

# FIREARMS CHIMERA: THE COUNTER PRODUCTIVE CAMPAIGN TO BAN THE AR-15 RIFLE

DENNIS P. CHAPMAN\*

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## INTRODUCTION

I have always been a collector. During my childhood, I collected comic books, butterflies, coins, and stamps, with a few tentative forays into other areas as well. These interests faded over the course of military service and the other endeavors of adulthood, but my collecting impulse was merely dormant, not extinct, and has long since revived. Among its chief

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\* Attorney, Virginia; Colonel (Retired), U.S. Army; BS, United States Military Academy; JD, Thomas M. Cooley Law School. Colonel Chapman served with the 10th Mountain Division during Operation *Restore Hope*, Somalia, and as head of a U.S. military advisory team with 3rd Brigade, 4th Division, Iraqi Army during Operation *Iraqi Freedom*.

objects now are old, arcane, or noteworthy books. Having settled into the practice of law after military retirement, a few obscure old law books have naturally found their way onto my shelves.

One such book is *The Revised Statutes of Michigan*, 1838. Among the enactments of the state's early legislative sessions was one providing that "[p]ersons going about armed with dirk, &c., [sic] may be required to find sureties of the peace,"<sup>1</sup> and that "[i]f any person shall go armed with a dirk, dagger, sword, pistol, or other offensive and dangerous weapon, without reasonable cause to fear an assault or other injury, or violence to his person, or to his family or property, he may, on complaint of any person having reasonable cause to fear an injury, or breach of the peace, be required to find sureties for keeping the peace, for a term not exceeding six months, with the right of appealing."<sup>2</sup> Another of my old volumes, the 1849 *Code of Virginia*, contains a similar provision.<sup>3</sup> These could be considered early versions of today's *red flag laws*—statutes enacted to facilitate the pre-emptive abridgment of a particular person's right to keep and bear arms upon the complaint of another private citizen. Like those today, these old laws required, expressly or implicitly, a reasonable basis to fear that the person sought to be restrained might do harm, and that said person be allowed to contest the restraint upon their right to own or bear arms.<sup>4</sup> Somewhat more restrictive was the 1852 *Code of Alabama*, which provided:

Any one who carries concealed about his person a pistol, or any other description of fire arms, not being threatened with, or having good reason to apprehend an attack, or travelling, or setting out on a journey, must, on conviction, be fined not less than fifty nor more than three hundred dollars.<sup>5</sup>

Yet, even Alabama's more restrictive code permitted unrestricted open carry and allowed concealed carry when travelling or when reasonably in fear of attack.<sup>6</sup> Thus, there can be no doubt that at the time they enacted these laws, the citizens of these states took it as given that the right to keep and bear arms was a private right individually vested in every peaceable citizen and that the view taken by some of their grandchildren (that the right

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1. THE REVISED STATUTES OF THE STATE OF MICHIGAN 707 (E. B. Harrington & E. J. Roberts eds., Detroit, John S. Bagg, Printer to the State, 1838).

2. *Id.* at 657–58.

3. THE CODE OF VIRGINIA 756 (Richmond, William F. Ritchie, Public Printer, 1849).

4. *Id.*; THE REVISED STATUTES OF THE STATE OF MICHIGAN, *supra* note 1.

5. THE CODE OF ALABAMA § 3274 (John J. Ormond et al eds., Montgomery, Brittain and De Wolf, State Printers, 1852).

6. *Id.* § 3274–75.

to keep and bear arms is a collective right only, vested in such militia as the legislature might deign to organize, with private ownership of arms for other purposes allowed at sufferance only) would have been heresy. This is confirmed by the states' constitutional provisions in force when they enacted the laws mentioned above. The Constitution of Alabama provided that "[e]very citizen has the right to bear arms in defence [sic] of himself and the State."<sup>7</sup> Michigan's Constitution contained a similar provision.<sup>8</sup> The Virginia Bill of Rights, adopted June 12<sup>th</sup>, 1776, and incorporated by reference into the Virginia Constitution in force at the time of the above-cited enactments, provided "[t]hat a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence [sic] of a free state."<sup>9</sup> As Michigan Chief Justice Thomas Cooley explained:

[I]f the right [to keep and bear arms] were limited to those enrolled [in the militia], the purpose of this guaranty might be defeated altogether by the action or neglect to act of the government it was meant to hold in check. The meaning of the provision undoubtedly is, that the people, from whom the militia must be taken, shall have the right to keep and bear arms; and they need no permission or regulation of law for the purpose. But this enables the government to have a well-regulated militia; for to bear arms implies something more than the mere keeping; it implies the learning to handle and use them in a way that makes those who keep them ready for their efficient use; in other words, it implies the right to meet for voluntary discipline in arms, observing in doing so the laws of public order.<sup>10</sup>

Yet these hardy and independent citizens, jealous of their liberties, saw no inconsistency between an individual right to keep and bear arms and the imposition of a limited abridgment of that right in specific cases where a person posed a credible threat of a breach of the peace.<sup>11</sup>

The revival of such laws is one proposal put forward to cope with the outrageous mass public shootings that beset us today. On its face, there would seem to be merit to the idea: it emerges in the aftermath of many such shootings where family, friends, or the authorities had good cause for

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7. ALA. CONST. of 1819, art. I, § 23.

8. MICH. CONST. of 1835, art. I, § 13.

9. VA. CONST., art. I, §13; VA. CONST. of 1830, art. I.

10. THOMAS M. COOLEY, *THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA* 271 (Boston, Little, Brown, and Co. 1880).

11. *See* THE REVISED STATUTES OF THE STATE OF MICHIGAN, *supra* note 1, at 657–58; *see also* COOLEY, *supra* note 10, at 271.

concern about the shooter beforehand, but failed to act.<sup>12</sup> A carefully drafted statute, with an appropriate standard of proof, and fair, reasonable, and prompt due process protections for the person purported to be a threat, might have prevented some attacks. However, many American gun owners vigorously resist such proposals, attracting the criticism that they oppose any firearms restrictions at all, including gun control advocates' own supposedly "common sense gun safety" proposals.

Gun control advocates take this opposition as proof of pro-Second Amendment advocates being in the thrall of the "gun lobby." This misses the mark, however, for as David Hardy has shown, gun owners have ample reason to be skeptical of gun control advocates' proposals.<sup>13</sup> This is unfortunate, for the natural impulse of gun rights advocates ought to be to support such laws: As a group, gun owners tend to be conservative, to value law and order, to favor tough-on-crime policies, to be strong supporters of law enforcement, and at least one researcher has found that they also tend to be relatively non-violent.<sup>14</sup> This paper examines one source of this inconsistency: the argument over whether to ban the AR-15 rifle and similar firearms and the impact of that proposal on the overall gun violence debate.

### I. THE FUNCTION OF THE RIGHT TO KEEP AND BEAR ARMS IN AMERICAN SOCIETY

The American tradition of arms and the private right to keep and bear arms, which is one of its political manifestations, is complex and multifaceted. It encompasses a wide range of functions. These include practical personal applications, such as subsistence, sport, and self-defense; collective applications such as defense of the community and resistance to tyranny; and potent political, cultural, historical, and mythological functions. In the American political tradition, private ownership of arms finds its highest and most fundamental function in serving as a badge of sovereignty. According to Max Weber, the "state is a human community that (successfully) claims the monopoly of the legitimate use of physical force within a given territory."<sup>15</sup> In many political systems, the embodiment

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12. Cf. Will Garbe et al., *Dayton Shooting: Oregon District gunman left decade of red flags*, Dayton Daily News (Aug. 9, 2019) [<https://perma.cc/9FZZ-WRPD>] (stating family and friends of a mass shooter had previous red flag's regarding shooter's behavior and mental state).

13. David A. Hardy, *Gun Owners, Gun Legislation, and Compromise*, 31 T.M. COOLEY L. REV. 33, 35 (2014).

14. See John R. Lott & David B. Mustard, *Crime, Deterrence, and Right-to-Carry Concealed Handguns*, 26 J. LEGAL STUD. 1, 2-3 (1997).

15. Max Weber, *Lecture: Politics as a Vocation*, 1 (1918) (transcript available at <http://anthropos-lab.net/wp/wp-content/uploads/2011/12/Weber-Politics-as-a-Vocation.pdf> [<https://perma.cc/5VAF-9Z5T>]) (emphasis omitted).

of the state and the locus of sovereignty is a political party, a monarch or autocrat, or a political institution, such as parliament or the army.<sup>16</sup> However, under the American political creed as expressed in its founding documents, the state is the mere agent of the People, governing at their sufferance, with the People themselves remaining the locus of sovereignty.<sup>17</sup> As the collective sovereign, they retain for themselves a private right to maintain the means of physical force, separate and apart from that entrusted to the state, as manifested in the Constitutional right to keep and bear arms.<sup>18</sup>

This is evident in the attitudes toward the bearing of arms by slaves during the antebellum period and by the Freedmen following the Civil War.<sup>19</sup> Among the most regrettable relics of the Antebellum period is Chief Justice Roger B. Taney's infamous opinion in *Dred Scott v. Sandford*, arguably the most odious holding ever emitted by the courts of any Common Law country. One of *Dred Scott's* principal holdings was that neither Congress nor the states had the power to naturalize African slaves or their descendants.<sup>20</sup> Among the litany of Taney's objections to such naturalization was that conferring citizenship upon slaves or their descendants would give them the right, among other things, "to keep and

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16. See *id.* at 1–2 (charismatic or personal rule), and 8 (parliamentary supremacy). For an example of the Army as the locus of sovereignty, consider the Revolutionary Army of Mexico from 1910 to 1940; see Edwin Lieuwen, *Mexican Militarism: The Political Rise and Fall of the Revolutionary Army* (The University of New Mexico Press, 1968), page xii.

17. The U.S. Declaration of Independence provides, "That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, — That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect [sic] their Safety and Happiness." The U.S. Constitution provides, in the Preamble, that "**We the People** of the United States, in Order to form a more perfect Union, establish justice, insure domestic Tranquility, provide for the common defence [sic], promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, **do ordain and establish this Constitution for the United States of America**" (emphasis added). See also ALA. CONST. of 1819, *supra* note 7, at art. I, §2, "All political power is inherent in the people, and all free governments are founded on their authority"; MICH. CONST. of 1835, *supra* note 8, at art. 1, §1, "[a]ll political power is inherent in the people;" THE CODE OF VIRGINIA, *supra* note 3, at 32, "all power is vested in, and consequently derived from, the people; that Magistrates are their trustees and servants, and at all times amenable to them."

18. See U.S. CONST. amend. II.

19. *Scott v. Sandford*, 60 U.S. 393, 417 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV; David B. Kopel, THE SECOND AMENDMENT IN THE NINETEENTH CENTURY, 1998 BYU L. REV. 1359, 1452–54 (1998).

20. *Scott*, 60 U.S. at 420.

carry arms wherever they went.”<sup>21</sup> By contrast, after the Civil War, the Republican-controlled Congress adopted the opposite policy during Reconstruction.<sup>22</sup> Congress enacted measures, such as the Freedmen’s Bureau Act of 1866, which provided that “the right to ... have full and equal benefit of all laws and proceedings concerning personal liberty, [and] personal security ... including the Constitutional right to bear arms, shall be secured to and enjoyed by all the citizens of such State or district without respect to race or color or previous condition of slavery.”<sup>23</sup> Furthermore, “[t]he framers intended and opponents recognized the Fourteenth Amendment to guarantee the right to keep and bear arms **as a right and attribute of citizenship** that no State government could infringe.”<sup>24</sup> They also intended that the Fourteenth Amendment would extend these rights to the Freedmen. As Stephen Halbrook argued:

The arms that the Fourteenth Amendment’s framers believed to be constitutionally protected included the latest firearms of all kinds, from military muskets (which were fitted with bayonets) and repeating rifles to shotguns, pistols, and revolvers. The right of the people to keep arms meant the right of an individual to possess arms in the home and elsewhere; the right to bear arms meant to carry arms on one’s person. The right to have arms implied the right to use them for protection of one’s life, family, and home against criminals and terrorist groups of all kinds, whether attacking Klansmen or lawless law enforcement. Far from being restricted to official militia activity, the right to keep and bear arms could be exercised by persons against the state’s official militia when it plundered and killed the innocent.<sup>25</sup>

While the importance of each has waxed and waned over time according to the conditions prevailing in the country at any given moment, each facet of the private right to keep and bear arms has shaped American

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21. *Id.* at 417.

