring that dealers maintain an inventory, which, of course, makes it difficult or impossible for ATF to tell whether a dealer’s guns are being stolen, lost, or deliberately diverted to the black market.

Let’s assume, for the sake of argument, that the loopholes could be closed and the political obstacles removed. Suppose the law required that all gun sales in all states – whether made by licensed dealers or private sellers* – were subject to NICS background checks? Suppose the ATF were adequately funded and permitted to inspect dealers as reasonably necessary to ensure, as much as possible, compliance with law. Suppose record reporting were improved to ensure, as much as possible, that relevant criminal and mental health records were timely entered into the system. If it were improved as much as possible, would the basic regulatory model we have be adequate to reasonably protect America from gun violence?

⁷⁷ Henigan, 119, Spitzer, 49-50.

⁷⁸ Henigan, 169.

⁷⁹ Henigan, 175-87.

⁸⁰ Cook & Goss, 117; Spitzer, 170-82.

* About one-third of the states require that private sales also go through the background check system. To accomplish this, private sellers and buyers visit Walmart or another local gun dealer, fill out the Firearms Transaction Form, and pay the dealer a modest fee to run the background check through the system.

The answer is no. Even with a perfect record system covering all gun sales, the good guy/bad guy model will not do the job. Let's start with the criminal side. Only 40 percent of people convicted of murder had prior felony records.⁸¹ Moreover, even if we require that all private sales be subject to background checks, people with felony records will still borrow guns from friends and family members, steal guns, and purchase them on the black market. When surveyed, only 20 percent of prisoners say they purchased the gun they used for the last crime from a store.⁸² Things are even bleaker on the mental health side. As previously mentioned, only a small fraction of people who commit murder are mentally ill. There are some serious mental illnesses such as schizophrenia, bipolar disorder, and severe depression that are associated with increased risks of violent behavior, but one study found that only seven percent of people who were hospitalized for these conditions were hospitalized involuntarily, and, under current federal law, only that subgroup is ineligible to purchase or own a firearm.⁸³ Even if the NICS records and federal law were to be expanded broadly to prohibit everyone suffering from a severe mental illness from owning a gun – regardless of whether they were hospitalized involuntarily, or even hospitalized at all – the records will still be woefully over-inclusive and under-inclusive. On the one hand, only a fraction of people with serious mental illness will ever wind up in the NICS; and on the other hand the vast majority of people with serious mental illnesses are not violent. Moreover, it is estimated that only five percent of violent crimes are committed by people with serious mental illness.⁸⁴ (At present, we are making it easier for mentally ill people to buy guns. At the NRA's behest, Congress passed and President Donald J. Trump signed legislation abolishing a federal regulation that required the Social Security Administration to report to the NICS people who receive disability checks because they are mentally disabled or unable to handle their own financial affairs.⁸⁵)

Currently, most states require psychotherapists to report patients who present a serious danger of violence to an identifiable individual.⁸⁶ This generally means that a psychotherapist must report a patient who expressly says he intends to harm a specific person. A few states require psychotherapists to also report individuals who they believe present a serious danger to society at large, regardless of whether they have said they want

⁸¹ Cook & Goss, 56. This does not mean, however, that 60 percent of murders would have been eligible under federal law to purchase a gun. About 37 percent of persons arrested for murder, robbery, assault, or illegal gun possession would have been eligible to purchase a gun under federal law. Braga & Cook, "The Criminal Records of Gun Offenders," 2.

⁸² *Ibid.*, 57.

⁸³ *Ibid.*, 149.

⁸⁴ *Ibid.*, 72.

⁸⁵ The regulation was promulgated in the waning days of the Obama administration. It is estimated that about 75,000 people are categorized as mentally disabled or unable to handle their own financial affairs. President Trump signed the legislation abolishing the regulation on February 28, 2017.

https://www.washingtonpost.com/news/powerpost/paloma/daily-202/2017/03/03/daily-202-what-trump-didn-t-want-you-to-see-him-signing/58b923fae9b69b1406c75d33/?utm_term=.43032ede9038

⁸⁶ Most of these statutes were stimulated by and follow the reasoning of *Tarasoff v. Regents of University of California*, 17 Cal.3d 425 (1976), involving a patient who told his psychotherapist that he intended to kill someone who he did, in fact, later murder. A duty to report only arises when the psychotherapist believes a particular patient presents a serious danger of violence to a readily-identifiable victim. Some have advocated broadening that rule. E.g., Sally Satel, "Loosen Restrictions for Therapists to Report Danger," *New York Times*, Aug. 20, 2013, available at <http://www.nytimes.com/roomfordebate/2014/05/29/can-therapists-prevent-violence/loosen-restrictions-for-therapists-to-report-danger>.

to harm a particular individual. Either way, this is very different than reporting all patients with serious mental illness. Requiring psychotherapists to report to the government everyone with a serious mental illness who comes to them for help, regardless of whether the psychotherapist has reason to believe the particular patient is dangerous, would likely to do more far harm than good. It would discourage people from seeking treatment, and it would weaken the patients' trust in their relationships with their psychotherapists, which are essential to successful treatment. Discouraging people with serious mental illnesses from getting treatment is hardly a recipe for improving public health and safety.

Scientists have begun to identify genes that are associated with violent behavior.⁸⁷ Suppose, for the sake of argument, they get much better at this – so much better that a DNA test can identify people who are likely to commit violent acts in the future. Should such individuals be prohibited from buying or possessing a firearm, even if they have not yet committed a violent act? In view of the fact that the Supreme Court has held that people have a constitutional right to own handguns, it would, a matter of law, be extremely difficult to deny that right to people who have, to date, been law-abiding citizens. If we can deny them that constitutional right, is not the next logical step preventive detention?⁸⁸

Thus, for a host of reasons – involving law, public policy, fundamental American values, medical ethics, sociology, and much more – the good guy/bad guy model is never going to be adequate to the task, even if it is improved as much as practicably possible. It should be no surprise, therefore, that the best evidence is that gun control measures based on that system have been ineffective.

