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## Forward: The Past And Future Of Guns

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# SYMPOSIUM ON GUNS IN AMERICA

## FOREWORD: THE PAST AND FUTURE OF GUNS

JAMES LINDGREN\*

Guns seem to have a strange power over people: too often passion drives out thought. The *Journal of Criminal Law and Criminology* should be commended for bringing together some of the best scholars on both sides of the debate over guns in America. My purpose in this introductory essay is to say a bit about how we got to where we are today on guns in Chicago and in the nation and what some of the things are that we should be thinking about going forward.

Before going further, I want to disclose my views. On historical issues, I agree with the gun rights crowd that in the Second Amendment the Framers recognized an individual right to own guns. On policy issues, however, I tend to believe that some forms of gun control probably save more lives than they cost, but unfortunately the net effects are probably not that large one way or the other.

### THE SECOND AMENDMENT

About twenty years ago, there were two theories of the Second Amendment. First, there was the individual rights view, which was favored by most law professors who actually wrote in the area, whether they leaned right,<sup>1</sup> left,<sup>2</sup> or libertarian.<sup>3</sup> Second, there was the states' rights (or

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<sup>1</sup> See, e.g., Nelson Lund, *The Second Amendment, Political Liberty, and the Right to Self-Preservation*, 39 ALA. L. REV. 103 (1987).

<sup>2</sup> See, e.g., 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* (3d ed. 2000); Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1205–11, 1261–62 (1992); Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 638, 645–46 (1989).

<sup>3</sup> See, e.g., Randy E. Barnett & Don B. Kates, *Under Fire: The New Consensus on the*

collective rights) view, which was favored by most Ph.D. historians who had written in the area and probably by most law professors who had not thought much about the issue.<sup>4</sup>

There was some contemporary evidence from the decades around the enactment of the Second Amendment supporting the individual rights view, but not a lot. While the Second Amendment was under consideration, some commentators referred to it as an individual right to be exercised outside of a militia,<sup>5</sup> and after it was adopted, other writers also referred to it as protecting more than a militia-based right.<sup>6</sup> But the original evidence for the individual rights view was fairly thin, since the right was seldom put at issue.

As for the states' rights view, there was no contemporary evidence. The Framers were remarkably self-aware,<sup>7</sup> and yet none of them at the time said that the Second Amendment did not protect an individual right to keep guns, instead protecting only a right of the states to resist federal control of the militia. All the states' rights camp had was a withering disdain for the "gun nuts" on the other side and a strained, but not entirely implausible, reading of the text: "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."<sup>8</sup> Under this reading, the Framers would not have put in a

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*Second Amendment*, 45 EMORY L.J. 1139, 1141–43 (1996); Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 466–67, 504 (1995); Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793, 802 (1998).

<sup>4</sup> See, e.g., Carl T. Bogus, *The History and Politics of Second Amendment Scholarship: A Primer*, 76 CHI.-KENT L. REV. 3 (2000); Michael C. Dorf, *What Does the Second Amendment Mean Today?*, 76 CHI.-KENT L. REV. 291 (2000); Paul Finkelman, "A Well Regulated Militia": *The Second Amendment in Historical Perspective*, 76 CHI.-KENT L. REV. 195 (2000).

<sup>5</sup> E.g., Letter from Samuel Nasson to George Thatcher (July 9, 1789), in *CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS* 260, 260–61 (Helen E. Veit et al. eds., 1991).

A Bill of rights well secured that we the people may know how far we may Proceede in Every Department then their [sic] will be no Dispute Between the people and rulers in that may be secured the right to keep arms for Common and Extraordinary Occations such as to secure ourselves against the wild Beast and also to amuse us by fowling and for our Defence against a Common Enemy you know to learn the Use of arms is all that can Save us from a forighn foe that may attempt to subdue us for if we keep up the Use of arms and become well acquainted with them we Shall allway be able to look them in the face that arise up against us . . . .

<sup>6</sup> See the discussion of St. George Tucker, *infra* text accompanying notes 17–20.

<sup>7</sup> See Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907, 914–917 (1993).

