

INTRODUCTION: GUNS, CRIME, AND PUNISHMENT IN AMERICA

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There are over 200 million firearms in private hands in the United States, more than a third of which are handguns. In 1993 alone, it is estimated that 1.3 million victims of serious violent crime faced an offender with a gun. In 1999, there were approximately 563,000 such victims. Estimates of defensive uses of firearms—situations where individuals used a gun to protect themselves, someone else, or their property—range from 65,000 to 2.5 million per year. Punishments for crimes committed with a firearm are severe: under the federal firearms enhancement statute, the mandatory minimum sentence for use of a firearm in a predicate crime ranges from five years to life imprisonment. In state courts in the mid-1990s, the average maximum length of prison sentences for weapons offenses was almost four years.

Guns, violent crime, and punishment: these are pressing issues in the United States. They reflect a certain kind of American exceptionalism. The relationship between these three issues is especially controversial, and has triggered a reexamination of the proper role of guns, particularly handguns, in American society. Despite falling crime rates in the 1990s, Fox Butterfield reports for the *New York Times*, “the police, mayors and criminologists are turning their sights as never before on handguns as a way to further reduce violent crime.”¹ Today, a record number of firearm-related policies are under review. The Bureau of Alcohol, Tobacco and Firearms (ATF) has promoted gun tracing as a way to learn more about illicit gun markets and trafficking, and to address the gun issue

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1. Fox Butterfield, *Overview: America Under the Gun*, N.Y. TIMES, Sep. 16, 1999, available at <<http://www.nytimes.com/library/national/091699guns-overview.html>>.

from the 'supply side.' Gun control advocates and legislators have proposed, and in some states passed, legislation extending Brady-type background checks to secondary markets such as gun shows. Federal law enforcement officials are encouraging federal prosecutions of state and local gun offenders on the model of "Project Exile" in Richmond, Virginia. Urban police departments are pursuing gun-oriented policing strategies focused on increased stop-and-frisk encounters and misdemeanor arrests as a way to get guns off the streets. A number of counties, as well as cities such as Chicago, Boston, Newark, Atlanta, St. Louis, and San Francisco, have filed civil suits against gun manufacturers challenging their marketing and distribution practices. Numerous other gun control and safety measures are being debated or implemented, including bans on particular weapons, licensing, gun registries, limits on handgun purchases, straw purchaser laws, safe or negligent storage laws, nondiscretionary concealed weapons laws, and smart gun technology.

These and other firearm measures raise a number of important questions. Was gun availability responsible for the high crime levels in the late 1980s and early 1990s? Why has gun violence steadily declined in the past eight years while gun availability has continued to increase? Will any of these proposed measures reduce the flow of guns to the illicit gun market? Are they likely to reduce crimes committed with firearms? Have gun-oriented policing strategies reduced the extent of illegal gun carrying? At what cost? Have increased federal enhancements overcrowded our prisons or stemmed the tide of gun violence? How are federal prosecutions of state and local gun offenses affecting the distribution of law enforcement authority in this country? Will civil law suits alter the marketing and distribution practices of gun manufacturers?

Despite the salience of these issues, the gun debates remain some of the most ideological, visceral, polarized, *ad hominem*—and often, ugly—debates in contemporary law and politics, matched only perhaps by the debates surrounding the death penalty, abortion, and the 2000 Florida federal elections. Meaningful engagement in the gun debates is most often rewarded with claims of bias and partiality. Scholarly and policy contributions are, more often than not, alleged to be tainted by links to the gun industry or the National Rifle Association, or are claimed to reflect anti-gun bias. Policy arguments devolve into character assassination—particularly with respect to the more prolific participants in the gun debates, such as Michael Bellesilles, author of *Arming America: The Origins of a National Gun Culture*, Philip Cook, co-author of *Gun Violence: The Real Costs*, or John Lott, Jr., author of *More Guns, Less Crime: Understanding Crime and Gun Control Laws*. In all the mud slinging, it is practically impossible today for a concerned citizen, lawyer, legal academic, social scientist, policy maker, or politician to trust anything she reads or hears. It has also become increasingly daunting to participate—or continue to participate—in the gun debates.

To redress this situation and move the gun debates forward, the University of Arizona James E. Rogers College of Law and the Rogers Program on Law, Philosophy and Social Inquiry convened a two-day conference on *Guns, Crime, and Punishment in America* on January 26 and 27, 2001. The conference brought together the nation's leading experts in a wide range of fields—lawyers

and legal scholars, public health and public policy researchers, criminologists, sociologists, historians, journalists, cultural critics, politicians, and government officials, from a wide spectrum of backgrounds, perspectives, and approaches. The goal of the conference was to create a forum to present the most current research on a range of policy interventions in the gun arena, and to help promote dialogue among the various fields of research.

While the conference participants took a variety of positions on the wisdom of specific policy interventions, there was a collective argument that unified the conference. It could be summarized as follows. The gun debates are presently polarized along two extreme positions for and against gun control measures. This polarization obscures, rather than clarifies the debates. To move the debates forward, we need to focus on more nuanced discussions of specific policy interventions and their relationships to each other. We need a better base of information about gun markets, gun availability, and the connection between guns and violent crime. We then need to focus more closely on the specific measures that have been implemented and debated—taking a *wide* view of the notion of intervention to include not only the Brady Bill and possible extensions to secondary markets, but also numerous other measures such as gun tracing, gun-oriented policing, community efforts, safety measures, federal enforcement initiatives, and civil litigation against gun manufacturers. The overarching goal should be to link these policy interventions and debates together, and to promote more concrete, more nuanced, and less polarized debate about guns.

The collective argument was well articulated by Franklin Zimring who stated, in opening the first panel at the conference: "What will improve the gun debate at the top end of the policy community is careful attention to the differences between types and intensities of firearms regulation. If experts start avoiding the silly overgeneralizations that come from assuming that all gun regulations were created equal, there is some hope that a more specific and pragmatic approach to reducing the harms of gun violence might trickle down the intellectual food chain to the powerful and powerfully confused citizenry that will shape gun policy in the fast approaching future."²

In this introduction, I will sketch the background and rapidly outline the themes presented at the conference, as a way to lay a foundation for the articles included in this Special Issue.