The statutory genesis of our current federal system was the Brady Handgun Prevention Act of 1994. That law imposed a five-day waiting period for handgun purchases. The purpose was two-fold: (1) to provide a cooling-off period for people who may be purchasing handguns because they were angry at someone and intending harm, and (2) to have local police conduct a background check of putative handgun purchasers during the waiting period.⁸⁹ When the law went into effect, 18 states already had similar laws in place. This set up something of a natural experiment to measure the efficacy of the Brady Act. Crime rises and falls for a many reasons, so just seeing whether homicide rates increased or declined after the law went into effect would not tell us much. A crime decrease may have happened anyway. However, researchers were able to compare the 32 states with new waiting periods and background checks with the 18 states that already had such requirements to see whether there were greater changes in one group of states than the other. They discovered that the average homicide rates in both groups followed nearly exactly the same trajectories.⁹⁰ There was no discernable impact of the Brady Act on crime rates.

⁸⁷ Melissa Hogenboom, “Two genes linked with violent crime, BBC News, Oct. 28, 2014, available at <http://www.bbc.com/news/science-environment-29760212>.

⁸⁸ Not everyone is horrified by preventive detention. See, e.g., Adam Klein & Benjamin Wittes, “Preventive Detention in American Theory and Practice,” *Harvard National Security Journal* 2:85 (2011), available at <http://harvardnsj.org/wp-content/uploads/2015/01/Preventative-Detention-in-American-Theory-and-Practice.pdf>.

⁸⁹ By its original terms, the five-day waiting period was to be replaced by the NICS within a ten years. In 1997, the Supreme Court held that the federal government could not require state and local police to conduct background checks of putative handgun purchasers *Printz v. U.S.*, 521 U.S. 898 (1997).

⁹⁰ Philip J. Cook & Jens Ludwig, “The Limited Impact of the Brady Bill: Evaluation and Implication,” in *Reducing Gun Violence in America*, 2. See also Cook & Goss, 142-43. But see Michael Luca, et al., “Handgun waiting periods

Further research has confirmed that the Brady Act has no discernable effect on reducing criminal violence by purchasers who were blocked from purchasing a gun because of their previous criminal histories. Researchers found evidence that the Act might have had “some positive effect” among purchasers who were disqualified exclusively by their mental health histories, that is, people with serious mental illness and without criminal records.⁹¹ But that is a pretty small subgroup. In the study, it comprised only five percent of the people blocked from purchasing a gun.

The fact that the Brady Act is not associated with a decline in homicides often surprises gun control advocates. On its website, the Brady Campaign to Prevent Handgun Violence, which was the principal advocate for the Brady Act, makes the following claim: “Since the Brady law took effect in 1994, over 2.4 million prohibited purchases have been blocked and countless lives have been saved.”⁹² It is true that 2.4 million sales by licensed gun dealers were blocked because purchasers were determined to be ineligible to purchase a gun, but it is, I believe, nothing more than an assumption that the blocked sales saved lives – at least as a result of homicides, robberies, and criminal assault. That is why, I suspect, the Brady Campaign says that “countless” lives were saved, without any supporting citation. The most obvious explanation as to why blocked sales do not appear to translate into saved lives is that buyers turned away by licensed dealers get guns elsewhere. While we do not know how often such buyers are redirected to private sellers or the black market, there is plenty of anecdotal evidence of people shopping at guns shows being turned away by licensed dealers and immediately going to unlicensed dealers at adjacent tables.⁹³

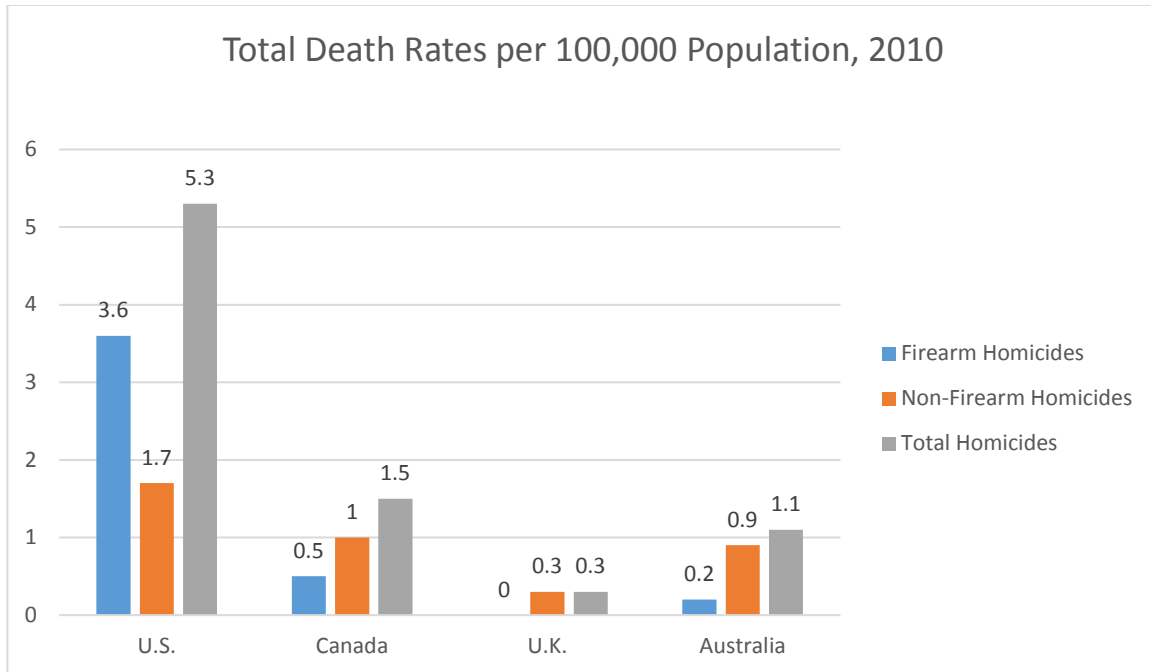
This does not mean, however, that effective gun control is impossible. Other nations have it. They have reduced firearm homicides to a tiny fraction of what we experience in the United States, and as a result their total homicides rates are also much lower than ours. I do not say “as a result” blithely, but before speaking of cause and effect let’s look at some data.

reduce gun deaths,” *PNAS Early Edition*, Sept. 21, 2017, available at <http://www.pnas.org/content/early/2017/10/11/1619896114.full> (finding that waiting periods reduce gun homicides by 17% and gun suicides by 7-11%). Luca looked at the same data as Cook and Ludwig, but he coded some key data differently. At the time of this writing, other researchers have not yet commented on the differences between the Cook-Ludwig and Luca studies.

⁹¹ Swanson, et al., “Preventing Gun Violence Involving People with Serious Mental Illness,” 45.

