

# The Swerve: A Legal and Empirical Evaluation of the Move to “Guns Everywhere”

John J. Donohue<sup>1</sup>

September 9, 2019

Forthcoming, Law and Contemporary Problems  
(Preliminary Draft)

## Abstract

Over the past forty years, there has been an astonishing shift in the American legal landscape on the issue of carrying of concealed handguns outside the home. At the start of that period most states – with strong Republican backing -- either prohibited or at least tightly regulated the practice. Today, the large majority of states confer the “right-to-carry” with little or no restriction, and many argue, with limited but increasing judicial support, that there is an individual right under the 2d Amendment to carry guns outside the home. One argument used to justify this development was that good guys with guns would quickly thwart mass shootings in the U.S., yet since the end of the federal assault weapons ban in 2004, deaths from mass shootings have been rising sharply – even as lawful gun toting has increased substantially. Moreover, a growing body of evidence suggests that allowing expanded gun access outside the home has elevated violent crime. This paper discusses the empirical evidence on these issues and argues that courts considering constitutional decisions that may impose large social costs in terms of increased gun massacres and violent crime should reflect on this evidence in interpreting the Second Amendment.

There has been a profound shift in the legal landscape concerning firearms over the last forty years. Before then, substantial state restrictions – even complete prohibitions -- on gun carrying were quite common and they enjoyed considerable support among Republican voters and politicians. Today, there is a strong “guns everywhere” element in almost all states, and Republicans feel compelled to articulate and advance this mission.

No current Republican office holder would have the temerity to state “I have never believed in the general practice of carrying weapons,” while praising state gun control laws in Congress. But NRA President Karl T. Frederick, 1920 Olympic gold-medal winner for marksmanship and then lawyer, so stated while testifying in support of the 1934 federal gun control act. He went on to articulate a belief that today’s NRA and Republican office holders would find horrifying: “I do not believe in the general promiscuous toting of guns. I think it should be sharply restricted and only under licenses.”

---

<sup>1</sup> Thanks to Theodora Boulouta, Trevor Hastie, and Rob Tibshirani for helpful comments and suggestions on aspects of this paper.

Today the denunciations of communist leadings would abound if Alexandria Ocasio Cortez were to proclaim: “There’s no reason why on the street today a citizen should be carrying loaded weapons.” Guns are “a ridiculous way to solve problems that have to be solved among people of good will.” The pro-gun forces would thunder scornful attacks against anyone who could spout such anti-American nonsense. But this proclamation came from Ronald Reagan in May 1967.<sup>2</sup>

The renowned conservative Republican and former Chief Justice of the U.S. Supreme Court Warren Burger [told](#) PBS’ News Hour in late 1991 that the Second Amendment “has been the subject of one of the greatest pieces of fraud, I repeat the word fraud, on the American public by special interest groups that I have ever seen in my lifetime.” Burger was dismayed at the attempts to thwart reasonable gun control measures with what he considered to be phony and absurd interpretations of the Second Amendment. Despite acknowledging that he was “a gun man. I have guns. I have been a hunter ever since I was a boy,” Burger continued: “Someone asked me recently if I was for or against a bill which was pending in Congress calling for five days waiting period. I said ‘Yes, I’m very much against it. It should be a 30-day waiting period, ‘till they find out why this person needs a handgun or a machine gun.’”<sup>3</sup>

A similar sentiment was captured in the remarks of former Nixon solicitor general Erwin Griswold, when he stated: “To assert that the Constitution is a barrier to reasonable gun laws, in the face of the unanimous judgment of the federal courts to the contrary, exceeds the limits of principled advocacy. It is time for the NRA and its followers in Congress to stop trying to twist the Second Amendment from a reasoned (if antiquated) empowerment for a militia into a bulletproof personal right for anyone to wield deadly weaponry beyond legislative control.” These remarks *came from* a ‘lifelong Republican with a background of Midwest conservatism,’ who ‘is built like a granite block and is just as inflexible in his conceptions of basic rectitude.’”<sup>4</sup>

By the mid-1970s, 45 states and the District of Columbia either banned concealed carry of firearms, or restricted it to those who could establish themselves to be an appropriate candidate for a concealed carry permit. As late as 1986, 16 states completely prohibited private gun carrying and all but eight required some government scrutiny to determine if someone should be allowed to carry a gun outside the home.

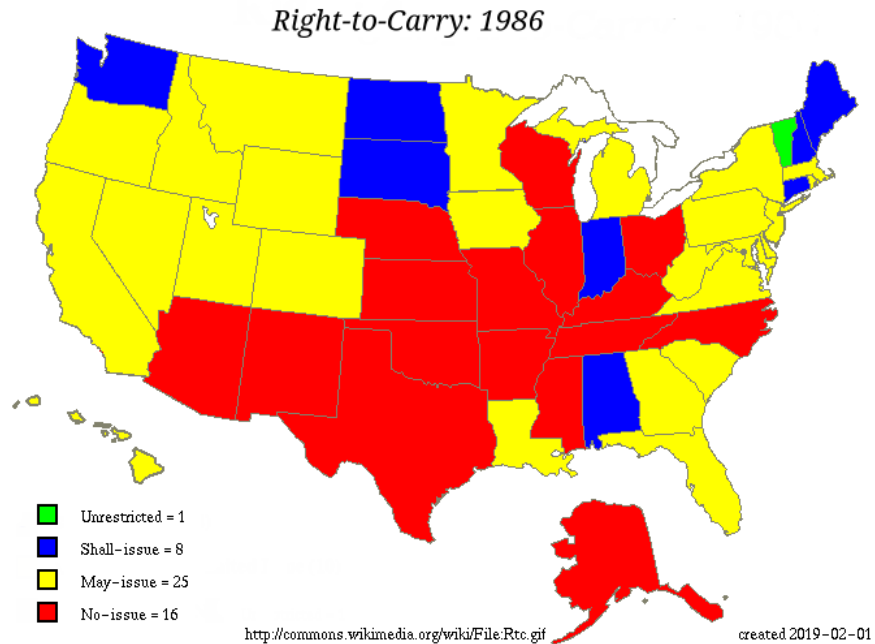
---

<sup>2</sup> [https://www.salon.com/2013/01/23/7\\_uncovered\\_quotes\\_that\\_reveal\\_just\\_how\\_crazy\\_the\\_nras\\_become/](https://www.salon.com/2013/01/23/7_uncovered_quotes_that_reveal_just_how_crazy_the_nras_become/)  
Indeed, Ronald Reagan was also in favor of the Brady bill that was name after his former press secretary who took a bullet to the head during the attempted assassination of Reagan by John Hinckley.

<sup>3</sup> <https://www.berkshireeagle.com/stories/burger-saw-through-the-gun-fraud,422093>

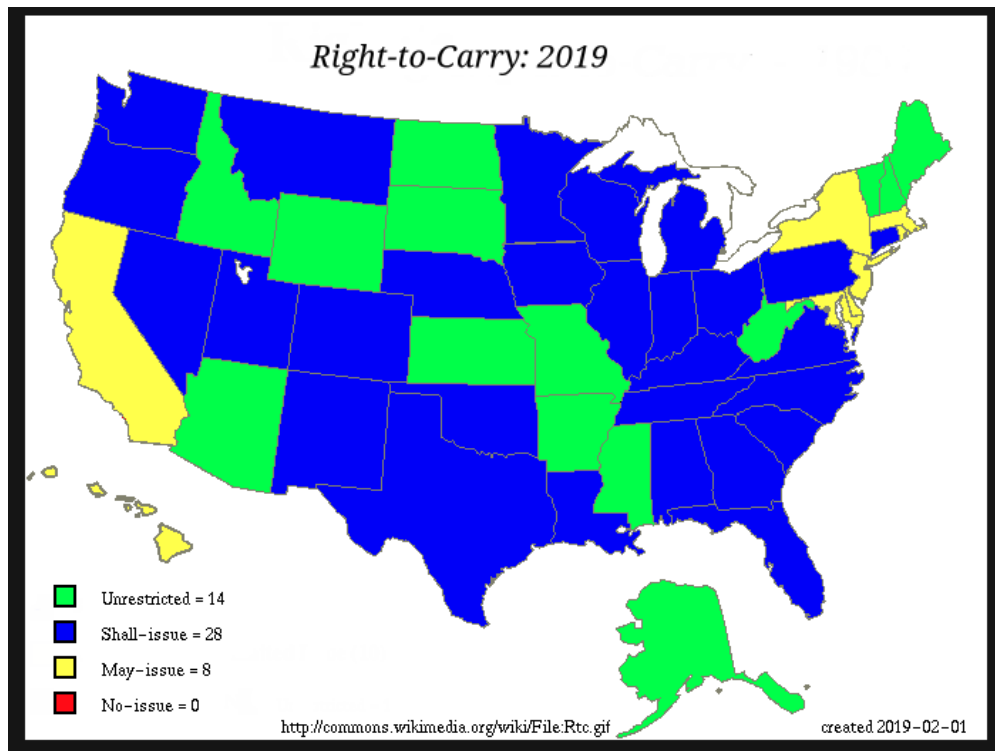
<sup>4</sup> Dennis Hevesi, “Erwin Griswold Is Dead at 90; Served as Solicitor General,” *The New York Times*, 21 November 1994.

Figure 1



Jump to today and all state prohibitions on gun carrying have been eliminated and 14 states have no removed all restrictions on who can carry within the state. So, for example, any 19 year old in Missouri is allowed to carry a concealed weapon without establishing good character, need for a weapon, or having any training in its use. When the University of Missouri tried to enforce its 60 year old ban of guns on campus to avoid having armed 19 year olds in the classrooms and roaming its campus, it was sued – and the Missouri Attorney General argued that the Constitution called for overturning the ban.

Figure 2



## I. Stopping Mass Shootings

One of the alleged benefits of this shift to unrestricted rights to carry guns outside the home is that the threat of public mass shootings would be greatly reduced.<sup>5</sup> Not only would the good guys with guns quickly end any threat once a shooting started, but the realization that their homicidal visions would not be achieved would greatly discourage any such criminal conduct.

The gun lobby tries to encourage this way of thinking, since it advances a very benign, even heroic, vision of gun toters that can usefully be invoked against any efforts to enact gun safety measures. It also promotes sales to those looking for what might seem to be an easy path to an elevation in status as the person who thwarts a crime. This advertisement tries to convey the sense of the wholesome gun carrier who will provide a protective shield to all those around him.

---

<sup>5</sup> John Lott originally advanced this argument, and the NRA made it a rallying cry after the killing of 26 at Sandy Hook Elementary School in Newtown, Connecticut in December 2012.



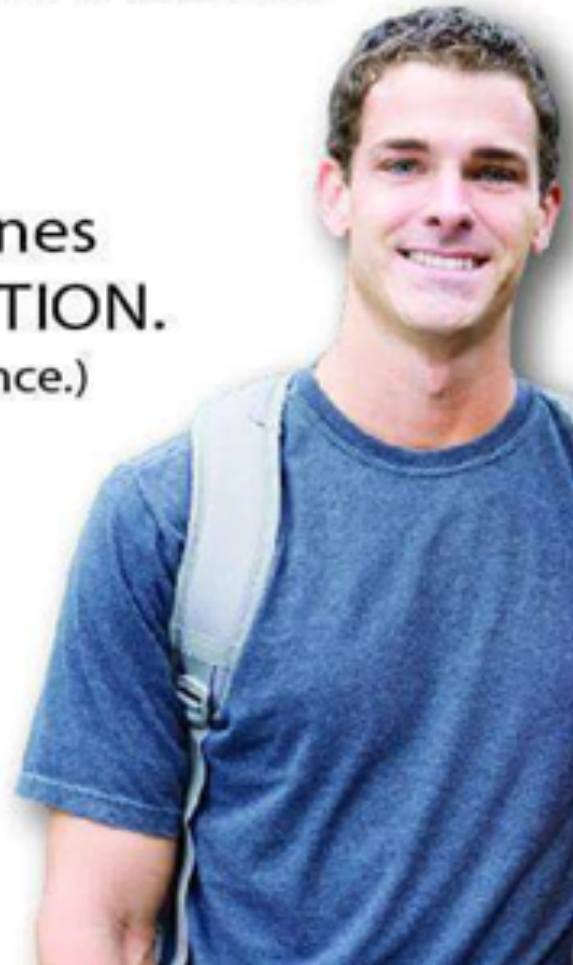
Figure 3

# **I CARRY A CONCEALED FIREARM.**

I take my firearm  
into "GUN FREE" zones  
**FOR YOUR PROTECTION.**  
(It's called Civil Disobedience.)