I. GUNS, CRIME, AND PUNISHMENT: SOME EMPIRICAL FACTS

Let's start with *guns*. The total number of *privately* owned firearms in the United States stands roughly at 200 to 250 million, with about 65 million, or one third, being handguns.³ Approximately eighty percent of these privately owned

2. Franklin E. Zimring, *Continuity and Change in the American Gun Debate*, at 21–22 (Jan. 26, 2001) (paper presented at the Conference on Guns, Crime, and Punishment in America, on file with author).

3. The 1994 National Survey of the Private Ownership of Firearms (NSPOF) found that there were 192 million privately owned firearms, of which 65 million were handguns. See PHILIP J. COOK & JENS LUDWIG, *GUNS IN AMERICA: RESULTS OF A COMPREHENSIVE NATIONAL SURVEY ON FIREARMS OWNERSHIP AND USE: SUMMARY REPORT*

firearms were acquired since 1974.⁴ A large number of *new* firearms, approximately 4.5 to 5 million, are purchased every year.⁵ Y2K fears helped make 1999 a banner year for gun sales: Smith & Wesson, the world's biggest manufacturer of handguns, saw its U.S. sales increase by about 15 percent in 1999.⁶ Estimates for the percentage of households that have at least one firearm range from about 35 to 50 percent.⁷ The personal gun ownership rate is around 25 percent.⁸

Of particular concern, gun possession among adjudicated male youths is extremely high. Criminologists Joseph Sheley and James Wright conducted a study in 1991 of 835 confined juvenile inmates in six correctional facilities in four different states and found that 86 percent of the inmates had owned at least one firearm at some time in their lives. Seventy-three percent had owned three or more types of guns.⁹ Another recent study, involving 63 interviews of incarcerated juvenile offenders at five detention facilities in metropolitan Atlanta in 1995 found that 53 (approximately 84 percent) of the youths had owned handguns. Eighty-four percent of these 53 youths who had carried guns had done so before they were fifteen years old.¹⁰ One result is that juveniles represent an increasing proportion of arrests for weapon offenses: whereas youths accounted for 16

13 (1996). The Bureau of Justice Statistics estimates that 223 million firearms entered circulation between 1899 and 1993. See Marianne W. Zawitz, *Firearms, Crime and Criminal Justice: Guns Used in Crime*, 2 (Washington, D.C. Bureau of Justice Statistics Selected Findings, July 1995, NCJ-148201). The F.B.I. estimates that there are over 250 million firearms in circulation today, a per capita ratio of almost one gun per person, and that there are approximately 5 million new firearms purchased every year. See MICHAEL A. BELLESILES, *ARMING AMERICA: THE ORIGINS OF A NATIONAL GUN CULTURE* 4 (2000).

4. Cook & Ludwig, *supra* note 3, at 13.

5. See *id.* at 26 (stating that 4.4 million new guns acquired annually on average 1993-1994); BELLESILES, *supra* note 3, at 4 (noting that the FBI estimates 5 million).

6. See Erika Rasmusson, *A Company Under Siege*, 152:4 SALES & MARKETING MANAGEMENT 90 (Apr. 2000).

7. See Cook & Ludwig, *supra* note 3, at 14 (finding by NSPOF of 35 percent; 1993 Gallup Poll finding 49 percent; General Social Survey (GSS) of 1994 finding 40-43 percent during 1990s); Gary Kleck & Mark Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-defense with a Gun*, 86 J. CRIM. L. & CRIMINOLOGY 150 (1995) (reporting that a survey conducted in 1993 found 38 percent); see generally GARY KLECK, *POINT BLANK: GUNS AND VIOLENCE IN AMERICA* (1991) (finding that about 50 percent of households have at least one firearm, a consistent finding since polling began in the 1950s).

8. See Cook & Ludwig, *supra* note 3, at 12 (noting that Kleck and Gertz find 25.5 percent; GSS for 1994 finds 28.7 percent; NSPOF finds 24.6 percent).

9. JOSEPH F. SHELEY AND JAMES D. WRIGHT, *IN THE LINE OF FIRE: YOUTHS, GUNS, AND VIOLENCE IN URBAN AMERICA* 40 (1995).

10. Peter Ash et al., *Gun Acquisition and Use by Juvenile Offenders*, 275:22 JAMA 1754, 1755 (1996). A RAND study conducted in 1998, involving interviews of 34 youthful offenders aged 16 and 17-years-old detained in the Los Angeles Juvenile Hall, also revealed that 75 percent had fired a gun, 75 percent had been threatened with a gun at least once, 66 percent had been shot at at least once, and almost all had at least one friend who had been shot. See JULIE H. GOLDBERG AND WILLIAM SCHWABE, *HOW YOUTHFUL OFFENDERS PERCEIVE GUN VIOLENCE*, 11-12 (1999).

percent of such arrests in 1974, they represented 23 percent of arrests for weapons offenses in 1993.¹¹

These statistics, however, are just part of the story. Behind the numbers, there is in the United States a unique and remarkable gun culture. It is a culture that reveres the gun as a liberator, a guarantor of freedom, and, as Richard Slotkin observes, an “equalizer.” At its heart lies a uniquely American belief. “I call it the ‘Cowboy Corollary’ to the Declaration of Independence,” Slotkin writes. “It’s a folk-saying, dating from before the Civil War, which has many variations, all of which add up to this: ‘God may have made *men*, but Samuel Colt made them *equal*.’”¹² For many Americans, guns are an integral and essential part of their identity. Among many young men, the gun is a symbol of masculinity, status, aggressiveness, danger and arousal. “Guns can perpetuate and refine the aesthetic of toughness, create an imminent threat of harm, help their users claim the identity of being amongst the ‘toughest,’ and act as an ultimate source of power in resolving disputes,” Jeffrey Fagan explains.¹³ There is in this country a “Cult of the Colt”¹⁴ that has important implications for the gun debates

Next, let’s turn to guns and *violent crime*. The increase in gun possession has been accompanied, during the past eight years, by sharp and steady declines in crime at the national level. Across practically all categories, we experienced in the 1990s, one of the most remarkable and consistent drops in crime in the twentieth century — made possible, of course, by an equally remarkable rise in crime during the 1960s, with several peaks during the 1970s, 80s and early 90s.¹⁵ Nevertheless, the amount of gun violence remains staggering. In 1993, it was estimated that 1.3 million victims of serious violent crime in the United States (rape, sexual assault, robbery, and aggravated assault), or 29 percent, faced an offender with a firearm.¹⁶ Handguns alone accounted for over 900,000 non-fatal violent crimes in 1992.¹⁷ In

11. Lawrence A. Greenfeld and Marianne W. Zawitz, *Firearms, Crime and Criminal Justice: Weapons Offenses and Offenders*, 3 (Washington, D.C.: Bureau of Justice Statistics Selected Findings, November 1995, NCJ-155284).