⁹² <http://www.bradycampaign.org/bradys-solutions-0>

⁹³ Garen J. Wintemute, “Broadening Denial Criteria for the Purchase and Possession of Firearms: Need, Feasibility, and Effectiveness,” in *Reducing Gun Violence in America*, 77, 84.



In the chart above, the first bar for each nation is the firearm homicide rate, the second bar is the non-firearm homicide rate, and the third bar is the total homicide rate.⁹⁴ The first bar for the United Kingdom is not missing; you cannot see it because the firearm homicide rate was zero. The firearm death rate for the United States towers above the other three countries: the U.S. rate is more than seven times the next highest rate. By contrast, the non-firearm homicide rate in the United States of is not even twice the Canadian rate. As one can clearly see, that towering third bar of total homicides in the United States is comprised, in the main, of the first bar – homicides with guns.

Franklin E. Zimring and Gordon Hawkins have convincingly demonstrated that the United States is not exceptional because Americans are more violent than citizens in other affluent countries. Rates of robberies and assaults in America are not far different than in other affluent nations. For example, during their study period the assault rates for Canada and England were within 30 percent of the U.S. rate, while the assault rate in Austria was a bit more than 30 percent above the U.S. rate. What makes America so different is its extraordinarily high rate of *lethal* violence, and what makes violence in America lethal so much more often is its much higher prevalence of guns. Guns are, quite simply, far more lethal than other weapons. The robbery rates in Canada, England, and Australia were, for the year studied, within 30 percent of the U.S. rate.⁹⁵ Robberies, however, are more likely to turn deadly when they are at gun point. It is so much easier to shoot a victim who resists, or flees, or whom the robber just does not like than it is to stab or bludgeon him, and someone who is shot is more likely to die than someone who is stabbed or bludgeoned. Guns are used

⁹⁴ The data is derived from Erin Grinshteyn & David Hemenway, “Violent Death Rates: The US Compared with Other High-income OECD Countries, 2010,” *The American Journal of Medicine* 129:266 (2016).

⁹⁵ Franklin E. Zimring & Gordon Hawkins, *Crime is Not the Problem: Lethal Violence in America* (New York: Oxford University Press 1997), 38. The year studied was 1991.

in in about 40 percent of New York robberies yet accounted for 85 percent of robbery killings.⁹⁶ The same dynamic plays out in assaults.⁹⁷ Guns are used in 26 percent of assaults in New York but only one percent of assaults in London.⁹⁸ Consider that last statistic, and then look again at the bars depicting the homicide rates in the United States and the United Kingdom.

Zimring and Hawkins compared crime in Los Angeles, California with crime in Sydney, Australia, and crime in New York City with crime in London, England.⁹⁹ Los Angeles and Sydney both had populations of 3.6 million during the study period, and they had roughly similar rates of theft and burglary. And yet, Sydney's robbery rate was only 12.5 percent of that of Los Angeles, and its homicide rate was only 4.8 percent of that of Los Angeles. Thus, as Zimring and Hawkins put it, "for every homicide reported in Sydney, twenty bodies are added to the count in Los Angeles."¹⁰⁰ During the study period, New York City's population was seven million and London's was 6.6 million. London's theft and burglary rates were, respectively, 166.5 percent and 157 percent of New York's. However, London's robbery rate was 19.4 percent of New York's rate, and its homicide rate was only 8.9 percent of New York's rate. Thus, even though London's burglary and theft rates were higher than New York's rates, New York's robbery rate was five times London's, and New York's murder was *more than eleven times* London's rate.

One famous study by other researchers examined crime over a seven-year period in both Seattle, Washington and Vancouver, British Columbia.¹⁰¹ During the study period, these two cities – located 140 miles apart – were nearly identical in population size, unemployment rate, and median household income. They had strong cultural similarities as well; for example, a majority of the top-ten rated television shows were the same in both cities. As one might expect of twin cities, the burglary rates in Seattle and Vancouver were nearly identical. The aggravated assault rate was slightly higher in Seattle, but when researchers examined that more closely they found something quite interesting. The aggravated assault rates with knives were almost identical. So were the aggravated assault rates with all other weapons besides firearms. However, Seattle's rate of aggravated assaults with firearms was nearly eight times Vancouver's rate. The murder rates between the cities were very different. In fact, there were nearly twice as many murder in Seattle than in Vancouver over the study period. The pattern here was much the same: the murder rates with knives, and with all other weapons other than firearms, were quite close, but Seattle's homicide firearm rate was nearly five times Vancouver's rate. The most salient difference between the two cities was the prevalence of handguns: 41 percent of Seattle households handguns compared to 12 percent of Vancouver households.

⁹⁶ Ibid., 45.

⁹⁷ The researchers note that in Los Angeles, for example, a far greater proportion of homicides "grow out of arguments and other social encounters between acquaintances" than out of robbery. Ibid., 16.

⁹⁸ Ibid., 47.

⁹⁹ Ibid., 4-7.

¹⁰⁰ Ibid., 16.

¹⁰¹ John Henry Sloan, et., al., "Handgun Regulations, Crime, Assaults, and Homicide," *The New England Journal of Medicine*, Nov. 10, 1988, 1256-62. See also discussion in Carl T. Bogus, "The Strong Case for Gun Control," *The American Prospect*, Summer 1992, 19.

More than anything else, the prevalence of guns that accounts for the disjunction between the relative similarity in non-lethal crimes and the yawning chasm in lethal crimes when comparing the United States to other affluent nations. Other international comparisons have found that major gun laws reduce homicides while modest regulations do not.¹⁰² And researchers have discovered that, within the United States, residents of states with higher gun prevalence are more likely to be murdered than residents of states with lower gun prevalence.¹⁰³ Indeed, residents of states with the very highest gun prevalence (Louisiana, Alabama, Mississippi, Wyoming, West Virginia, and Arkansas) are 2.5 times more likely to be homicide victims than are residents of states with the very lowest gun prevalence (Hawaii, Massachusetts, Rhode Island, and New Jersey).¹⁰⁴

“No program for the prevention of lethal violence can possess even superficial credibility without paying sustained attention to guns,” wrote Zimring and Hawkins.¹⁰⁵ “The basic choice,” they continued, “is between trying to deny handguns to only high-risk groups and attempting to curtail the availability of handguns generally.”¹⁰⁶ That is, the U.S. follows the good guy/bad guy model, which allows everyone except those in prohibited categories to own firearms while other high-income nations allow only people in certain special categories to own firearms. Zimring and Hawkins recognized that the choice is either to bring “U.S. handgun policy to the standard of the rest of the developed world” or be content with making “minor adjustments to current regulations that will all but guarantee persisting high rates of death.”¹⁰⁷ It was, they observed, an “unpalatable” choice – unpalatable for reasons of public opinion and politics.