I won't be a victim,  
And I won't let you  
be a victim either.

**TAKE THE PLEDGE!**  
**use the hashtag**  
**#CCW247**



But the smiling visage can distract from the broader reality of the consequences of the dramatic expansion of gun carrying in the United States. Whatever element of the imaginary advertisement is useful for thinking about this shift in policy, it is also useful to consider actual cases that can provide a more complete picture. For example, as Figure 4 indicates, one very real downside of the guns everywhere movement is the resulting impact on accidental deaths. The Figure shows a six-year-old girl who was killed in the family car outside of Atlanta in April 2019 when her younger brother grabbed a gun from the car's center console on the way to his baseball game and shot his sister in the head.<sup>6</sup>

Figure 4

### A 6-year-old girl has died after being shot by her 4-year-old brother

Kelly and her brother were going to his baseball game with their mother when the boy retrieved a handgun from the car's center console, and the 4-year-old accidentally discharged it.

The accidental shooting happened about 6 p.m. inside a car parked in the driveway of a home outside Atlanta. (April 2019)

"Our hearts break for this family and we hope God puts his healing hands around them during this difficult time," Sheriff Gary Gulledge said in a statement Thursday morning.

No charges will be filed in the case, Henson said.



Moreover, the vision of the protective shield afforded by gun carriers seems to be at odds with the empirical evidence. FBI data shows a remarkable surge in active shooter incidents even as the number of law-abiding citizens strolling along with concealed weapons in tow has risen sharply, as reflected in Figure 5: "In 2017 there were 30 separate active shootings in the United States, the largest number ever recorded by the FBI during a one-year period."<sup>7</sup> The FBI noted that while armed security and police were able to stop mass shooters, armed civilians rarely played any positive role in these deadly episodes. Indeed, in the 160 active shooter incidents over the period from 2000-2013 covered in the report, no private citizen who was not armed

---

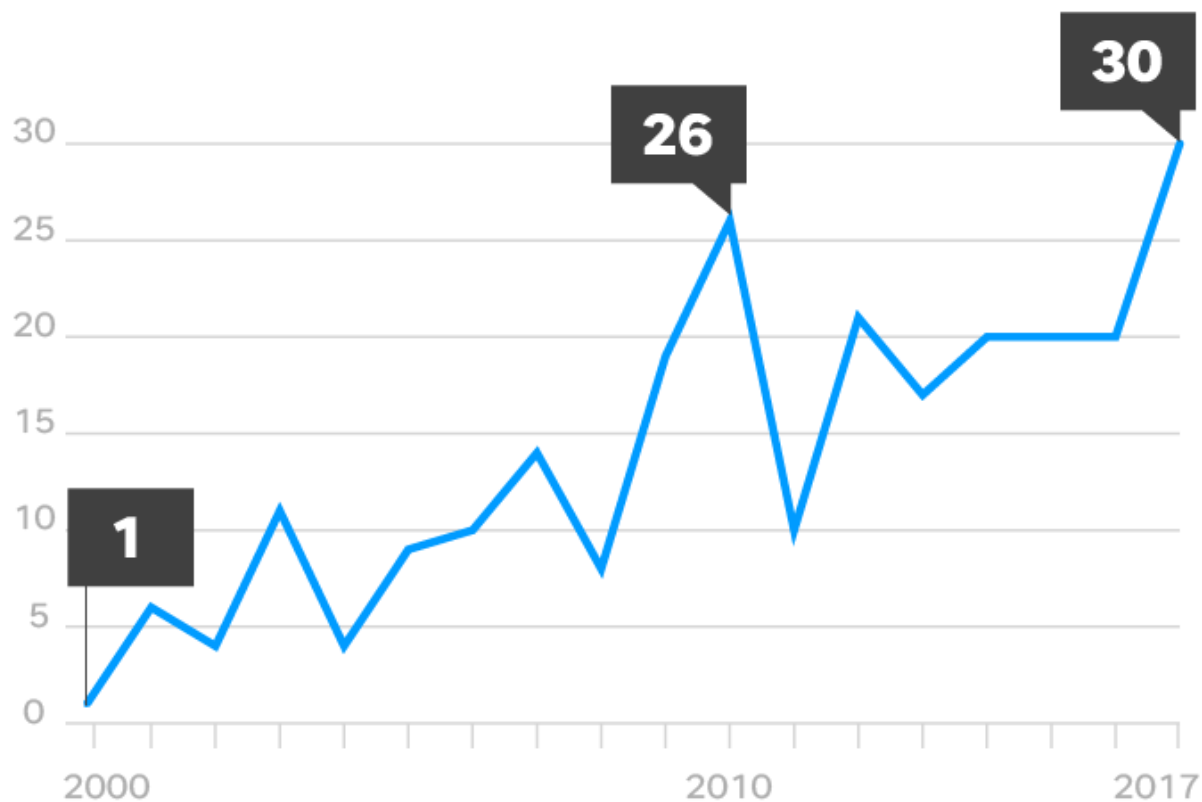
<sup>6</sup> <https://www.ajc.com/news/breaking-news/breaking-year-old-girl-dies-days-after-accidental-shooting-paulding-county/E7UeP5AijlUqfbq81XRqcI/#>

<sup>7</sup> James Silver, et al, "A Study of the Pre-Attack Behaviors of Active Shooters in the United States," June 2018. <https://www.hsdl.org/?abstract&did=812282>

security or active duty military played any positive role in these incidents.<sup>8</sup> Moreover, even when police did need to intervene to stop a mass shooting, this was a dangerous task. In almost half of the episodes where police fired upon a mass shooter, one or more officers was shot or killed. The smiling gun toter of the gun advertisement is a far cry from the reality of dealing with a modern-day mass shooter, possibly equipped with far more lethal firepower than one would have in a concealed carry holster.

Figure 5

## Active shooter incidents on the rise, with 2017 topping all years since 2000.



SOURCE FBI data and the FBI's report on active shooter incidents in the United States in 2016 and 2017

<sup>8</sup> One private citizen who was active duty military did kill a shooter in 2008 at a bar in New Mexico, although it is not clear if the shooting was already completed in that case. For comparison, 21 of the 160 active shooters were stopped by unarmed civilians.

Indeed, important work by Louis Klarevas<sup>9</sup> not only highlighted the dramatic increase in public mass shootings but also suggested that the constraining influence on those deaths was not gun carrying by private citizens but the federal assault weapons ban, which had been in place from 1994-2004 (when George W. Bush reneged on his presidential campaign promise to reauthorize the law and it was allowed to lapse). To further probe this finding, Theodora Boulouta and I culled through the Mother Jones Mass Shooting Database to shed light on the alarming increase in gun massacres (in which a shooter killed at least six individuals in public over a 35-year period, not including crimes of armed robbery, gang violence, or domestic violence) since the end of the federal assault weapons ban.<sup>10</sup> Figure 7 shows the number of incidents of such gun massacres and the deaths resulting therefrom. The Figure reveals a number of important points.

First, cases of public mass shootings where six or more individuals die have been growing sharply over the last 15 years – a period when the legal ability to carry guns outside the home has grown dramatically. Of course, it is not the growing number of lawfully carried guns that is leading to proliferation in mass shootings, but there is certainly no indication that this expanded gun toting has slowed the growth in these gun massacres.

Second, one sees that the number and deadliness of these mass shootings dropped during the ten years of the federal assault weapons ban from September 1994 through 2004 and rose sharply after the federal ban was lifted.<sup>11</sup> Although the number of incidents is too limited to highlight the 25 percent drop in gun massacres, the 40 percent drop in overall fatalities during the period of the federal ban is noteworthy.

On its face, this is plausible since for that decade mass killers could not simply waltz into a gun store and buy an assault weapon with a large capacity magazine, as they can do in most of the U.S. today.<sup>12</sup> On the other hand, Figure 7 also notes that overall violent crime dropped by roughly 14 percent during the decade of the federal assault weapons ban. This raises the question of whether the decline in gun massacres and deaths was simply part of larger drop in crime. The short answer is no.

After the federal ban lapsed in 2004, the gun industry was able to flood the market with increasingly more powerful weapons that allow mass killers to kill ever more quickly with predictable results. The decade after the ban elapsed saw a 266% increase in mass shooting incidents and a 347% increase in fatalities, even as overall violent crime continued downward.

---

<sup>9</sup> Louis Klarevas, *Rampage Nation: Securing America from Mass Shootings* (Amherst, NY: Prometheus 2016).

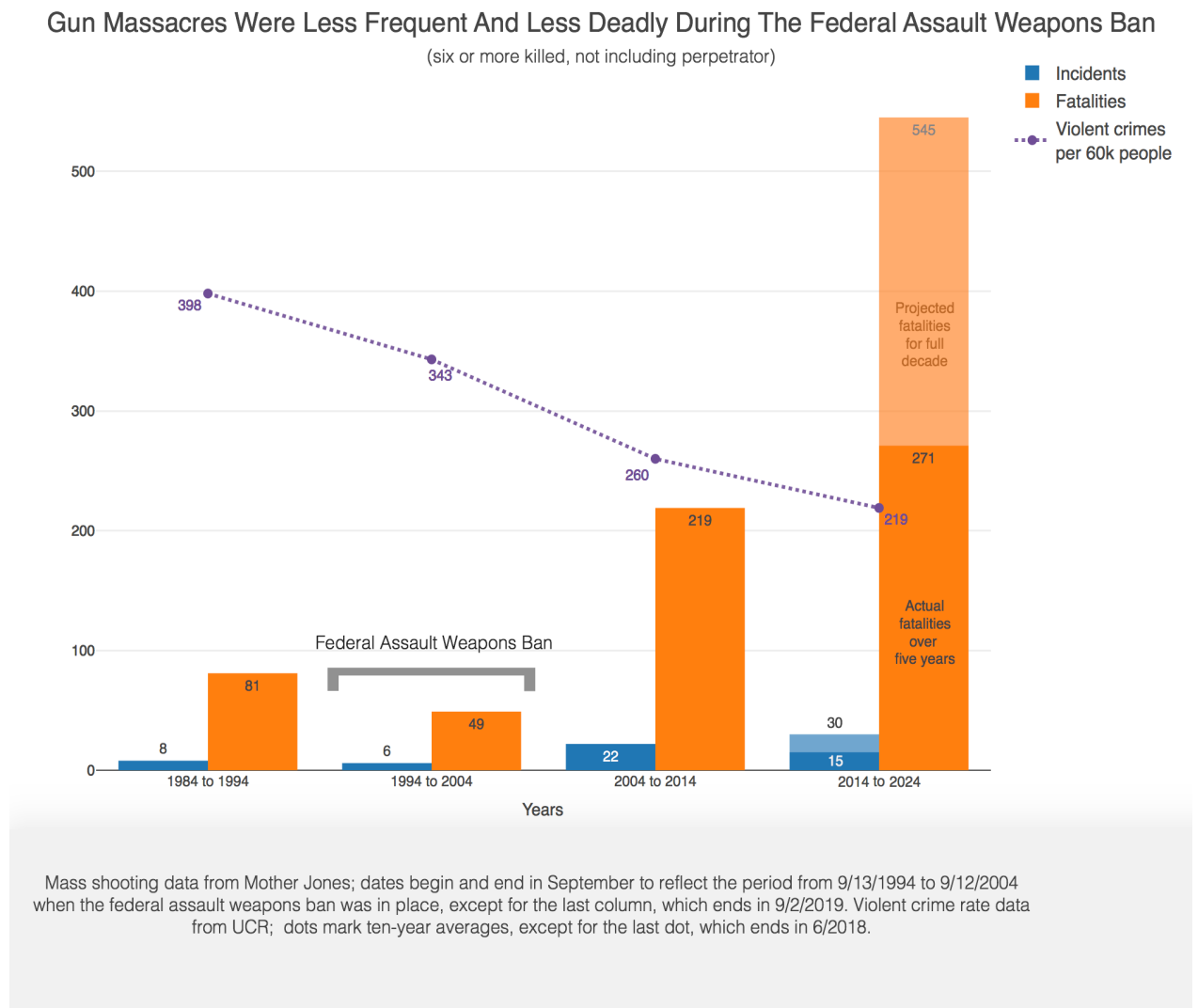
<sup>10</sup> Mother Jones has compiled a comprehensive listing and description of mass shootings from 1982 to the present. See, <https://www.motherjones.com/politics/2012/12/mass-shootings-mother-jones-full-data/>. See, John Donohue and Theodora Boulouta, “That Assault Weapon Ban? It Really Did Work,” *The New York Times*, September 4, 2019. <https://www.nytimes.com/2019/09/04/opinion/assault-weapon-ban.html>

<sup>11</sup> The Federal Assault Weapons Ban took effect September 13, 1994, and expired on September 13, 2004, due to a sunset provision that enabled the law to lapse after President George W. Bush reneged on his campaign promise to support retention of the federal ban.

