

THE RIGHT TO ARMS:
THE CRIMINOLOGY OF GUNS

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IN THIS BRIEF ARTICLE I SEEK TO LIMN THE CRIMINOLOGICAL underpinnings of the Second Amendment right to arms.

I. BASING PUBLIC POLICY ON FICTION

Everyone except perhaps the most extreme libertarians generally agrees with prohibiting possession of firearms by convicted felons, violent misdemeanants and the mentally unbalanced—as our laws currently do.¹ But an insistent and articulate minority argues for going further: to banning possession of handguns, or all guns, by the ordinary adult population. This is unfortunate, for central to their argument is a preposterous lie.

The lie on which gun prohibitionists centrally rely asserts that most murders are committed by ordinary citizens because they happened to have a firearm in a moment of anger. This lie is repeated time and again in countless supposedly scholarly books and articles. For instance, the medical school professor and gun prohibition lobbyist Katherine Kaufer Christoffel solemnly asserts: “most shootings are not committed by felons or mentally ill people, but are acts of passion that are

* LL.B., Yale 1966. The author wishes to acknowledge his indebtedness to Randy Barnett, Clayton Cramer, C.B. Kates, Gary Kleck, John Lott, Nelson Lund, Carl Moody and William Van Alstyne.

¹ Federal law imposes a lifetime bar on firearm ownership by those convicted of any of the countless state or federal felonies, including non-violent ones such as tax evasion, anti-trust violations and violations of various record-keeping laws. 18 U.S.C. § 922(g) (2006). Persons who have been involuntarily committed to mental institutions also are barred for life, and juveniles are barred from purchasing guns until they reach majority. *Id.* State laws are generally similar.

committed using a handgun that is owned for home protection.”² To the same effect, other mendacious gun control advocates commonly claim that:

[M]ost [murderers] would be considered law-abiding citizens prior to their pulling the trigger[;]³

More than half the homicides in this country involve people who are not criminals. . . . These so-called “mom and pop” murders, the result of heated arguments or accidents, are rarely premeditated[; and]⁴

[Murderers] are neither felons nor crazy, [but rather] people involved in family fights and fights over jobs and money, and people who are sad or depressed.⁵

Among the most extensive prevarications along this line are those in a book on gun control by SUNY political scientist Robert Spitzer.⁶ He denounces the idea that:

[O]ne can readily differentiate between ‘good guys’ and ‘bad guys’; . . . that guns in the hands of good guys are good, whereas guns in the hands of bad guys are bad[; and that if the bad guys] are controlled (through deterrence or imprisonment, for example), the problem is essentially solved.⁷

Professor Spitzer admits this “good guy-bad guy” dichotomy is more or less valid as to crimes “such as robbery and theft . . . since such crimes (especially when guns are involved) are infrequently attributable to impulse.”⁸ But it

bears little relation to reality for most gun-related homicides, in that many homicides are the result of impulsive actions taken by individuals *who have little or no criminal background* and who are

² Katherine Kaufer Christoffel, *Toward Reducing Pediatric Injuries from Firearms: Charting a Legislative and Regulatory Course*, 88 PEDIATRICS 294, 300 (1991).

³ Daniel W. Webster et al., *Reducing Firearms Injuries*, ISSUES SCI. & TECH., Spring 1991, at 73, 73.

⁴ Bruce R. Conklin & Richard H. Seiden, *Gun Deaths: Biting the Bullet on Effective Control*, PUB. AFF. REP., Oct. 1981, at 1, 4.

⁵ Deane Calhoun, *From Controversy to Prevention: Building Effective Firearm Policies*, INJ. PREVENTION NETWORK NEWSL., Winter 1989, at 15; see also GEORGE PICKETT & JOHN J. HANLON, PUBLIC HEALTH: ADMINISTRATION AND PRACTICE 496 (9th ed. 1990); J.A. Barondess, *Correspondence*, 272 JAMA 1409 (1994); Frederick P. Rivara & F. Bruder Stapleton, *Handguns and Children: A Dangerous Mix*, 3 J. DEVELOPMENTAL & BEHAV. PEDIATRICS 35, 37 (1982).