Since they made that observation, the option of joining the rest of the world seems even more unrealistic. Constitutional law has become as a second obstacle. It is entirely understandable that gun control advocacy groups today try to content themselves with fighting off ever more radical proposals by the gun lobby – such as requiring states to honor concealed weapon permits issued by other states, or making gun silencers legal¹⁰⁸ – or seeking modifications in the existing good guy/bad guy model. And yet, as I shall explain shortly, that strategy is counterproductive because it accepts and entrenches the good guy/bad guy model. I am not arguing that we can overthrow the good guy/bad guy model and join the rest of the developed world soon. Rather, I shall argue that we must take a long-term view. Neither public opinion nor constitutional law is unalterable. Both can be changed through concerted and sustained effort.

It was, not that long ago, settled constitutional law that the Second Amendment only grants the people a right to keep and bear arms only within the government-regulated militia. The higher federal courts, including the United States Supreme Court, had consistently so held throughout American jurisprudential history, and all legal commentators agreed. And yet, beginning in the 1970s, the NRA and its allies launched a campaign to change that basic

¹⁰² Hemenway, *Private Guns, Public Health*, 169-70.

¹⁰³ Henigan, 103.

¹⁰⁴ *Ibid.*, 104.

¹⁰⁵ *Ibid.*, 200.

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.*, 201.

¹⁰⁸ See Robert Spitzer, “Silencing lifesaving noise,” *Washington Post*, Jan. 25, 2017, A17 (regarding a NRA push to eliminate registration requirements for owning gun silencers).

understanding. They knew this was not an easy task; they knew it would take sustained effort over considerable time. I have told some of the story elsewhere.¹⁰⁹ Suffice it to say here that they proceeded incrementally, gained momentum slowly but continuously, and succeeded with a dramatic reversal of Supreme Court precedent. It took almost thirty years. Had they contented themselves with easier but less consequential short-term projects, Second Amendment jurisprudence would never have changed.

Can Second Amendment jurisprudence be changed again? If America is someday to have a rational public policy and reasonable public safety, it must be changed. Moreover, it can be changed without constitutional amendment because the historical background to the Second Amendment demonstrates that the Supreme Court's decisions in *Heller* – the five-to-four decision that reversed two centuries of precedent – was wrong. I shall next try to give you just a flavor of that history.

VI.

Almost exactly one-hundred years before James Madison and the First Congress drafted the Second Amendment, the English Parliament included a right-to-possess-arms provision in its Bill of Rights of 1689. Although the English and American provisions are not identical, they were written to deal with parallel problems, namely, competing governmental authorities. Both were fundamentally separation of powers provisions. In England, the question was whether Parliament had the sole right to regulate guns, or whether the King could dispense with those laws; in America, it was whether the states had some minimum right to armed militia even though the newly-adopted Constitution gave Congress the sole authority to organize and arm the militia.

The English provision arose out of the Glorious Revolution of 1688. The genesis of the revolution was the ascension to the throne of King James II.¹¹⁰ That set England's teeth on edge. Some years earlier, Parliament had enacted the Test Acts, which required that all political and military officials take an oath renouncing any belief in Catholicism.¹¹¹ James, who was the brother of then-ruling King Charles II, shocked the nation by refusing to take the oath and instead resigning his position as Lord High Admiral. When Charles II died unexpectedly in 1685 without an heir, he was succeeded by James II.

Although historians estimate that England's Catholic population was only between two and ten percent at the time, Protestant England nonetheless feared an attempt to restore the nation to Catholicism, whether by invasion or subversion. That is why Parliament enacted the Test Acts in the first place. James began ignoring the Test Acts by appointing Catholic army officers. While the King could "dispense" with the law under certain circumstances,

¹⁰⁹ See Carl T. Bogus, "The History and Politics of Second Amendment Scholarship," *Chicago-Kent Law Review* 76:3 (2000).

¹¹⁰ For an abbreviated history, see Carl T. Bogus, "The Hidden History of the Second Amendment," *U.C. Davis Law Review* 31:309, 375-86 (1998). See also Lois G. Schworer, *Gun Culture in Early Modern England* (U. Va. Press 2016), at 156-70.

¹¹¹ The Test Act of 1673 required civil and military officers to "declare that I do believe that there is not any transubstantiation in the sacrament of the Lord's Supper, or in the elements of the bread and wine, at or after the consecration thereof by any person whatsoever."

many considered this an abuse of that authority. There was fear that James intended to disarm Protestants and arm Catholics by replacing Protestant military officers with Catholics, as James' friend, the Earl of Tryronnel, was doing in Ireland. James, however, was fifty-five, then an advanced age, and neither hale nor hearty. His second wife was also Catholic, but she was believed to be infertile. Next in line to the throne was James' daughter Mary. There was no problem there. Mary's deceased mother, James' first wife, had been a Protestant, and Mary's husband – William of Orange, the Stadtholder of Holland – was the principal defender of Protestantism on the Continent. The hope, therefore, was that the danger posed by James II would be a fleeting one.

That hope was dashed in June of 1688 when the Queen gave birth to a baby boy, who by virtue of his gender became first in line to the throne. The prospect of a line of Catholic kings was intolerable. Precipitating what is known as the Glorious Revolution, leaders of Parliament invited William of Orange to invade England. William accepted the invitation. James II, finding himself with no support – political or military – in the face of Williams' advancing army, fled to France.

Parliament then negotiated the terms under which it would offer William the throne.¹¹² It presented William with a Declaration of Rights, and asked him to accept it as a condition of being made King of England. Parliament wanted assurances that its lawmaking authority would be recognized and not curtailed. For example, the Declaration accused James II of “assuming and exercising a power of dispensing with and suspending of laws and the execution of laws without consent of Parliament,” and provided that “the pretended power of dispensing with laws or the execution of laws by regal authority, as it hath been assumed and exercised of late, is illegal.”¹¹³ Most relevant for our purposes, the Declaration accused James II of “causing several good subjects being Protestants to be disarmed at the same time when papists were both armed and employed contrary to law.” Article VII of the Declaration provided that “the subjects which are Protestants may have arms for their defence suitable to their conditions and as allowed by law.”* William accepted the Declaration, but insisted that he rule as King and not merely as Mary's consort. Parliament agreed that William and Mary would be joint sovereigns but that William would administer the kingdom. When, ten months later, Parliament formally enacted the Declaration by statute, and it became the English Bill of Rights of 1689.