<sup>12</sup> Only 7 states and the District of Columbia ban assault weapons and all of them plus Colorado and Vermont restrict the permissible size of the ammunition magazines.

In other words, an independent assessment confirms the pattern first revealed by Louis Klarevas: gun massacres fell during the assault weapons ban and rose sharply when it was removed in 2004.

Figure 6



What has happened since 2014 is even more alarming. In just under five years, the number of fatalities in these gun massacres has already topped the previous high for the decade after the federal assault weapon ban was removed (at the same time that overall violent crime persisted on a downward trend). If we continue at the post-2014 pace until 2024, the last column of Figure 7

shows that we will have an order of magnitude increase in gun massacre deaths over a 20-year period.<sup>13</sup>

Indeed, there is no reason to think that this ghastly upward trend will abate without concerted governmental effort. Every year the gun industry increases the deadliness of its weaponry, trying to facilitate the number of rounds that can be quickly fired with as much deadly consequence as possible through high velocity and tumbling projectiles.

It should be immediately clear that the percentage of mentally ill Americans did not drop substantially during the 10 years of the federal assault weapon ban and then suddenly rise rapidly when the ban was lifted. Mental illness is clearly not driving the alarming growth in fatalities from gun massacres.

In addition to the growing deadliness of the weaponry, the 2005 passage of a federal immunity statute did eliminate the threat of lawsuits that likely would have deterred gun industry advertisements designed to play on the weaknesses of troubled young men into believing that their perceived grievances could be remedied if only they possessed the latest assault weaponry. The deeply troubled 20-year old Adam Lanza used a Bushmaster rifle – advertised under the slogan “Consider Your Man Card Reissued” – to kill 26 at Sandy Hook Elementary School in 2012. No other industry is allowed to act so recklessly without facing legal challenge.



---

<sup>13</sup> We followed Klarevas’ six-death criterion for our definition of a gun massacre, and simply note that the numbers of mass shootings would be substantially larger using alternative definitions, such as the Gun Violence Archive definition of 4 individuals wounded by gunfire in a single incident. Using that more capacious definition, there have been [574 mass shootings](#), killing 596 Americans and injuring 2,315 more in the 555 days between the February 14, 2018 Parkland High School shooting and August 24, 2019.



## Newtown Shooter Adam Lanza



Figure 7 illustrates the number of fatalities in each mass shooting for the same four periods shown in Figure 6. The pattern is the same: fatalities per incident fell during the federal assault weapon ban and have risen sharply thereafter. With assault weapons getting increasingly more potent and plentiful, the average number of people who die in every incident has increased by 90% since the decade after elimination of the assault weapons ban. Assault weapons and/or high capacity magazines were used in at least 14 of the 15 gun massacres since 2014 (93 percent); at least 255 of the 271 people who died in gun massacres since 2014 (94 percent) were killed by weapons prohibited under the federal assault weapons ban.

The 19-year-old killer of 17 at Parkland High School<sup>14</sup> and the recent Dayton shooter<sup>15</sup> possessed traits that would have been disqualifying in our competitor nations from access to any firearm,

---

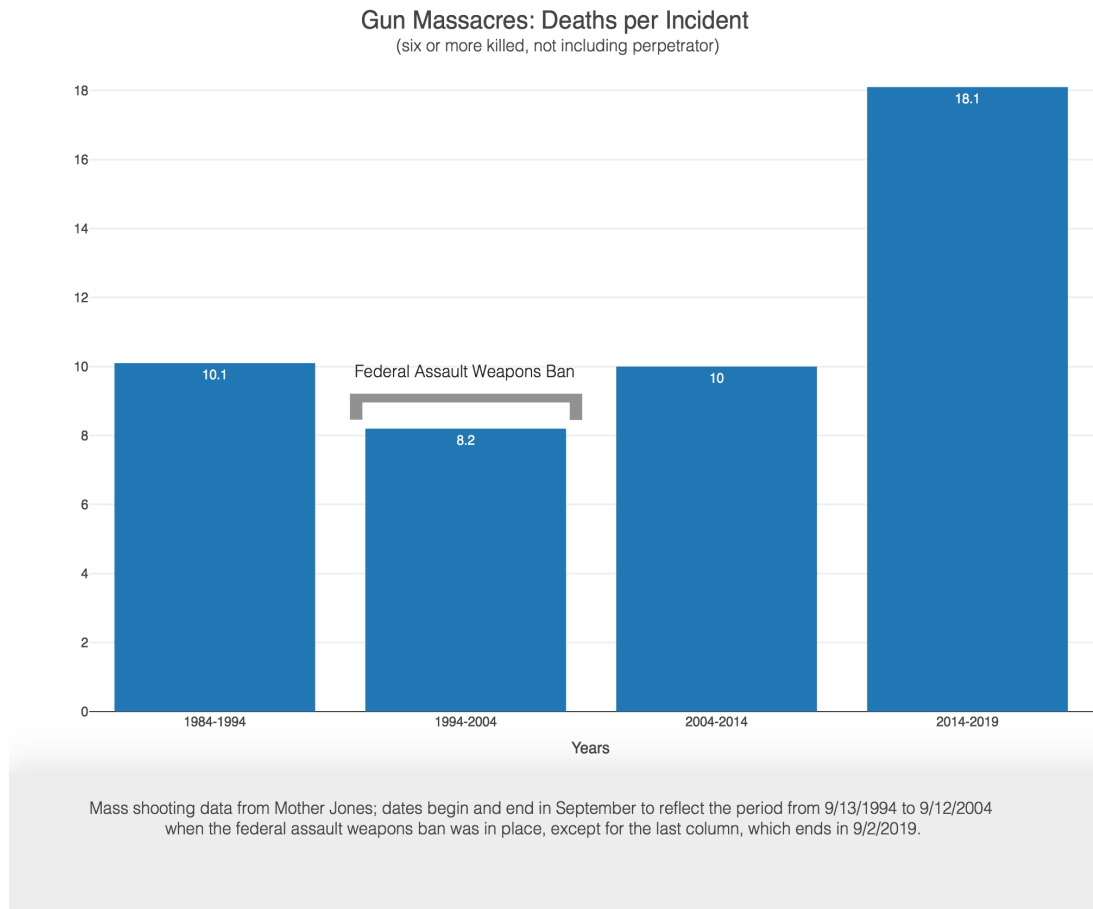
<sup>14</sup> The school was so concerned with the behavior of Nikolas Cruz that he was searched for weapons every morning before school. Needless to say, this is not the profile of someone that government authorities would readily grant a request for a license to have a firearm. <https://nypost.com/2019/07/26/parkland-shooter-was-searched-for-weapons-every-morning-before-school/>; <https://www.sun-sentinel.com/local/broward/parkland/florida-school-shooting/fl-ne-nikolas-cruz-threat-assessment-20190124-story.html>

<sup>15</sup> The warning signs for the Dayton shooter screamed out that this was a person who should not have access to weapons. <https://www.cnn.com/2019/08/05/us/connor-betts-dayton-shooting-profile/index.html>. Being kicked out of school for having a "hit list" of people he wanted to kill or rape would ordinarily be frowned upon by those evaluating fitness to have a gun. Indeed, almost every mass shooter except the Las Vegas shooter showed dramatic signs that they should not be near weapons, but of course many of the people who should have understood these signs did nothing and sometimes even failed to perceive danger. For example, Nancy Lanza actually seemed to think it was good that her disturbed son Adam should have access to firearms. She paid with her life, but 25 other families also were destroyed because of her mindless enthusiasm for guns and their protective power.

The mother of the mass killer at Umpqua Community College in Oregon had a similar benevolent view of her son's fascination with guns despite her knowledge of his struggles with mental illness and the fact that he had once threatened her with a shotgun. She boasted online of how their arsenal would keep them safe from intruders

let alone an AR-15 style weapon.<sup>16</sup> In the U.S., they were just considered “law-abiding citizens” – until they committed mass murder.

Figure 7



Not surprisingly, this evidence was discomfiting to those who resist efforts to reduce gun massacres through appropriate legislative steps. Jacob Sollum responded in the libertarian journal *Reason* that the evidence that gun massacre deaths declined during the decade of the federal assault weapons ban is “suspiciously selective,” because Figures 6 and 7 defined gun

---

and sneered at legislative efforts directed at gun safety: “I keep two full mags in my Glock case. And the ARs & AKs all have loaded mags. No one will be ‘dropping’ by my house uninvited without acknowledgement.” <https://www.nytimes.com/2015/10/06/us/mother-of-oregon-gunman-wrote-of-keeping-firearms.html?smid=pl-share>; Julie Turkewitz, Oregon Gunman Smiled, Then Fired, Student Says, N.Y. Times (Oct. 9, 2015), <http://www.nytimes.com/2015/10/10/us/roseburg-oregon-shooting-christopher-harper-mercier.html> (noting eight students and a professor were killed in an attack in Oregon in October 2015).

<sup>16</sup> <https://theconversation.com/how-us-gun-control-compares-to-the-rest-of-the-world-79490>



massacres to be those public mass shootings in which at least six individuals were killed by the gunman.<sup>17</sup>

But there was nothing suspicious or selective in the definition of gun massacre, which was taken from the afore-mentioned important work of Louis Klarevas that identified a pattern that was suggestive that the federal assault weapons ban had suppressed these deaths and its removal had revived them. Since one hallmark of science is replicability, I asked Theodora Boulouta to see if we could investigate the robustness of Klarevas' finding using an alternative database, using our own judgments about what constituted a public mass shooting that would follow some of the insights from recent FBI work on active shooter incidents in the U.S. Figures 6 and 7 not only vindicated Klarevas's finding but indeed even strengthened it by including the latest five years of data.

One can almost hear the voices at *Reason* cry out: "But all you have shown is that Klarevas is the one who is guilty of this devious selective definition." Unfortunately, the truth is even more unsettling for the libertarians and the gun lobby. Whether one looks at shootings defined by at least six deaths, at least five deaths, or at least four deaths, the same patterns we see in Figures 6 and 7 still hold.

As one can see in Figure 8, gun deaths fell by almost 30 percent during the decade of the AWB and then rose sharply using Sollum's preferred definition of at least four killed in the public mass shooting. Moreover, in Figure 9, one also sees fatalities per episode restrained during the AWB. In fact, while Sollum thought one should use a more inclusive definition of gun massacres, it is actually useful to see what happens when you use a more restrictive definition that only looks at gun massacres in which, say, at least ten individuals were killed by the shooter.