<sup>8</sup> U.S. CONST. amend. II.

militia justification for giving a right to the people if they had not intended to limit the right to the militia.<sup>9</sup>

Yet did constitutional drafters in early America include justifications for rights, without meaning to limit the scope of the right solely to that context? The answer is “absolutely, yes,” as Eugene Volokh shows in *The Commonplace Second Amendment*.<sup>10</sup> For example, Rhode Island’s first constitution provided: “The liberty of the press being essential to the security of freedom in a state, any person may publish his sentiments on any subject, being responsible for the abuse of that liberty . . . .”<sup>11</sup>

Or consider the Virginia Constitution’s 1776 Bill of Rights:

That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience . . . .<sup>12</sup>

Because of the preamble to Virginia’s Bill of Rights, would it be reasonable to think that Virginia could decide to protect religions that are based on reason, but not religions based on tradition and memorized catechisms? Of course not. The preamble gives a rationale and a purpose to the right (in this case, the protection of religious liberty); it does not restrict it. Volokh offers many other examples.<sup>13</sup>

Thus with essentially no original evidence to support their view—and some evidence directly contrary to it—the states’ rights academics came up with an entirely new view, which they termed the “civic rights” view.<sup>14</sup> According to this view, the right to keep and bear arms was an individual right, but it could be exercised only with the permission of the state in a militia. This civic rights theory had the advantage of not being directly contradicted by most of the available evidence. Since the civic rights camp was willing to admit that the right was an individual one at bottom, then it could argue that this individual right could be restricted by the state to only

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<sup>9</sup> See Saul Cornell, “Don’t Know Much About History”: *The Current Crisis in Second Amendment Scholarship*, 29 N. KY. L. REV. 657, 671–72 (2002); Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 FORDHAM L. REV. 487, 491 (2004).

<sup>10</sup> Volokh, *supra* note 3, at 801–02.

<sup>11</sup> *Id.* at 814 (citing R.I. CONST. art. I, § 20 (1842)).

<sup>12</sup> *Id.* at 818 (citing VA. CONST. of 1776, Bill of Rights § 16).

<sup>13</sup> See *id.* at 814–21. “Economy being a most essential virtue in all states, especially in a young one; no pension shall be granted, but in consideration of actual services, and such pensions ought to be granted with great caution, by the legislature, and never for more than one year at a time.” *Id.* at 818 (citing N.H. CONST. pt. I, art. XXXVI (1784)).

<sup>14</sup> See Cornell, *supra* note 9, at 671–72; Cornell & DeDino, *supra* note 9, at 491.

those citizens acting as part of a state militia. Under this view, there was no individual right to own a gun outside of service in a militia.<sup>15</sup>

The problem with this view was that, again, there was no contemporary evidence from the Framers' era to support it, and, indeed, no one had ever heard of the civic rights view for the first two centuries of the Second Amendment's existence. The first use of the term "civic right" to describe the Second Amendment in American law reviews appeared in a 2002 article by the historian Saul Cornell.<sup>16</sup> It would be strange if most of the Framers held the civic rights view of the Second Amendment, but kept it a secret from everyone, including the other Framers.

Further, there is evidence from the 1790s that directly contradicts Cornell's civic rights view. St. George Tucker, both in an early 1790s draft and in the appendix to his 1803 edition of *Blackstone's Commentaries*, made clear that he viewed the Second Amendment as guaranteeing an individual right not limited to members of a militia.<sup>17</sup> As the historian Robert Churchill explains:

It is clear from the Tucker's gloss on the Second Amendment in the manuscript draft that he saw in the amendment a guarantee that extended well beyond the concern over federalism that Cornell discusses. Tucker noted that "in England the people have been disarmed under the specious precept of preserving the game." In a note on the facing page, Tucker commented that in England, "the right of the people to bear arms" was by the inclusion of limiting language "entirely done away." In this gloss, Tucker suggested that the passage of England's game laws had in England eliminated the constitutional protection that the Second Amendment was intended to guarantee. Tucker reiterated this view in 1803, noting that under the game laws in England, "the right of keeping arms is effectually taken away," while expressing his hope that in America, "the people will never cease to regard the right of keeping and bearing arms as the surest pledge of their liberty."

The problem for Cornell's argument is that England's game laws prohibited citizens, the vast majority not enrolled in the militia, from possessing firearms for private purposes. That Tucker saw the game laws as a contravention of the right protected by the Second Amendment is clear evidence that he understood that right to apply in America to all citizens and to weapons owned for both public and private purposes.<sup>18</sup>

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<sup>15</sup> Cornell, *supra* note 9, at 671–80.

<sup>16</sup> *Id.* at 679.