The right-to-have-arms provision of the Bill of Rights was not designed to grant the people a right to have weapons regardless of what Parliament might decide. It was precisely the opposite: it reaffirmed that firearm ownership was regulated by law, and that Parliament made the laws. Moreover, Parliament had long and vigorously regulated gun ownership and use in England. It had, for example, always restricted ownership of guns to the wealthy. In 1523, Parliament made it unlawful for anyone with an annual income of less than 100£ – a considerable income at the time – to own a gun, a restriction that remained in place in 1689

¹¹² Parliament sat as a Convention because Parliament could not be formally convened.

¹¹³ English Bill of Rights of 1689, available at http://avalon.law.yale.edu/17th_century/england.asp.

* Parliament had no objection if the Mayor of London decided that public safety required disarming all Catholics in his city, which, in fact, he was doing at the very moment that Parliament was presenting its Declaration of Rights to William of Orange.

and well beyond.¹¹⁴ Crossbows were similarly regulated. One of the reasons for allowing the wealthy to own handguns was that military officers were drawn from the aristocracy. (Proposals that officers should instead be appointed on the basis of competency or merit were repeatedly rejected. This lasted through World War I and even to some extent into World War II, when the aristocracy still provided a majority of military officers. The view was that a “British military officer should be a gentleman first and an officer second.”¹¹⁵) It was sensible that military officers be familiar with the handguns, which were their principal weapon, and the view, no doubt, was that gentlemen could be trusted with handguns. The gun laws were supplemented with game laws that made it unlawful for anyone except those meeting real property qualifications to either possess or use a gun for hunting. The game laws were designed to restrict hunting to the landed gentry – or, as one modern historian cleverly put it, the game laws “protected pheasants from peasants.”¹¹⁶ The laws regulating arms – guns and crossbows – were, of course, public safety measures.

It is quite interesting that even as early as the sixteenth century Parliament distinguished between what we today think of as handguns – that is, a gun small enough to conceal on one’s person – and longer guns, and between urban and rural areas. In 1541, Parliament noted that “little shorte handguns and little hagbuttes” were responsible for “destestable and shameful murders, robberies, felonies, riot and route,” and prohibited the possession of guns shorter than one yard in length. Residents living outside of urban areas were allowed to own guns of the prescribed length to protect their households, and residents living near the seacoast or the Scottish border were also permitted to own guns as a defense against invasion.¹¹⁷ Residents in urban areas with annual incomes of more than 10£ were required to own weapons to help provide for the national defense and public order, but they were required to keep those weapons in public storage facilities.¹¹⁸

Both the gun laws and the hunting laws were, of course, modified from time to time. The central point is this: Parliament vigorously regulated arms. There was no tradition of granting all subjects a right to own guns. Historian Lois Schwoerer writes:

A striking feature of England’s early modern gun culture was its restrictive nature: English subjects whose socioeconomic standing was below a certain level (usually an annual income of £100) were legally disallowed to possess or use a firearm. This limit affected about 98 percent of the population.¹¹⁹

And Parliament wanted the King to acknowledge that it – that is, Parliament, as the law-making body of the nation – had the sole authority to decide how arms were to be regulated. Prior to James II, there had been at least one previous episode of a king exercising his claimed dispensing power regarding Parliament’s gun laws. In 1544, while England was at

¹¹⁴ See Schwoerer, *Gun Culture of in Early Modern England*, at 48 and 162. The statute referred to handguns, but in early modern England the words “handgun” or “hand gonnies” referred to almost all firearms and included pistols and muskets. See generally *ibid.*, Appendix A, “What Is a Gun?” A handgun was defined as “a firearm that one person could discharge with or without a rest.” *Ibid.*, 181.

¹¹⁵ *Ibid.*, 79.

¹¹⁶ *Ibid.*, 50 (quoting Edmund S. Morgan).

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.*, 81.

¹¹⁹ *Ibid.*, 171.

war with both Scotland and France, King Henry VII proclaimed that all native-born subjects could possess guns, notwithstanding any statute to the contrary.¹²⁰ But that was during war, and it was brief; two years later the King rescinded that proclamation. James II's program of disarming Protestants and arming Catholics was another matter entirely. Article VII was not intended to curtail gun regulation but to specify which branch of government had the authority to regulate guns. Its most salient phrase was *as allowed by law*, which meant that possession and use of arms was entirely contingent upon parliamentary regulation. The main point was to have the King accept that phrase.¹²¹

The American Founders were well aware of the English Bill of Rights, and it should not be a surprise that the Second Amendment of the United States Constitution was also a separation of powers provision. The new Constitution adopted by the Founders in Philadelphia on September 17, 1787 radically changed governmental authority over the militia. Previously, the militia had been creatures of the states. The Constitution changed that. It placed the militia under the joint control of the federal and state governments, but it gave the lion's share of power to the federal government. Article I, Section 8, Clause 16 of the Constitution gave Congress the power:

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.

That meant that Congress could organize and govern the militia as it saw fit. Congress was also empowered to call forth the militia to execute the laws of the Union and to suppress insurrections and repel invasions. The states were left with only the power to appoint officers and to train the militia, although it had to train the militia as Congress would prescribe. Congress, moreover, was not required to rely principally on the militia for national defense. Although it had been a topic of some controversy in Philadelphia, the Constitution ultimately gave Congress the power to maintain standing armies and a navy. Congress was therefore free to decide to what extent it wanted to maintain a citizen militia.

I have told the remarkable story what of happened next at length elsewhere,¹²² and will give only a snapshot description here. When James Madison sought to have his home state of Virginia ratify the new Constitution at a convention in Richmond, Virginia in June of 1788, his Antifederalist opponents – led by Patrick Henry and George Mason – accused him

¹²⁰ Ibid., 60. Sixteenth-century gun laws authorized the king to grant gun licenses to people who were otherwise ineligible to own guns. In significant part, this appears to have been used to as a means of enabling landholding aristocrats – who were willing to pay a considerable licensing fee – to arm a small number of designated servants in order to help protect their estates from intruders, poachers, or pests such as buzzards. Some aristocrats also purchased licenses for friends they wanted to take hunting with them but were otherwise not authorized to possess guns. The practice ended in 1604 however. See generally *ibid.*, 65-73.