12. Richard Slotkin, *Equalizers: The Cult of the Colt in American Culture*, (Jan. 26, 2001) (paper presented at the Conference on Guns, Crime, and Punishment in America, on file with author).

13. Jeffrey Fagan, *Context and Culpability in Adolescent Crime*, 6 VA. J. SOC. POL’Y & L. 507, 529 (1999).

14. Slotkin, *supra* note 12, at 3.

15. See, e.g., James Alan Fox & Marianne W. Zawitz, Bureau of Justice Statistics, U.S. Department of Justice, *Homicide Trends in The United States*, available at <<http://www.ojp.usdoj.gov/bjs/homicide/hmtrnd.htm>>. Preliminary indications suggest that the decline in crime may be leveling off. See Fox Butterfield, *U.S. Crime Figures Were Stable in 2000 After 8-Year Drop*, N.Y. TIMES, May 31, 2001, at A1.

16. See Kathleen M. Quinn, *Guns & Crime Statistics Information Package*, Bureau of Justice Statistics, January 1997 (NCJ 161170); Zawitz, *supra* note 3, at 1.

17. Michael R. Rand, *Handgun Victimization, Firearm Self-Defense, and Firearm Theft: Guns and Crime*, 1 (Wash, D.C.: Bureau of Justice Statistics Crime Data Brief, April 1994, NCJ-147003); see also U.S. Department of Justice, Bureau of Justice Statistics, *Firearms and Crimes of Violence: Selected Findings from National Statistical Series*, NCJ-146844 (Feb. 1994); Jeffrey A. Roth, *Firearms and Violence*, National Institute of Justice Research in Brief, Feb. 1994.

1999, over 560,000 victims of serious violent crimes faced a perpetrator with a gun.¹⁸ A string of multiple-victim shootings in schools and workplaces have devastated communities across the United States.¹⁹ Moreover, although overall crime has been dropping, the proportion of gun homicides to total homicides has continued to increase with every recent peak. As Franklin Zimring and Jeffrey Fagan have demonstrated in their work on homicide rates in New York City, with each of the three homicide peaks since 1968, the ratio of gun to non-gun homicides increased from 1.23 in 1972, to 1.76 in 1981, to 3.16 in 1991.²⁰ The increase is due, in part, to the steady long-term decline in the number of non-firearm homicides; in fact, non-firearm homicides during the period 1985 to 1991—the last wave of increased homicides—actually dropped consistently.²¹

Another important element in the violent crime equation is the defensive use of guns. Gary Kleck estimates from his research that guns are used defensively about 2.5 million times per year.²² Although the National Crime Victimization Survey offers a far more conservative estimate of about 65,000 per year in the late 1980s,²³ the NSPOF survey conducted for the Police Foundation indicated that in 1994 about 1.5 million adults used a gun defensively.²⁴ Philip Cook and Jens Ludwig contend that the NSPOF results are too high, but ultimately remain uncertain about the number of defensive gun uses per year.²⁵ On a related topic, John Lott argues, in *More Guns, Less Crime*, that nondiscretionary laws regarding the right to carry concealed weapons have significantly reduced the incidence of violent crime in this country. Using county-level data for the period 1977 through 1996, Lott found that the adoption of nondiscretionary laws coincided with fewer murders, rapes, robberies, and aggravated assaults, as well as fewer property crimes, burglaries, larcenies and auto theft.²⁶ These findings have been criticized

18. U.S. Department of Justice Bureau of Justice Statistics, *Firearms and Crime Statistics* (visited July 2, 2001) <<http://www.ojp.usdoj.gov/bjs/guns.htm>>.

19. See generally *Bullying, tormenting often led to revenge in cases studied*, CHICAGO SUN-TIMES, Oct. 15, 2000 (documenting recent surge in school shootings).

20. See Jeffrey Fagan, et al., *Declining Homicide in New York City: A Tale of Two Trends*, 88 J. CRIM. L. & CRIMINOLOGY 1277 (1998); Jeffrey Fagan, *Social Contagion of Violence* (Apr. 19, 1999) (paper Presented at the Fortunoff Colloquium Series, Center for Research on Crime and Justice, New York University Law School).

21. See generally *Declining Homicide in New York*, *supra* note 20.

22. See Gary Kleck, *Crime Control Through the Private Use of Armed Force*, 35 SOC. PROBLEMS 1 (1988); GARY KLECK, *TARGETING GUNS: FIREARMS AND THEIR CONTROL* 150–152 (1997); Gary Kleck & Mark Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun*, 86 J. CRIM. L. & CRIMINOLOGY 150 (1995).

23. See David McDowall & Brian Wiersema, *The Incidence of Defensive Firearm Use by U.S. Crime Victims, 1987 through 1990*, AM. J. PUBLIC HEALTH 1982 (1994).

24. See Cook & Ludwig, *supra* note 3, at 57–76.

25. *Id.* at 68.