<sup>17</sup> Robert H. Churchill, *Three Steps Forward, One Step Back*, H-SHEAR (Sept. 2007), <http://www.h-net.org/reviews/showrev.php?id=13574>, archived at <http://perma.cc/RS9P-N6HE> (reviewing SAUL CORNELL, *A WELL-REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA* (2006)) (citing St. George Tucker's early 1790s draft and 1803 published edition of *Blackstone's Commentaries*, including an appendix to the 1803 version titled *A View of the Constitution of the United States*).

<sup>18</sup> *Id.* See also Robert H. Churchill, *Gun Regulation, the Police Power, and the Right To Keep Arms in Early America: The Legal Context of the Second Amendment*, 25 *LAW & HIST. REV.* 139, 173 (2007).

Churchill goes on to point out that:

Tucker's view mirrors that of Samuel Nasson and Saumel Latham Mitchel, cited by Cornell, and of a supporter of Samuel Adams in August 1789 who interpreted the House draft of the Second Amendment as a vindication of Adams's earlier proposed amendment that prohibited Congress from preventing "the people of the United States, who are peaceable citizens, from keeping their own arms."<sup>19</sup>

Thus, as Churchill notes, some of the "early interpreters of the language embedded in the Second Amendment understood it to guarantee a right to keep arms that transcended 'the inextricable connection' to militia service that Cornell posits."<sup>20</sup> If, as the civic rights camp believes, the Framers believed in the civic rights view of the Second Amendment, somebody should have told St. George Tucker, perhaps the leading American legal commentator of the day.

When *District of Columbia v. Heller* was decided in 2008, both sides of the Court saw the Second Amendment as guaranteeing an individual right in at least some sense.<sup>21</sup> The decision struck down Washington, D.C.'s outright ban on guns, but left broad leeway for state regulation of guns.<sup>22</sup>

The majority endorsed a version of the individual rights view that was roughly consistent with the individual rights views of the Framers and one strain of scholars for over two centuries.<sup>23</sup> The minority embraced the new civic rights view, a view that had not even been invented a decade earlier.<sup>24</sup> The biggest surprise was that it was a five-to-four split decision,<sup>25</sup> with the majority garnering only five votes for a position giving nontrivial content to a constitutional right explicitly guaranteed in the Bill of Rights.

In *McDonald v. City of Chicago*, the Court held that the Fourteenth Amendment incorporated the Second Amendment and applied it to the states, striking down Chicago's gun ban as unconstitutional.<sup>26</sup> Thus the individual rights view has won in the courts—at least for now. Litigation in lower courts continues over how substantial the restrictions can be. In *Ezell v. City of Chicago*, the Seventh Circuit held that Chicago's post-*McDonald* gun ordinance was still too restrictive.<sup>27</sup> Two years later in *Moore v.*

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<sup>19</sup> Churchill, *supra* note 17.

<sup>20</sup> *Id.*

<sup>21</sup> *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008); *id.* at 636 (Stevens, J., dissenting).

<sup>22</sup> *Id.* at 635.

<sup>23</sup> *Id.* at 579.

<sup>24</sup> *Id.* at 636–37 (Stevens, J., dissenting).

<sup>25</sup> *Id.* at 636.

<sup>26</sup> *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010).

<sup>27</sup> *Ezell v. City of Chicago*, 651 F.3d 684, 689–90 (7th Cir. 2011).

*Madigan*, the Seventh Circuit held that Illinois must revise its laws to allow concealed carry of firearms.<sup>28</sup> Under pressure from the Seventh Circuit, the Illinois legislature finally passed a law allowing concealed carrying of guns in Illinois.<sup>29</sup>

#### GUN CONTROL

With the individual civil right to own a gun now enshrined by the Supreme Court, the debate can now move to which gun policies make the most sense. In thinking about what gun control can and cannot accomplish, one should recognize that gun control seldom makes a big difference one way or the other. This is because guns tend to have conflicting effects: they make fights, crimes, and suicide attempts more lethal,<sup>30</sup> but they also deter some criminals.

In 2004, the National Academies' National Research Council examined the then-existing studies on guns, concluding:

[1] There is no credible evidence that "right-to-carry" laws . . . either decrease or increase violent crime . . . .

[2] There is almost no evidence that violence-prevention programs intended to steer children away from guns have had any effects on their behavior, knowledge, or attitudes regarding firearms . . . .