22. See *Congress Profiles: 39th Congress (1865–1867)*, HISTORY, ART & ARCHIVES: UNITED STATES HOUSE OF REPRESENTATIVES, <https://history.house.gov/Congressional-Overview/Profiles/39th/> [<https://perma.cc/L6HR-57YW>]; STEPHEN P. HALBROOK, FREEDMAN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS, 1866-1876, at 40–41 (1998).

23. HALBROOK, *supra* note 22, at 40–41 (emphasis omitted).

24. *Id.* at 42 (emphasis added).

25. *Id.* at 43.

culture and history in its turn and continues to do so to a greater or lesser degree today.<sup>26</sup>

The use of ranging weapons for subsistence hunting dates back tens or even hundreds of thousands of years.<sup>27</sup> Nonetheless, it seems unlikely

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26. These functions do not merely fade in importance over time; they sometimes wax more important. See, for example, Walter G. Libber, *Every Citizen A Rifleman*, NATIONAL SERVICE WITH THE INTERNATIONAL MILITARY DIGEST, Apr. 1919, at 207-09 (deploring the fact that while “[t]he American is traditionally a rifleman,” with the growth of our population, “centered in the towns,” “our skill and confidence in the use of firearms gradually decreased,” even to the point that it became “a deplorable fact that shortly before signing the armistice [ending WWI] during the operations of the Argonne American soldiers were sent into the front lines who had never fired a rifle,” and that “it is a well-known fact that our urban population is cut off from any opportunity of learning the use of the rifle...”); compare this to the situation one hundred years later, where firearms use has dramatically rebounded to the point that “[m]ore people participate in target shooting than play tennis, soccer or baseball,” with shooting sports generating over \$16 billion in retail sales annually (National Sports Shooting Foundation, *Target Shooting in America, A Force for Conservation*, 2019), and National Public Radio reporting that, notwithstanding high profile incidents of gun violence, shooting ranges in the United States are booming, with the National Sports Shooting Foundation listing “hundreds and hundreds of shooting ranges in the United States, including more than 1,800 that have special programs for women and young people. Linton Weeks, *Are Shooting Ranges The New Bowling Alleys?* NPR, <https://www.npr.org/2013/01/31/170391799/are-shooting-ranges-the-new-bowling-alleys>, retrieved Sept. 5th, 2020. Consider also the changing face of competition shooting in the United States, which was driven largely by state militia organizations in the 19th Century (see generally James B. Tefethen and James E. Serven, *Americans and Their Guns*, Stackpole Books, 1967), as compared with the contemporary sports shooting scene, in which competition shooting has expanded considerably to include large numbers of civilian shooters of both sexes (see *Frontsight*, the magazine of the USPSA, cited elsewhere in this work), also discussed at Chapman, *Features and Lawful Common Uses of Semi-Automatic Rifles*, cited elsewhere in this paper. Furthermore, even when the role of a particular shooting application does fade in prominence, it rarely if ever fades to the point of irrelevance. Consider, for example, hunting: In *Sport Hunting and Conservation, 1880 – 1920*, ENVIRONMENTAL REVIEW: ER Vol. 12, No. 1 (Spring, 1988), at 51-60, Thomas R. Dunlap discusses the transition from “pot hunting to sport hunting” (page 53), and the subsequent decline in hunting popularity in recent generations; but notwithstanding said change, hunting remains a major component of American culture. Consider that there were nearly 11.5 million hunters in the United States as of 2016, a number exceeding the populations of 43 states, and that these hunters spent \$27.1 billion pursuing their sport that year (National Sports Shooting Foundation, *Hunting in America: An Economic Force for Conservation*, 2018). For discussion of how the AR-15 has displaced earlier firearms platforms in pursuit of these activities, see Chapman, *Features and Lawful Common Uses of Semi-Automatic Rifles*; the ATF’s Ronald Turk; and AR15Hunter.com, all cited elsewhere in this paper.

that many Western Europeans were still dependent upon subsistence hunting by the time firearms technology emerged and took hold with sedentism, herding, and agriculture having emerged in the Fertile Crescent 12,000 years ago and spread across Europe from 8,800 to 5,500 years ago, millennia before the invention of firearms.<sup>28</sup>

However, the very different conditions prevalent in North America made the earliest English colonists here heavily dependent upon firearms for their survival, with the Native American tribes becoming dependent upon the same technology themselves in due course.<sup>29</sup> Thus, the Jäger rifles, made by German gunsmiths as the accoutrement of European sportsmen, became the Pennsylvania or Kentucky long rifle—a tool of practical necessity for daily life—when those gunsmiths migrated to the New World.<sup>30</sup> Economic and technical developments have since rendered subsistence hunting obsolete.<sup>31</sup> As hunting author, Norman Strung, once noted: “Since man first learned to use weapons, he has hunted to obtain food. [But] [e]xcept in the remotest corners of the world, hunting is no longer necessary for survival.”<sup>32</sup>

Privately-owned firearms were decisively important to the collective defense of the community in North America in a way never contemplated in Europe.<sup>33</sup> In North America, “defense of country and laws [would] be secured through the Militia—civilians primarily, soldiers on occasion” who “when called for service these men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time.”<sup>34</sup> However, the growth of the Army National Guard has largely displaced the individual, armed citizen in the role of collective defense of the local community.<sup>35</sup>

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27. Corey A. O’Driscoll & Jessica C. Thompson, *The Origins and Early Elaboration of Projectile Technology*, *EVOLUTIONARY ANTHROPOLOGY*, Jan./Feb. 2018 at 30, 31, 35, 41.

28. See Solange Rigaud, *Ornaments Reveal Resistance of North European Cultures to the Spread of Farming*, *Plos One* (Apr. 8th, 2015), <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0121166> (last visited Sept. 5th, 2020).

29. DAVID HARSANYI, *FIRST FREEDOM: A RIDE THROUGH AMERICA’S ENDURING HISTORY WITH THE GUN* 24–25, 49 (1st Threshold ed. Hardcover Oct. 2018).

30. *Cf. id.* at 26–30 (discussing the evolution of the Kentucky rifle).

31. See NORMAN STRUNG, *DEER HUNTING: TACTICS AND GUNS FOR HUNTING ALL NORTH AMERICAN DEER* 7 (J.B. Lippincott Co. 1973).

32. *Id.*

33. See HARSANYI, *supra* note 29, at 20.

34. *United States v. Miller*, 307 U.S. 174, 179 (1939).

35. See generally Christopher R. Brown, *Been There, Doing That in a Title 32 Status: The National Guard Now Authorized to Perform Its 400-Year Old Domestic Mission in Title 32 Status*, *ARMY LAW.*, May 2008, at 23, 23, 26, 35 (discussing how the National Guard’s role has changed).

Although the foregoing applications of privately owned arms are no longer a practical necessity for daily survival, they are still valuable and important. As Strung has observed: “[A] heritage stretching for eons can’t be denied by a paltry few centuries of ‘civilization.’”<sup>36</sup> Additionally, the nearly miraculous growth and development of the United States since achieving independence does not rule out the revival of the day to day importance of these shooting applications in the event of future emergency.<sup>37</sup> Nonetheless, the applications of privately-owned firearms that are of greatest practical importance to Americans today are sporting purposes and, most importantly, personal self-defense against violent attack.<sup>38</sup>

## II. THE MOVING GOAL POSTS OF THE GUN CONTROL MOVEMENT

The stated aim of red flag laws is to get guns out of the hands of the imminently violent, while leaving them in the hands of peaceable citizens. Notwithstanding this, many gun owners vigorously oppose red flag laws. Sadly, this opposition is neither unreasonable nor, regrettably, unjustified. For gun control advocates have given American gun owners ample reason to view all of their proposals, no matter how benign they may seem, as a mere Trojan horse, offered to gain a foothold from which to enact ever more draconian gun control measures.<sup>39</sup> From the perspective of reducing gun violence, today’s American-gun-control lobby agenda is counterproductive in the extreme, being almost perfectly calibrated to generate the implacable opposition of American gun owners to any proposals that might be put forward—a constituency at least some of whose support will be essential to pass any reform.<sup>40</sup>

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36. STRUNG, *supra* note 31, at 7.

37. Having served in the relief effort in Homestead, Florida following devastation of Hurricane Andrew, and having observed the dystopian societal collapse of Somalia triggered by that country’s suicidal civil war in the early 1990s via my service there during Operation Restore Hope in 1992 and 1993, I can attest from personal observation to the fragility of our civilized existence. For a visual depiction of the devastation caused by Hurricane Andrew, see *THE BIG ONE: HURRICANE ANDREW* (Andrews & McNeel, 1992). For a discussion of the savage brutality of the Somali civil war and the dystopian nightmare that followed it, see LIDWIEN KAPTEIJNS, *CLAN CLEANSING: THE RUINOUS LEGACY OF 1991* (University of Pennsylvania Press, 2013); for accounts of the U.S. military involvement in Somalia, see Martin Stanton, *Somalia on \$5.00 a Day: A Soldier’s Story* (Presidio, 2001); and LAWRENCE E. CASPER, *FALCON BRIGADE: COMBAT AND COMMAND IN SOMALIA AND HAITI* (Lynne Rienner, 2001).

38. GARY A. KLECK, *POINT BLANK: GUNS AND VIOLENCE IN AMERICA* 41–42 (Aldine De Gruyer 1991).

39. Hardy, *supra* note 13, at 37–39, 42, 46.

40. *Id.* at 39, 42, 45–46.

No single gun policy proposal has done more to discredit gun control advocates in the eyes of American gun owners than the obsession with banning the most popular rifle in the United States, the AR-15.<sup>41</sup> In their quest to ban the AR-15, gun control advocates have discredited themselves by candidly admitting that their true aim is not so much the elimination of that particular rifle, but the opening up of an aperture through which further, more extreme restrictions might be pursued.<sup>42</sup> As early as 1989, the Violence Policy Center noted that “assault weapons are quickly becoming the leading topic of America’s gun control debate and will most likely remain the leading gun control issue for the near future. Such a shift will not only damage America’s gun lobby, but strengthen the handgun restriction lobby.”<sup>43</sup> The *Washington Post* admitted in 1994 that “[t]he [crime] bill also includes a ban on assault weapons . . . but no one should have any illusions about what was accomplished. Assault weapons play a part in only a small percentage of crime. The provision is mainly symbolic; *its virtue will be if it turns out to be, as hoped, a stepping stone to broader gun control.*”<sup>44</sup> As criminologist Gary Kleck has noted,

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41. Examples of this single minded focus on AR-15s and similar rifles in recent years abound: Popular horror writer Stephen King, an outspoken advocate for gun control, calls for the banning of “the sale of assault weapons such as the Bushmaster and the AR-15,” while assuring us that he has no designs on our other guns: “Guys, gals, now hear this: no one wants to take away your hunting rifles. No one wants to take away your shotguns. No one wants to take away your revolvers, and no one wants to take away your automatic pistols, as long as said pistols hold no more than 10 rounds” (also note how he seems not recognize that the “Bushmaster” is not a separate category of firearm, but merely one brand under which the AR-15 platform is sold) See Stephen King, *Stephen King: Why the US Must Introduce Limited Gun Controls*, THE GUARDIAN (Feb. 1, 2013, 8:27 AM), <https://www.theguardian.com/books/2013/feb/01/stephen-king-pulled-book-gun-controls> [<https://perma.cc/E5ZP-9QUG>]; When asked about gun owners who feel that “a Biden Administration means they’re going to come for my guns,” former Vice President, Joe Biden, replied, “Bingo, you’re right if you have an assault weapon.” David Harsanyi, *Of Course Joe Biden Wants to Take Your Guns Away*, THE CORNER -- NAT’L REV. Online, Mar. 10th, 2020, <https://www.nationalreview.com/corner/joe-biden-second-amendment-of-course-he-wants-to-take-your-guns-away/> retrieved September 5th, 2020); and presidential candidate Beto O’Rourke declared that “hell, yes, we are going to take your AR-15, your AK-47” (Todd J. Gillman, *Beto ‘Hell yes’ O’Rourke’s endorsement has Joe Biden fending off allegation that he’s a gun-grabber*, The Dallas Morning News, March 10th, 2020, <https://www.dallasnews.com/news/politics/2020/03/10/beto-hell-yes-orourkes-endorsement-has-joe-biden-fending-off-allegation-that-hes-a-gun-grabber/> (last visited Sept. 5th, 2020).