⁶ ROBERT SPITZER, THE POLITICS OF GUN CONTROL 186 nn.10–12 (1995).

⁷ *Id.* at 186.

⁸ *Id.*

known to the victims.

. . . [In a] *Time* magazine compilation of all 464 gun deaths that occurred nationwide during the week of 1–7 May, 1989 [the majority of the murders] ‘typically involved people who loved, or hated, each other—spouses relatives or close acquaintances.’⁹

He also cites the 1991 F.B.I. Uniform Crime Report (UCR) as showing that

almost half of all murders . . . were committed by an acquaintance or relative of the victim. More than a quarter of all women murdered were killed by boy friends or husbands. Arguments precipitated 32 percent of all murders. Only 21 percent resulted from the commission of felonies such as arson, robbery, and the like. . . . The good guy-bad guy myth thus evaporates when *most murders* are examined¹⁰

Such canards are in fact the central tenet of arguments for banning possession of guns by the general populace rather than just by high risk groups. That tenet is expounded by opinion leaders, anti-gun activists and editorialists alike. Thus, law professor and anti-gun activist David Kairys claims “[t]hat gun in the closet to protect against burglars will most likely be used to shoot a spouse in a moment of rage. . . . The problem is you and me—law-abiding folks.”¹¹ Likewise a 2006 *L.A. Times* guest editorial falsely asserts “thousands of law-abiding citizens annually become criminals when they pick up a firearm and shoot other people.”¹²

Naturally, such canards are supported by groups like the National Coalition to Ban Handguns which claims “most murders are committed by previously law abiding citizens where the killer and the victim are related or acquainted” and describes thousands of “gun murders done [annually] by law-abiding citizens who might have *stayed* law-abiding if they had not possessed firearms.”¹³

⁹ *Id.*

¹⁰ *Id.* (emphasis added).

¹¹ David Kairys, *Handguns: A Carnage in the Name of Freedom*, PHILA. INQUIRER, Sept. 12, 1988, at A15. Professor Kairys, who teaches at Temple University Law School, was one of the major figures in formulating the current rash of suits against the firearms industry by Philadelphia and other cities across the nation. See David Kairys, *Legal Claims of Cities Against the Manufacturers of Handguns*, 71 TEMPLE L. REV. 1 (1998).

¹² Jenny Price, *These people have guns?*, L.A. TIMES, Aug. 13, 2006, at M1, available at <http://www.latimes.com/news/opinion/la-op-price13aug13,0,4206961.story?coll=la-opinion-rightrail>.

¹³ NATIONAL COALITION TO BAN HANDGUNS, A SHOOTING GALLERY CALLED

II. A “SCHOLARLY” LITERATURE WITHOUT REFERENCES

Articles making the claims described in Part I exhibit a remarkable similarity: there are *never* any endnotes or footnotes for their claims that most murderers are ordinary people. This is not because there is no relevant literature. There are literally dozens of homicide studies dating back to the late nineteenth century. But even the many anti-gun articles in normally scholarly publications never reference such studies or any studies showing that most murders are committed by ordinary citizens because they happened to have a firearm in a moment of anger. Not even in articles which give footnotes about everything else is there ever such a footnote!

Remarkable though this absence of supporting reference is for a scholarly publication, its justification is simple necessity. There are *no* homicide studies finding that most murderers—or many murderers, or even a few murderers—are ordinary sane people who killed in a moment of passion. The dozens of homicide studies dating back to the Nineteenth Century invariably show the overwhelming majority of murderers are long-time criminals with long prior records—and the rest are mentally deranged.

For instance, though only fifteen percent of Americans have criminal records, roughly ninety percent of adult murderers have *adult* records (exclusive of their often extensive juvenile records), with an average adult crime career of six or more years, including four major felonies.¹⁴ Moreover, leading American criminologists know the prior criminality of murderers is so well established by dozens of homicide studies as to rank among the axioms of criminology.¹⁵

Before delving further into the relevant studies, it is instructive to review what anti-gun advocates offer as evidence in lieu thereof. As quoted above, the sole facts Professor Spitzer advances as proof that

AMERICA (n.d.) (emphasis in original).