---

<sup>17</sup> <https://reason.com/2019/09/05/a-suspiciously-selective-logically-shaky-analysis-of-mass-shooting-data-claims-the-federal-assault-weapon-ban-really-did-work/>

Figure 8

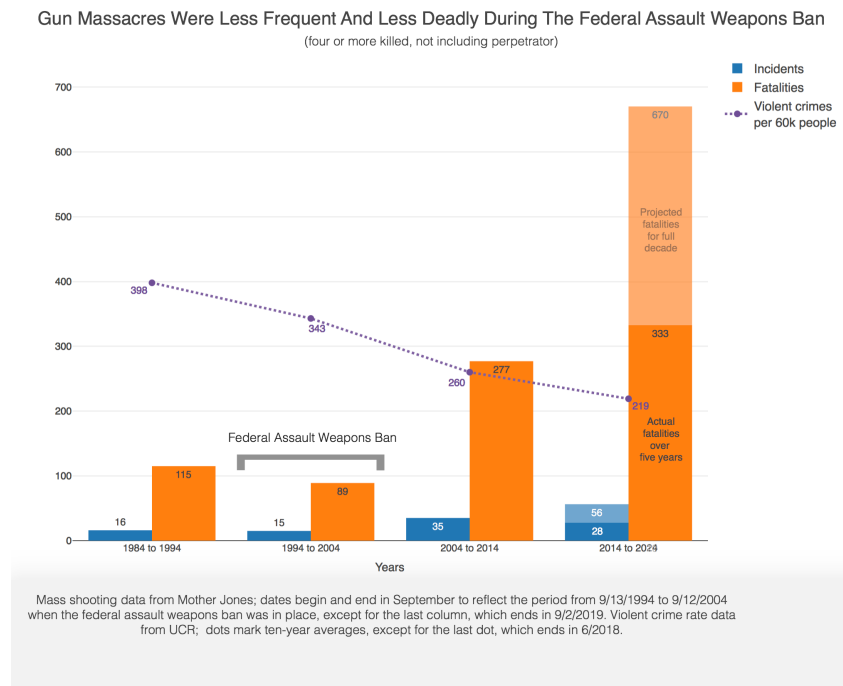
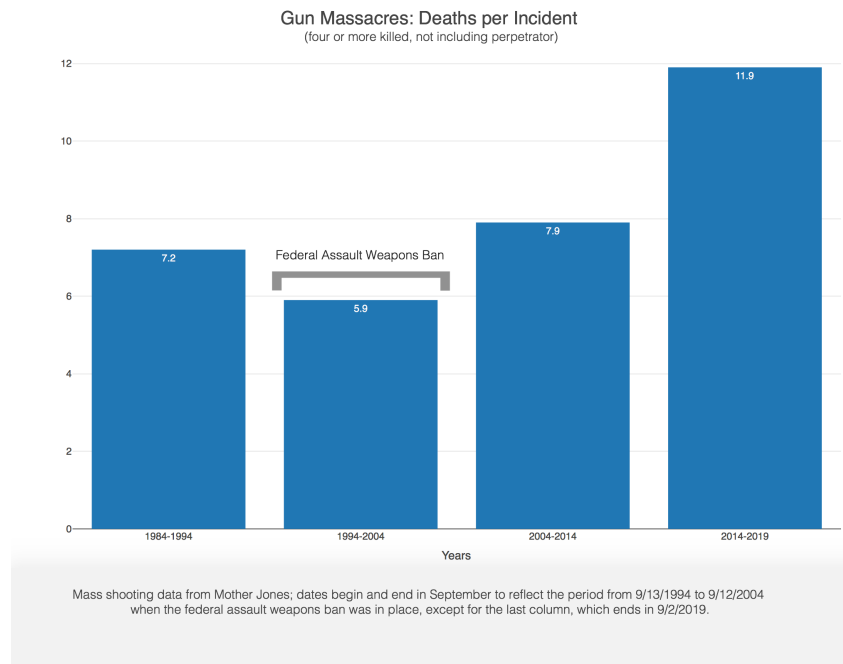


Figure 9



With this more restrictive definition, we see that there were 5 such high-fatality public shootings in the decade prior to the assault weapons ban and only one during the decade of the ban – the Columbine shooting, which was one of the few cases of having more than 1 shooter. But what happened when the ban ended? The U.S. suffered through 7 of these horrific killings in the next decade. In other words, there was an 80 percent drop in these most deadly massacres during the ban and a 600 percent increase following the ban.

This research highlights the causal mechanism -- the restraining of the ability of weaponry to rapidly kill -- that explains why the federal assault weapons ban was effective and why its elimination has facilitated more deaths in public mass shootings. When the government imposes wise restraints on the ability to kill wantonly and voluminously, the number of deaths from these traumatic mass shootings will fall. Of course with less powerful weaponry available to those who would commit mass murder, fewer cases make it across any given threshold since the most dangerous weapons help one get over the bar.

The *Reason* article does inadvertently make two rather good points, which its author would likely be unhappy to learn. First, the author buttresses the point that the gun lobby did try to dampen the effectiveness of the assault weapons ban by restricting the array of weapons that would come within its prohibition. One confused commenter on our article thought he had issued a fatal blow by pointing out that he has two rifles – an AR-15 (pictured immediately below<sup>18</sup>) and a Mini-14 (pictured thereafter<sup>19</sup>) – and only the AR-15 would be deemed a prohibited assault weapon.<sup>20</sup>

But this point fails for two reasons. First, imagine that you are one of the typical feckless, deeply troubled males who feels powerless and hopeless who might be inclined to engage in a public mass shooting to finally show their manliness. In other words, someone like Adam Lanza or the Parkland shooter or so many others mass killers. Gun industry imagery is very moving to such troubled young men, and if one of them was trying to assert his power and manliness, which of these two guns do you think, the budding mass killer would gravitate towards – the AR-15 or the Mini-14? There is a reason that assault weapons are advertised under slogans like “Consider your Man card reissued,” while the Mini-14 is not.

---

<sup>18</sup> <https://tinyurl.com/y5wkmohd>

<sup>19</sup> <https://tinyurl.com/y5lqfp45>

<sup>20</sup> It should be noted that the federal assault weapons ban did apply to the Ruger MiniThirty Rifle and to some Mini-14 models, such as the Ruger Mini-14 Auto Loading Rifle without side folding stock, while the pictured model was not covered.

Figure 10

AR-15 (top picture) and a Mini-14 (below)



Indeed, if you scan the entire Mother Jones data base using the most expansive definition of at least four killed that the *Reason* magazine implicitly endorsed, one learns that no public mass shooting in the U.S. has ever used a Mini-14. Indeed, there was even a gun massacre where the mass shooter brought one along but opted not to use it.<sup>21</sup> Mass killing in America is typically about more than just killing a lot of people; it is also about asserting one's power when one feels utterly hopeless and powerless. The Mini-14 may do fine in achieving the first goal but it seems to be far less appealing on the second dimension – even though it has become popular in the states that have assault weapons bans that do not extend to it.<sup>22</sup>

So the first point is that even if these two guns functioned identically in every mechanical respect, it could still make sense to ban the first and not the second, since we would be depriving the mass killer of his preferred vehicle to live out some final homicidal fantasy. I am still willing to grant the thrust of the point though that a renewed assault weapons ban should be more functionally capacious since at least some mass shooters may simply turn to the next best alternative. This concern might suggest that anything that approximates the deadliness and capacity to facilitate mass murder of an AR-15 should be removed from civilian usage, apart from carefully restricted shooting ranges.<sup>23</sup>

But the second reason that the claims in the *Reason* magazine article are completely misguided is that they fail to recognize the key point that the federal assault weapons ban limited the size of gun magazines to ten rounds. There is no way in the world that in a few minutes the Las Vegas shooter could have inflicted the level of damage that he did without having access to high capacity magazines and this is the reason that virtually all the deaths from gun massacres in the last five years have come from weapons equipped with such magazines. The ten-year ban on such magazines sharply drove up their price and limited their availability so it is not surprising that even when public mass shootings occurred, the body count was curtailed during the decade of the ban. The *Reason* magazine comparison of an assault weapon and a Mini-14 simply ignores that you can kill more people and limit the chance for escape and counterattack with a larger magazine. Thus, both weapons are now more dangerous than they were during the period of the federal assault weapons ban.

---

<sup>21</sup> <https://www.nytimes.com/2003/07/09/us/man-kills-5-co-workers-at-plant-and-himself.html>

<sup>22</sup> “The Mini-14 is particularly favored in states with so-called assault weapons bans, which ban semi-automatic rifles with pistol grips and detachable magazines. Although the Mini-14 has detachable magazines it has a more traditional rifle grip.” (<https://nationalinterest.org/blog/buzz/meet-ruger-mini-14-rifle-most-underappreciated-gun-planet-45607>).

<sup>23</sup> For those who think that AR-15's and the like are simply recreational toys, I would advise them to read the Defense Department reports on why the gun was chosen for battlefield use in Vietnam. Essentially, the speed of fire of and devastating injuries inflicted by the AR-15 make it one of the most effective mass killing technologies available – even when restricted to only semi-automatic operation, which is actually the customary battlefield mode of fire.

But at least isn't it helpful that Texas has recently taken steps to allow guns to be carried everywhere so that these mass shootings can be quickly stopped? It is correct that "good guys with guns" can play a very positive role in ending these mass shootings. They are called "the police."

Armed and well-trained police showed their effectiveness in quickly ending three recent mass shooting episodes – although sadly not until many had been killed or severely injured (because of the increasing deadliness of modern weaponry). Certainly, one couldn't expect untrained private citizens to do better than the police in these three cases, so it is clear that further steps are needed to reduce the probability of active shooter episodes and the deadliness of those that occur.

What is striking is that while the number of mass shootings rises, we see so little of any helpful role played by private gun carriers, despite the large and growing number of carrying permits. This is not surprising because these events unfold quickly, and even trained individuals have difficulty intervening against a homicidal killer with an assault weapon (recall the security guard at Parkland high school who did not move toward the shooter). A high proportion of the time that police engage such shooters they themselves will be shot or killed, so private individuals with guns who try to intervene face challenging odds (and have at times paid with their lives for doing so with no benefit to the public). Recall that the police officer who charged into a crowded bar to stop the Thousand Oaks massacre was struck by 6 bullets — 5 fired by the gunman and 1 fatal shot fired by a California Highway Patrol officer. Moreover, the first person killed by that gunman was the armed security guard in the bar.

It is also worth remembering that almost all of the mass shooters from Columbine, Sandy Hook, Aurora theatre shooting, Fort Hood, Washington Navy Shipyard, Isla Vista, Orlando nightclub, Las Vegas, Parkland High School, Virginia Beach, and the three episodes of the last month in Gilroy, El Paso, and Dayton met the NRA definition of "law abiding citizens"—until they became mass killers. Much more needs to be done to keep guns away from such good guys.

## II. The Impact of RTC Laws

My study examining the impact of right to carry laws raised another concern: whatever benefit might come from gun carrying by private citizens seems to be more than offset by overall increases in violent crime. A number of recent studies have found that permissive gun carrying leads to higher rates of homicide and there is little question it leads to enormous increases in gun thefts that can further stimulate criminal activity. Indeed, while gun carrying has shown no ability to reduce robberies, states that adopt right to carry laws see increases in the percentage of robberies committed with a gun.

The combination of the huge number of guns and lax regulation poses a significant challenge for law enforcement. Just as American criminals shoot faster because of the dangers posed by an armed population, so do the American police, who legitimately fear the prospect of facing an armed assailant. As a result, American police officers kill at far higher levels than their counterparts in other affluent nations. Consider this striking fact: ["In the first 24 days of 2015,](#)

[police in the US fatally shot more people \(59\) than police did in England and Wales, combined, over the past 24 years \(55\).](#)” A well-regulated militia may be necessary to the security of a free state, but promiscuous and unregulated possession of firearms – including assault weapons with high capacity magazines -- leads to many socially harmful consequences.

But Figure 6 also shows that violent crime trended down over the last 35 years. Surely the increased gun carrying is responsible for that benign trend? Again, the simple answer is no.

While some early work in the late 1990s claimed to find that right-to-carry laws did reduce violent crime,<sup>24</sup> a report issued in 2005 by the National Research Council using data through 2000 showed that with the tools and data available at that time, the statistical models were too fragile to provide a clear picture of the impact of RTC laws on crime. In the last decade, though, a growing body of evidence points in exactly the opposite direction from the early papers that suggested RTC laws might have benefits greater than their costs.