[3] Research has found associations between gun availability and suicide with guns, but it does not show whether such associations reveal genuine patterns of cause and effect.<sup>31</sup>

[4] "[I]llegal diversions from legitimate commerce are important sources of crime guns and guns used in suicide, . . .

[5] firearms are used defensively many times per day, and . . .

[6] some types of targeted police interventions may effectively lower gun crime and violence."<sup>32</sup>

The irony is that the one kind of gun control that the National Research Council thinks might be effective is targeted police interventions, yet

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<sup>28</sup> *Moore v. Madigan*, 702 F.3d 933, 934, 942 (7th Cir. 2012).

<sup>29</sup> Firearm Concealed Carry Act, 430 ILL. COMP. STAT. § 66/1 (West 2014).

<sup>30</sup> Philip J. Cook, et al., *Some Sources of Crime Guns in Chicago: Dirty Dealers, Straw Purchasers, and Traffickers*, 104 J. CRIM. L. & CRIMINOLOGY 717 (2015).

<sup>31</sup> COMM. ON LAW AND JUSTICE, NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., *Data on Firearms and Violence Too Weak to Settle Policy Debates; Comprehensive Research Effort Needed* (Dec. 16, 2004), <http://www8.nationalacademies.org/onpinews/newsitem.aspx?RecordID=10881>, archived at <http://perma.cc/QY3T-VVBY>.

<sup>32</sup> COMM. ON LAW & JUSTICE, NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., *FIREARMS AND VIOLENCE: A CRITICAL REVIEW 2* (Charles F. Wellford et al. eds., 2005).

aggressive policing in high-crime areas is the one kind of gun control that advocates for more restrictions tend to oppose.

The recent data on gun ownership is somewhat mixed. There were over sixty-five million background checks in President Barack Obama's first term—about 90% more than in President George W. Bush's first term.<sup>33</sup> Yet in the General Social Survey, while in the 1970s about half of respondents lived in gun-owning households, gradually that proportion has dropped to about a third of respondents.<sup>34</sup>

In 2012, there were 500 murders in Chicago, more than New York City (419) or Los Angeles (299).<sup>35</sup> In Illinois, 86% of homicides were with guns, the highest percentage in the nation; in the United States overall, 69% homicides involved guns.<sup>36</sup> In 2012 in Illinois, all rifles comprised only 0.9% of gun homicides, compared to 3.6% nationwide.<sup>37</sup> Rifles, whether of the ordinary type or of the type that are designed to look like assault weapons, account for relatively few homicides. Thus if someone is campaigning for a ban on assault style weapons and claims that it would have a significant effect on gun deaths, he is at best misinformed, and at worst, demagoguing.

#### SYMPOSIUM ARTICLES

The four substantive contributions to this symposium are marked by a seriousness of tone and a commitment to evidence-based reasoning. Though one can sometimes tell on which side of the ideological fence the authors live, the works here seem more enlightened by these points of view

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<sup>33</sup> Gregory Gwyn-Williams, Jr., *65.4 Million Gun Purchases Since Obama Took Office, 91% More Than Bush's First-Term Total*, CNSNEWS.COM (Feb. 11, 2013, 11:59 PM), <http://cnsnews.com/blog/gregory-gwyn-williams-jr/654-million-gun-purchases-obama-took-office-91-more-bushs-first-term>, archived at <http://perma.cc/9JDL-4FE6>.

<sup>34</sup> I analyzed the 1972–2012 National Opinion Research Center's General Social Surveys (GSS), weighting for household size and nonresponse (where that was available). In the 1973–1977 GSSs, 48%–54% of respondents lived in a household with a gun, compared to 32%–36% in the 2006–2012 GSSs. See NAT'L OPINION RESEARCH CTR., UNIV. OF CHI., DOWNLOAD DATA - SPSS FORMAT, <http://www3.norc.org/GSS+Website/Download/SPSS+Format/> (last visited Aug. 28, 2014), archived at <http://perma.cc/6MM6-EGYD> (using the "GSS 1972–2012 Cross-Sectional Cumulative Data (Release 6, June 19, 2014)" data file).

<sup>35</sup> Reid Wilson, *FBI: Chicago Passes New York as Murder Capital of U.S.*, WASH. POST (Sept. 18, 2013), <http://www.washingtonpost.com/blogs/govbeat/wp/2013/09/18/fbi-chicago-passes-new-york-as-murder-capital-of-u-s/>, archived at <http://perma.cc/99J2-BJRK>.