26. See JOHN R. LOTT, JR., *MORE GUNS, LESS CRIME: UNDERSTANDING CRIME AND GUN-CONTROL LAWS* 170–172 tbl. 9.1 (1998). Many commentators fail to account for the additional updated data (1995 and 1996) that appears to have eliminated the positive effect on property crimes.

on a number of empirical and theoretical grounds,²⁷ but, according to Lott, withstand the challenges.²⁸

Finally, let's turn to guns, violent crime, and *punishment*. Punishment of gun offenders and persons suspected of carrying guns steadily increased during the 1970s, 1980s and 1990s. Beginning in 1968, Congress enacted several federal firearms statutes, including prohibitions on possession of a firearm by a previously convicted felon, gun possession in a gun-free school zone, use of a firearm in the course of a predicate felony, among others. Over the years, Congress has consistently increased the sentences associated with these offenses. For example, while in 1968 the federal firearms enhancement statute, 18 U.S.C. Sec. 924(c), provided for an additional sentence of one to ten years (over and above the sentence for the predicate offense), Congress added a mandatory minimum five year sentence in 1984 for crimes of violence, and, since then, a mandatory term of thirty years for using or carrying a machine gun or assault weapon, and a mandatory life sentence for those caught carrying a machine gun or assault weapon for a second time.²⁹

Under the federal firearms enhancement statute today, the mandatory minimum consecutive sentence for use of a firearm ranges from five to thirty years depending on the type of firearm and on whether or not it was brandished or discharged.³⁰ In the case of a second or subsequent conviction, the mandatory minimum ranges from twenty-five years to life, depending on the type of firearm.³¹ Moreover, federal law enforcement authorities have turned increasingly to federal prosecutions of gun laws on the model of "Project Exile."³² At the state

27. See, e.g., Ian Ayres and John Donohue III, *Nondiscretionary Concealed Weapons Laws: A Case Study of Statistics, Standards of Proof, and Public Policy*, 1 AM. L. & ECON. REV. 436 (1999) (eliminating Maine and Florida data, and using incarceration rather than arrest rates, eliminates significant effect on crime rates); Dan A. Black & Daniel S. Nagin, *Do Right-to-Carry Laws Deter Violent Crime?*, 27 J. Legal Studies 209 (1998) (removing Florida from the sample, no detectable impact on the rate of murder and rape); Jens Ludwig, *Concealed-Gun-Carrying Laws and Violent Crime: Evidence from State Panel Data*, 18 INT'L REV. L. & ECON. 239 (1998) (finding discrepancies given the evidenced of similar juvenile crime reduction rates); Mark Duggan, *More Guns, More Crime* (Oct. 2000) (SSRN Research Paper, on file with author) (finding that counties where gun ownership is highest did not see significant changes in crime with passage of concealed-weapons laws).

28. See Lott, *supra* note 26, at 205-233; John R. Lott, Jr., *More Guns, Less Crime: A Response to Ayres and Donohue* (Sept. 1999) (SSRN Research Paper, on file with author). Although Lott's work has been the subject of much criticism, it should not be dismissed as pseudo-science. As Ian Ares and John Donohue observe, Lott's book "displays the indicia of high-quality social science," even if they do not agree with the findings. See Ayres & Donohue, *supra* note 27, at 448.

29. 18 U.S.C. § 924(c) (1994, Supp. IV. 1998 & Supp V. 1999).

30. *Id.*

31. See *id.*; Sara Sun Beale, *The Unintended Consequences of Efforts To Target Gun Violence: Changing the Incentives for Congress and Prosecutors, Shifting the Balance Between Prosecution and Defense*, at 14 (Jan. 26, 2001) (paper presented at the Conference on Guns, Crime, and Punishment in America, on file with author).

32. See, e.g., Frank Bruni, *Citing the Drain of Violence, Bush Backs Increased Prosecution of Gun-Related Crimes*, N.Y. TIMES, May 15, 2001, at A16; see generally

level, the average maximum length of prison sentences for weapons offenses was 47 months, almost four years, in 1994.³³ Increased social control also pervades the streets of many urban areas, where police departments have implemented gun-oriented policing strategies that involve increased police-civilian contact. In New York City, for instance, the police have pursued a strategy of increased stop-and-frisks with a stated goal of seizing illegal guns; other cities have also adopted policing measures aimed at curbing the flow of guns among youths and criminals.³⁴

II. THE UNIVERSITY OF ARIZONA CONFERENCE ON GUNS, CRIME, AND PUNISHMENT IN AMERICA

Guns, violent crime, and punishment: these three issues should be at the center of vigorous and constructive debate. Yet, instead of fruitful debate, we are getting mostly *ad hominem* attacks.³⁵ To move the conversation forward, the James E. Rogers College of Law and Rogers Program on Law, Philosophy, and Social Inquiry sponsored a conference on *Guns, Crime, and Punishment in America*. The conference was organized along three axes. The first axis was intended to engage broad sociological, historical, and cultural perspectives on guns and the gun debates, and to provide a rich empirical background on gun markets and gun availability. The second axis surveyed the different public policy interventions currently ongoing in the gun area, using a comprehensive definition of policy intervention to include not only the ATF's gun tracing initiative and the Brady Bill approach to background checks and waiting periods, but also gun-oriented street policing, community interventions, federal law enforcement efforts,

Daniel C. Richman, *"Project Exile" and the Allocation of Federal Law Enforcement Authority*, 43 ARIZ. L. REV. 369 (2001).

33. See U.S. Department of Justice Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics 1997*, 427 tbl. 5.53.

34. See Rudolph W. Giuliani and William J. Bratton, *Police Strategy No. 1: Getting Guns off the Streets of New York* (City of New York Police Department 1994) (describing the policing initiative in New York City); Eliot Spitzer, *The New York City Police Department's 'Stop & Frisk' Practices: A Report to the People of the State of New York From The Office Of The Attorney General*, (visited July 1, 2001) <http://www.oag.state.ny.us/press/reports/stop_frisk/stop_frisk.html> (evaluating the New York policing strategy); Memorandum from the Mayor and Council of the City of Tucson, Arizona, Gun Violence Reduction Plan (Dec. 18, 2000) (on file with author) (describing the gun-oriented policing initiative in Tucson, Arizona). See generally BERNARD E. HARCOURT, *ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING* (2001).