A quick examination of the long-term changes in crime shows that simple claims that more guns lead to less crime can be given little credence. For example, Figure 11 depicts percentage changes in the violent crime rate over a 38-year period for three groups of states: those that never adopted RTC laws, those that adopted RTC laws sometime between 1977 and before 2014, and those that adopted RTC laws prior to 1977. It is noteworthy that the 42.3 percent drop in violent crime in the nine states that never adopted RTC laws is almost an order of magnitude greater than the 4.3 percent reduction experienced by states that adopted RTC laws during the 38-year period.<sup>25</sup>

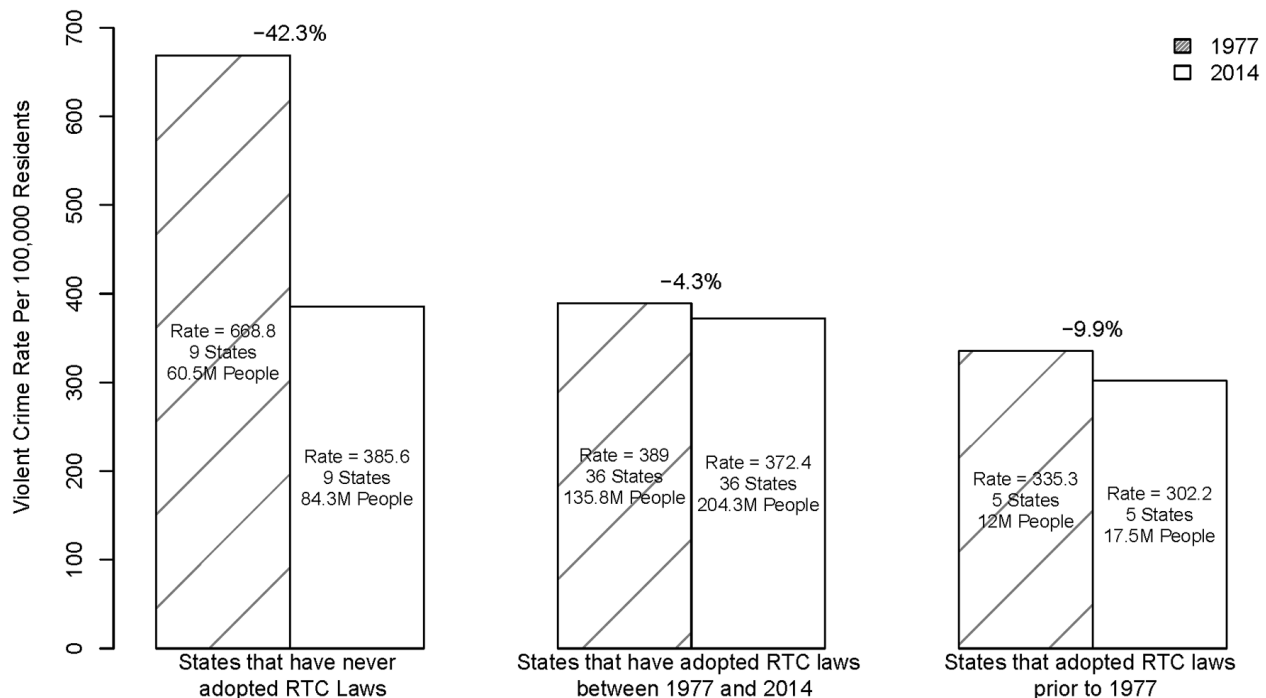
---

<sup>24</sup> See Lott and Mustard.

<sup>25</sup> The following discussion draws on the empirical analysis presented in John J. Donohue, Abhay Aneja, and Kyle Webber, Right-to-Carry Laws and Violent Crime: A Comprehensive Assessment Using Panel Data and a State-Level Synthetic Control Analysis, 16 J. Empirical Legal Studies 198, 200 (2019)(hereafter “DAW (2019)”).

Figure 11

The decline in violent crime rates has been far greater in states with no RTC laws, 1977–2014.<sup>26</sup>



The standard econometric tool that tries to control for other factors that may be influencing crime over the period of state adoption of RTC laws is called a panel data model with state and year fixed effects. The early work by John Lott and others was marred by at least two econometric shortcomings that had not become standard practice prior to around 2004. Before that time, most researchers failed to adjust their standard errors properly and hence exaggerated the statistical significance of their findings. Early researchers were also less aware of or at least attentive to the concern that pronounced crime trends prior to adoption could badly bias the estimated impact of RTC laws. Both of these problems, coupled with the far less complete data that was available at that time, undermined the work of those who thought that RTC laws might be beneficial.

Donohue, Aneja and Webber (“DAW”) present a panel data model that properly adjust its standard errors (through clustering) and finds that on average RTC laws are associated with a roughly 9 percent higher rate of violent crime controlling for an array of variables that might be thought to influence crime in each state, such as levels of incarceration, police, income, poverty and unemployment rates, beer consumption, demographics, and the percentage of state population living in metropolitan statistical areas. This estimate was highly statistically

<sup>26</sup> Reprinted from Figure 1 in DAW (2019).

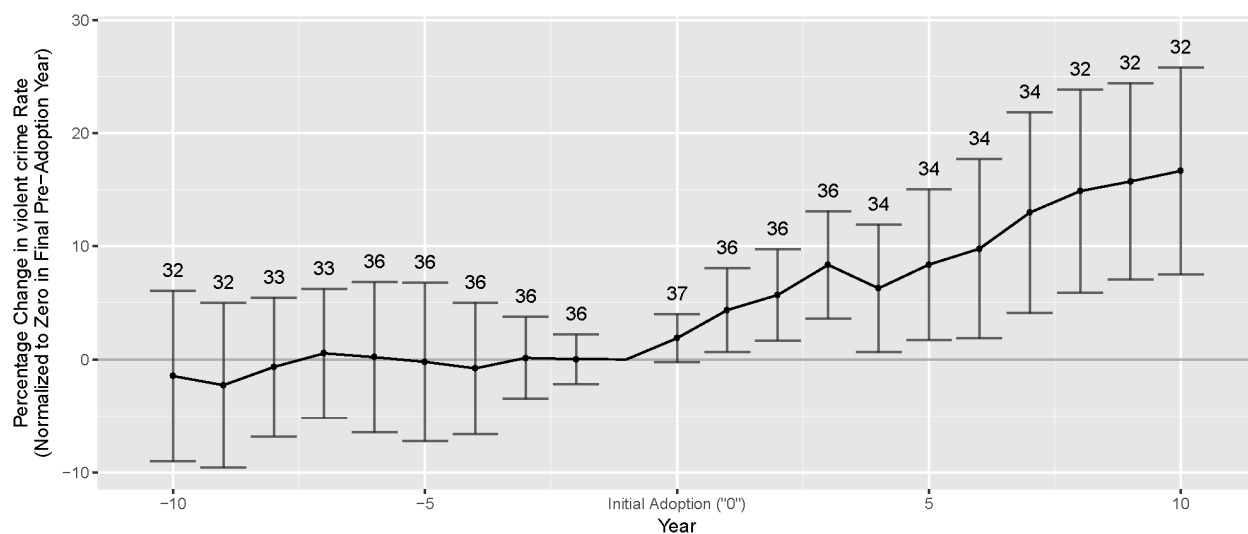


significant, with a standard error that was less than one-third the size of the 9 percent point estimate.

What about the concern that unexplained trends in violent crime prior to adoption could be obscuring the true impact of RTC laws on crime? Essentially the panel data model is a difference-in-differences estimator which tells us what happened to violent crime after RTC adoption compared to states that did not adopt RTC laws. If the trends in crime had previously been the same and then that pattern is altered after RTC adoption, one has evidence that RTC laws altered the path of crime.

Figure 12 highlights the near perfect parallel trends in the ten years prior to adoption. Once the RTC law is in place we see a gradual increase in crime that rises to above 15 percent higher after 10 years. This is not a trivial crime increase since a plausible estimate of how much crime reduction would flow from doubling our prison population is in the neighborhood of 15 percent. In other words, if one wanted to have an RTC law and varied the incarceration rate to maintain the violent crime level that would exist without having an RTC law in place, one would roughly have to double the state prison population. This is a measure that is both costly in monetary and human terms.

Figure 12: The impact of RTC laws on violent crime, DAW model, 1979–2014.



NOTE: We regress crime on dummies for pre- and post-passage years and DAW covariates. Reference year is year before adoption and adoption year is first year with RTC in place at any time, meaning that in states that adopt after January 1, this will capture only a partial effect of RTC laws. We display the 95 percent confidence interval for each estimate using cluster-robust standard errors and show the number of states that contribute to each estimate.

While panel data analysis has been the workhouse of empirical evaluation of the impact of various state law changes, it is obviously not a perfect or infallible tool. Ideally, one would like to have a randomized experiment with enough states being randomly assigned to one set of policies and another group of states assigned to an alternative policy. Without random assignment, one relies on the various control variables to capture other influences on violent

crime, and there is always some uncertainty whether a rich enough array of such controls is available.

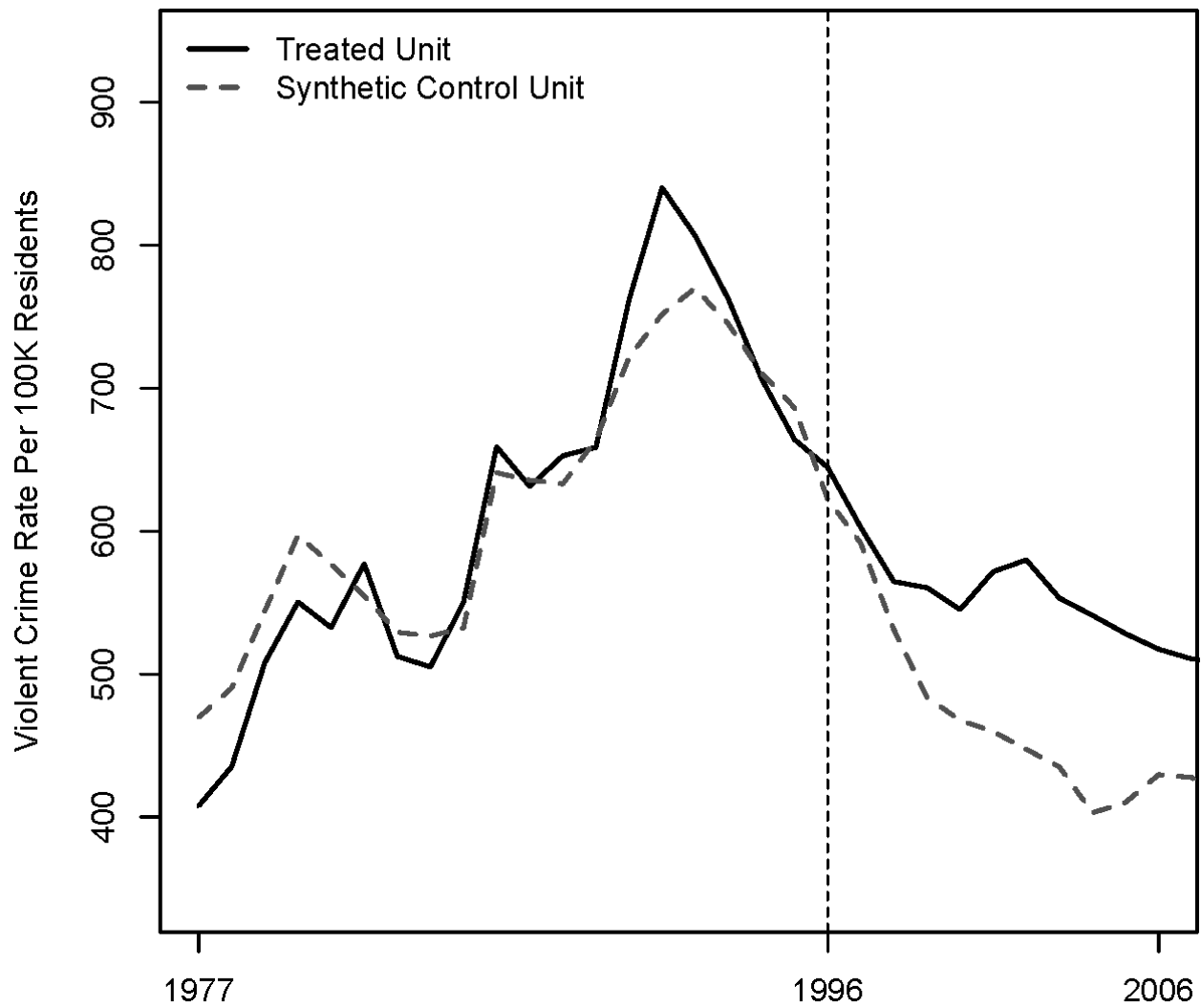
These limitations led Harvard economist Alberto Abadie and his coauthors to develop a newer technique that has already gained widespread acceptance, called a synthetic control analysis. DAW implemented this approach for 33 RTC adoptions occurring over three decades throughout the country. For each adopting (“treated”) state, the synthetic control approach finds a weighted average of other states (“a synthetic control”) designed to serve as a good counterfactual for the impact of RTC laws because it had a pattern of crime similar to that of the adopting state prior to RTC adoption. By comparing what actually happened to crime after RTC adoption to the crime performance of the synthetic control over the same period, we generate estimates of the causal impact of RTC laws on crime.