42. Editorial, *Hyping the Crime Bill*, WASH. POST., Sept. 15, 1994, at A16.

43. *Assault Weapons and Accessories in America*, THE VIOLENCE POL’Y CTR. (1988), <https://www.vpc.org/studies/awaconc.htm> [<https://perma.cc/8Q9A-FHWQ>] (emphasis added).

44. *Hyping the Crime Bill*, *supra* note 42.

Leaders of procontrol [sic] advocacy groups such as Handgun Control and the Coalition to Stop Gun Violence (previously the National Coalition to Ban Handguns) used to assure audiences that they were interested only in regulating handguns, so hunters and sport shooters who used rifles and shotguns had nothing to fear from them.... Yet, once “assault rifles” became a highly publicized issue, leaders of these groups immediately pushed for strict controls on semi-automatic rifles ... This kind of policy shift undercuts their credibility regarding their ultimate intentions, and feeds the worst paranoia of anticontrol extremists. In Don Kates’ words, this sort of “extremism poisons the well,” making it all the harder to get people to seriously consider more reasonable alternatives.<sup>45</sup>

As Kleck further notes,

[i]t would be unfair to generalize from such cases to all supporters of moderate controls [as] [u]ndoubtedly, many of those who insist they are not interested in further controls are sincere[;] [u]nfortunately, it is impossible for gun owners to know for sure which gun control supporters are sincere, how numerous they are, whether they will continue in the future to adhere to their commitment to limited controls, and whether they will dominate the gun control movement in the future. There are uncomfortable historical parallels between the gun control movement and the Temperance movement. The latter movement was originally directed toward regulating alcohol and encouraging, as its name suggested, moderation in drinking and reduction in alcoholism. Yet it eventually evolved into the national Prohibition movement, which completely banned the production and sale of alcohol and thereby criminalized millions of Americans (citation omitted).<sup>46</sup>

### III. FIREARMS EVOLUTION AND THE EMERGENCE OF A UNIQUELY MILITARY FIREARMS CAPABILITY

In pursuit of banning the AR-15 “as a stepping stone to broader gun control,” gun control advocates have bet heavily on their view that “[t]he weapons’ menacing looks, coupled with the public’s confusion over fully automatic machine guns versus semi-automatic assault weapons—anything

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45. KLECK, *supra* note 38, at 10.

46. *Id.* at 10–11.

that looks like a machine gun is assumed to be a machine gun—can only increase the chance of public support for restrictions on these weapons.”<sup>47</sup> However, they have not sat by and complacently waited for the AR-15’s martial appearance to carry the day for them. They have embarked upon a vigorous, unflagging disinformation campaign to frighten the public into demanding that the AR-15 be banned. One rhetorical device frequently deployed is to characterize the AR-15 as a “weapon of war.” Notwithstanding the AR-15’s outward appearance, this characterization is groundless, resting in part upon the common misconception that “[m]ost firearms, no matter what their current uses, derive directly or indirectly from firearms originally designed for the military.”<sup>48</sup> However, not only have developments in civilian and military firearms technology been interrelated throughout history, but important technological advancements have often been accepted in civilian firearms long before being accepted for military applications.<sup>49</sup> This tendency toward military skepticism of new developments in firearms technology, even manifested itself to a small degree with respect to Armalite’s ground breaking design that would become the AR-15 and later the M16, is evident from the Army’s 1966 marksmanship field manual, which sniffed that “the much-argued-for superiority of lightweight alloys, plastics, and glass compounds must be balanced against the yet-to-be-confirmed field observations of their wearing qualities and stress resistance.”<sup>50</sup>

One noteworthy example of the lag in military acceptance of firearms technology developed for civilian use is the rifled barrel; gunsmiths in Germany were proficient in this technology as early as 1530,<sup>51</sup> and the first patent for such was issued as early as 1635.<sup>52</sup> Yet rifles were not widely accepted for military use for centuries after that. While rifles were successfully employed during the French and Indian War and the American Revolutionary War in North America,<sup>53</sup> the British were still relying on the smoothbore Brown Bess as their standard infantry arm at

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47. *Assault Weapons and Accessories in America*, *supra* note 43.

48. KLECK, *supra* note 38, at 70.

49. *See generally* Dennis Chapman, Features and Lawful Common Uses of Semi-Automatic Rifles 88-91 (July 16, 2019) (unpublished ms.) (on file with SSRN), <https://ssrn.com/abstract=3436512> [<https://perma.cc/VS5V-RSWK>].

50. DEP’T OF THE ARMY, FIELD MANUAL 23-71, RIFLE MARKSMANSHIP, 225 (December 1966).

51. *See* HARSANYI, *supra* note 29, at 29.

52. C.H.B PRIDHAM, SUPERIORITY OF FIRE: A SHORT HISTORY OF RIFLES AND MACHINE-GUNS 8 (Hutchinson’s Sci. and Tech. Publications 1945).

53. *Id.* at 8–10.

Waterloo.<sup>54</sup> Only in the Crimean War in 1854 was the rifle first “generally used” as a standard infantry arm by Great Britain.<sup>55</sup>

The introduction of semi-automatic firearms in the civilian market substantially preceded their military adoption. A “gas-operated semi-automatic pistol” emerged as early as 1863.<sup>56</sup> “[T]he earlier [semi-]automatic rifles of the beginning of the modern type” were introduced by the mid-1890s,<sup>57</sup> decades before the U.S. adopted the M1 Garand, the first semi-automatic rifle adopted as a standard infantry arm.<sup>58</sup> Even the AR-15 itself, as David R. Hughes reports, owes its existence to civilian visionaries with civilian shooting applications in mind.<sup>59</sup> Though Eugene Stoner is famously credited with its invention, the AR-15 ultimately owes its space-age construction of aluminum, fiberglass, and polymers to avid hunter and firearms enthusiast Richard Boutelle, President of Fairchild Aircraft. Boutelle, among others, tasked Fairchild’s Armalite Division with creating a line of high-end, lightweight sporting rifles made from the materials used in aircraft construction.<sup>60</sup> Only after the unexpected success of Armalite’s AR-5 survival rifle did Armalite defer commercial work in favor of the military market.<sup>61</sup> Notwithstanding its distinctive appearance and unique aluminum, fiberglass, and plastic construction, the AR-15’s most groundbreaking feature was, arguably, its ammunition—the intermediate .223 Remington and 5.56mm NATO rounds. Yet, even this feature was derived from a civilian antecedent.<sup>62</sup> It was based on the .222 Remington varmint cartridge developed in 1950 by Remington’s Mike Walker.<sup>63</sup>

Only in the 20<sup>th</sup> century did automatic and selective fire technology—the first shoulder-fired weapons technology (with trivial exceptions) conceived solely for military applications—become firmly established. Selective fire technology gives the modern infantryman a capability not present in any civilian firearm: the option of firing either semi-automatically, that is, one round per pull of the trigger (a capability

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54. *Id.* at 11.

55. JOHN A. ENGLISH & BRUCE I. GUDMUNDSSON, ON INFANTRY 12 (Praeger Publishers rev. ed. 1994); PRIDHAM, *supra* note 52, at 12.

56. Wilson, R.K., *Textbook of Automatic Pistols*, Small Arms Tech. Pub. Company, Plantersville, South Carolina, 1943; reprinted by Palladium Press for the Firearms Classics Library, 1999, p. 53.

57. MELVIN M. JOHNSON JR. & CHARLES T. HAVEN, AUTOMATIC ARMS: THEIR HISTORY, DEVELOPMENT AND USE 51 (William and Morrow Co. 1941).

58. *Id.* at 65–66.

59. DAVID R. HUGHES, THE HISTORY AND DEVELOPMENT OF THE M16 RIFLE AND ITS CARTRIDGE 254–55 (1990).

60. *Id.*

61. *Id.*

62. *Id.* at 23.

63. *Id.*

readily available in civilian firearms for well over a hundred years), or in automatic mode, firing multiple rounds with a single pull of the trigger.

Implicit in the characterization of the AR-15 as a “weapon of war” is the assumption that it bears certain features useful in combat, and that those features are also useful in crime.<sup>64</sup> This, however, is faulty reasoning: “the logical problem with this position is that whatever technical attributes guns have that make them suitable for committing crimes necessarily make them useful in a variety of lawful applications.”<sup>65</sup> Yet, the error is even greater than that. While capabilities that make a firearm useful in crime may also be useful in other shooting applications, the reverse is not true. This paper will demonstrate how applications useful in legitimate shooting activities are often, even usually, *irrelevant* in criminal applications.

#### IV. MISCONSTRUING THE AR-15 AS A MILITARY WEAPON

In *Kolbe v. Hogan*, the U.S. 4<sup>th</sup> Circuit Court of Appeals observed that “soldiers and police officers are often advised to choose and use semiautomatic fire, because it is more accurate and lethal than automatic fire in many combat and law enforcement situations.”<sup>66</sup> The court’s assertion that semi-automatic fire may be more “accurate and lethal” than automatic fire is very dubious, especially as it regards lethality.<sup>67</sup> The court

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64. Christopher S. Koper, William D. Johnson, Jordan L. Nichols, Ambrozie Ayers & Natalie Mullins, *Criminal Use of Assault Weapons and High-Capacity Semiautomatic Firearms: an Updated Examination of Local and National Sources*, 95 J. OF URB. HEALTH 313, 313–14 (2018); Jeffrey A. Roth & Christopher S. Koper, *Impacts of the 1994 Assault Weapons Ban: 1994-96*, NAT’L INST. OF JUST. RES. IN BRIEF, Mar. 1999, at 2.

65. KLECK, *supra* note 38, at 14.

66. *Kolbe v. Hogan*, 849 F.3d 114, 125 (4th Cir. 2017).