¹⁴ GARY KLECK & DON B. KATES, ARMED: NEW PERSPECTIVES ON GUN CONTROL 20–21 (2001).

¹⁵ David M. Kennedy & Anthony A. Braga, *Homicide in Minneapolis: Research for Problem Solving*, 2 HOMICIDE STUDIES 263, 269 (1998); *see also id.* at 267. There are a few murderers, (e.g., the Petersons, Michael and Scott) who killed to be rid of wives, whether anticipating insurance payment or because the wives were inconveniently pregnant. Though these murderers were without prior crime records and outwardly normal, their sanity is questionable. At best they would be described as sociopaths. And, of course, the Petersons' murders: (a) were not committed with firearms; and (b) apparently were the result of deliberation rather than a moment of ungoverned anger.

murderers are ordinary citizens rather than criminals, are that murders “typically involved people who loved, or hated, each other—spouses, relatives or close acquaintances.”¹⁶ Apparently Professor Spitzer believes that only ordinary citizens—but not criminals!—love or hate or have spouses, relatives or close acquaintances. Likewise, another article quoted rests its unsubstantiated claim that murderers “are neither felons nor crazy” on its assertion that murderers are “people who are sad or depressed.”¹⁷ Apparently the author thinks that only ordinary people, but not criminals and the deranged, are ever sad or depressed. And the authors of the other articles I have quoted apparently believe that it refutes the fact that murderers are overwhelmingly lifelong criminals to assert that “murder is almost always an act of blind rage or illogical passion”¹⁸ and that “most shootings are not committed by felons or mentally ill people, but are acts of passion.”¹⁹

Compare to this a criminologist’s summary of the criminological literature:

[T]he use of life-threatening violence in this country is, in fact, largely restricted to a criminal class and *embedded in a general pattern of criminal behavior*. . . . [V]irtually all individuals who become involved in life-threatening violent crime have prior involvement in many types of minor (and not so minor) offenses. . . . The frequency, seriousness, and variety of offending are all strongly predictive of life-threatening violent offending. *Even in the case of life-threatening domestic violence, most of these violent offenders have a history of prior involvement in criminal behavior and serious forms of violent crimes.*²⁰

In 2009 Clayton Cramer and I published an article²¹ describing some of the studies subsequent to those Professor Elliott summarized. Like the prior studies, the later ones continue to demonstrate his point that “virtually all” murderers have prior criminal records. A few examples:

MASSACHUSETTS: “Some 95% of homicide offenders . . . [in a Kennedy School study had been] arraigned at least once in

¹⁶ SPITZER, *supra* note 6.

¹⁷ Calhoun, *supra* note 5.

¹⁸ PICKETT & HANLON, *supra* note 5, at 496.

¹⁹ Christoffel, *supra* note 2, at 300.

²⁰ Delbert S. Elliott, *Life Threatening Violence is Primarily a Crime Problem: A Focus on Prevention*, 69 U. COLO. L. REV. 1081, 1086–89 (1998) (emphasis added).

²¹ Don B. Kates & Clayton E. Cramer, *Second Amendment Limitations and Criminological Considerations*, 60 HASTINGS L.J. 1339 (2009).

Massachusetts courts before they [murdered]. . . . On average . . . homicide offenders had been arraigned for 9 prior offenses.”²²

- ATLANTA:** Eighty percent of 1997 Atlanta murder arrestees had previously been arrested at least once for a *drug* offense; and 70% had three or more prior *drug* arrests—in addition to all their arrests for *other* crimes.²³
- DELAWARE:** Reporting on shootings, including many in which victims had only been wounded rather than killed, 80% of shooters had arrest records going all the way back to their juvenile years; 57% had been charged at least twice with drug offenses.²⁴
- NEW YORK CITY:** A *New York Times* study of the 1,662 murders in that city over the years 2003–2005 found “[m]ore than 90 percent of the killers had criminal records”²⁵
- ILLINOIS:** Over the years 1991–2000, the great majority of murderers had prior felony records.²⁶

But for time and space considerations I could go on for pages citing studies finding that “virtually all” murderers differ from ordinary citizens in being long-time criminals, or mentally disturbed, or both. The “evidence” to the contrary offered by gun ban advocates is laughable, consisting only of complete *non sequiturs*. These claims could only prove that killers are ordinary people if such mental states were unique to the law abiding, i.e., if hatred and rage, sadness and depression were mental states that violent felons and violent psychopaths do not experience.