The synthetic control method attempts to generate representative counterfactual units by comparing a treatment unit (i.e., a state adopting an RTC law) to a set of control units across a set of explanatory variables over a preintervention period. The algorithm searches for similarities between the treatment state of interest and the control states during this period and then generates a synthetic counterfactual unit for the treatment state that is a weighted combination of the component control states.<sup>49</sup>

Figure 12 shows the synthetic control graph for violent crime in Texas over the period from 1977 through 2006 (10 years after the adoption of Texas’s RTC law). The solid black line shows the actual pattern of violent crime for Texas, and the vertical line indicates when the RTC law went into effect. Implementing the synthetic control protocol identifies three states that generate a good fit for the pattern of crime experienced by Texas in the pre-1996 period. These states are California, which gets a weight of 57.7 percent owing to its similar attributes compared to Texas, Nebraska with a weight of 9.7 percent, and Wisconsin with a weight of 32.6 percent.

One of the advantages of the synthetic control methodology is that one can assess how well the synthetic control (call it “synthetic Texas,” which is identified in Figure 12 by the dashed line) matches the pre-RTC-passage pattern of violent crime to see whether the methodology is likely to generate a good fit in the 10 years of postpassage data. Here the fit looks rather good in mimicking the rises and falls in Texas violent crime from 1977–1995. This pattern increases our confidence that synthetic Texas will provide a good prediction of what would have happened in Texas had it not adopted an RTC law.

Figure 13: Estimated Effect of 1996 Texas RTC Law on Violent crime rate – Using Synthetic Control Analysis



Looking at Figure 13, we see that while both Texas and synthetic Texas (the weighted average violent crime performance of the three mentioned states) show declining crime rates in the postpassage decade after 1996, the crime drop is substantially greater in synthetic Texas, which had no RTC law over that period, than in actual Texas, which did. As Figure 13 notes, 10 years after adopting its RTC law, violent crime in Texas was 16.9 percent higher than we would have expected had it not adopted an RTC law.

Figure 13 also illustrates perhaps the most important lesson of causal inference: one cannot simply look before and after an event to determine the consequence of the event. Rather, one needs to estimate the difference between what did unfold and the counterfactual of what would have unfolded without the event. The value of the synthetic control methodology is that it provides a highly transparent estimate of that counterfactual, using a tool designed to ensure the validity of the parallel trends assumption that we have already seen is so critical to achieving meaningful causal estimates. Thus, when Lott quotes a Texas District Attorney suggesting that he had reversed his earlier opposition to the state's RTC law in light of the perceived favorable experience with the law, we see why it can be quite easy to draw the inaccurate causal inference that Texas's crime decline was facilitated by its RTC law.

The public may perceive the falling crime rate post-1996 (the solid black line), but our analysis suggests that Texas would have experienced a more sizable violent crime decline if it had not passed an RTC law (the dotted line). More specifically, Texas experienced a 19.7 percent decrease in its aggregate violent crime rate in the 10 years following its RTC law (between 1996 and 2006), while the state's synthetic control experienced a larger 31.0 percent decline. This counterfactual would not be apparent to residents of the state or to law enforcement officials, but our results suggest that Texas's RTC law imposed a large social cost on the state.

The greater transparency of the synthetic control approach is one advantage of this methodology over the panel data models that we considered above. Figure 13 makes clear what Texas is being compared to, and we can reflect on whether this match is plausible and whether anything other than RTC laws changed in these three states during the postpassage decade that might compromise the validity of the synthetic control estimate of the impact of RTC laws.

Table 1 shows our results on the full sample examining violent crime.<sup>60</sup> Our estimates of the normalized average treatment effect percentage (TEP) suggest that states that passed RTC laws experienced more deleterious changes in violent criminal activity than their synthetic controls in the 10 years after adoption. On average, treatment states had aggregate violent crime rates that were almost 7 percent higher than their synthetic controls five years after passage and around 14 percent higher 10 years after passage. Table 1 suggests that the longer the RTC law is in effect (up to the 10th year that we analyze), the greater the cost in terms of increased violent crime.

Table 1: The Impact of RTC Laws on the Violent Crime Rate, DAW Covariates, Full Sample, 1977–2014

|  | (1)               | (2)               | (3)               | (4)                | (5)                 | (6)                | (7)                  | (8)                  | (9)                  | (10)                 |
|--|-------------------|-------------------|-------------------|--------------------|---------------------|--------------------|----------------------|----------------------|----------------------|----------------------|
| Average normalized treatment effect percentage (TEP) | –0.117<br>(1.076) | 2.629*<br>(1.310) | 3.631*<br>(1.848) | 4.682**<br>(2.068) | 6.876***<br>(2.499) | 7.358**<br>(3.135) | 10.068***<br>(2.823) | 12.474***<br>(3.831) | 14.021***<br>(3.605) | 14.344***<br>(2.921) |
| <i>N</i>   | 33                | 33                | 33                | 33                 | 33                  | 33                 | 33                   | 31                   | 31                   | 31                   |
| Pseudo <i>p</i> value                                | 0.936             | 0.274             | 0.220             | 0.192              | 0.094               | 0.106              | 0.060                | 0.038                | 0.032                | 0.032                |

Note: Standard errors in parentheses. Column numbers indicate postpassage year under consideration; *N* = number of states in sample. The synthetic controls method is run using the nested option, and each year's estimate is the average effect across *N* states. \**p* < 0.10; \*\**p* < 0.05; \*\*\**p* < 0.01.

The extensive array of panel data and synthetic control estimates of the impact of RTC laws that we present uniformly undermine the “More Guns, Less Crime” hypothesis. There is not even the slightest hint in the data from any econometrically sound regression that RTC laws reduce violent crime. Indeed, the weight of the evidence from the panel data estimates as well as the synthetic control analysis best supports the view that the adoption of RTC laws substantially raises overall violent crime in the 10 years after adoption. While both approaches have advantages and disadvantages, it is reassuring that the picture that emerges from both is the same: violent crime rises in the ten years following RTC adoption.

A number of other recent studies provide further support for this conclusion. For example, Siegel et al look at state data from 1991–2015 and conclude that RTC laws increase overall homicide 6.5%, firearm homicide by 8.6%, and handgun homicide by 10.6%.<sup>27</sup> A second paper by Siegel and his coauthors extends his dataset for one additional year (through 2016) and controls for a richer array of gun laws to ensure that other legal changes are not driving the results in his initial paper. Again, they find that RTC laws increase homicides 9%.<sup>28</sup> (controlling for more gun laws).

To explore whether the state analyses are too aggregated to give precise estimates of the impact of RTC laws, Crifasi and coauthors look at 136 large, urban U.S. counties from 1984–2015. They find that RTC increase firearm homicides by 4%.<sup>29</sup> Gius explores the specific legal change of moving from a prohibition on concealed carry to adopting an RTC law. Using a synthetic control approach, Gius finds that this transition to RTC law elevates homicide 4.9% and firearm homicides 12.3 percent.<sup>30</sup>

<sup>27</sup> Michael Siegel, et al., *Easiness of Legal Access to Concealed Firearm Permits and Homicide Rates in the United States*, 107 Am. J. Pub. Health 1923, 1923 (2017)

<sup>28</sup> Siegel (J Gen Intern Med 2019).

<sup>29</sup> Crifasi, et al., *Association between Firearm Laws and Homicide in Urban Counties*, *supra*, at 387; (J Urban Health 2018)

Crifasi, et al., *Correction to: Association Between Firearm Laws and Homicide in Urban Counties*, *supra*, at 773–74.

<sup>30</sup> Mark Gius, *Using the Synthetic Control Method to Determine the Effects of Concealed Carry Laws on State-Level Murder Rates*, 57 Int'l Rev. L. & Econ. 1, 6 (2019).

While virtually all of the recent work on RTC law has pointed in the direction of the conclusion that increased gun carrying leads to higher violent crime, this literature generally focuses only on identifying net effects with little exploration of the mechanisms involved. Since we know that there are some instances where gun carrying thwarted crime and one could imagine there might be some deterrent impact of increased gun carrying, the literature suggests that other factors that lead to more violent crime outweigh any beneficial influences. But what are these harmful effects.

The most obvious is that ready access to guns can quickly turn arguments into deadly encounters, and there is certainly plenty of evidence suggesting that road rage incidents can be fueled by gun carrying. Another potent contributor to illegal misconduct is that guns carried outside the home are more likely to be lost or stolen, and these guns are particularly valuable to criminals since they cannot be traced back to the miscreants. A rough but plausible estimate for the number of guns stolen each year solely because of the adoption of RTC laws is 100,000 (with overall gun thefts being roughly 400,000 per year).

Moreover, some of the more naïve thinking about increased gun carrying by “law abiding citizens” is that nothing else will change so that the balance will tip in favor of the good guys and away from the bad guys. The problem with this view is that it ignores that the bad guys act more dangerously in the wake of RTC adoption. Indeed, a panel data estimate over the years 1980 to 2016 reveals that the percentage of robberies committed with a firearm rises by 18 percent in the wake of RTC adoption ( $t = 2.60$ ). A synthetic controls assessment predicts an even more ominous response: the percentage of robberies committed with a firearm increases by 35 percent over 10 years ( $t = 4.48$ ). It might be a tolerable tradeoff if the increase in armed and dangerous criminals was offset by an overall decline in robberies, but in fact there is no evidence that RTC laws reduce the overall level of robberies. Indeed, a panel data analysis associates RTC laws with a 9 percent *higher* level of overall robberies ( $t = 1.85$ ) and the synthetic controls analysis suggests a 7 percent growth over 10 years ( $t = 1.19$ ).

Moreover, just as criminals react in socially harmful ways to the adoption of RTC laws for the simple reason that they don’t want to be shot, police also act more aggressively and violently as gun carrying proliferates for much the same reason. Apart from car accidents, virtually the only threat to police safety comes from armed civilians. This in part explains why the rate of killings of civilians by police is so high in the U.S. compared to countries that are far less gun saturated such as England. Indeed, in the first 24 *days* of 2015, police in the US fatally shot 59 individuals, which was greater than the comparable number of 55 shot by police in

England and Wales, combined, over the past 24 years.<sup>31</sup> Of course the U.S. population is considerably greater, but the rate of police killings – largely driven by the fear of guns – is dramatically higher in the U.S.<sup>32</sup>

Similarly, the increased shootings, thefts, aggravated assaults, and accidental discharges that follow from increased gun carrying take up an enormous amount of additional police time. This tax on police activity puts upward pressure on violent behavior since the police are one of the most important elements in restraining crime, as an abundance of studies has consistently found.<sup>33</sup>

### III. Legal Considerations in Light of the Empirical Evidence

The growing evidence that the lax regulation of guns leads to substantial harmful consequences raises the question of how courts should consider such empirical evidence in their decisions interpreting the Second Amendment. One view is that it should have no impact since the Founders sealed the fate of the victims of gun violence by enacting the Second Amendment, so the consequences of that decision are now off the table. While many would find such a claim to be idiotic, this was the assertion of then Judge Brett Kavanaugh in a D.C. Court of Appeals case in which he was outvoted by two Republican-appointed judges.<sup>34</sup>

Kavanaugh argued that “text, history, and tradition” should “guide analysis of gun laws.” In his view, the Supreme Court had “expressly rejected judicial assessment of ‘the costs and benefits of firearms restrictions’ and stated that courts applying the Second Amendment thus would not have to make ‘difficult empirical judgments’ about the efficacy of particular gun regulations.”

It is true that at one point in his confused and misguided *Heller* opinion, Justice Scalia stumbled in the direction of a making an intelligent comment about the nature of the Second Amendment, but he then quickly gained his footing and

---

<sup>31</sup> <https://www.theguardian.com/us-news/2015/jun/09/the-counted-police-killings-us-vs-other-countries>

<sup>32</sup> The estimated rate that there are 2.93 killings by U.S. police per million citizens is about 42 times the rate from police in Germany and more than 100 times that of police in England and Wales. Franklin Zimring, *Firearms and Violence* (2017). Zimring also found that police in the United State die from assaults on duty at about 35 times the rate as police in Germany and 17 times the rate in the United Kingdom, which are overwhelmingly from fatal shootings.