67. The Court’s assertion that semi-automatic fire is more accurate and lethal than automatic fire cannot bear scrutiny, as demonstrated by the effect of fully automatic machine guns in battle. See, e.g., PRIDHAM, *supra* note 52, at 47., describing an attack by a company of 200 Japanese troops upon a Russian position defended by two Maxim machineguns during the Russo-Japanese War, in which “the Japanese firing line was literally swept away;” see also John Ellis, writing of the Battle of the Somme, that “As before, British tactics were based upon the infantry charge, and the German upon the deployment of large numbers of machine guns. The forward positions were almost entirely entrusted to the battle-hardened machine gunners, whilst the bulk of the ordinary infantry was held further back to counter-attack or mop up the few enemy who managed to get beyond the front line;” Ellis then quotes Lloyd George as observing that “[o]ur men advanced against the most terrible machine gun fire ever directed against troops ... and fell by the thousands in every attack.” JOHN ELLIS, *THE SOCIAL HISTORY OF THE MACHINE GUN* 141 (Johns Hopkins Univ. Press paperback ed. 1986). The fully automatic machinegun retains pride of place in the infantry even today, thus refuting the Court’s conclusion that automatic fire is interchangeable with or even inferior to that of semi-automatic weapons: “The machinegun is one of the most

does correctly note that semi-automatic fire is the most appropriate mode of fire for individual soldiers and police in many law enforcement and military scenarios. From this, the court leaps to the conclusion that, because semi-automatic firing capability has military value, it is therefore unprotected by the Second Amendment. The court misapprehends the situation; however, semi-automatic fire is useful in law enforcement and military situations because it is useful in *all* legitimate shooting applications. This is especially true about the AR-15, as well-stated by John Stokes in the left-leaning *Vox*:

In the pre-AR-15 era, if you wanted a gun for shooting little groundhogs, a gun for shooting giant feral hogs, and a gun for home defense, you'd buy three different guns in three different calibers and configurations. With the AR platform, a person with absolutely no gunsmithing expertise can buy one gun and a bunch of accessories, and optimize that gun for the application at hand ... So cops and civilians buy AR-15s because that one gun can be adapted to an infinite variety of sporting, hunting, and use-of-force scenarios by an amateur with a few simple tools ... **Anyone who tells you that the AR-15 is bad for hunting and home defense has absolutely no idea what they're talking about because by definition an AR is a gun that can be exquisitely adapted for those niches and many others** ... The AR-15's incredible flexibility, accuracy, and ease-of-use combine with its status as the most thoroughly tested and debugged firearm in military history to make it massively popular with shooters of all stripes, **from hunters to home defense buyers to competitors to police**.<sup>68</sup>

The same cannot be said about automatic fire; it exists for the purely military purpose of achieving fire superiority over an enemy force. Automatic and selective fire is **the only significant uniquely military firearms feature**. Stokes observes that “[t]here is no conceivable

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potent weapons in a rifle company’s armory. It can support the rifleman with a heavy volume of close and continuous fire in both the attack and the defense” (Major Harlie R. Treat, *Machinegunners*, Infantry, Nov-Dec 1983, page 38); “The two M60 machine guns in the light infantry platoon provide a significant portion of the unit’s firepower” (FM 7-70, *Light Infantry Platoon/Squad*, Headquarters, Dep’t of the Army, September 1986, page 7-1 ); “The machine gun ... is the platoon leader’s means to decisively influence a combat situation” (*Id.* at 7-35); “Whatever technique is in the defense, machine guns are the heart of it” (*Id.* at 7-41).

68. John Stokes, *Why millions of Americans – including me – own the AR-15*, VOX.COM, (June 20, 2016, 11:00 AM) <https://www.vox.com/2016/6/20/11975850/ar-15-owner-orlando> [<https://perma.cc/T2G6-PHKF>] (emphasis added).

circumstance in which a police officer — not even a SWAT team member — would need to mow down hordes of people.”<sup>69</sup> However, this cannot be said about infantry combat. Combat is a truly distinctive shooting application, wherein combatants employ fire and movement to gain advantage over another force.<sup>70</sup> A key assumption in planning for infantry combat is that the opposing force will have the ability to *offer meaningful resistance*.<sup>71</sup> Overcoming such resistance is the purpose of automatic fire and selective fire capability. On the offense, automatic fire enables an attacker to direct such a high volume of fire at that enemy that he is *suppressed*—that is to say, the intensity of the attacker’s fire materially degrades the defender’s ability to return effective fire or to maneuver to counter the attack.<sup>72</sup> Individual riflemen in combat often engage the enemy in semi-automatic mode. However, that changes when they find themselves acting in a support by fire (SBF) role, suppressing an enemy position so that a maneuvering element can destroy it; as Conrad and Tinsley explain,

The SBF element’s focus is to gain fire superiority and cover the maneuver of the assaulting force as it gains a foothold onto an objective. Establishing the SBF is as critical to the deliberate attack as conducting the assault. Without the SBF, the assaulting element has to contend with an enemy that is presented with only one problem. When the assault element is covered by the SBF element, the enemy is now presented with a dilemma.<sup>73</sup>

In the military context, a “dilemma” is:

a situation in which the enemy is presented with two or more equally bad alternatives . . . When presented with a dilemma, an enemy has two reactions. The first reaction is not knowing what to do as he attempts to decide between equally bad options. This effect is commonly termed “fixed.”<sup>74</sup>

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69. *Id.*

70. SFC Carter H. Conrad & SFC Johnny Tinsley, *The Art of Support by Fire*, 103 INFANTRY 2, Apr. - June 2014, at 28.

71. Dennis P. Chapman, *Tactical Errors in the Dismounted Fight*, 113 ARMOR 20, 22 (July-Aug. 2004).

72. *Id.* at 20–22; Dennis P. Chapman, *An Element of Strength: Reinvigorating Small-Unit Training*, 113 ARMOR 35, 36–37 (May-June 2004).

73. Conrad & Tinsley, *supra* note 70, at 28.

74. DEP’T OF THE ARMY, FIELD MANUAL 3-21.8 (FM 7-8), THE INFANTRY RIFLE PLATOON AND SQUAD 1-22 (28 Mar. 2007).

The sources quoted above are all from the 21<sup>st</sup> Century, but this concept is not a new one. As early as 1945, the staff of the Allied 15<sup>th</sup> Army Group, under Lieutenant General Mark Clark in Italy, described what happens when a military unit allows itself to be caught on the horns of such a dilemma:

Troops that . . . permitted themselves to be pinned down were inevitably subjected to deadly mortar and artillery concentrations which very often caused excessive casualties . . . Our troops had a strong inclination, when fired upon, to dig in without returning the fire, inasmuch as they could see no suitable targets at which to fire. When they did return fire into the hostile area, the German fire either materially decreased or stopped. Some units quickly learned that the proper procedure to take, when fired upon, was to return fire promptly, deploy a force sufficient to overcome the resistance, and keep on going.<sup>75</sup>

Conversely, the defender uses automatic fire to attempt to break the attacker's momentum by confronting him with a curtain of interlocking fires so intense that he cannot continue his attack without excessive losses.<sup>76</sup> As the Canadian officer, historian, and military theorist, John A. English, explained:

A commander has a moral responsibility to keep his men alive and [] no commander is ever justified in launching his troops to a direct attack on an enemy firmly in position. To do so under modern conditions would be to trigger, from even a dozen enemy armed with assault rifles, an intense fire of roughly 6,000 rounds a minute during the last few hundred yards.<sup>77</sup>

In infantry combat, “mow[ing] down lots of people” is wholly in order and calls for a uniquely military capability: automatic or selective fire.

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75. G-3 SECTION HEADQUARTERS 15 ARMY GROUP. ITALY, A MILITARY ENCYCLOPEDIA BASED ON OPERATIONS IN THE ITALIAN CAMPAIGNS 169 (1943-1945).

76. Chapman, *supra* note 72, at 37.

77. ENGLISH & GUDMUNDSSON, *supra* note 55, at 222.

## V. VIOLENT CRIME AND COMBAT ARE NOT EQUIVALENT PHENOMENA

In contrast to infantry combat, crime is an entirely different phenomenon wherein the assailant assumes that his victim *cannot* offer meaningful resistance. A criminal seeks out weak, isolated, vulnerable victims who pose little likelihood of resisting the attack.<sup>78</sup> Where the intended victim is able to place the attacker in an “initiative/armament deficit,” thereby demonstrating that he *can* resist effectively, it is likely that the attacker will forgo that target, knowing that “there is probably someone a couple of blocks away who is unprepared and will make a far easier victim.”<sup>79</sup> Not only does this paradigm make automatic fire capability superfluous to a criminal, even a mass shooter, but it also renders all the firearms features that gun control advocates find so disturbing irrelevant in the criminal context. As Craig Douglas has noted, a criminal approaches his presumptively helpless target with two profound advantages. The first is “unequal initiative,” in that he chooses the time, place, and manner of his attack so as to place his victim at maximum disadvantage. The second is “unproportional armament,” bringing to bear some sort of weapon—often, but not always, a firearm—to multiply his strength vis-à-vis the victim and to compel compliance.<sup>80</sup> *Under these circumstances, the specific features or qualities of any particular firearm become irrelevant.* In the criminal attack scenario, any marginal improvement in the effectiveness of one firearm versus another is simply subsumed within the overwhelming imbalance of power in the attacker’s favor created by his possession of nearly any type of firearm at all.

The converse, however, *does not follow*. Having been taken at a disadvantage, the victim requires more than mere parity with his attacker to survive. Instead, he or she requires superiority in some capacity to break the assailant’s momentum and regain the initiative. The most efficacious means to accomplish this is a firearm superior in quality and effectiveness to the attacker’s weapon.

## VI. IS THE AR-15 UNIQUELY SUITED TO KILLING LARGE NUMBER OF PEOPLE?

Gun control advocates argue that the AR-15 is particularly well-suited to produce a high volume of fire and kill lots of people, making them ideal for mass shootings.<sup>81</sup> They typically ascribe this supposed excessive

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78. CRAIG DOUGLAS, THE CRIMINAL ASSAULT PARADIGM, IN STRAIGHT TALK ON ARMED DEFENSE 92, 94 (Massad Ayoob ed., 2017).

79. *Id.* at 96.

80. *Id.* at 92–104.

81. See, e.g., Tim Dickinson, *All-American Killer: How the AR-15 Became Mass Shooters’ Weapon of Choice*, ROLLING STONE (Feb. 22, 2018 4:20PM ET), <https://www.rollingstone.com/politics/politics-features/all-american-killer-how-the->

lethality to pistol grips, hand-guards that encircle the barrel (“barrel shrouds”),<sup>82</sup> and so-called “high capacity” magazines,<sup>83</sup> all of which gun control advocates allege enable a shooter to “spray an area and kill large amounts of people,” by stabilizing the weapon and protecting the shooter’s hand from the heat generated by rapid firing.<sup>84</sup>

This claim does not withstand scrutiny. A comprehensive review of U.S. Army marksmanship doctrine from 1923 through 2012 demonstrates that neither pistol grips nor “barrel shroud” hand-guards are associated with spraying fire, from the hip, or otherwise.<sup>85</sup> “Barrel shroud” handguards are old technology. One of the earliest rifles equipped with them was the Short Magazine Lee-Enfield (S.M.L.E.), introduced around the turn of the 20<sup>th</sup> Century.<sup>86</sup> These rifles served British forces through both World Wars. The S.M.L.E. was equipped with such a hand-guard to protect the soldier’s hand from the heat generated by rapid firing.<sup>87</sup> But this rather debunks the gun control advocates’ claims than confirm them. The “rapid firing” of the S.M.L.E. was only 15 rounds per minute, or one round every four seconds. This is a far cry from the fantastical rates of fire mistakenly attributed to the AR-15 by gun control advocates, as noted below.<sup>88, 89</sup> Furthermore, a 1975 Rock Island Arsenal study on the M16 rifle found that the barrel can reach temperatures high enough to cause injury at rather low rates of fire, even at some points along the barrel, after the first round fired.<sup>90</sup> Thus, contrary to

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ar-15-became-mass-shooters-weapon-of-choice-107819/ [https://perma.cc/A36F-WLXQ].

82. The term “barrel shroud” does not appear in any U.S. Army firearms literature, nor the literature of the shooting sports community, so far as I am aware. It appears to be a phrase coined by legislators, regulators, or gun control activists, rather than by those who actually design and use firearms.

83. COUNCIL OF THE DIST. OF COLUMBIA COMM. ON PUBLIC SAFETY AND THE JUDICIARY, REP. ON B. 17-843, “FIREARMS REGISTRATION AMENDMENT ACT OF 2008” at 7 (2008).

84. *Id.*; Johnathan Lowy, et al., *Panel 2: Are Semiautomatic Rifles, aka “Assault Weapons,” Protected by the Second Amendment?*, THE FEDERALIST SOC’Y, THE SECOND AMENDMENT IN THE NEW SUPREME COURT (Jan. 15, 2019), <https://fedsoc.org/conferences/the-2nd-amendment-in-the-new-supreme-court/#agenda-item-panel-2-are-semiautomatic-rifles-aka-assault-weapons-protected-by-the-second-amendment>.

85. *See* Chapman, *supra* note 49, at 34–68, for a more detailed account of the U.S. Army marksmanship doctrine as it relates to pistol grips and “barrel shrouds.”

86. PRIDHAM, *supra* note 52, at 16–17.

87. *Id.* at 17.

88. *Id.* at 56–57, 67.

89. As a bolt action rifle, the S.M.L.E. can hardly be said to be capable of “spraying” fire anyway.

90. RONALD E. ELBE, EXTERNAL BARREL TEMPERATURE OF THE M16A1 RIFLE 15–21 (1975); J.C. Lawrence & J.P. Bull, *Thermal Conditions Which Cause*

the claims of gun control advocates, “barrel shrouds” are an appropriate safety feature in any legitimate shooting application, not just combat or mass shootings.