What differentiates criminals and violent psychopaths from ordinary people is not their experiencing hatred or rage, but the ease with which those emotions are prompted and the acts to which they give rise. Killers exhibit an absence of impulse control and a seemingly

²² Anthony A. Braga et al., *Understanding and Preventing Gang Violence: Problem Analysis and Response Development in Lowell, MA.*, 9 POLICE Q. 20, 29–31 (2006).

²³ Dean G. Rojek, *The Homicide and Drug Connection*, in THE VARIETIES OF HOMICIDE AND ITS RESEARCH 124, 128 (Paul H. Blackman et al. eds., 2000).

²⁴ Adam Taylor & Ira Porter, *Growing Audacity Among City Gunmen*, NEWS J., Sept. 20, 2009, <http://www.delawareonline.com/article/20090920/NEWS01/909200364/Growing-audacity-among-city-gunmen>.

²⁵ Jo Craven McGinty, *New York Killers, and Those Killed, by Numbers*, N.Y. TIMES, Apr. 28, 2006, at A1.

²⁶ Philip J. Cook et al., *Criminal Records of Homicide Offenders*, 294 JAMA 598 (2005).

inexplicable (to ordinary people) propensity to explode into extreme violence over the most trifling matters. Ordinary people virtually never kill, while the kind of people who murder often do so over things so trivial that we are left aghast not only at the fact of killing but at the inconsequential grievance that engendered it.²⁷ The triviality of motive further confirms the extreme deviance of murderers.

To reiterate, the claim of gun prohibition advocates that most murderers are ordinary people is preposterous, devoid of even a shred of supporting evidence.

III. UNIQUELY DEFENSIVE WEAPONS

The unique role of firearms in human society is that they are the only weaponry which allows the weak to defend against victimization and aggression by the strong. This obvious point is obscured to us because, of course, firearms can also be used by aggressors for unlawful violence. But the true impact of firearms on society is that only they allow victims to defend themselves on equal terms.

Visualize a confrontation that all too often occurs: a confrontation between a homicidal 200-pound man armed with a knife and a 115-pound woman. Even if the woman also has a knife, her chances of survival are minimal. Now imagine the same confrontation except that both parties are armed with firearms. The woman is still in serious danger but she is no longer a helpless victim. The man is also in serious danger if instead of retreating he persists in attacking her.

Moving from theory to ascertainable fact, it turns out that criminological studies find that, in confrontations with criminals, armed citizens usually win. Self-defense incidents involving gun-armed citizens occur three to six times more often each year than gun attacks by criminals.²⁸ Further, Professor Lawrence Southwick concludes that

²⁷ This was noted as long ago as Wolfgang's classic study of Philadelphia homicide in the 1940s and '50s. As Daly & Wilson note:

Wolfgang was able to classify 560 cases into one or another of 12 motive categories. By far the most frequent, accounting for 37% of the cases, was a sort of dispute that Wolfgang labeled an '*Altercation of relatively trivial origin; insult, curse, jostling, etc.*' Subsequent studies in other American cities have regularly replicated this Such altercations constitute the most prevalent variety of urban homicide in the United States.

MARTIN DALY & MARGO WILSON, HOMICIDE 125 (1988) (emphasis in original).