<sup>36</sup> FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, CRIME IN THE UNITED STATES 2012 tbl.20, <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/tables/20tabledatadecpdf> (last visited June 25, 2014), archived at <http://perma.cc/MQN8-AMN9>.

<sup>37</sup> *Id.*



than driven by them. In *Some Sources of Crime Guns in Chicago: Dirty Dealers, Straw Purchasers, and Traffickers*, Philip J. Cook, Richard J. Harris, Jens Ludwig, and Harold A. Pollack explore new data on Chicago guns that have been traced through the federal system.<sup>38</sup> Because they have Chicago Police Department data on the backgrounds of those caught with guns, they are able to identify gang members, the segment of the population most at risk for shooting and being shot. With Chicago having experienced an almost outright ban on guns for a generation, how can guns be involved in over 80% of Chicago homicides? Where do the guns seized from Chicago gang members come from?

In important work here, Cook et al. determine that only about 1% of gang guns can be traced to direct purchases from federally licensed firearms dealers.<sup>39</sup> Crime guns in Chicago are “remarkably old”: the median age is 11.6 years old for gang guns and 6.9 years for other crime guns.<sup>40</sup> There are some hints of straw purchasing, since 15% of the guns seized from male gang members were originally purchased by women,<sup>41</sup> compared to only 6% of women buyers for other crime guns.<sup>42</sup> The data here tend to show that the secondary market is the larger one for guns used by Chicago gangs, but as Cook et al. carefully note, this does not necessarily mean that it would be more cost effective for enforcement efforts to focus on discouraging secondary markets than on deterring misbehavior by licensed dealers.<sup>43</sup>

In *The Posse Comitatus and the Office of Sheriff: Armed Citizens Summoned to the Aid of Law Enforcement*, David B. Kopel explores the history of the posse in Anglo-American law with a detailed account of how posses are still used in various Colorado counties—both for extraordinary challenges (such as chasing serial killer Ted Bundy) and for routine law enforcement duties (such as crowd control at charity events).<sup>44</sup> Given

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<sup>38</sup> Cook et al., *supra* note 30. More specifically, their dataset comprises of 2009–2013 gun tracing requests from the Chicago Police Department to the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) National Tracing Center (NTC). *Id.* at 722.

<sup>39</sup> *Id.* at 742.

<sup>40</sup> *Id.* at 725. Guns in Chicago are probably even older than that on average because some of the oldest guns are not traceable. *Id.* at 738.

<sup>41</sup> *Id.* at 744.

<sup>42</sup> *Id.* at 744 tbl.7.

<sup>43</sup> *Id.* at 754.

<sup>44</sup> David B. Kopel, *The Posse Comitatus and the Office of Sheriff: Armed Citizens Summoned to the Aid of Law Enforcement*, 104 J. CRIM. L. & CRIMINOLOGY 761, 813, 819–23 (2015). In prior historical work, I had researched the creation of laws against extortion by officers of the king in medieval England. James Lindgren, *The Elusive Distinction Between Bribery and Extortion: From the Common Law to the Hobbs Act*, 35 UCLA L. REV. 815 (1988). In that story, the official perhaps most often accused of corruption was the county

Kopel's interest in gun rights and the Second Amendment, it is not surprising that he points out that an armed citizenry formed the basis, not only for the militia, but also for another traditional duty of male citizens—serving when requested in a sheriff's posse.

In perhaps his most interesting move, Kopel examines the traditional phrase in some state constitutions (and early commentaries) protecting the right of the people to keep and bear arms “for the defence of themselves and the state.”<sup>45</sup> He argues that these two purposes are not as different as they might seem and the phrase embraces all the “common law practices by which armed citizens aided in the protection of their communities,” not only militia, but “hue and cry” and the *posse comitatus*.<sup>46</sup>

William Vizzard writes on *The Current and Future State of Gun Policy in the United States*.<sup>47</sup> Vizzard traces the waxing and waning of gun control initiatives in the last few decades in the United States and speculates on what might be done in the near future. Though he mentions the Supreme Court and the Republican-controlled House of Representatives<sup>48</sup> as limiting reforms, he also mentions that increasingly fewer households own guns, a trend likely to be “amplified by the increasing electoral influence of women and minorities.”<sup>49</sup>