¹²¹ The Bill of Rights did not cause Parliament to relax firearm regulation, either then or now. In England today, people may only possess shotguns or “section 1 firearms,” which are mainly limited to manually-loaded cartridge pistols and manually-loaded rifles. Possession requires either a Shotgun Certificate or a Firearm Certificate. Handguns, revolvers, and automatic and semiautomatic guns of any kind are banned to the general public. See Walter Hickey, “How Australia and Other Developed Nations Have Put a Stop to Gun Violence,” *Business Insider*, Jan. 15, 2013, available at <http://www.businessinsider.com/canada-australia-japan-britain-gun-control-2013-1>. See also http://www.cps.gov.uk/legal/d_to_g/firearms/#a12.

¹²² Bogus, “The Hidden History of the Second Amendment,” *supra*.

of creating a militia clause that presented grave dangers for Virginia and the South. The Antifederalists accepted the representation that the Constitution did not give Congress the power to eliminate slavery – not directly, that is. But, they argued, the Constitution gave Congress the power to undermine the slave system by disarming the state militia, on which the South relied for slave control. Only Congress was empowered to arm the militia, they argued, and thus Congress could effectively disarm the militia. As everyone in Richmond well understood at the time, that would leave the South defenseless against slave revolts. (George Mason also argued that Congress might stimulate slave uprisings by, for example, sending Georgia’s militia to New Hampshire.)

Even with an armed and very present militia, the South then lived in constant terror of slave revolts.¹²³ Henry and Mason’s suggestion that Congress might deprive Virginia of an armed militia had to be profoundly disturbing. They went as far as to suggest that Congress might deliberately disarm the militia to undermine the slave system. “Slavery is detested,” Patrick Henry reminded his audience.¹²⁴ “The majority of Congress is to the north,” he added, “and the slaves are to the South.”¹²⁵ When Madison tried to rebut these arguments by suggesting that if Congress did not arm the militia, the states could do so themselves, he was ridiculed. What did it mean to provide that Congress had specific powers over the militia and the states had other specific powers? Certainly that did not mean that all of those powers were concurrent between the national and state governments.

Madison and the Federalists ultimately prevailed, albeit only by a vote of 88 to 80, and Virginia ratified the Constitution and joined the Union. But, I believe, when Madison went off to the First Congress the following year representing Virginia in the House of Representatives politically committed to writing a Bill of Rights, he sought to fix the problem identified by Henry and Mason and to ensure that the states could have an armed militia regardless of Congress’ desire.

With all of this in mind, consider the words of the Second Amendment anew: “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.”

VII.

I shall conclude with two short, personal stories.

In 1987, I was elected to the board of directors of the organization that is known today as the Brady Campaign. It was then Handgun Control Inc. (HCI). At about the time I joined the board, HCI decided to make the Brady Bill its flagship objective. In its original form, the Brady Bill would have created a nationwide, seven-day waiting period for handgun purchases. I questioned the wisdom of that effort. Nearly half of the states already had waiting periods, some longer than seven days. California, I believe, had a fifteen-day waiting period. I knew of no data suggesting that waiting periods were effective in reducing handgun

¹²³ Ibid. For a brief supplement about the South’s fear of slave uprisings, see <http://www.carltbogus.com/edmund-a-blog/72-the-hidden-history-of-the-second-amendment-redux>.

¹²⁴ See Bogus, “The Hidden History of the Second Amendment,” *supra* at 352, and sources cited therein.

¹²⁵ See *Ibid.*, 353, and sources cited therein.

deaths. Why, therefore, should we put all of our effort behind this proposal? The top officers believed that HCI needed a legislative victory to show its members it was making progress, and they wanted that victory in the next congressional session. The Brady Bill was so reasonable, so moderate, and so commonsensical that even the NRA could not oppose it without humiliating itself. The bill would breeze through the next session of Congress, they argued.

The NRA, however, did not seem embarrassed about opposing the bill. It did so with the same passion and fury it would have mustered if HCI had sought to confiscate all guns. In fact, that was pretty much the NRA argument: the Brady Bill was a ploy to get America to take a first step on a slippery slope that would eventually lead to banning guns. Not so, countered HCI. We favor only common-sense gun control measures. We do not support banning handguns.

Public opinion seemed to be overwhelmingly on HCI's side. During the seven-year campaign, HCI provided its board members with every poll on the Brady Bill. My recollection is that national polls were consistently over 90 percent and over the entire seven years there was not a single state poll, even in states such as Virginia and Montana, in which less than 80 percent of respondents favored a seven-day waiting period for handgun purchases.¹²⁶ That level of support was practically unheard of, then or now, for any issue.

Nevertheless, year after year the NRA successfully held off the legislation. The reason for its success was simple: while the overwhelming majority of people favored the bill, for them the issue was not do-or-die. It was not a decisive factor in the voting booth. Meanwhile, although the number of voters against a waiting period was relatively tiny, many of them considered the issue the most important issue of all. They told their congressional representatives that they would never again vote for them if they voted for the Brady Bill, and they clearly meant it. I remember discussing the bill at the time with a Democratic congressman representing a mostly suburban Philadelphia district that stretched into rural areas. I told him that supporting the measure would cost him no more than one percent of the electorate. "Do you know what my margin was in the last election?" he asked. It had been less than one percent. "This is not an issue over which I am prepared to lose my seat," he said. And why should it have been? There was evidence then (or now) that the Brady Bill would actually save lives.

The Brady Act was, of course, ultimately enacted in 1993. In fact, its passage did provide some political momentum; the following year a federal assault weapons ban was included in the Violent Crime Control and Law Enforcement Act. The argument for banning assault weapons was that there is no legitimate reason for private citizens to own military-style weapons. The weapons were defined by certain features, including whether they had a pistol grip, flash suppressor, barrel shroud, folding stock, or bayonet mount. A gun containing at least two of nineteen specified features was deemed to be an assault weapon. The NRA argued that the objection to these weapons was merely cosmetic; they might look more dangerous than standard hunting rifles, but they were functionally the same. All semi-automatic weapons, including those not designated as assault weapons, are capable of firing rounds as rapidly as the shooter can pull the trigger, allowing for rates of fire approaching

¹²⁶ I am working largely from memory in this section.

or even exceeding a round per second.¹²⁷ The NRA had a legitimate point. Nevertheless, the assault weapons looked especially fearsome, and this measure too enjoyed broad public support. When it passed the House on August 21, 1994, 46 Republicans voted for it.¹²⁸