²⁸ Don B. Kates, *The Limited Importance of Gun Control from a Criminological Perspective*, in SUING THE FIREARMS INDUSTRY: A LEGAL BATTLE AT THE CROSSROADS OF GUN

in such incidents “[t]he use of a gun by the victim significantly reduces her likelihood of being injured.”²⁹ Another study finds that “firearms are used over half a million times in a typical year [in America] against home invasion burglars; *usually the burglar flees as soon as he finds out that the victim is armed, and no shot is ever fired.*”³⁰

I add emphasis to the foregoing quote because the words emphasized represent the consistent outcome of confrontations between criminals and gun-armed citizens. The latter enjoy two immense advantages which may explain why the criminals usually flee without firing a shot. First, gunshots tend to attract police attention, a consummation as devoutly welcomed by victims as it is dreaded by the criminals. Second, roughly eighty five percent of those wounded by gunshot survive *if they get medical care.*³¹ Again, victims welcome such intervention while criminals avoid it if at all possible since it focuses police attention. Victims can satisfactorily answer police questions while criminals cannot; for them going to a hospital is just a first step toward going to prison.

In short, if victims are armed they are generally in a much better position to engage in a gunfight than are criminals.

IV. EUROPEAN LAW AND EXPERIENCE

A more reasonable approach than dreaming hazily of a gun-less society, as anti-gun fantasists do, is to examine the actual phenomenon. Russia is an actual real-world gun-less society. Handguns have been totally banned for civilians since 1929, and unlike wealthy western nations where such bans are unenforceable, in a poor society like Russia with a police-state government, the ban is enforceable. As a result, gun murders among the general populace have always been rare in Russia. Yet as far back as records are available (the 1960s) the murder rate in

CONTROL AND MASS TORTS 62, 68–69 (Timothy Lytton ed., 2005) (collecting studies).

²⁹ Lawrence Southwick Jr., *Self-Defense with Guns: The Consequences*, 28 J. CRIM. JUSTICE 351 (2000). Another study to the same effect is Jungyeon Tark & Gary Kleck, *Resisting Crime: The Effects of Victim Action on the Outcomes of Crimes*, 42 CRIMINOLOGY 861 (2004).

³⁰ David Kopel et al., *The Human Right of Self-Defense*, 22 BYU J. PUB. L. 43, 166 (2008) (citing Robert M. Ikeda et al., *Estimating Intruder-Related Firearms Retrievals in U.S. Households, 1994*, 12 VIOLENCE & VICTIMS 363 (1997) (reporting results of study conducted by the CDC)) (emphasis added).

³¹ See Don B. Kates, *The Value of Civilian Handgun Possession as a Deterrent to Crime or a Defense Against Crime*, 18 AM. J. CRIM. L. 113 (1991) (collecting studies).

gun-less Russia has always been higher than in gun-ridden America. As of the year 2000 it was almost four times higher.³²

In fact, Russia has by far the highest murder rate among the industrialized nations and one of the highest murder rates among all the nations of the world. Moreover, the murder rates of the now-independent, but still gun-less, nations that used to be part of the Soviet Union are generally about three times higher than the American murder rate.³³

These facts do not necessarily prove that depriving victims of the means of self-defense promotes murder, but the facts certainly cast doubt on the faith that banning guns is the sovereign remedy for violent crime.

Further doubt is cast by comparing European gun laws and murder rates. Contrary to the mythology perpetrated by ignorant anti-gun advocates and the equally ignorant media, gun control cannot be what kept and keeps European murder rates so low compared to the United States because Europe had much lower murder rates before it had gun control laws.³⁴

Moreover, though the gun laws in the principal European nations are significantly different from American gun laws, they are not more restrictive. The primary difference is that European gun laws were adopted to preclude political violence, not apolitical violent crime.