35. Accusations of bias have become commonplace. Sanford Levinson, for example, is described as "a political opponent of gun control." Carl T. Bogus, *The History and Politics of Second Amendment Scholarship: A Primer*, 76 CHI.-KENT L. REV. 3, 13 (2000). Carl Bogus is accused of "intellectual McCarthyism." See Chris Mooney, *Liberal Legal Scholars Are Supporting the Right to Bear Arms. But Will Historians Shoot them Down?* LINGUA FRANCA, Feb. 2000, at 33 (comments of Robert Cottrol of George Washington University). John Lott has repeatedly been accused of bias because he was a John M. Olin Fellow at the University of Chicago and the Olin Foundation was originally tied to Olin Corporation, parent company of Winchester Ammunition. See LOTT, *supra* note 26, at 202-05. These, and many other similar comments and accusations, reflect how *ad hominem* the gun debates have become.

and civil litigation against gun manufacturers. The third axis placed these policy interventions within the larger framework of the two recent and leading controversies in the gun debates, namely the current dispute over the proper interpretation of the Second Amendment and the debate over John Lott's thesis, "more guns, less crime."

An introductory plenary panel, entitled *Historical, Sociological and Cultural Perspectives on the Gun Debates*, examined the vicissitudes of the gun debates over the past several decades. Franklin Zimring of Boalt Hall opened the session with an insightful paper exploring the consistent elements and the major changes in the American gun debate since the late 1960s. While Zimring observed significant continuity in the debates—especially with regard to the dominance of symbolic or expressive preferences in the gun debates, the huge gap (or "gulch" as he called it) in gun ownership between the sexes, and the centrality of handguns to the policy discussions—Zimring nevertheless emphasized important changes in the gun debate in recent years. First, guns have changed from being episodically important to being chronically important as a public policy priority. Second, empirical data on firearms, violence, and gun control, though still spotty, have increased tremendously since the 1970s. Third, the Second Amendment has become a topic of controversy. Fourth, the focus of citizen concern has shifted from crime to lethal gun violence. Zimring called for a more nuanced approach to gun policy, an approach that focuses and distinguishes between specific policies rather than relying on the broad categories of pro-gun and anti-gun.

Richard Slotkin of the American Studies Program at Wesleyan University and author of an award-winning trilogy on the myth of the frontier in American cultural history,³⁶ traced the historical roots of America's gun culture to a set of values that linked equality, personal dignity, and status to the private ownership of guns and the right of armed self-defense. Through a close cultural and historical reading of the code of the duel, the right to serve in the militia (denied to women, non-whites and foreigners), increased vigilantism after the Civil War, and the development of modern mass media, Slotkin drew a sharp picture of today's gun culture—what he referred to as a "permissive ethic of private violence—what I will call 'The Cult of the Colt'—that has made Americans want not merely to own guns, but to accumulate firepower in excess of need."³⁷

Drawing on the expressive and cultural dimensions of the gun controversies, Dan Kahan of Yale Law School explored and deconstructed, in provocative fashion, the rhetorical structure of contemporary gun debates. The empirical evidence demonstrates, Kahan argued, that individuals do not rely on empirical evidence in formulating their positions regarding guns, but instead base their opinions on the social meaning they attribute to guns and their cultural interpretation of gun possession. "In America at least, guns connote a particular

36. See generally RICHARD SLOTKIN, *GUNFIGHTER NATION: THE MYTH OF THE FRONTIER IN TWENTIETH CENTURY AMERICA* (1992); RICHARD SLOTKIN, *REGENERATION THROUGH VIOLENCE: THE MYTHOLOGY OF THE AMERICAN FRONTIER, 1600–1860* (1973); RICHARD SLOTKIN, *THE FATAL ENVIRONMENT: THE MYTH OF THE FRONTIER IN THE AGE OF INDUSTRIALIZATION, 1800–1890* (1985).

37. Slotkin, *supra* note 12, at 3.

cultural style that prizes honor and individual self-sufficiency," Kahan explained. "Many individuals find that cultural style abhorrent. . . . Other individuals oppose gun control with remarkable intensity precisely because they see it as an attack on their cultural identities."³⁸ Kahan noted the resulting "illiberal" character of gun control: gun control proponents are not so much motivated by the harm of guns, but rather by aversion to the values expressed by the gun culture. Kahan urged more—and more sensitive—debate about the key cultural values in dispute. Kahan exhorted progressives in particular "to replace the demoralized language of liberalism with an *expressive* idiom that is unembarrassed to defend the partisan cultural commitments on which their own positions—on gun control and a host of other issues—rest."³⁹

A second introductory panel, entitled *Gun Markets and Gun Availability*, offered a rich empirical background into contemporary gun markets, gun availability and gun carrying. Public policy expert Philip Cook of Duke University, in a paper co-authored with Anthony Braga of Harvard University, explored new data emerging from the ATF's program of gun tracing, known as the "Youth Crime Gun Interdiction Initiative." The trace data reveal that, contrary to earlier suppositions, guns reach the hands of criminals through narrower channels, and especially through a handful of rogue gun dealers and traffickers. "[N]ewer guns are over-represented in crime even though criminal users are rarely among the first purchasers," Cook found. "[T]hese findings suggest that licensed dealers are playing a significant role in 'supplying the suppliers' of guns to criminals."⁴⁰ Cook's paper also demonstrated how the implementation of the Brady Bill impacted the flow of guns nationally; for example, it resulted in sharp declines in traceable firearms recovered in Chicago that were imported from Southern states affected by the Brady requirements. Public policy expert Jens Ludwig of Georgetown University, in a paper co-authored with Philip Cook, investigated the effect of the Brady Bill on gun availability and its impact on homicide and suicide rates. Using the states that already met the Brady requirements as a control group, Ludwig concluded that there is some evidence that the passage of Brady was associated with a decline in the firearm suicide rate, particularly among older residents, although the reduction was partly offset by an increased rate of non-firearm suicide attempts. Ludwig found no evidence that firearm homicides, or homicides more generally, declined at a greater rate in states that had to implement Brady versus the control states.⁴¹ John Lott of Yale Law School presented evidence about multiple-victim public shootings and gun availability. Relying on data compiled by the *New York Times*, Lott argued that neither arrest or conviction

38. Dan M. Kahan, *Is Gun Control Illiberal?*, at 2 (Jan. 26, 2001) (paper presented at the Conference on Guns, Crime, and Punishment in America, on file with author).

39. *Id.* at 36.

40. Philip J. Cook & Anthony A. Braga, *Comprehensive Firearms Tracing: Strategic and Investigative Uses of New Data on Firearms Markets*, 43 ARIZ. L. REV. 277, 279 (2001).