While United States Army doctrine has provided for quick-kill, hip-firing techniques for all the shoulder-fired arms adopted since World War I, there is no correlation between the existence of such techniques and the presence of pistol grips or “barrel shroud” hand-guards on the weapons.<sup>91</sup> For example, one of the United States Army’s earliest shoulder fired automatic weapons was the selective fire M1918 Browning Automatic Rifle (BAR). It had neither a “barrel shroud” nor a pistol grip, but its training manual provided for “assault fire” from the hip.<sup>92</sup> The doctrine for the semi-automatic M1 Garand and M1 Carbine, as well as for the selective fire M14, all contained hip-firing techniques. Yet while all these rifles had “barrel shrouds,” none of them had pistol grips in their standard configuration.<sup>93</sup> While the doctrine for both the Thompson and M3 submachine guns provided for hip firing and both had pistol grips, neither had a “barrel shroud.”<sup>94</sup> Furthermore, even to the extent that military doctrine provided for hip firing techniques, these were niche techniques that received very little attention or training. In fact, the doctrine sometimes denigrated them. One doctrinal manual for the Thompson submachinegun allowed for firing “from the hip while marching,” but dismissed it as a “relatively ineffective” technique that “should rarely be used.”<sup>95</sup> The doctrine for the M3 “Grease Gun” allowed for hip firing, but cautioned that “the soldier must have a great deal of practice before he can do accurate shooting” in this manner.<sup>96</sup>

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*Skin Burns*, 5 ENGINEERING IN MED. 61, 61 (1976); A. R. Moritz & F. C. Henriques, *Studies of Thermal Injury*, 1974 AM. J. OF PATHOLOGY 695, 711.

91. War Dep’t Training Regulation (TR) 150-30, Marksmanship, Automatic Rifle, at 23 (November 21, 1923).

92. *Id.* at 23.

93. DEP’T OF ARMY FIELD MANUAL 23-5, U.S. RIFLE CALIBER .30, M1, at 4 (May 1965); DEP’T OF ARMY FIELD MANUAL 23-5, U.S. RIFLE CALIBER .30, M1, at 106–110 (Sept. 1958); WAR DEP’T BASIC FIELD MANUAL, U.S. CARBINE, CALIBER .30, M1, at 2 (May 20, 1942); DEP’T OF ARMY FIELD MANUAL 23-7/DEP’T OF THE AIR FORCE MANUAL 50-4, CARBINE CALIBER .30 M1, M1A1, M2, AND M3, at 1–6 (Jan. 1952); DEP’T OF ARMY FIELD MANUAL 23-8, U.S. RIFLE 7.62-MM M14, at 11, 25 (Dec. 1959); DEP’T OF ARMY FIELD MANUAL 23-8, US M14 AND M14A1 RIFLES, at 5 and 133 (15 Apr. 1974).

94. WAR DEP’T FIELD MANUAL 34-35, THOMPSON SUBMACHINE GUN, CALIBER .45, M19281A, WITH CHANGES 1, 2, 3, & 4, at 2 (31 December 1941); FM 23-41, SUBMACHINE GUNS CALIBER .45 M3 AND M3A1, at 5, 55 (July 1957) [hereinafter FM23-41].

95. WAR DEP’T FIELD MANUAL 23-40, THOMPSON SUBMACHINE GUN, CALIBER .45, M19281A, WITH CHANGES 1, 2, 3, & 4, at 35 (31 Dec. 1941).

96. FM 23-41, *supra* note 94, at 54.

Were the AR-15's distinctive pistol grip and hand-guards intended to facilitate "spraying fire" from the hip, one would expect U.S. military doctrine to have further emphasized such firing techniques with the introduction of the semi-automatic AR-15's selective-fire military analogue, the M16. Yet the opposite happened: while Army marksmanship doctrine retained them, it diluted the already limited importance of hip-firing techniques by incorporating quick fire techniques from the shoulder not long after the M16's introduction.<sup>97</sup> By 2012, the Army had effectively admitted to the obsolescence of hip-firing firing techniques by acknowledging the primacy of firing from the shoulder, noting that "[m]odern short-range combat (SRC) techniques emphasize carrying the rifle with the butt high, so the rifle sights can be brought into display as quickly as firing a hasty unaimed shot. In extremely dangerous moments, special reaction teams (SRTs) commonly advance with **weapons shouldered**."<sup>98</sup> The Marine Corps marksmanship manual does not include any reference to hip firing at all.<sup>99</sup>

The principal voices popularizing this myth of spraying fire from the hip are governmental authorities seeking to justify firearms restrictions,<sup>100</sup> gun control advocates, and the creators of pop culture fiction. Examples of the latter include 1967's *The St. Valentine's Day Massacre*, wherein Al Capone's "Tommy Gun" wielding henchmen mow down his

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97. 50359 ARMY TRAINING TEXT 23-71-1, PRINCIPLES OF QUICK KILL 13 (12 May 1967); JAMES W. DEES, GEORGE J. MAGNER & MICHAEL R. MCCLUSKEY, HUMAN RESOURCES RESEARCH ORGANIZATION TECHNICAL REPORT 71-4, at 15, AN EXPERIMENTAL REVIEW OF BASIC COMBAT RIFLE MARKSMANSHIP: MARKSMAN, PHASE I, at 15 (1971); DEP'T OF ARMY FIELD MANUAL 23-8, M14 AND M14A1 RIFLES, AND RIFLE MARKSMANSHIP, at 152 (15 April 1974); FM 23-9, M16A1 RIFLE AND RIFLE MARKSMANSHIP, at 151-53 (June 1974); DEP'T OF ARMY FIELD MANUAL 23-9, M16A1 AND M16A2 RIFLE MARKSMANSHIP, at 4-12 (3 July 1989).

98. DEP'T OF ARMY FIELD MANUAL 3-22.9(FM 23-9), RIFLE MARKSMANSHIP M16A1, M16A2/3, M16A4, AND M4 CARBINE, at 7-17 (April 2003) (C3 April 2005); DEP'T OF ARMY FIELD MANUAL 3-22.9, RIFLE MARKSMANSHIP M16-/M4-SERIES WEAPON, at 7-20 (August 2008) [hereinafter FM 3-22.9] (emphasis added).

99. US MARINE CORPS, MCRP 3-01A, RIFLE MARKSMANSHIP (11 Oct. 2012).

100. COUNCIL OF THE D.C., COMM. ON PUB. SAFETY AND THE JUDICIARY, REP. ON BILL 17-843, *FIREARMS REGISTRATION AMENDMENT ACT OF 2008*, 7 (2008). "As stated in the above paragraph, assault weapons are military-style weapons made for offensive military use. They are designed with military features to allow rapid and accurate spray firing. They are not designed for sport, but to kill people quickly and efficiently. Assault weapons also have features such as pistol grips and the ability to accept a detachable magazine. **Pistol grips help stabilize the weapon during rapid fire and allow the shooter to spray-fire from the hip position.**" *Id.* (emphasis added).

enemies,<sup>101</sup> and 1983's *Scarface*, where Al Pachino's Tony Montana cuts down his enemies with an M16 in the film's climactic scene.<sup>102</sup>

This is not the only false claim about the capabilities of the AR-15 in circulation. After the Pulse Nightclub shooting, Congressman Alan Grayson claimed that the AR-15 could fire 700 rounds per minute.<sup>103</sup> Similarly, the 4<sup>th</sup> Circuit in *Kolby v. Hogan* absurdly claimed that there is little difference between automatic and semi-automatic fire.<sup>104</sup> Theoretically, the rate at which a semi-automatic weapon can fire is limited by the speed of its recoil cycle, but the rate at which a shooter can induce his weapon to expend ammunition is of little importance in itself.<sup>105</sup> As Johnson and Haven noted in 1941, what really matters is how fast one can fire *and still hit targets*.<sup>106</sup> As they observed, "[i]t is customary to consider rapid fire in terms of how many shots are fired in one minute. **This is unreal and very misleading.** The true criterion and measure of efficiency are expressed in terms of how many shots are necessary to fire the necessary number of effective shots."<sup>107</sup>

Referring again to the semi-automatic AR-15's selective-fire military analogue, the M16, the maximum *effective* semi-automatic rate of fire is 45 rounds per minute and the sustained rate of fire of 12–15 rounds per minute.<sup>108</sup> Even if a shooter were able to replicate the fantastical rates of fire attributed to the semi-automatic AR-15 by Representative Grayson and others, his fire would be ineffective. Semi-automatic rifles have greater effective rates of fire than bolt action rifles, but they are still limited.<sup>109</sup> After conducting a study comparing the effective rates of fire for bolt action and semi-automatic rifles, Johnson and Haven found that firing a semi-automatic rifle at 10 rounds per 1.5 seconds produced *unaimed fire*.<sup>110</sup> This derives from the fundamental principles of marksmanship.<sup>111</sup> These principles include steady position, sight picture, breath control, and trigger squeeze.<sup>112</sup> A shooter attempting to replicate fully automatic fire with a

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101. THE ST. VALENTINE'S DAY MASSACRE (Twentieth Century Fox 1967).

102. SCARFACE (Universal Pictures 1983).

103. Douglas Ernst, *Alan Grayson claims AR-15s can fire '700 rounds in a minute' after Orlando attack*, THE WASHINGTON TIMES (Monday, June 13, 2016), <https://www.washingtontimes.com/news/2016/jun/13/alan-grayson-claims-ar-15-rifles-can-fire-700-round/> [<https://perma.cc/Z7G2-NMH9>].

104. *Kolbe v. Hogan*, 849 F.3d 114, 125 (4th Cir. 2017).

105. JOHNSON & HAVEN, *supra* note 57, at 189.

106. *Id.*

107. *Id.* (emphasis added).

108. DEP'T OF ARMY FIELD MANUAL 3-22.9(FM 23-9), RIFLE MARKSMANSHIP M16A1, M16A2/3, M16A4, AND M4 CARBINE, at 2-1 (Apr. 2003) [hereinafter FM 3-22.9(FM23-9)].

109. JOHNSON & HAVEN, *supra* note 57, at 189–90.

110. *Id.* at 190.

111. FM 3-22.9, *supra* note 98, at 4–16.

112. *Id.*

semi-automatic rifle would, through the rapidity of his actions, fail to apply these principles correctly. Specifically, he or she would fail to properly apply the trigger squeeze fundamental, which requires careful, even depression of the trigger.<sup>113</sup>

The most important single factor in marksmanship is trigger squeeze. Everything about your position and aim may be perfect, but, unless you squeeze the trigger correctly, your shot will not go where you have aimed ... if you jerk the trigger, you lose control ... jerking the trigger will disturb the sites. Even a slight movement will spoil an otherwise good shot.<sup>114</sup>

A shooter attempting to replicate automatic fire with a semi-automatic rifle would jerk the trigger, moving the rifle slightly off target, thereby spoiling his aim. A selective fire rifle, such as the M16 in automatic mode, continuously fires rounds as long as the trigger remains depressed.<sup>115</sup> This eliminates the jerking effect of rapid, repeated trigger pulls and minimizes errors in applying the other marksmanship techniques while firing on automatic.

#### VII. “HIGH CAPACITY” MAGAZINES: SUPERFLUOUS FOR CRIMINALS, ESSENTIAL FOR SELF DEFENSE.

One feature that might seem at first blush to materially enhance the lethality of a semi-automatic firearm are so-called “high capacity” magazines. This is based on the assumption that a shooter equipped with such magazines can fire more rounds without reloading, and thereby inflict more casualties.<sup>116</sup> However, upon scrutiny this hypothesis fails. Former Indiana Sheriff Ken Campbell, in a 2013 video demonstration, compared the amount of time that it took both experienced and inexperienced shooters to expend the same amount of rounds using different combinations of magazines of varying capacities.<sup>117</sup> He also performed a demonstration

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113. *Id.* at 4–23; DEP’T OF ARMY FIELD MANUAL 23-5, U.S. RIFLE CALIBER .30, M1, at 110 (Sept. 1958).