In many cases, European gun laws are less restrictive than those of the most restrictive American states. For instance, law abiding Italian adults have more freedom to arm themselves than do Californians. Unlike Californians, law abiding Italians are free to buy 14-shot Browning semi-automatic pistols, or 16-shot Berettas or 18-shot Steyrs. (Note that Europe invented all these high-capacity magazine weapons.) A law abiding Italian just goes into his local gun store and buys whatever he wants with no permit or waiting period required. There is but one exception: Without a special license, Italians may not purchase handguns in the "military caliber," i.e., 9mm Parabellum. But they are free to buy more powerful handguns in .45 ACP, 10mm and .40 S&W, and 9mm Ultra as well as handguns in 9mm Long and 9mm Short or of

³² Don B. Kates & Gary Mauser, *Would Banning Firearms Reduce Murder and Suicide: A Review of International Evidence*, 30 HARV. J.L. & PUB. POLY 649 *passim* (2007). The suicide rate was also almost four times higher. *Id.*

³³ *Id.*

³⁴ See Randy E. Barnett & Don B. Kates, *Under Fire: The New Consensus on the Second Amendment*, 45 EMORY L.J. 1139 (1996).

any type other than 9mm Parabellum.³⁵ The reason for this exception is simple: it is aimed at the keeping of weapons for revolution, political assassination or terrorism whereas American gun restrictions are aimed at apolitical violence.

Law abiding Austrians are free to buy any revolver they want without permit or other restriction, including such ultra-powerful ones as the .500 S&W magnum, the .500 Linebaugh, the .480 Ruger, the .475 Linebaugh, the .454 Casull, and the less powerful .44, .41 and .357 Magnums. Somewhat like New York, New Jersey, Massachusetts, Connecticut, Missouri, and North Carolina, which require a permit to buy *any kind* of handgun, Austrians are required to have a permit to buy semi-automatic pistols. But unlike those states, Austrian law requires that a permit issue if the handgun is for self-protection. As in Italy, a special permit is required for a semi-automatic in 9mm Parabellum, but Austrians are free to buy a semi-automatic in any other caliber and there is no restriction on high capacity magazines.

Law abiding French citizens need no permit to buy any revolver with a nineteenth century *design*, i.e., “cowboy guns,” and that includes *twenty-first century-manufactured copies* of cowboy guns. Permits are required for any other handgun but, again, they are freely granted to the law abiding for protection.

The foregoing is not to deny that the spectacular growth of post World War II violent crime in Europe belatedly prompted some nations to adopt severely restrictive gun laws in the last quarter of the twentieth century. The authoritative (and anti-gun) Swiss Small Arms Survey estimates that nine such European nations have fewer than 5,000 firearms per 100,000 people. In contrast, it estimates that seven European nations have gun possession ratios that exceed 15,000 per 100,000 people. But gun control works no better in Europe than in America; the murder rates of the low gun-possession nations are three times *higher* than the murder rates of the high gun-possession nations.³⁶

³⁵ The facts set out regarding Italian, Austrian and French gun laws are validated in a series of memoranda I have filed with the *Cardozo Law Review*. In the course of the amicus briefing of the *Heller* case I directed a research effort into European gun laws which eventuated in an amicus brief by European professors asserting that the D.C. gun bans we were challenging were far more restrictive than many European gun laws. The memoranda were researched and written by American law students I hired who are literate in Italian, German and French respectively.

³⁶ Kates & Mauser, *supra* note 32.

A. *A Brief Digression on Violent Crime and Response Thereto in Europe*

Having been misled by the common American stereotype of peaceful Europe, I was shocked at what I saw in the nine trips I made as a tourist or to participate in conferences over the years 1995 to 2006. First, as a former American police official, I was stunned by the difference in European policing: neither in France nor the Czech Republic did I ever see a *lone* police officer. The police always traveled in groups of at least two and often as many as six officers. Routine police patrols looked like full-scale raids to one accustomed to American practices. Occasionally I would see a lone officer directing traffic, but on looking around I would see two or three other officers in a near-by police vehicle “covering” him.

As for the armament: On one trip I had occasion to fly in and out of Paris airports and many times be at Paris railway stations and on the subway. Wherever you looked there were police officers or officer-cum-soldiers carrying fully automatic weapons as well as sidearms. As I walked by an ordinary jewelry store in Venice, Italy I saw a private security guard carrying a sub-machine gun in addition to a handgun. In contrast, over a lifetime of observation, roughly a decade of it as a police official, I have never seen an American police officer carrying a fully automatic weapon for routine patrol.