41. *See generally* Jens Ludwig & Philip J. Cook, *Homicide and Suicide Rates Associated with Implementation of the Brady Handgun Violence Prevention Act* (Jan. 26, 2001) (paper presented at the Conference on Guns, Crime, and Punishment in America, on file with author).

rates, prison sentences, nor the death penalty had a significant effect on multiple-victim shootings, but that, in contrast, the policy that had a significant effect was the passage of right-to-carry concealed weapons laws.⁴²

The conference then focused on four broad categories of interventions in the gun arena, the first category consisting of “gun-oriented policing”—policing strategies specifically aimed at reducing the amount of illicit gun carrying in urban centers. Many urban police departments initiated efforts in the early 1990s targeting guns and gun carrying, most notoriously the New York City Police Department with its policy of aggressive misdemeanor arrests, stop-and-frisks, and order-maintenance or ‘quality-of-life’ initiative. In the first panel on *Guns, Urban Violence and Gun-Oriented Policing*, public health and law scholar Jeffrey Fagan of Columbia University, Jerome Skolnick of New York University School of Law, and I focused on gun possession and street policing strategies. Jeffrey Fagan, in a paper co-authored with Garth Davies, closely analyzed the data on stop-and-frisk encounters in New York City and documented the disparate impact of the policies on minority groups.⁴³ Building on this rich data set and other recent investigations of racial profiling, Jerry Skolnick, in a paper co-authored with Abigail Caplovitz, investigated the contemporary problem of racial profiling and identified ways to minimize profiling. Specifically, Skolnick offered a three-prong approach: to improve police accuracy: “sophisticated data collection, analysis, and management; management-driven training and cultural shifts; and civilian efforts to raise profiling costs.”⁴⁴ In my paper, I explored the allure and meaning of gun possession among incarcerated male youths. Drawing on rich narratives from in-depth interviews with youths detained at the Catalina Mountain School in Tucson, Arizona, I explored what handguns symbolize for adjudicated male youths, in an effort to develop a richer understanding of the environment within which youths find themselves and strategically negotiate youth firearm possession.⁴⁵

Second, a panel on *Gun Control Legislation*, with papers by Fox Butterfield of the *New York Times*, James B. Jacobs of New York University School of Law, and John Lott of Yale Law School, focused on specific gun control measures. Drawing on case studies of ATF enforcement initiatives, Fox Butterfield argued that federal gun laws themselves represent the first obstacle to federal enforcement efforts aimed at reducing straw purchases of guns and penalizing scofflaw firearms dealers. The *mens rea* requirement for prosecutions of gun dealers involved in straw purchases, as well as the light sentence imposed,

42. Fox Butterfield of the *New York Times* challenged Lott on the inadequacy of the data, arguing that there were insufficient cases of multiple-victim shootings in the *New York Times* data, which is why the *Times* chose not to perform statistical analyses.

43. See Jeffrey Fagan and Garth Davies, *Street Stops and Broken Windows: Terry, Race, and Disorder in New York City*, 28 *FORDHAM URB. L.J.* 457 (2000).

44. See Jerome H. Skolnick & Abigail Caplovitz, *Guns, Drugs, and Profiling: Ways to Target Guns And Minimize Racial Profiling*, 43 *ARIZ. L. REV.* 413, 431 (2001).

45. See generally Bernard E. Harcourt, “Hell no, you can’t jack that fool. He stays strapped. He’s strapped all the time”: Exploring the Meaning of Guns Among Adjudicated Male Youths and the Implications for Law and Public Policy Analysis (Jan. 26, 2001) (paper presented at the Conference on Guns, Crime, and Punishment in America, on file with author).

the lack of a federal statute prohibiting the act of purchasing a handgun with the intent to transfer ownership to someone else, and the legal restrictions on sting purchases of firearms, Butterfield suggested, are significant obstacles to federal enforcement efforts and undermine the argument that all we need to do in this area is enforce existing gun laws.⁴⁶ James Jacobs, in an insightful paper co-authored with Daniel Heumann, explored the current state of the regulation of secondary gun markets, and the history of efforts to expand Brady to the secondary markets, especially to private sales at gun shows (known as the “Gun Show Accountability Act,” which the Clinton Administration supported). Jacobs evaluated the proposed legislation and concluded that it would likely have little effect because it could so easily be evaded. Indeed, Jacobs concluded, “the more closely one focuses on gun shows, the more clearly one sees that they are just one small piece of the larger mosaic of unregulated secondary firearms sales. And to effectively regulate the whole secondary market would pose an awesome administrative and enforcement challenge.”⁴⁷ Finally, John Lott discussed safe storage gun laws and their impact on rates of accidental death, suicide and crime. Lott reviewed data from the fifteen states that passed safe storage laws in the late 1980s to mid-1990s, and concluded that the passage of those laws had no impact on accidental gun deaths or total suicide rates, but did have a consistent impact on crime. “During the five full years after the passage of the safe storage laws,” Lott argued, “the fifteen states face an annual average increase of 309 more murders, 3,860 more rapes, 24,650 more robberies, and over 25,000 more aggravated assaults.”⁴⁸

A third panel focused on *Federal Law Enforcement Initiatives*, with papers by Sara Sun Beale of Duke University and Daniel Richman of Fordham University. Congressional reform of the federal firearms statutes, as well as federal prosecutorial initiatives, have significantly altered the field of criminal law and prosecution. Beale explored how these legislative efforts have affected the behavior of judges, legislators, and prosecutors. The enhanced sentencing schemes have, Beale suggested, tested the boundary of federal and state enforcement authority, and provoked a judicial backlash against federal legislative efforts in this area, as evidenced by the Supreme Court’s decision in *United States v. Lopez*.⁴⁹ At the same time, federal prosecutors have been reluctant to actively pursue the super-enhanced penalties, and have either bargained away, or declined to bring charges under, the enhanced penalty provisions in most cases. As a result, “the effect of enhancing the penalties applicable to gun related crime,” Beale concluded, “has been to greatly enlarge the scope of the discretion exercised by federal prosecutors, and the magnitude of the consequences controlled by their

46. See generally Fox Butterfield, *The Federal Gun Laws: The First Obstacle to Enforcement* (Jan. 26, 2001) (paper presented at the Conference on Guns, Crime, and Punishment in America, on file with author).