<sup>33</sup> As the Council of Economic Advisors has found, “Expanding resources for police has consistently been shown to reduce crime; estimates from economic research suggest that a 10 percent increase in police force size decreases crime by 3 to 10 percent.” Council of Economic Advisors, “Economic Perspectives on Incarceration and The Criminal Justice System,” April 2016. In other words, if the entire array of impositions on police time imposed by lawful gun carrying in the U.S. took up 10 percent of police time, then one would expect this would elevate crime by 3 to 10 percent. See also, Steven Mello, “More COPS, Less Crime,” *Journal of Public Economics*, Volume 172, April 2019, Pages 174-200 (“the social value of a marginal police officer exceeds \$300,000” in terms of reduced crime). Available at <https://doi.org/10.1016/j.jpubeco.2018.12.003>.

<sup>34</sup> *Heller* II.

retreated.<sup>35</sup> Justice Scalia stated: “Some have made the argument ... that only those arms in existence in the 18th century are protected by the Second Amendment. We do not interpret constitutional rights that way.” But of course not only does this argument not “borde[r] on the frivolous,” as Scalia asserted, but it makes perfect sense to consider whether the reasons for the amendment are still operative today and whether the weaponry currently available would further those goals.

The first question is rather easily answered. The Second Amendment was designed to ensure the federal government would have the ability to generate a fighting force to defend the country. Civilian ownership of firearms no longer plays any role in furthering that objective. The security of the United States is now guarded by the U.S. military and the National Guard. Therefore, as even Scalia acknowledged in his Heller decision, the right created in that 2008 opinion did not include the right to have weapons of war but only the right to self-defense within the home. When one considers the weaponry available at the time of the founding to that available today, it becomes clear that the difference is immense, with similar implications for constitutional analysis. Figure 14 highlights this point.

Figure 14



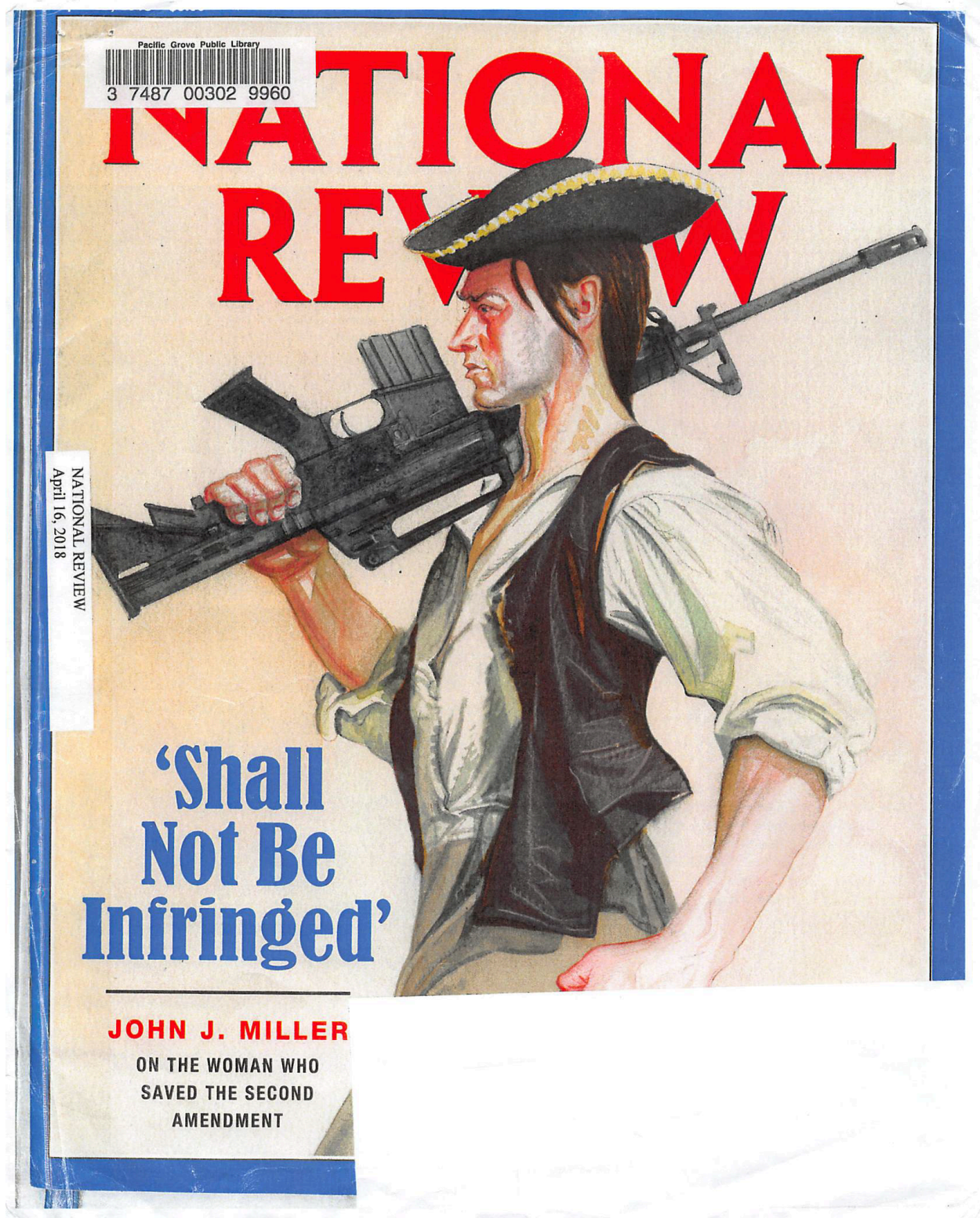
A musket from the 18th century, when the Second Amendment was written, and an assault rifle of today.  
Top, MPI, via Getty Images, bottom, Joe Raedle/Getty Images .

---

<sup>35</sup> For one of the many strong criticisms of Scalia’s decision in Heller and its “faux originalism,” see Richard A. Posner, In Defense of Looseness: The Supreme Court and Gun Control, NEW REPUBLIC, Aug. 27, 2008, at 32, 33, available at <http://www.newrepublic.com/article/books/defense-looseness>.



Figure 15



Perhaps not surprisingly, those who would seek to follow Kavanaugh's view that assault weapons are protected by the Second Amendment offer differing visual

support – see Figure 15. Of course, the continentals were not carrying around anything like the modern assault weapons of today. There could not be a mass shooting problem in 1791 given the nature of the weaponry available to average citizens. Of course, the situation could not be more different today. Hundreds were shot in a matter of minutes in the horrendous Las Vegas shooting and the recent Dayton shooting ended with more bullets fired at than by the shooter (who was killed within 32 seconds of his initial firing), but he still managed to shoot 26 (killing nine) because of the enormous power, deadliness, and speed of his assault weapon.<sup>36</sup>

Scalia’s bizarre view that the Second Amendment could undermine the ability to address the current, growing mass shooting problem in the U.S. because any gun in “common use” is now beyond government control is fatuous. If originalist Scalia had contemplated what the practical framers of our Constitution would have thought about the idea that an Amendment that they crafted would bind the hands of government hundreds of years later in a way that would facilitate mass murder, he likely would have realized the absurdity of his position.

The following wisdom from the time of the constitutional debate seems particularly relevant:

...the vigor of government is essential to the security of liberty; ...in the contemplation of a sound and well-informed judgment, their interest can never be separated; and ... a dangerous ambition more often lurks behind **the specious mask of zeal for the rights of the people** than under the forbidden appearance of zeal for the firmness and efficiency of government. History will teach us that the former has been found a much more certain road to the introduction of despotism than the latter, and that of those men who have overturned the liberties of republics, the greatest number have begun their career by paying an obsequious court to the people; commencing demagogues, and ending tyrants.  
-- The Federalist, No. 1 (emphasis added).

And yet Kavanaugh thought that the *Heller* holding that citizens must have the right to a handgun in the home mandated their right to also have an assault weapon. Kavanaugh felt he had a difficult choice to make. He could say that AR-15’s were more like handguns, which *Heller* said could not be banned or more like “M-16 rifles,” while *Heller* said could be banned. My guess is most third graders could figure out what the right answer was to that simple categorization question. Indeed, as the en banc panel of the Fourth Circuit noted in concluding that “banned assault weapons and large-capacity magazines are not protected by the Second Amendment,”

we are convinced that the banned assault weapons and large-capacity magazines are among those arms that are “like” “M-16 rifles”—“weapons that are most useful in military

---

<sup>36</sup> <https://www.nytimes.com/2019/08/13/us/dayton-shooter-video-timeline.html>

service”—which the *Heller* Court singled out as being beyond the Second Amendment’s reach. See 554 U.S. at 627, 128 S.Ct. 2783 (rejecting the notion that the Second Amendment safeguards “M-16 rifles and the like”). Put simply, we have no power to extend Second Amendment protection to the weapons of war that the *Heller* decision explicitly excluded from such coverage. **Nevertheless, we also find it prudent to rule that—even if the banned assault weapons and large-capacity magazines are somehow entitled to Second Amendment protection—the district court properly subjected the FSA to intermediate scrutiny and correctly upheld it as constitutional under that standard of review.**<sup>37</sup>

Judge Kavanaugh somehow thought the AR-15 was more like the handgun that could not be banned:

“In my judgment, ... D.C.’s ban on semi-automatic rifles [is] unconstitutional under *Heller*.... In *Heller*, the Supreme Court held that handguns – the vast majority of which today are semi-automatic – are constitutionally protected because they have not traditionally been banned and are in common use by law-abiding citizens. There is no meaningful or persuasive constitutional distinction between semi-automatic handguns and semi-automatic rifles. Semi-automatic rifles, like semi-automatic handguns, have not traditionally been banned and are in common use by law-abiding citizens for self-defense in the home, hunting, and other lawful uses.”

Kavanaugh thus showed an uncanny ability to separate the wheat from the chaff in his analysis, but then a lamentable tendency to throw out the wheat. He is right that handguns kill more individuals overall than assault rifles but that doesn’t pose an argument for preventing governmental action to ban assault rifles. Handguns also kill far more Americans than bazookas, hand-held missile launchers, and nuclear arms, but the notion that the right to keep and bear these arms cannot be infringed is hopefully beyond serious debate.

Some have tried to ground an individual right to possess such weaponry on the argument that the right of the 2d Amendment is the right to fight a tyrannical federal government. Once we have crossed that bridge, of course, there must be a right to all of the weapons that the federal government has. Otherwise, telling the good citizens that it is their right to fight the tyrannical federal government while tying their hands behind their back by not giving them the needed weaponry would be the most cynical deception. The Second Amendment cannot be a suicide pact for our most patriotic and freedom-loving citizens who are willing to stand up against tyrants with their own weapons.

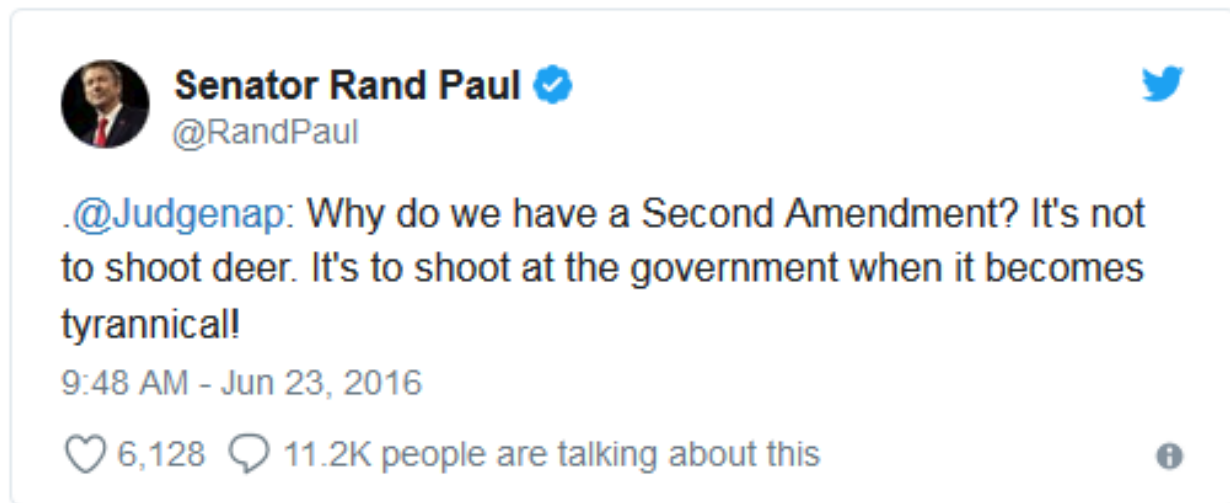
But surely no one would believe that the unregulated mob could stand up to the United States military. One might have thought not, but cast your eyes on the words of wisdom of Senator Rand Paul.