Building design is also indicative: Unlike U.S. banks, all over Europe I saw banks with only one entrance which consisted of multiple massive bullet-proof glass doors, electronically controlled from inside the bank. Assuming a robber could get in to rob the bank, how would he get out? Bank personnel could be coerced to open the inner door, but the outer door will not open while the inner is open. If he went through the inner door it would close behind him, the bank personnel would not open the outer door and the robber would end up trapped between the two doors, waiting for the police to arrive. Alternatively, he could refuse to enter the inner door and just wait in the bank until the police arrive, or he could kill all the bank personnel (and then just wait in the bank till the police arrive).

V. CRIMINALS HAVE NO RIGHT TO ARMS

In another venue I have addressed this question at some length³⁷ so I shall try to briefly summarize the points made there:

From ancient Greece to present day America, societies that saw their people as having a right to arms always limited that right to trustworthy adults. Obviously, serious felons are not trustworthy.

The Second Amendment speaks of a “right of the people”—and in the time of its authors “the people” did not include serious criminals. Under eighteenth century law, felons were “civilly dead,” i.e., they lost all their property. Moreover, they were often dead in fact, for death was the penalty for felons. Contemporary proposals guaranteeing the right to arms limited it to peaceable citizens.

All these things taken together strongly buttress the claim that laws against gun possession by serious felons are valid. This does not imply that individuals may be deprived of their right to arms because they were convicted of violating one of the innumerable trivial crimes which under today’s laws may be defined as felonies. Our legislatures should enact definitions of the kind of serious crimes whose commission should preclude malefactors from the right to arms.

Such preclusive laws probably should be limited in time so that 10 or 20 years of blameless conduct would be a basis for a former felon’s exclusion from bans on gun possession. The statistical evidence, however, shows that serious felons commit hundreds of crimes per year; they simply do not have years of blameless conduct.

CONCLUSION

Modern criminological research imperatively supports the confidence of the Founding Fathers in the right to arms³⁸ and the safety with which that right may be reposed in the general citizenry.

The Founders and the philosophers they followed believed that self-defense was the cardinal human right, the one from which all others flow.³⁹ That right emphatically embraced—indeed was

³⁷ Kates & Cramer, *supra* note 21.

³⁸ See the discussion and examples, including Hobbes, Locke, and Montesquieu, cited in Don B. Kates, *The Second Amendment and the Ideology of Self-Protection*, 9 CONST. COMMENT. 87 (1992).

³⁹ *Id.*

coextensive with⁴⁰—the right to arms.⁴¹ It was a right to effective self-defense, not the trivial “right” anti-gun advocates concede, i.e., the “right” of a 110-pound woman to futilely struggle unarmed against a 200-pound attacker who rapes and strangles her. But that right did not and does not extend to criminals whose misconduct separates them from the general citizenry described by the Second Amendment as “the people.”

⁴⁰ This is epitomized by a 1790 lecture by Supreme Court Justice and law professor James Wilson. Here is how Wilson explained why a victim may lawfully use deadly force in self-defense:

[Such self-defense is sanctioned by] the great natural law of self preservation, which, as we have seen, cannot be repealed, or superseded, or suspended by any human institution. This law, however, is expressly recognized in the Constitution of Pennsylvania. “*The right of the citizens to bear arms in defense of themselves shall not be questioned.*”

James Wilson, *Of Crimes Against the Right of Individuals to Personal Safety*, in 3 THE WORKS OF THE HONOURABLE JAMES WILSON, L.L.D. 77, 84 (Bird Wilson ed., Philadelphia, Lorenzo Press 1804) (emphasis added).

⁴¹ Consider the statement of Roger Sherman: “[I] conceive it to be the privilege of every citizen, and one of his most essential rights, to bear arms, and to resist every attack on his liberty or property, by whomsoever made.” STEPHEN P. HALBROOK, THE FOUNDERS’ SECOND AMENDMENT: ORIGINS OF THE RIGHT TO BEAR ARMS 262 (2008).