47. James B. Jacobs & Daniel M. Heumann, *Extending Brady to Gun Shows and the Secondary Market* (Jan. 26, 2001) (paper presented at the Conference on Guns, Crime, and Punishment in America, on file with author).

48. John R. Lott, Jr., *Safe Storage Gun Laws: Accidental Deaths, Suicides and Crime*, at 26 (Jan. 26, 2001) (paper presented at the Conference on Guns, Crime, and Punishment in America, on file with author).

49. 514 U.S. 549 (1995) (striking down the Gun Free School Zones Act of 1990 under the Commerce Clause).

discretion, without the development of any additional checks against the abuse of this enhanced discretion.”⁵⁰

Another important initiative in the federal arsenal has been the Eastern District of Virginia United States Attorney’s Office “Project Exile,” which has targeted gun violence in the Richmond, Virginia area by prosecuting, whenever possible, state and local gun arrests in federal court under federal firearms statutes. According to proponents, the increased federal sentences and the “exile” of incarceration in a distant federal penitentiary offer increased deterrence and break the cycle of social influence between gun offenders and their communities. Daniel Richman traced the intricate political and procedural history of Project Exile, and explored the implications of the initiative for the distribution of federal, state and local enforcement authority. Project Exile, Richman explained, met with strong bipartisan support from both Republican lawmakers and the Clinton Administration. Republicans have proposed extending the program nationwide, and this may mark “a new phase in efforts of legislators to put federal enforcement resources at the disposal of state and local authorities.”⁵¹ “[T]he legacy of Project Exile,” Richman observed, “may be a serious challenge to the idea of federal enforcement policy in the areas where federal, state and local authority most overlap.”⁵²

A fourth panel focused on *Civil Litigation Against Gun Manufacturers*, with papers by David Kairys of Temple University School of Law, Mark Geistfeld of New York University School of Law, and David Kopel of the Independence Institute. A number of cities and counties have begun suing gun manufacturers for the production and distribution of guns.⁵³ These suits have been encouraged, in part, by the February 1999 Brooklyn federal district court verdict against gun makers for gun shootings based on their alleged negligence in marketing.⁵⁴ Given the relatively small size of the gun industry—approximately \$1.5 billion in revenues annually⁵⁵—these civil suits have the potential of significantly affecting the gun debates. The suits have proceeded under a number of different theories, including public nuisance, negligence, and strict liability for abnormally dangerous activities or defective products.

50. Sara Sun Beale, *The Unintended Consequences of Efforts To Target Gun Violence: Changing the Incentives for Congress and Prosecutors, Shifting the Balance Between Prosecution and Defense*, at 26 (Jan. 26, 2001) (paper presented at the Conference on Guns, Crime, and Punishment in America, on file with author).

51. Daniel C. Richman, “*Project Exile*” and the Allocation of Federal Law Enforcement Authority, 43 ARIZ. L. REV. 369, 411 (2001).

52. *Id.*

53. See Barry Meier, *Local Governments Attack Gun Industry With Civil Lawsuits*, N.Y. TIMES, July 22, 1999, available at <<http://www.nytimes.com/library/national/072399guns-lawsuits.html>>.

54. See Fox Butterfield, *Verdict Against Gun Makers Likely to Prompt More Lawsuits*, N.Y. TIMES, Feb. 13, 1999 available at <<http://www.nytimes.com/library/national/023199ny-gun-suit.html>>. The judgment in that case is likely to be reversed in light of a recent decision by the New York Court of Appeals. See Richard Perez-Pena, *State Court Sides with Gun Makers in Liability Case*, N.Y. TIMES, Apr. 27, 2001, at A1.

55. See Rasmusson, *supra* note 6, at 90.

The public nuisance theory focuses principally on the marketing and distribution practices of gun manufacturers, which, it is alleged, “create and contribute to a public nuisance by knowingly making handguns easily available for purposes of crime.”⁵⁶ Over thirty cities and counties have invoked their public nuisance duties and powers, and are seeking injunctive relief in the form of abatement, and, in some cases, money damages. David Kairys helped formulate the public nuisance approach, and, in his paper, traced the origin and development of these handgun cases. Mark Geistfeld discussed the negligence and strict liability theories. With regard to the first, Geistfeld suggested that there may not be a sufficiently strong causal connection between the negligent conduct and the injury to sustain negligence suits. “[E]ven if most guns involved in crimes can be traced to negligent marketing practices,” Geistfeld argued, “it does not follow that negligent marketing probably caused the criminal shooting at issue in the tort case against negligent gun distributors. The criminal probably would have gotten a gun anyway.”⁵⁷ With regard to strict liability for abnormally dangerous activities, Geistfeld suggested that the courts have reached the right result in denying liability, but for the wrong reason. According to Geistfeld, tort law has already made the policy decision involved in the abnormally dangerous theory by sanctioning the right of self-defense of non-criminal gun holders. David Kopel argued against court intervention in the gun debates on the ground of institutional incompetence. Kopel offered evidence concerning “hot” burglary rates (burglaries committed while residents are in the home) in the United States versus Canada. Kopel suggested that the disparity is a large positive externality associated with gun possession in this country and is largely overlooked in the handgun suits. He argued that courts are not competent to assess such externalities and for that reason should not be involved in this litigation. “Courts,” Kopel declared, “cannot properly assess the true socioeconomic costs and benefits of controversial products.”⁵⁸

The third and final axis of the conference concerned two heated contemporary debates that are, in a sense, orthogonal to the gun debates—the Second Amendment controversy⁵⁹ and John Lott’s thesis “more guns, less crime.” Lott’s thesis was presented and addressed within the context of previous panels, with papers by John Lott on safe storage laws and multiple-victim shootings, and by David Kopel on the deterrent effect of gun availability on hot burglaries in the United States. The Second Amendment controversy was addressed in a plenary

56. David Kairys, *The Origin and Development of the Governmental Handgun Cases*, at 1173 (Jan. 27, 2001) (paper presented at the Conference on Guns, Crime, and Punishment in America, on file with author).