---

<sup>37</sup> Kolbe v. Hogan, 849 F.3d 114 (4<sup>th</sup> Cir. 2017)



Figure 15



While some may applaud this “specious mask of zeal for the rights of the people,” the idea that we want to encourage “the people” to have the weapons that would enable them to start shooting at “the government” when they decide it is tyrannical is utter nonsense. Some Pennsylvanians entertained this notion when they launched the Whiskey Rebellion, which prompted President George Washington to amass an army of 13,000 from four state militias to march on the rebels and end the insurrection. The American civil war is also not a stirring endorsement of the idea that those who would take up arms against the federal government are the ones fighting *against* tyranny.

Of course, we needn’t be concerned that the nonsensical ranting of a deluded libertarian Senator would be taken seriously by someone who could have the power to act on this delusion, right? Enter U.S. District Court Judge Roger Benitez of the Southern District of California, a prized appointment of President George W. Bush. In a noticeably effective effort at judge shopping, the NRA filed identical challenges to California’s 2016 ban on high capacity magazines in two separate federal courts (changing only the names of the filing plaintiffs), hoping to enjoin the implementation of the ban prior to its July 1, 2017 effective date. The two federal district court judges decided the request for a preliminary injunction on the same day, with Judge William Shubb of the Eastern District of California properly rejecting the NRA request<sup>38</sup> and Judge Roger Benitez issuing the injunction two days before the ban was to take effect.<sup>39</sup>

Judge Benitez’s ill-advised order had the degree of wisdom one might expect to find in a John Birch Society pamphlet. He quoted a statement – absurd on its face in the context of modern America – “that tyranny thrives best where government need not fear the wrath of an armed

---

<sup>38</sup> Weise v. Becerra

<sup>39</sup> Duncan v. Becerra

people.” Perhaps it is not clear to the Judge that a tyrannical federal government that has the support of the U.S. military will have little to fear from weapons in the hands of private citizens – beyond the apprehension that the experiences of President John Kennedy, former Senator Robert Kennedy, and President Ronald Reagan would (unhelpfully) create in any American politician.<sup>40</sup>

Moreover, Judge Benitez, born in Cuba in 1950, seems not to have learned the lesson of his native land that arming the civilians with assault weapons simply because they intone lofty promises to fight tyranny offers little guarantee that they will support the right side in any battle against the government. I assume the Judge was no fan of Fidel Castro, and his reference to the shooting at the Congressional baseball practice in Alexandria, Virginia highlights the exact opposite of his claims: encouraging U.S. citizens to arm themselves to stand up against tyranny is insanity, and the more powerful the weapons that these “fighters against tyranny” have at their disposal, the more needless deaths and injuries will occur.<sup>41</sup>

---

<sup>40</sup> Recall the size and power of the Iraqi army in 1990, which was battle tested, and over a million strong: “With about 6,000 battle tanks, 300 fighter planes and a vast array of missiles, Iraqi war-making equipment is impressive by any standard. In its top-line stockpile are battle-tested weapons that have earned stellar reputations in the decade’s few wars: the Soviet T-72 tank, the Chinese Silkworm missile, the French Mirage fighter and the Exocet tactical missile, which almost sank the U.S. guided-missile frigate Stark in the Persian Gulf in 1987.” A relatively small portion of the U.S. military fighting more than 6000 miles from the United States defeated this army in four days. <https://www.latimes.com/archives/la-xpm-1990-08-13-mn-465-story.html>

<sup>41</sup> In July 2016, incensed by police shootings of unarmed black men, Gavin Long used a particularly powerful assault rifle with a 40-round magazine to shoot six police officers in Baton Rouge, Louisiana, killing three before he himself was killed by a police sniper. Prior to the attack, a 911 call was made when Long was spotted walking in the July heat wearing a coat, body armor, and a ski mask while carrying a TAVOR assault rifle – which the manufacturer describes as “the ultimate weapon of the 21st century” – which under Louisiana’s open carry law gave the police no basis for disarming him. Israel Weapon Industries notes on its webpage that this particular weapon, developed in co-operation with the Israel Defense Forces, was “especially created” in response to “dynamic changes in the modern battlefield, the threats of global terrorism and the demands of ever-changing combat situations.” The TAVOR, which can fire 900 rounds a minute, is employed by armed forces around the globe. James Gill, “Civilians carrying ‘ultimate weapon’ Gavin Long used in Baton Rouge would be regarded worldwide as insane,” The New Orleans Advocate, August 10, 2016, [https://www.nola.com/opinions/james\\_gill/article\\_4567899b-0cac-5e78-81ad-84729147171f.html](https://www.nola.com/opinions/james_gill/article_4567899b-0cac-5e78-81ad-84729147171f.html).

Judge Benitez, who stated that government employees should fear the wrath of armed citizens, would likely be gratified by the sentiments among Baton Rouge police and their families following the shooting:

“It scares the hell out of me,” Sgt. C. Bryan Taylor, the president of the Baton Rouge police union, said of open carry, adding there’s an even greater risk for officers who encounter citizens sporting exposed rifles or shotguns. “There’s a time and place for everything,” he said, adding that he would prefer owners of long guns to avoid carrying those weapons in public....

Open carry has unnerved the family of at least one of the slain officers. The father of Baton Rouge Cpl. Montrell Jackson said he couldn’t comprehend why someone would be allowed to own an IWI Tavor, the Israeli-made assault rifle Long used to wreak havoc, let alone be allowed to carry it around in public. “I’m against that 100 percent,” the officer’s father, Hosea Jackson, said last week. “They shouldn’t be able to own (a military-style rifle). They shouldn’t be able to put their hands on it. If you’re not in the military, you shouldn’t be able to get your hands on it, and if you do, you should be punished.”

Maya Lau and Jim Mustian, “Baton Rouge police shooting brings renewed attention to Louisiana’s ‘open carry’ rights,” The New Orleans Advocate, August 6, 2016,

But stopping the new ban on possession of high-capacity magazines from taking effect was only the beginning of the damage. On March 29, 2019, Judge Benitez struck down not just the new law (adopted by both the state legislature and the people of California via referendum by an almost two-to-one margin<sup>42</sup>) about to take effect, but all restrictions on high-capacity magazines which had effectively been in place for decades.<sup>43</sup> Ironically, in his earlier order in the case, the Judge had stated that “Courts are not free to impose their own policy choices on sovereign states,” when his behavior could be described by the dictum that “I am the sovereign and hereby reverse the policy choices of both the people of California and their elected officials.” High capacity magazines immediately started pouring into the state following the Judge’s decision, and the California Attorney General was only able to stop that fiasco a week later when it secured a stay of Benitez’s order pending 9<sup>th</sup> Circuit Court of Appeals review.

Judge Benitez concluded his error-filled opinion<sup>44</sup> with some words of encouragement:

“The State has not carried its burden to justify the restrictions on firearm magazines protected by the Second Amendment based on the undisputed material facts in evidence.

---

[https://www.theadvocate.com/baton\\_rouge/news/baton\\_rouge\\_officer\\_shooting/article\\_83d7317a-5b60-11e6-84b4-13cf89c9f22f.html](https://www.theadvocate.com/baton_rouge/news/baton_rouge_officer_shooting/article_83d7317a-5b60-11e6-84b4-13cf89c9f22f.html).

<sup>42</sup> On July 1, 2016, the California legislature enacted the legislation that criminalized possession of high-capacity magazines within the state as of July 1, 2017, and the California electorate strongly endorsed this position in adopting Proposition 63 on November 8, 2016.

<sup>43</sup> The federal assault weapons ban had prohibited the acquisition of new high capacity magazines since September of 1994, and the California legislature had further prohibited the purchase, sale, transfer, receipt, or manufacture of such magazines since 2000.

<sup>44</sup> Almost every factual contention made by Judge Benitez in his two opinions was inaccurate, misleading, or did not stand for the proposition he claimed (often standing for the exact opposite). Unfortunately, the Judge had apparently gotten on to some NRA or other gun industry webpages to find support for his conclusions, which consistently led him to make utterly nonsensical or simply factually erroneous statements. For example, citing the worst fear of any homeowner – that a burglar will come into one’s home and commit a homicide – the judge cited a report for the claim that such home-invasion homicides occur 430 times a year on average (stating he visited the webpage the day before his 2019 opinion was released – see his fn. 9). Of course, anyone familiar with U.S. homicide data would have recognized that Judge Benitez’s claim was incorrect because the report clearly specified that less than 1 percent of all homicides fall into this category. The true number was 86 – which is 1/5<sup>th</sup> the value that the Judge claimed and of course is far smaller than the number of family members killed each year in the home by accidental discharge of guns.

In another of the Judge’s forays into fantasyland, he states that “Nationally, the first study to assess the prevalence of defensive gun use estimated that there are 2.2 to 2.5 million defensive gun uses by civilians each year. Of those, 340,000 to 400,000 defensive gun uses were situations where defenders believed that they had almost certainly saved a life by using the gun.” Of course, while we might appreciate the historical reference, I don’t think if we wanted to comment on the age of the earth we would reference Lord Kelvin’s estimate of 20 million years since we now know the true number is 4.5 billion years. The Judge inadvertently makes an important point though. Since the largest number of homicides in the U.S. was about 25,000 in 1992, the idea that private gun toters saved lives anywhere close to 400,000 times a year is absurd – as anyone with the most basic knowledge of U.S. homicide rates would know. While these numbers still have currency on NRA webpages and among ignorant Second Amendment enthusiasts, they are widely acknowledged to be among the most absurd figures referenced in U.S. policy debates. See, David Hemenway, “The Myth of Millions of Annual Self-Defense Gun Uses: A Case Study of Survey Overestimates of Rare Events,” *Chance*, Volume 10, 1997 - Issue 3, available at <https://www.tandfonline.com/doi/abs/10.1080/09332480.1997.10542033>.

That is not to be lamented. It ought to provide reassurance. [I]t is the proudest boast of our Second Amendment jurisprudence that we protect a citizen's right to keep and bear arms that are dangerous and formidable."

I have grave concerns about any proud boasts that unleash the gun industry to provide increasingly dangerous and formidable weapons.

It should be noted in passing that to the extent the argument of being a bulwark against tyranny is to be offered as an explanation for an expansive interpretation of the Second Amendment, it would not further the argument that citizens should have a right to carry guns outside the home. The tyranny argument turns on having access to a gun when the time comes to launch the rebellion. Moving about town with a gun now does nothing to advance that interest – but does generate the unhappy consequences of increased violent crime that are discussed above.

I should hasten to add that in *Weise v. Becerra*, the other federal district judge to address California's ban on high-capacity magazines -- Judge William Shubb -- correctly noted that "because California's ban does not substantially burden individuals' ability to defend themselves, intermediate scrutiny is appropriate." Judge Shubb then correctly explained that since this level of scrutiny requires "(1) the government's stated objective to be significant, substantial, or important; and (2) a reasonable fit between the challenged regulation and the asserted objective," the California law is constitutional.

While some federal judges have shown an appalling indifference to the growing menace of mass slaughters, one hopes that the U.S. Supreme Court will heed the words penned by conservative Reagan appointee J. Harvie Wilkinson when the 4th Circuit voted to uphold the Maryland assault weapons ban:

"To say in the wake of so many mass shootings in so many localities across this country that the people themselves are now to be rendered newly powerless, that all they can do is stand by and watch as federal courts design their destiny -- this would deliver a body blow to democracy as we have known it since the very founding of this nation."

The evidence that RTC laws increase violence should cause particular hesitation to any court contemplating an extension of the Second Amendment beyond the right to have a gun in the home for self-defense to a right to carry guns outside the home. If recent estimates are correct, there may be a higher price to pay in lives and increased violent crime from gun carrying outside the home than from our mass shooting problem. Curtailing the increased crime that follows from the adoption of right-to-carry laws would require a doubling of our already bloated prison populations. We should not interpret constitutional rights that way.