114. DEP’T OF ARMY FIELD MANUAL 23-7/DEP’T OF AIR FORCE MANUAL 50-4, CARBINE CALIBER .30 M1, M1A1, M2, AND M3, at 157 (Jan. 1952).

115. FM 3-22.9(FM23-9), *supra* note 108, at 4–8.

116. Gary Kleck, *Large-Capacity Magazines and the Casualty Counts in Mass Shootings: The Plausibility of Linkages*, 17(I) JUST. RESEARCH AND POL’Y 28, 44 (2016).

117. Billy Hallowell, *Sheriff Debunks Gun Magazine ‘Fallacies’ in This Viral Vid (Plus:His Response to Biden’s Shotgun Advice)*, *The Blaze*, (Mar. 1, 2013), <https://www.theblaze.com/news/2013/03/01/sheriff-debunks-fallacies-surrounding->

where he simulated a bystander attempting to disarm a shooter during the interval when the shooter changes magazines.<sup>118</sup> Sheriff Campbell demonstrated that shooters of any skill level can change magazines so fast as to have no material impact upon the shooter's net rate of fire. Additionally, the demonstration showed that a shooter can change magazines fast enough to defeat any attempt to rush and disarm him.<sup>119</sup> Commenting on firearms restrictions limiting magazine capacity to 10 rounds, self-defense and firearms expert Massad Ayoob observed that

Criminals bent on causing harm, on the other hand, even assuming they were impeded from obtaining magazines holding over ten rounds due to the ordinance, could simply arm themselves with multiple weapons, and often do. Criminals have time to assess and plan shootings, whereas victims do not. Whitman, the Texas Tower mass murderer, literally brought a large box of rifles, handguns, a shotgun and ammunition to his sniper perch. Harris and Klebold had four firearms between them at Columbine. Holmes in Aurora brought rifle, shotgun, and pistol into the theater ... The likelihood of the mass murderer arriving on scene with multiple firearms also largely negates the theory that with fewer rounds in the gun, the killer could be more easily disarmed and subdued by unarmed citizens when he first ran empty, before he could reload.<sup>120</sup>

Given the alacrity with which attackers can change magazines, restrictions on magazine capacity are not an effective way of curbing the lethality of their attacks. However, while magazine capacity limits do little to constrain the damage done by criminal assailants, they do materially

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gun-magazines-in-this-viral-vid-plus-his-response-to-bidens-shotgun-advice  
[<https://perma.cc/6BNM-H4QZ>].

118. *Id.*

119. Regrettably, Sheriff Campbell resigned his post in 2014 after it was revealed that he had been involved in an affair with a known prostitute. While this regrettable lapse certainly reflects upon Sheriff Campbell's personal and professional values and judgment, it says nothing about the efficacy of the demonstrations described here. See Diana Penner & Vic Ryckaert, *Boone County sheriff resigns amid prostitution investigation*, INDYSTAR. (9:22 p.m. ET Jun. 19, 2014), <https://www.indystar.com/story/news/crime/2014/06/19/boone-county-sheriff-resigns-amid-prostitution-probe/11015867/> (last updated 1:20 p.m. ET Jun. 20, 2014) [<https://perma.cc/K55D-V7UY>].

120. Declaration of Massad Ayoob in Support of Motion for Preliminary Injunction ¶¶ 19–22, at 7–8, *S.F. Veteran Police Officers Ass'n v. City and Cty. of S.F.*, No. 13-CV-13-5351 (N.D. Cal. 2014).

impair the ability of peaceable citizens to defend themselves.<sup>121</sup> Ayoob explains:

The homeowner who keeps a defensive firearm and is awakened in the night by an intruder is most unlikely to have time to gather spare ammunition. The sudden and unpredictable nature of such attacks, and their occurring in relatively confined spaces, generally do not permit gathering multiple firearms or magazines. Ideally, one hand would be occupied with the handgun itself, and the other, with a telephone to call the police. And, assuming they even had time for a magazine change, most people do not sleep wearing clothing that would allow them to stow spare magazines, etc. on their person. They would have only what was in the gun ... The virtuous citizen, . . . cannot practically be expected to have accessible that many guns or that much ammunition at a moment's notice. The victimized citizen is the one who is, therefore, most deleteriously impacted by the magazine capacity limitation. If he or she must use the gun to protect self and family, they will most likely have only the ammunition in the gun with which to fend off determined, perhaps multiple, attackers.<sup>122, 123</sup>

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121. *Id.* ¶¶ 17–23, at 6–8.

122. *Id.* ¶¶ 19–22.

123. Gun control advocates sometimes assert that 10 rounds ought to be enough to repel an attacker (for example, see Stephen King, *supra* note 41: “[i]f you can't kill a burglar with 10 shots, you need to go back to the shooting range.”) However, this is not a valid assumption. As shown by Marshall and Sanow, *post*, it often requires multiple rounds to stop an attacker. This is especially true where there are multiple assailants, and in such cases 10 rounds may not be nearly sufficient. See Stefani Okolie, *post*, reporting on a home invasion where “dozens of shots were fired” by home owner to repel five home invaders. See also the case of Susan Gonzalez and her husband, reported by Masaad Ayoob, who were confronted by two home invaders. Mrs. Gonzalez was armed with a Ruger 9mm pistol “designed to hold fifteen cartridges in the magazine and one more in the firing chamber,” but which due to legal restrictions was loaded with a 10 round magazine. By the time she had expended 10 rounds, she had gravely injured one attacker but the other was unhit; he disarmed her and stole the couple's vehicle in which both suspects fled, leaving Mrs. Gonzalez and her husband lucky to be alive. Declaration of Masaad Ayoob in Support of Motion for Preliminary Injunction, San Francisco Veteran Police Officers Ass'n, et al., v. The City and County of San Francisco, et al., U.S. District Court for the Northern District of California, San Francisco Division, Case No. 13-CV-13-5351, Document 17, filed December 27th, 2013, paragraphs 5 – 9.

Gary Kleck confirmed Sheriff Campbell's results.<sup>124</sup> In a 2016 study, Kleck reviewed 24 mass shootings in which the shooter's effective rate of fire could be ascertained.<sup>125</sup> In the mass shooting events he analyzed, the average rate of fire was slower than the time needed to change magazines.<sup>126</sup> Therefore, the changing of magazines did not reduce the attackers' net effective rate of fire at all.<sup>127</sup>

Criminal assaults and military combat are not equivalent phenomena. Nonetheless, the law abiding citizen that hopes to cope successfully with a criminal attack can learn something from the American infantrymen who successfully coped with their own enemies in Italy, as noted by the staff of the 15<sup>th</sup> Army Group in the Italian Theater during the Second World War: "It was shown repeatedly that units which pressed their attack vigorously suffered far fewer casualties and were more uniformly successful than those which hesitated or stopped when fired upon."<sup>128</sup>

It is here that a semi-automatic firearm equipped with a so-called "high capacity" magazine becomes essential to a peaceable citizen defending himself. These tools enable a law-abiding citizen to respond vigorously to his attacker with equal or greater force than the attacker has brought to bear. This gives the citizen the chance to wrest the initiative back away from the criminal assailant.

### VIII. AR-15 RIFLES ARE COMMONLY USED FOR LAWFUL PURPOSES

So-called "assault" weapons and "high capacity" magazines are not necessary to execute mass shootings.<sup>129</sup> Christopher Koper's findings indicate that so-called "assault weapons" are used in as few as 18% and as many as 57% of mass shooting incidents.<sup>130</sup> Therefore, many of these attacks are carried out with other firearms.<sup>131</sup> For example, shotguns were

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124. Kleck, *supra* note 116.

125. *Id.*

126. *Id.*

127. Kleck, *supra* note 116, at 44.

128. G-3 SECTION HEADQUARTERS 15 ARMY GRP., IT., *supra* note 75.

129. See Matthew Larosiere, *Losing Count: The Empty Case for "High-Capacity" Magazine Restrictions*, LEGAL POL'Y BULL., No. 3, July 17, 2018, at 8, 10 (arguing that, because mass shooters plan ahead, they can execute their murderous motivations using any weapon of choice).

130. Christopher S. Koper, et al., *Criminal Use of Assault Weapons and High-Capacity Semiautomatic Firearms: An Updated Examination of Local and National Sources*, J. URB. HEALTH 313, 317–18, tbl.2 (2018).

131. Statista Research Dep't, *Weapon Types Used in Mass Shootings in the United States Between 1982 and February 2020*, STATISTA (May 4, 2020),

used in the Washington Navy Yard and Annapolis Gazette attacks.<sup>132</sup> Additionally, firearms are not the only weapons by which a spree killing can be executed. In Eighteenth and Nineteenth Century Malay culture, men would suddenly embark upon mass killing sprees, armed only with edged weapons.<sup>133</sup> This was known as the *amok* phenomenon.<sup>134</sup>

Not only are American gun owners confronted with a flood of false and deceptive information about the AR-15 from the gun control lobby, but they are also subject to a veritable gaslighting campaign.<sup>135</sup> Gun control advocates such as Senator Diane Feinstein claim that the AR-15 is not commonly used for lawful purposes.<sup>136</sup> The AR-15 is only the *latest* target of this kind of advocacy. As Kleck has observed:

many gun law proponents have narrowed their political efforts, targeting specific types of guns, which they argue are “good for only one thing – to kill.” These proponents differentiate “good” (or at least not-so-bad) types of guns, like the old family deer rifle, from “bad” types of guns. At various times, the especially dangerous, “bad” subcategory has been (1) handguns, (2) the cheap, small handguns known as “Saturday Night Specials,” (3) so-called “assault rifles,” (4) machine guns, and (5) plastic guns. Proponents argue that these weapons are only useful for committing crimes, and sometimes even imply that they are never used

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<https://www.statista.com/statistics/476409/mass-shootings-in-the-us-by-weapon-types-used/> [<https://perma.cc/A454-HZQ5>].

132. JOHN M. RICHARDSON, DEP’T OF THE NAVY, REPORT OF THE INVESTIGATION INTO THE FATAL SHOOTING INCIDENT AT THE WASHINGTON NAVY YARD ON SEPTEMBER 16, 2013 AND ASSOCIATED SECURITY, PERSONNEL, AND CONTRACTING POLICIES AND PRACTICES 2, 40 (Nov. 8, 2013); Chase Cook, *Man Charged in Capital Gazette Shooting Asks for Time to Consider Insanity Plea*, CAPITAL GAZETTE (Aug. 15, 2018), <https://www.capitalgazette.com/news/crime/ac-cn-ramos-plea-0816-story.html> [<https://perma.cc/XZY5-P5H9>].

133. JOHN C. SPORE, *RUNNING AMOK: AN HISTORICAL INQUIRY* (Ohio Univ. Ctr. for Int’l Studies, 1988).

134. *Id.*

135. See Emily Miller, *Here Are the 5 Worst “Fake News” Reports on Guns in 2017*, THE DAILY SIGNAL (Dec. 28, 2017), <https://www.dailysignal.com/2017/12/28/5-worst-fake-news-reports-guns-2017/> [<https://perma.cc/QV2V-NZ25>]; David Stitz, “Gaslighting” and Gun Control, THE INTELLIGENCER (Apr. 26, 2013, 12:15 A.M.), <https://www.theintell.com/88082ef6-f221-50cc-8f60-d2f9a51d2841.html> [<https://perma.cc/K7SM-JW9H>].