Vizzard argues for (1) reducing gun possession by high-risk individuals and prohibited persons and (2) using firearms laws to incapacitate violent career criminals.<sup>50</sup> He correctly notes that the second suggestion runs counter to the views of most “liberals, particularly criminologists.”<sup>51</sup> But he argues that about 20% of active offenders carry firearms and that this group commits the majority of violent crimes and about half of most felonies.<sup>52</sup>

Conservatives would not disagree with Vizzard's first goal in principle, but rather with his primary means of achieving that goal. Vizzard wants to increase recordkeeping and the responsibilities of legal gun dealers and to target secondary sales at gun shows by expanding the definition of a dealer to include those who sell more than a set number of guns a year, such

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sheriff. For that reason, I found Kopel's work showing that the sheriff was often viewed as the embodiment of the people interesting.

<sup>45</sup> Kopel, *supra* note 44, at 827 (citing PA. CONST. art. XIII (1776)).

<sup>46</sup> *Id.*

<sup>47</sup> William J. Vizzard, *The Current and Future State of Gun Policy in the United States*, 104 J. CRIM. L. & CRIMINOLOGY 879 (2015).

<sup>48</sup> *Id.* at 892.

<sup>49</sup> *Id.* at 893.

<sup>50</sup> *Id.* at 901.

<sup>51</sup> *Id.* at 894.

<sup>52</sup> *Id.* at 895.

as six.<sup>53</sup> Then he would require private sellers to process their sales through licensed dealers, allowing background checks.<sup>54</sup> He would, however, stop short of full federal licensing.<sup>55</sup>

In *Missing the Mark: Gun Control Is Not the Cure for What Ails the U.S. Mental Health System*, Carolyn Reinach Wolf and Jamie Rosen take on one of the hottest topics in gun control today—preventing the mentally ill from having guns.<sup>56</sup> When assessing the causes of mass shootings, about eighty percent of the general public blames mental illness,<sup>57</sup> a consensus that has led to calls for greater reporting of and restrictions on the mentally ill. I very much agree with their concerns about stigmatizing those with mental problems and with their policy prescription of making treatment more available and effective. Work by John Monahan has established that after release from a mental health facility, patients who obtain regular treatment and keep up with their medicines are much less likely to engage in violence. Indeed, they are no more likely than the general public.<sup>58</sup>

The only argument of Wolf and Rosen that I part company with is their treatment of the relationship between mental illness and violence.<sup>59</sup> They start by asserting that “people assume those with mental illnesses are more prone to violence than those without these issues.”<sup>60</sup> Wolf and Rosen avoid the question of whether the mentally ill are more violent by truthfully noting that the mentally ill account for only a small fraction of violence, that drug abuse and a history of violence are much stronger predictors of violence, and that the risk of violence increases when people are denied access to treatment.<sup>61</sup>

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<sup>53</sup> *Id.* at 897.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 900.

<sup>56</sup> Carolyn Reinach Wolf & Jamie A. Rosen, *Missing the Mark: Gun Control Is Not the Cure for What Ails the U.S. Mental Health System*, 104 J. CRIM. L. & CRIMINOLOGY 851 (2015).

<sup>57</sup> In a Gallup Poll conducted September 17–18, 2013, 80% of Americans blamed mass shootings a “great deal” or a “fair amount” on a “[f]ailure of the mental health system to identify individuals who are a danger to others,” compared to 61% on “[e]asy access to guns.” Lydia Saad, *Americans Fault Mental Health Most for Gun Violence*, GALLUP POLITICS (Sept. 20, 2013), <http://www.gallup.com/poll/164507/americans-fault-mental-health-system-gun-violence.aspx>, archived at <http://perma.cc/K4BR-CZKG>.

<sup>58</sup> See John Monahan, *Risk Assessment of Violence Among the Mentally Disordered: Generating Useful Knowledge*, 11 INT’L J.L. & PSYCHIATRY 249, 250–51 (1988). My brief discussion of mental illness and violence owes more to Monahan’s various syntheses of this field than these footnotes would otherwise suggest.

<sup>59</sup> Wolf & Rosen, *supra* note 56, at 855.

<sup>60</sup> *Id.* at 853.