There was, however, one aspect of the assault weapon ban that was of potential consequence: high-capacity magazines. The legislation essentially defined gun magazines capable of holding more than ten rounds to be assault weapons. Thirty-round magazines had been common. High-capacity magazines provide little benefit for hunters and target shooters – but they are enormously useful to mass murderers. The legislation purported to ban magazines holding more than ten rounds. Someone equipped with ten-round magazines must replace empty magazines with full magazines three times more often than someone equipped with thirty-round magazines. While it only takes a few seconds to reload this way, those few seconds give victims a chance to escape or to attack the shooter. For example, the man who shot Congresswoman Gabrielle Giffords and eighteen other people in Tucson, was successfully tackled by bystanders while he was attempting to replace the empty magazine in his Glock 19 handgun, and nine children successfully fled from the classroom with shooter at the Sandy Hook Elementary School in Newton, Connecticut while he was reloading.¹²⁹

The ban on high-capacity magazines was, however, a mirage. Not only did the legislation grandfather assault weapons that were manufactured before the legislation passed, it also grandfathered high-capacity magazines manufactured before that date. An estimated 25 million high-capacity magazines were in private hands when the legislation was passed – they were, in fact, heavily promoted while the legislation was pending Congress, and sold like hotcakes – and another 4.7 million exempted high-capacity magazines were imported to the U.S. during the first five years the legislation was effect.¹³⁰ High-capacity magazines remained readily available throughout the ten-year life of the ban. Researchers at the University of Pennsylvania found that while the number of assault weapons in private hands declined while the law was in effect, that decline was offset by a rise in weapons equipped with high-capacity magazines.¹³¹

The Brady Campaign spent its political capital on legislation that did not, in fact, make America safer. While Brady and other gun control advocates may have thought they would improve these pieces of legislation down the road, the public believed that the best available gun control measures had been enacted and lost interest in the issue. According to the Gallup Poll, the percentage of Americans who believe that gun control laws “should be made more

¹²⁷ In a recent opinion, the majority and dissent argued over the possible rate of fire of semi-automatic assault rifles. The majority cited studies showing that rates of fire can exceed two rounds per second while the dissent cited authorities placing the rate of fire at 45 to 60 rounds per minute. *Kolbe v. Hogan*, No. 14-1945, slip. op. at 19 and 103, 2017 WL 679687 *7 and *33 (4th Cir. Feb. 21, 2017)(en banc). It is possible that the difference results from some studies calculating rate of fire on a single magazine while other studies calculate how many rounds can be fired per minute using standard 30-round magazines and thus including the time it takes to change magazines.

¹²⁸ Spitzer, 152.

¹²⁹ See <http://www.cnn.com/2013/06/10/us/arizona-safeway-shootings-fast-facts> (regarding Tucson, AZ) and *Kolbe v. Hogan*, supra, slip. op. at 6, 2017 WL 679687 *1 (regarding Newton, CT).

¹³⁰ Christopher S. Koper, “Updated Assessment of the Federal Assault Weapons Ban: Impacts on Gun Markets and Gun Violence, 1994-2003,” Report to the National Institute of Justice, June 2004, available at <https://www.ncjrs.gov/pdffiles1/nij/grants/204431.pdf>.

¹³¹ *Ibid.*, 2.

strict” declined from 78 percent in 1990 to 49 percent in 2013.¹³² Most importantly, the Brady Act entrenched acceptance of the good guy/bad guy model. Everyone accepted the premise that it is possible “to keep guns out of the wrong hands.”

The gun control movement has never recovered from its Pyrrhic victories in 1993 and 1994. Moreover, it may well be the case that acceptance of the good guy/bad guy model led Supreme Court justices to believe that their decision in *Heller* had no adverse public health consequences. They made it clear that convicted felons and other dangerous people could be prohibited from purchasing and possessing guns.

Here is the second story. In 1996, Common Cause of Rhode Island launched a campaign to get Rhode Island to recognize the principle of separation of powers in its state government.¹³³ The state legislature took the position that Rhode Island government was unique and did not accept that principle. As a result, the legislature could – in addition to creating and funding administrative agencies – also operate them. The legislature accomplished this by creating agencies controlled by a commission or a board, and gave itself – i.e., the legislature – the ability to appoint a majority of the controlling body. In the federal system, that would violate the principle of separation of powers and be flatly unconstitutional. The Rhode Island legislature even appointed sitting legislators to agency boards and commissions. This was a system vulnerable to – some might even say designed for – corruption.¹³⁴

The state Common Cause chapter took on the issue. First, Common Cause took the matter to the Rhode Island Supreme Court. But the court, whose members had also been effectively selected by the legislature, upheld the legislature’s position.¹³⁵ Common Cause then launched a campaign for a constitutional amendment. Most people, including the state’s savviest political strategists, considered that a fool’s errand. The state constitution could not be amended without the consent of the legislature. The legislature would not willingly yield an enormous source of its power absent a firestorm of voter displeasure. Voters cared about issues such as schools, taxes, and potholes, and were not going to understand, let alone become outraged, over an abstract principle of political philosophy. And yet, Common Cause persisted. It educated journalists and community leaders; it sent speakers to community groups of all kinds; it organized forums, lectures, and debates; its members wrote op-eds and letters-to-the-editor for newspapers. It was a vigorous and sustained effort of public education. During the seven-year campaign, the *Providence Journal* published nearly 800 news articles, editorials, commentary articles, and letters-to-the-editor about separation of powers.

Other good government groups initially joined the effort but fell by the wayside as the campaign stretched on. Their familiar calculation was that they had to show their members

¹³² Spitzer, 126.

¹³³ For a more complete recounting of this story, see Carl T. Bogus, “The Battle for Separation of Powers in Rhode Island,” *Administrative Law Review* 56:77 (2004).

¹³⁴ The battle for separation of powers in Rhode Island began when then United States Attorney (now United States Senator) Sheldon Whitehouse published an article explaining why not recognizing separation of powers exacerbated corruption. Sheldon Whitehouse, “Appointments by the Legislature Under the Rhode Island Separations of Powers Doctrine: The Hazards of the Road Less Traveled,” *Roger Williams University Law Review* 1:1 (1996).