136. Stephanie Mencimer, *Kavanaugh Defends Opinion That Assault Weapons Are “Common” and Can’t Be Banned*, MOTHER JONES (Sept. 5, 2018), <https://www.motherjones.com/politics/2018/09/kavanaugh-defends-opinion-that-assault-weapons-are-common-and-cant-be-banned/> [<https://perma.cc/RHZ2-37YT>] (this page contains a tweet and video clip).

for any legitimate purposes. Because the guns have no legitimate purposes, it is argued, there can be no objection to outlawing them.<sup>137</sup>

These claims are demonstrably false, as Ronald Turk, Associate Deputy Director (Chief Operating Officer) of the ATF, admitted in 2017:

Since the sunset of the Assault Weapons ban in 2004, the use of AR-15s, AK-style, and similar rifles now commonly referred to as “modern sporting rifles” has increased exponentially in sport shooting. These firearm types are now standard for hunting activities. ATF could re-examine its almost 20-year-old study to bring it up to date with the sport shooting landscape of today, which is vastly different than what it was years ago. Action shooting sports and organizations such as 3 Gun and the United States Practical Shooting Association (USPSA) have also drastically expanded in recent years. Restriction on imports serves questionable public safety interests, as these rifles are already generally legally available for manufacture and ownership in the United States.<sup>138</sup>

The AR-15 is the most popular rifle for competition shooting and is thoroughly integrated into competition shooting,<sup>139</sup> including Civilian Marksmanship Program and National Rifle Association Service Rifle and High Power competitions;<sup>140</sup> United States Practical Shooting Association

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137. KLECK, *supra* note 38, at 14.

138. RONALD TURK, BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES (ATF), OPTIONS TO REDUCE OR MODIFY FIREARMS REGULATION, 5 (Jan. 20, 2017).

139. It is not merely integrated into formal shooting competitions, but into the very fabric of recreational shooting. As my own observations show, the vast majority of rifles appearing at ranges for target shooting are AR-15s.

140. *See* NRA HIGH POWER RIFLE RULES, 7–8 (Nat’l Rifle Ass’n of Am., 2020); CMP HIGHPOWER RIFLE COMPETITION RULES, 33–36 (Civilian Marksmanship Program, 23d ed. 2019); Frank Melloni, *Intro to Service Rifle*, NRA SHOOTING SPORTS USA (June 5, 2019), <https://www.ssusa.org/articles/2019/6/5/intro-to-service-rifle> [<https://perma.cc/29FJ-LWQ2>]; SUSSA Staff, *supra* note 135; Serena Juchnowski, *Why Shoot High Power Service Rifle?* NRA SHOOTING SPORTS USA (Nov. 19, 2018), <https://www.ssusa.org/articles/2018/11/19/why-shoot-high-power-service-rifle/> [<https://perma.cc/4Z5M-LSJ3>]; Dennis Santiago, *What You Need to Know About High Power Rifle Competition*, NRA SHOOTING SPORTS USA (Sept. 18, 2018), <https://www.ssusa.org/articles/2018/9/18/what-you-need-to-know-about-high-power-rifle-competition/> [<https://perma.cc/SJ3B-6KN5>]; *See* SUSSA Staff, *10 Essential Items You Need to Get Started in High Power Rifle*, NRA SHOOTING SPORTS USA (Sept. 20, 2017), <https://www.ssusa.org/>

competitions;<sup>141</sup> and Three Gun competitions.<sup>142</sup> At the Three Gun competition, competitors shoot with pistol, shotgun, and rifle in the same course.<sup>143</sup>

An unarmed person can be incapacitated or killed with relative ease with nearly any improvised weapon that comes to hand; because humans are relatively fragile compared to game animals, this tells us virtually nothing about hunting, one of the archetypal American firearms activities. Criticizing the methods used by Colonel Louis A. LaGarde in his classic 1914 study, *Gunshot Injuries*,<sup>144</sup> Evan P. Marshall and Edwin J. Sanow observed in 1992 that “steers are much harder to kill than humans, so applying the results of shooting animals to how particular handgun loads would work against humans was a hopeless task.”<sup>145</sup> Because wild animals are physically much more agile and robust than human beings, choice of firearm is much more important when hunting wild game than when committing violent crime against people.<sup>146</sup> As Montana hunting and fishing guide Norman Strung explained in 1973:

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articles/2017/9/20/10-essential-items-you-need-to-get-started-in-high-power-rifle [https://perma.cc/2RN6-SDEA] (photo caption).

141. See Jake Martens, *The JP Enterprises PCC [Pistol Caliber Carbine] Midwest Championship*, 35 USPSA: THE OFFICIAL J. OF THE U.S. PRACTICAL SHOOTING ASS'N. STARTING PAGE NO., 40-42 (2019).

142. See Jeff Johnston and Phil Bourjaily, *The Beginner's Guide to 3-Gun Competition*, FIELD & STREAM (Sept. 30, 2019), <https://www.fieldandstream.com/beginners-guide-3-gun-competition/> [https://perma.cc/4AMT-6LMS].

143. See, e.g., John B. Holbrook, II, John Wick 3-Gun, USPCA Magazine, July/Aug. 2019, at 56; Aaron Bright, Review: A Couple of Carbines from Palmetto State Armory, USPCA Magazine, July/Aug. 2019, at 42; Troy McManus, Cochin in Steel Challenge, USPCA Magazine, July/Aug. 2019, at 9; Manny Bragg and Carole Bryant, The Glock 2018 Area 6 Championship, Frontsight, July/Aug. 2018, at 11; Jessica Nietzel, Multigun Nationals: What a Blast, Frontsight, July/Aug. 2018, at 16, 18, 20, 22; Kristine Hayes, The Science of Competition: Is Knowing How to Fail the Secret to Winning? Frontsight, July/Aug. 2017, at 18; Cora Maglaya, 2017 USPSA Armscor Rock Island Multigun National Championship, Frontsight, July/Aug. 2017, at 22. See also Frontsight, July/Aug. 1989; Frontsight, Mar./Apr. 1990; Frontsight, September/October 1991; Frontsight, July/Aug. 2001; Frontsight, July/Aug. 2002; Frontsight, Mar./Apr. 2010; Frontsight, Nov./Dec. 2010; Frontsight, Sept./Oct. 2014; Frontsight, July/Aug. 2015; Frontsight, July/Aug. 2016; Frontsight, May/June 2017; Frontsight, July/Aug. 2017; Frontsight, July/Aug. 2018 (covers).

144. LOUIS A. LA GARDE, GUNSHOT INJURIES: HOW THEY ARE INFLICTED, THEIR COMPLICATIONS AND TREATMENT. 43 (William Wood & Co., 2d ed. 1916). Le Garde used animals and cadavers to evaluate the lethality of various handgun calibers and loads.

145. EVAN P. MARSHALL & EDWIN J. SANOW, HANDGUN STOPPING POWER: THE DEFINITIVE STUDY 13 (Paladin Press, 1992).

146. See Will Drabold, *Here Are 7 Animals Hunters Kill Using an AR-15*, TIME (July 6, 2016, 12:13 P.M.), <https://time.com/4390506/gun-control-ar-15->

[t]hat kind of country you are hunting in should be the determining factor in your choice of a rifle rather than the species you are hunting or the size of your quarry. This is true of the caliber, the type of sight to use, and the action of the weapon.<sup>147</sup>

On the other hand, nearly any firearm will suffice in the hands of a criminal to kill as many people as he wants.<sup>148</sup> Contrary to the perceptions of some, semi-automatic rifles have long been recognized as superior hunting instruments in appropriate settings. Strung notes,

Actions include bolt, lever, pump, and [semi]automatic. Because of the sudden snap-shot nature of hunting deer in brushy country, the bolt action is the least desirable for this situation. . . . I also find this problem with the lever actions . . . Personally, I favor the [semi]auto in the woodlands . . . I find being able to squeeze off four fast shots . . . a real advantage.<sup>149</sup>

As AR-15 has become more popular generally, it has also become increasingly popular as a hunting platform.<sup>150</sup> In fact, Colt marketed the AR-15 as a “superb hunting partner” when it introduced the rifle to the civilian market in 1964.<sup>151</sup> *Time* recently profiled several hunters who use the AR-15 in various calibers to hunt everything from jackrabbits to elk,<sup>152</sup> and *AR15Hunter.com* describes the use of the AR-15 as a hunting implement.<sup>153</sup> The AR-15 and other semi-automatic carbines are also increasingly the firearm of choice for many as a home defense weapon.<sup>154</sup>

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semiautomatic-rifles/ [https://perma.cc/UJF8-28ZZ] (recognizing various gun choices to be used for hunting different wild animals and noting the agility of coyotes and the robust nature of boars).

147. STRUNG, *supra* note 31, at 168–69.

148. See Larosiere, *supra* note 129 (arguing that a murderer may use any firearm to kill).

149. *Id.* at 174.

150. See Drabold, *supra* note 146.

151. *American Rifleman*, Apr. 1964.

152. Drabold, *supra* note 146.

153. *About AR15 Hunter*, AR15 HUNTER (July 22, 2014, 8:26 P.M.), <http://ar15hunter.com/about-us/> [https://perma.cc/PMJ9-3GLZ].

154. Larosiere, *supra* note 129, at 12; Jim Wilson, *AR-15 Rifles for Home Defense? Yes!* NRA FAMILY (June 13, 2019), <https://www.nrafamily.org/articles/2019/6/13/ar-15-rifles-for-home-defense-yes/> [https://perma.cc/Z499-DRU8].

For example, a resident used his semi-automatic AK-47 to repel five armed home invaders in a Houston incident in January 2019.<sup>155</sup>

Gun control advocates have mounted an effective disinformation campaign against the AR-15 by inaccurately stigmatizing it as a tool of warfare and crime, while ignoring the true basis of its popularity.<sup>156</sup> The true basis is that it is an extremely well-designed rifle readily mastered by shooters of all shapes, sizes, and skill levels, and is easily adapted to all manner of legitimate shooting applications.<sup>157</sup> The gun control lobby has very effectively built public and political support for their position but at a steep cost.<sup>158</sup> In relying upon such false claims and misleading tactics, they have badly provoked many responsible American gun owners, aborting any reasoned discussion of the problem of gun violence in the process.

### IX. A FINAL OBSTACLE: THE POTENTIAL FOR ABUSE

It is not merely the divisive tactics of the gun control movement that put gun owners on their guard about red flag laws. There are also real concerns about the potential for error and abuse in the implementation of such laws.<sup>159</sup> As Dave Workman of the Second Amendment Foundation has said, “It’s a great idea on paper . . . . The problem is execution.”<sup>160</sup> A dramatic example of just how red flag laws can go wrong in the “execution” is the case of Gary Willis. He was killed by Maryland police in Anne Arundel County after the police arrived at his home, shortly after 5:00 in the morning on November 5, 2018, to execute an *ex parte* “extreme risk protective order” (ERPO).<sup>161</sup> This order was issued at the request of his sister following a dispute over the care of their mother.<sup>162</sup> While it can be

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155. Stefania Okolie, *5 Shot and 3 Killed After Homeowner Opens Fire on Suspects in East Houston*, ABC EYEWITNESS NEWS (Jan. 20, 2019), <https://abc13.com/5-shot-and-3-dead-after-home-invasion-in-east-houston/5097015/> [<https://perma.cc/FZ43-63AP>].

156. See KLECK, *supra* note 38, at 73; David B. Kopel, *Trust the People: The Case Against Gun Control*, 3 J. ON FIREARMS AND PUB. POL’Y, 77, 77–78 (1990); Larosiere, *supra* note 129, at 5.

157. See Jon Schuppe, *America’s Rifle: Why So Many People Love the AR-15*, NBC NEWS (Feb. 15, 2018, 7:08 A.M.), <https://www.nbcnews.com/news/us-news/america-s-rifle-why-so-many-people-love-ar-15-n831171> [<https://perma.cc/2CMG-2BBA>].

158. See David B. Kopel, *The Costs and Consequences of Gun Control*, POL’Y ANALYSIS NO. 784 (Dec. 1, 2015), <https://www.cato.org/publications/policy-analysis/costs-consequences-gun-control> [<https://perma.cc/2WS8-QQPF>].

159. See generally Jacob Sullum, *States Are Depriving Innocent People of Their Second Amendment Rights*, REASON, Nov. 1991, at 47–51 (providing a concise overview of these concerns).

160. *Id.* at 51.

161. *Id.* at 47.