57. Mark Geistfeld, *Tort Law and Criminal Behavior (Guns)*, 43 ARIZ. L. REV. 311, 320 (2001).

58. David B. Kopel, *Lawyers, Guns, and Burglars*, 43 ARIZ. L. REV. 345, 346 (2001).

59. For a comprehensive review of leading contributions to the contemporary debate, see *Symposium on the Second Amendment: Fresh Looks*, 76 CHIC.-KENT L.J. 3–715 (2000); *A Second Amendment Symposium Issue*, 62 TENN. L. REV. 443–821 (1995); *Second Amendment Symposium*, 1998 BYU L. REV. 1–336; see also Christopher A. Chrisman, *Constitutional Structure and the Second Amendment: A Defense of the Individual Right to Keep and Bear Arms*, 43 ARIZ. L. REV. 439 (2001).

panel on *Second Amendment Controversies*, with papers by Sanford Levinson of the University of Texas School of Law, Carl Bogus of the Roger Williams University School of Law, and Christopher Eisgruber of New York University School of Law.

Sanford Levinson triggered the most recent wave of scholarship on the Second Amendment with his article *The Embarrassing Second Amendment* in 1989.⁶⁰ At the conference, Levinson responded to what he described as the “historian’s counterattack”⁶¹—the recent writings by historians (especially the essays by Saul Cornell, Michael Bellesiles, Don Higginbotham and Robert Shalhope in *Constitutional Commentary*, and the publication of Bellesiles’ *Arming America*) which criticize the historical claims of individual-rights or ‘standard model’ constitutional scholars.⁶² Levinson’s overarching theme was that Second Amendment scholarship and historical research is in its infancy, and therefore it is at present impossible to make confident statements about the origins of the Second Amendment. Given the early state of the debate, Levinson posed a number of questions to the historians: Who ‘proposed’ the Second Amendment? Is state history relevant to the constitutional analysis? Should we focus on 1868 and the ratification of the Fourteenth Amendment rather than on the revolutionary moment? Levinson did not offer answers to these questions, acknowledging his own disciplinary limitations, but made clear that there remain important legal distinctions that need to be made—and legal interpretations that need to be drawn—in the constitutional context, and that these issues are not necessarily resolved by the historical evidence alone.

Carl Bogus, a leading advocate of the collective rights position, responded to the critique that the collective-rights interpretation renders the Second Amendment largely irrelevant. Bogus explored the kinds of constitutional situations where the Second Amendment might be or might have been offended. He discussed four specific historical episodes that might have raised concern under a collective rights interpretation. One example was in June 1963, when President John F. Kennedy federalized the state National Guard to prevent Governor George C. Wallace from using the state militia to prevent black students from enrolling at the University of Alabama.⁶³ Was this a violation of the Second Amendment under a collective rights reading? “I do not suggest that the Second Amendment was violated in all, or perhaps even in any, of these incidents,” Bogus responds. “Rather, I offer these case histories as examples of the kinds of real world federal action to which the Second Amendment may be germane.”⁶⁴

60. See Bogus, *supra* note 35, at 12.

61. See generally Sanford Levinson, *The Historians’ Counterattack: Some Reflections on the Historiography of the Second Amendment* (Jan. 26, 2001) (paper presented at the Conference on Guns, Crime, and Punishment in America, on file with author).

62. See generally 16 CONSTITUTIONAL COMMENTARY (1999); BELLESILES, *supra* note 3.

63. See generally Carl Bogus, *What Does the Second Amendment Restrict? A Collective Rights Analysis* (Jan. 26, 2001) (paper presented at the Conference on Guns, Crime, and Punishment in America, on file with author).

64. *Id.* at 14.

Finally, Chris Eisgruber argued that both sides of the Second Amendment controversy have it wrong. Constitutional analysis should not turn on arcane historical trivia about “yeoman militia” but rather on the current meaning that should be given to the abstract principle of the right to bear arms. “[W]hatever one’s position about gun control,” Eisgruber emphasized, “it is nutty to suppose that we should determine America’s gun control policies today on the basis of arguments about, for example, how many Americans owned muskets in the late eighteenth century.”⁶⁵ Instead, Eisgruber argued, disagreement about the meaning of the Second Amendment should be framed in the language of moral principle.

The conference also included a panel on ongoing gun research, chaired by Lois Felson Mock, Program Manager of the Office of Research and Evaluation at the National Institute of Justice, as well as a panel of experts who commented and reacted to the conference proceedings, including Pima County Attorney Barbara LaWall, Susan Ginsburg, Senior Advisor and Firearms Policy Coordinator in the Office of Enforcement at the United States Treasury Department under President Clinton, Captain John Leavitt of the Tucson Police Department, Henry Ruth, co-author of *America’s Crime War*⁶⁶ and Deputy Director of the National Crime Commission under President Johnson, and Dr. Richard Carmona of the University of Arizona Medical School. The conference closed with a keynote address by Bryan A. Stevenson of New York University School of Law and director of the Equal Justice Initiative. Stevenson urged us to remember how consequential the gun debates are. They have repercussions in many people’s lives, especially poor and minority communities that bear the brunt of criminal victimization. People across the country are listening to the gun debates—to what we say and to how we say it. We all bear a heavy responsibility for the substance, quality, and tenor of the debates.

III. CONCLUSION

A collected volume of the conference papers is forthcoming in a book titled *Guns, Crime, and Punishment in the United States of America*. Due to space and time limitations, the editors of the Arizona Law Review are publishing five of the conference papers, as well as an essay by David Kairys⁶⁷ in this Special Issue. The articles represent a sample from the different panels, and provide the reader with a representative cross-section of the topics discussed at the conference. From gun tracing to Project Exile, from gun-oriented policing and racial profiling to civil litigation and the proper role of the judiciary in the gun controversies, the articles cover the spectrum of subjects, methodologies, perspectives, and politics. They greatly enrich and advance our contemporary gun debates.

65. Christopher Eisgruber, *Moral Principle and the Second Amendment*, at 26 (Jan. 26, 2001) (paper presented at the Conference on Guns, Crime, and Punishment in America, on file with author).

66. Henry Ruth & Kevin Reitz, *America’s Crime War* (forthcoming).

67. David Kairys, *Public Nuisance Claims of Victims of Handgun Violence*, 43 ARIZ. L. REV. 339 (2001).