¹³⁵ Bogus, “The Battle for Separation of Powers in Rhode Island,” *supra*, 124-26.

they had achieved something recently. Yet, year after year, separation of powers remained Common Cause's flagship proposal. Voters began peppering state legislators with questions – and increasingly passionate demands – about separation of powers. Legislators started offering cosmetic concessions that would have allowed Common Cause to claim victory while actually accomplishing little. Common Cause rejected those offers. Eventually, a government scandal provided the spark that ignited a firestorm. For days on end, local talk radio was all about separation of powers. Voters sent the General Assembly so many emails that its system crashed. In the end, the legislature and voters approved a truly meaningful constitutional amendment.

The lesson of these two stories – as well as the NRA's successful campaign to change how the Supreme Court interpreted the Second Amendment – is that it is sometimes necessary and possible to take the long view. Despite conventional wisdom, neither the NRA nor Common Cause of Rhode Island were institutionally weakened by doing so.

What would a decades-long campaign to look like? Both the Common Cause campaign to amend the Rhode Island Constitution and the NRA campaign to change the meaning of the Second Amendment had strong similarities. Both campaigns began with academic writings, which were used to give the non-consensus view legitimacy and persuade opinion makers such as leaders of advocacy groups, potential financial supporters, politicians, other academics and teachers, and – perhaps most importantly – journalists. The writings were expanded to popular venues such as the op-ed pages of newspapers. In the case of gun control, op-eds could be produced by authors with recognized expertise such as criminologists, sociologists, epidemiologists and public health experts, or more often, by newspaper columnists and journalists describing the work of researchers. The message must be the simple, hard truth about gun control: effective gun control is available, but it requires reducing handguns in general circulation. It is a message that the American public has not heard because gun control advocates, for political and institutional reasons, have led Americans to believe the myth that less draconian, “common sense” measures are available. At the first the message will seem jarring, but that may help it get attention. Because this is a long campaign, it is not necessary – indeed, it may even be counterproductive – to combine it with a plea of quick political action. The first, essential task is to tell the simple, hard truth and let it sink in. Both the message and its importance should be repeated wherever it is relevant. In debates over health care costs, for example, it should be noted that reducing gun violence would reduce public health care costs because gunshot wounds result in extremely expensive emergency room and trauma center visits. Both the NRA and Common Cause also effectively sent speakers to every venue that would have them – community groups, college clubs, social action committees of churches and other religious organizations, and radio talk shows.

What I have described so far is necessary but by itself insufficient. Arguments based on facts and logic may persuade a necessary cohort of opinion leaders, but they will not, by themselves, create a sea change in public opinion. Consider this statement by the eighteenth century Scottish politician Andrew Fletcher:

I knew a very wise man [who] believed if a man were permitted to make all the ballads he need not care who should make the laws of a nation, and we find that

most of the ancient legislators thought that they could not well reform the manners of any city without the help of a lyric, and sometimes of a dramatic poet.¹³⁶

Everyone today is familiar with the term “designated driver.” Many of us have been one or had someone else be one when going out on the town with a group of friends. It was not always so. When I was a college student, neither the term nor the concept were known. In 1986, experts at the Harvard School of Public Health who wanted to do something about drunk driving met with hundreds of Hollywood screenwriters and producers, introduced them to the term, and asked them to include it in television scripts.¹³⁷ Over a four-year period, the term “designated driver” was used in 160 prime-time television shows. In some shows, it was mentioned only in passing; in other shows, it was integral to the main plot line. This campaign had a profound effect on public attitudes and behavior. My point is not that the gun control movement must replicate the designated driver campaign for every campaign is different. My point is that, just as Andrew Fletcher suggested three hundred years ago, sea changes in public attitudes require help from artists and storytellers.

Storytellers are evocative. I can create a bar chat, but storytellers know how to paint indelible images in their audience’s mind. For example, a moment ago I made a point about the costs of treating gunshot wounds in hospital emergency rooms. In his novel *Balance of Power*, Richard North Patterson has a fictional President of the United States also speak about gunshot wounds and emergency rooms while advocating stricter gun control in a speech to Congress. Here is the line Patterson wrote for his fictitious President: “Only in America, in *this* city, do surgeons prepare for combat duty by training at an urban hospital...”¹³⁸

We should also listen to the storytellers for their instincts about how public opinion on the issue might be shaped. Richard North Patterson’s *Balance of Power* is about an effort to persuade the nation to accept more rigorous gun control, and so is John Madden’s 2016 film *Miss Sloane*.¹³⁹ In both stories, gun control advocates successfully employ strategies based upon making gun control a more salient issue for women and exposing the commercial interests of the gun lobby, as well as the self-interest of politicians who do its bidding. Moreover, in both stories the winning strategies are built on a combination of public education and carefully crafted evocative approaches.

The NRA has been a master of the evocative stratagem. It had, for example, the foresight to make Charlton Heston its president for a five year period beginning in 1998. The famous actor’s value to the NRA was extremely simple – it was nothing more than the image of Heston holding a musket over his head and declaring, “From my cold, dead hands!” This became ritual at the NRA’s annual convention and was inevitably included in that evening’s television newscasts. It was a double-barreled subliminal image. It semi-consciously evoked Moses, whom Heston famously played in Cecil B. DeMille’s 1956 movie *The Ten Commandments*,¹⁴⁰ holding up his staff against Pharaoh and leading his people to freedom

¹³⁶ https://en.wikiquote.org/wiki/Andrew_Fletcher

¹³⁷ Bogus, *Why Lawsuits Are Good for America*, supra, at 143-44.

¹³⁸ Richard North Patterson, *Balance of Power* (New York: Ballantine Books, 2003), 188.

¹³⁹ *Miss Sloane* (EuropaCorp 2016).

¹⁴⁰ *The Ten Commandments* (Paramount Films 1956).

under Devine guidance. Probably more significantly, it simultaneously evoked the Minuteman at Lexington and Concord. The power of such images should not be underestimated, and when deployed must be decoded and rebutted. That second image can be turned completely around by communicating that the Second Amendment was not written to protect the musket in the hands of the Minute Man in Lexington; it was written to protect the musket in the hands of the militia slave patrols in the South.¹⁴¹ I have written a law review article laying out that case; but to be effective it needs to be turned into a movie.

Finally, we need to be clear about the choice before us. The choice is not whether America will have effective gun control today. The choice is whether America will have effective gun control in the future. While public opinion, politics, and constitutional law currently bar the way, all three are malleable. The public, politicians, and judges can all be educated. That must begin, however, with telling the simple, hard truth about gun control.

¹⁴¹ See Bogus, “The Hidden History of the Second Amendment,” *supra*.