162. *Id.*

fairly said that Mr. Willis contributed to this tragic outcome by his ill-judged obstinate behavior in response to the police attempt to enforce the order, there would also seem to be some doubt as to whether an ERPO was appropriate in the first place. According to family, Mr. Willis “wasn’t dangerous, just strongly opinionated.”<sup>163</sup> His niece said that Mr. Willis “like[d] to speak his mind” but that he “wouldn’t hurt anybody.”<sup>164</sup> She added that the incident had left her “just dumbfounded now” and that the police “didn’t need to do what they did.”<sup>165</sup> However, for the Anne Arundel County Police Chief Timothy Altomare, the ambiguity of the situation served more to justify than to cast doubt on the validity of the EPRO. Altomare stated that “[i]f you look at this morning’s outcome, it’s tough for us to say ‘Well, what did we prevent?’ ... [b]ecause we don’t know what we prevented or could’ve prevented. What would’ve happened if we didn’t go there at 5 a.m.?”<sup>166</sup> In response, *Reason*’s Jacob Sullum tartly observed that “[w]ell, for one thing, Gary Willis probably would still be alive.”<sup>167</sup>

Also impeding real dialogue is a concern over other types of potential government abuse of which gun owners are aware. One such is eminent domain abuse. This was dramatically brought to the public’s consciousness by the Supreme Court’s notorious holding in *Kelo v. City of New London*,<sup>168</sup> dramatized in the film *Little Pink House*.<sup>169</sup> Another is civil asset forfeiture abuse, recently addressed by the U.S. Supreme Court in *Timbs v. Indiana*.<sup>170</sup> Here, the Court held for the first time that the Eighth Amendment’s Excessive Fines clause is incorporated against the States via the Fourteenth Amendment.<sup>171</sup> In this case, Tyson Timbs was convicted of selling about \$260 worth of heroine.<sup>172</sup> In addition to the sentence of one year of home detention and five years’ probation imposed by the trial court, the State also seized his \$40,000 SUV.<sup>173</sup> Philadelphia<sup>174</sup> and Chicago<sup>175</sup>

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163. *Id.*

164. *Id.*

165. *Id.*

166. Phil Davis, *Anne Arundel Police Chief: Shooting Was Evidence That Month-Old “Red Flag” Law Is Needed*, TCA REG’L NEWS, Nov. 6, 2018.

167. Sullum, *supra* note 159, at 47.

168. *Kelo v. City of New London*, 545 U.S. 469 (2005) (holding that an interpretation of “public use” may be broadened to “public purpose” within the meaning of the Takings Clause).

169. LITTLE PINK HOUSE (Korchula Productions 2017).

170. *Timbs v. Indiana*, 586 S. Ct. 682, 684–87 (2019).

171. *Id.* at 685–87.

172. Kellie Hwang, *An Indiana Man Was Caught With \$260 of Heroin. The State Took His \$42,000 Land Rover*, INDYSTAR (Nov. 30, 2018, 11:44 A.M.), <https://www.indystar.com/story/news/2018/11/30/civil-forfeiture-timbs-v-indiana-scotus-supreme-court/2148377002/> [<https://perma.cc/Q56S-9YFS>].

173. *Timbs*, 586 S. Ct. at 686.

174. See DICK M. CARPENTER II, ET AL., INST. FOR JUST., POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE 19 (2d ed. Nov. 2015).

have implemented even more kafkaesque forfeiture regimes. Given some municipalities' callous disregard of their citizens' property rights, it is hardly inconceivable that states and municipalities, hostile to gun ownership, might abuse the power vested in them under red flag laws to harass law abiding gun owners and relieve them of their firearms, if only temporarily.<sup>176</sup>

### CONCLUSION

In warfare, “[t]reachery or [p]erfidy”—acts such as “feign[ing] surrender” or falsely “broadcast[ing] to the enemy that an armistice has been agreed upon”—are “forbidden because [they] destroy[] the basis for a restoration of the peace short of the complete annihilation of one belligerent by another.”<sup>177</sup> The pro and anti-gun movements are not literally at war, of course. Nonetheless, the gun control movement’s rhetoric—mischaracterizing the nature and capabilities of the AR-15; constantly shifting targets as to which guns are “bad” and merit proscription and which may be tolerated in private hands; and repeated, brazen insistence, against all evidence to the contrary, that the AR-15 neither has legitimate use nor is commonly used for any purposes but combat and mass murder—has gravely impeded constructive discourse on the question. The rhetorical excesses of gun control advocates have “destroy[ed] the basis for”<sup>178</sup> real, effective discussions about how to curb gun violence by convincing gun owners that the gun control lobby’s true objectives are the total annihilation of America’s firearms tradition and the *de facto*, if not *de jure*, repeal of the Second Amendment, and that any proposals that may be enacted will be just one more click on the implacable ratchet toward their goal of obliterating gun rights altogether.

Even worse is the impact that these false arguments have on members of the gun control movement itself. In focusing on certain weapons like the AR-15 as particularly “bad” compared to other firearms,

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175. See Inst. for Justice, Chicago Impound: The Windy City Tows the Cars of Innocent People and Holds Them for Ransom, <https://ij.org/utility/case-print/?case-name=123791> [<https://perma.cc/KUP8-HB6C>]; John Pearley Huffman, *An Inside Look at Chicago’s Seedy Car-Impound Netherworld*, CAR AND DRIVER (Aug. 25, 2019), [https://www.caranddriver.com/features/a28776512/impounded-cars-chicago/?mkt\\_tok=eyJpIjoiTm1ZMU1EazRNV1ZpT1RjMiIsInQiOiJCUHNzVkdGT2JBaGFCQlFlamNDc3JpMTNPWFBeForMUVVdzJoMVBScjZtWnZ6c1RadUxySHA1RFdHaG4xR1wvSWtmaVwvMUJmc0xsWHdlZFBcL1FiYXRIYTnwUFJmQzdnUjFNuKJMTXkwMDM3ekIzZU1peStnNm5YWW51YTVRc0liaSJ9](https://www.caranddriver.com/features/a28776512/impounded-cars-chicago/?mkt_tok=eyJpIjoiTm1ZMU1EazRNV1ZpT1RjMiIsInQiOiJCUHNzVkdGT2JBaGFCQlFlamNDc3JpMTNPWFBeForMUVVdzJoMVBScjZtWnZ6c1RadUxySHA1RFdHaG4xR1wvSWtmaVwvMUJmc0xsWHdlZFBcL1FiYXRIYTnwUFJmQzdnUjFNuKJMTXkwMDM3ekIzZU1peStnNm5YWW51YTVRc0liaSJ9) [<https://perma.cc/6JL6-FW7A>].

176. See generally CARPENTER II, ET AL., *supra* note 174, at 2–3 (providing an overview of the problem of civil asset forfeiture abuse).

177. DEP’T OF THE ARMY, THE LAW OF LAND WARFARE 22 (July 1956).

178. *Id.*

the gun control movement has inculcated in its supporters the unrealistic belief that if only these particularly “wicked” firearms were eliminated, the problem of gun violence would be greatly reduced. This, in turn, has the effect of relieving states, municipalities, and the Federal Government of the expensive, tedious, and time-consuming work that might really prevent some of these tragedies. As Kevin Williamson noted,

What’s missing is ordinary, unglamorous, labor-intensive law-enforcement and public-health work ... We complain about ‘straw buyers’ but rarely prosecute them; some federal prosecutors refuse as a matter of publicly stated policy to take a straw-buyer case unless it is part of a larger (sexier) organized-crime investigation. ... On and on it goes: Ordinary crime and ordinary criminals, ordinary bureaucratic failure, and the occasional act of armed histrionics to keep the headlines churning.<sup>179</sup>

One of my favorite books as a youth was written by Soviet defector Vladimir Bogdanovich Rezu, writing pseudonymously as Victor Suvorov.<sup>180</sup> This book, *Inside the Soviet Army*, contains a very important leadership lesson that any soldier must learn: “[a]fter some time you will come to understand the most important rules of all, one which you have never been taught – respect your soldiers.”<sup>181</sup> However, the real point is what he adds a few lines later: that respecting your soldiers “means more than just showing them respect.”<sup>182</sup> A commander respects his soldiers by “[s]how[ing] that [he] care[s] about them by meeting their needs whenever possible [and by] [c]onsider[ing] them as men—with problems, hopes, and feelings—just like [himself].”<sup>183</sup> What relevance do these observations have for the debate over firearms in America? Only this: in the aftermath of *District of Columbia v. Heller*,<sup>184</sup> gun control activists have been forced to

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179. Kevin D. Williamson, *How to Spot a Serious Gun-Crime Proposal*, NAT’L REV. (Sept. 3, 2019, 2:43 P.M.), <https://www.nationalreview.com/2019/09/how-to-spot-a-serious-gun-crime-proposal/> [<https://perma.cc/2AMG-4VNX>].

180. Luke Harding, “*Will They Forgive Me? No*”: *Ex-Soviet Spy Viktor Suvorov Speaks Out*, THE GUARDIAN (Dec. 29, 2018), <https://www.theguardian.com/world/2018/dec/29/ex-soviet-spy-viktor-suvorov> [<https://perma.cc/6RYA-ABB4>].

181. VIKTOR SUVOROV, *INSIDE THE SOVIET ARMY* 257 (Macmillan Publ’g Co., Inc., 1982).

182. *Id.* at 257–58.

183. DANDRIDGE M. MALONE, *SMALL UNIT LEADERSHIP: A COMMONSENSE APPROACH* 33 (Presidio Press, 1983).

184. *District of Columbia v. Heller*, 554 U.S. 570, 602, 635 (2008) (holding that the Second Amendment protects an individual’s right to keep and bear arms).

pay grudging homage to the individual right to keep and bear arms.<sup>185</sup> However, American gun owners remember the contrary assertions of these same activists: that the Second Amendment did not codify such an *individual* right, but only a collective guarantee intended to “protect members of a state militia from being disarmed by the federal government,”<sup>186</sup> and that “the majority of Americans **mistakenly believe** that the Second Amendment of the Constitution guarantees the individual right to keep and bear arms.”<sup>187</sup> Just as respecting Suvorov’s soldiers meant more than merely treating them with respect, “respecting” the right to keep and bear arms means more than making an empty obeisance to it. Really respecting the right means taking the time to understand the true nature of firearms, developing proposals that are effective in reducing gun violence, and doing so in a way that really respects the rights of peaceable law-abiding gun owners. These have been notably absent on the pro-control side of the debate.<sup>188</sup>

Some gun control activists will never be satisfied until every last privately-owned firearm in the United States has been confiscated. By the same token, some gun rights advocates will never accept any firearms regulations whatsoever. Few people, however, fall into either of these extreme camps. Many gun owners are willing to consider measures that might actually contribute to a reduction in gun violence, as opposed to misguided and pointless proposals such as banning so-called “assault” weapons and “high-capacity” magazines. Unfortunately, given the acrimony to which the debate over guns has descended, and given the extent to which it has become encumbered by misinformation and error, substantial assurances are needed to bring American gun owners to the table; bland assertions of respect for the Second Amendment will not suffice.

Serious progress on the problem of gun violence, including mass shootings, depends upon acceptance by all parties of certain fundamental principles: (1) the right to keep and bear arms is an individual right, as set forth in *Heller* and *McDonald v. City of Chicago*;<sup>189</sup> (2) the Second Amendment protects the rights of peaceable citizens to acquire, possess, and use the firearms of their choice, including semi-automatic firearms such as the AR-15 and the magazines designed for them by their manufacturers; and (3) that real and effective due process protections must be respected

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185. See The Cato Institute, *The Right to Keep and Bear Arms: 10 Years After Heller*, CATO POL’Y REP., Sept./Oct. 2018, at 16.

186. PETE SHIELDS, GUNS DON’T DIE – PEOPLE DO 55 (Arbor House Publ’g Co., 1981).

187. *Assault Weapons and Accessories in America*, *supra* note 43 (emphasis added).

188. See Kopel, *supra* note 158 (“Responsible firearms policies . . . do not attempt to infringe the constitutional rights of good persons.”).

189. *McDonald v. City of Chicago*, 561 U.S. 742, 749–50, 791 (2010).

before these rights may be abridged. Affirmation of these basic points by the United States Supreme Court would clear away much of the detritus clogging the debate about guns and violence and might facilitate the implementation of real, practical solutions in a way that has heretofore evaded us.