<sup>61</sup> *Id.*

They also say that mental illness is “not a strong predictor of future violent crimes,”<sup>62</sup> a conclusion that depends on what one means by “strong.” Perhaps the most important study exploring the association of mental illness to violence shows that having a mental illness more than doubles the probability of violence.<sup>63</sup> Another leading study shows about a sixfold increase in the probability of self-reported violence.<sup>64</sup> Further, while it is true that alcohol abuse is about twice as strong and drug abuse is about three times as strong a predictor of violence as mental illness,<sup>65</sup> what Wolf and Rosen do not mention is that the mentally ill are more likely to suffer from substance abuse than their neighbors<sup>66</sup> and that the effect of substance abuse on the mentally ill is stronger.<sup>67</sup> Accordingly, while I embrace their policy prescriptions and most of their article, I think a more candid assessment of the actual relationship between mental illness and violence would be a better starting point.

#### CONCLUSION

All of the articles show a high degree of professionalism and a commitment to the search for truth. If we are to move ahead on reducing gun violence, we must be willing to follow the evidence to reach conclusions that our ideological compatriots might not embrace. If we want to succeed, it is important not to waste political capital on proposals, however popular, that do almost nothing to reduce violence. Further, the tendency to try to make policy in the wake of mass murders might not lead to the desired ends. What might reduce the frequency or severity of mass murders might have no effect on gun homicides more generally or might even increase them.

For example, almost all mass killings of four or more victims since 1950 have taken place in gun-free zones, such as the shootings at Fort Hood, the Navy Yard in Washington, D.C., Sandy Hook Elementary School in Newtown, Connecticut, and at a movie theater in Aurora, Colorado.<sup>68</sup>

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<sup>62</sup> *Id.*

<sup>63</sup> See Henry J. Steadman et al., *Violence by People Discharged from Acute Psychiatric Inpatient Facilities and by Others in the Same Neighborhoods*, 55 ARCHIVES OF GEN. PSYCHIATRY 393, 399 tbl.5 (1998). In the first ten weeks after release from a mental facility, 11.5% of patients committed a violent act, compared to 4.6% of a matched comparison group. *Id.*

<sup>64</sup> Jeffrey W. Swanson et al., *Violence and Psychiatric Disorder in the Community: Evidence from the Epidemiologic Catchment Area Surveys*, 41 HOSP. & COMMUNITY PSYCHIATRY 761, 765 tbl.2 (1990).

<sup>65</sup> *Id.*

<sup>66</sup> See Steadman, *supra* note 63, at 393.

<sup>67</sup> See Swanson, *supra* note 64, at 769.

<sup>68</sup> Noting the correlation between gun-free zones and mass homicides is usually credited

Among the few exceptions are the mass murders in Tucson, Arizona and the Sikh Temple outside Milwaukee, Wisconsin. It is certainly possible that a great reduction in gun-free zones would reduce the incidence and body count in mass murders. But would carrying guns in zones that are currently designated “gun-free,” such as most universities, lead to fewer deaths, or would the availability of more lethal weapons lead to more lethal arguments and more homicides and suicides overall? Though the effects are unlikely to be large, I would not be surprised if reducing gun-free zones increased homicides and suicides overall, while it reduced the number of lives lost in mass murders.

Conversely, if newly purchased rifle magazines were limited to ten or fifteen rounds, that would have little effect on gun deaths overall since rifles of all kinds cause so few gun deaths nationwide (3.6%) and in big cities such as Chicago (less than 1%).<sup>69</sup> But restricting the size of magazines might have a small effect on reducing mass murders, at least several decades from today when the supply of existing magazines lessened.

Now that an individual right to own a gun has been recognized, one open question today is which restrictions can pass muster if there is not good evidence one way or the other on the efficacy of a reform. For example, I can definitely see some advantages (as well as some drawbacks) from more extensive registration and background checks. But is there good evidence that more extensive registration works? If you do not think that protecting gun rights should mean much when lives are at stake, then what do you think about vigorous stop-and-frisk laws? If they were to show benefits in seizing guns and reducing violence, would you be sanguine about burdening the right of people to walk the streets without being stopped by police?

I am not pushing any particular reforms here. Rather, I am saying that if we really want to reduce violence, we might have to consider some things that we or our friends would find distasteful. Or perhaps we should instead recognize that because on balance few forms of gun control appear to make much of a difference, we might opt for a wide liberty to carry guns and to walk the street without being hassled by the authorities. I close with one fairly safe prediction: the near future of guns and gun regulation is likely to be as interesting as the turmoil of its recent past.

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to John Lott.

<sup>69</sup> FED. BUREAU OF INVESTIGATION, *supra* note 36.