

**VIOLENCE IN THE STREETS? HARDLY.
EVEN UNDER THE “TIERS OF SCRUTINY”
APPROACH TO JUDICIAL REVIEW, STATE
ACTORS CANNOT JUSTIFY RESTRICTING THE
RIGHT TO CARRY FIREARMS BASED ON
CONTEMPORARY CRIMINOLOGICAL STUDIES**

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I. INTRODUCTION

Most states in the United States today—over forty of them—are considered “right-to-carry” states or “shall-issue” gun permit states in that any law-abiding American may carry a concealed handgun without seeking the permission of a law enforcement official or, if they have to seek a license from law enforcement, the state has an obligation to grant a license if the citizen satisfies a few objective criteria.¹

Advocates seeking to protect and expand the right of individual Americans to carry handguns outside of the home for the protection of themselves, their family, and their community emphasize that the right to self-defense is an inalienable right and that the Second Amendment of the Constitution recognizes this longstanding fundamental human right.² These advocates strongly support the right to carry firearms, including the right to carry across state lines and into those few American states—such as New York, California, and New Jersey—that largely oppose the right to armed self-defense.³

In contrast, gun-control advocates reject the notion that Americans should be allowed to use firearms outside the home for the defense of themselves or others on the ground that allowing such individual freedom would cause Americans to find themselves engaged in daily gunfights in streets and restaurants across the country.⁴ They argue it would be far better and safer for Americans to trust the police to protect people from violent

1. Stephen P. Halbrook, *To Bear Arms for Self-Defense: A “Right of the People” or a Privilege of the Few? Part I*, 21 FED. SOC’Y REV. 47, 47 (2020) (noting that today, “[f]orty-one states (arguably forty-four) and the District of Columbia, are ‘shall issue’ states, which means that permits to carry concealed firearms on one’s person are available to all law-abiding persons who meet training or other requirements. Vermont does not issue permits, but both concealed and open carry are lawful. Nine states have ‘constitutional carry,’ meaning that both concealed and open carry without a permit are lawful. Only eight states (arguably six) are ‘may issue,’ i.e., officials may issue a permit if they decide a person ‘needs’ to carry a firearm.”).

2. See, e.g., Chuck Klein & Robert H. Carp, *Understanding the Second Amendment*, U.S. CONCEALED CARRY ASS’N (May 4, 2019), <https://www.usconcealedcarry.com/blog/understanding-the-second-amendment/>.

3. See, e.g., Conner Drigotas, *Despite SCOTUS, Self-Defense Is an Inalienable Human Right*, FREE THE PEOPLE (June 27, 2020), <https://freethepeople.org/despite-scotus-self-defense-is-an-inalienable-human-right/>.

4. See, e.g., *Regulate Firearms Like Other Consumer Products*, VIOLENCE POL’Y CTR., <https://vpc.org/regulating-the-gun-industry/regulate-firearms-like-other-consumer-products/> (last visited Jan. 18, 2021).

predators and threats rather than to rely on ordinary Americans who do not work as government law enforcement.⁵

It is in this public-policy debate context that the gun-controllers sound the alarm that trusting Americans with their own armed self-defense will give rise to catastrophic public-policy consequences.⁶

But does the data bear out this concern articulated by those seeking to use laws to limit the right to armed self-defense by law-abiding and responsible Americans? The short answer: no.⁷

II. IMPLEMENTATION OF RIGHT-TO-CARRY NATIONWIDE WOULD NOT CAUSE THE COUNTRY TO COLLAPSE INTO A STATE OF LAWLESSNESS

Many gun-control advocates vehemently oppose any development that would promote the freedom of law-abiding citizens to carry a concealed handgun in public for self-defense.⁸ This puts such advocates at odds with the Constitution because the Supreme Court ruled a decade ago in *District of Columbia v. Heller* that the Second Amendment's protection is "not limited to the carrying of arms in a militia;"⁹ rather, "individual self-defense is 'the central component' of the Second Amendment."¹⁰

In a strikingly originalist decision, the Court explained that this reading of the right to keep and bear arms is supported by longstanding precedent:

When used with "arms," . . . the term [bear] has a meaning that refers to carrying for a particular purpose—confrontation. . . . [I]n the course of analyzing the meaning of "carries a firearm" in a federal criminal statute, Justice GINSBURG wrote that "[s]urely a most familiar meaning is, as the Constitution's Second Amendment . . . indicate[s]: 'wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being

5. See, e.g., Clifton B. Parker, *To Keep Police and Citizens Safe: Fewer Guns, More Trust*, FUTURITY (July 18, 2016), <https://www.futurity.org/guns-police-safety-1204642/>.

6. See Editorials, *The NRA's Dead Aim: Working To Make Concealed-Carry the Law of the Land*, N.Y. DAILY NEWS (Nov. 21, 2016, 4:10 AM), <https://www.nydailynews.com/opinion/nra-dead-aim-article-1.2879588>; see also Lois Beckett, *Gun Rights Group: US Should Appoint Special 'Second Amendment' Prosecutor*, GUARDIAN (Nov. 22, 2016), <https://www.theguardian.com/us-news/2016/nov/22/gun-rights-trump-administration-second-amendment-prosecutor?>; see generally VIOLENCE POL'Y CTR., www.vpc.org (last visited Jan. 18, 2021); BRADY CAMPAIGN TO PREVENT GUN VIOLENCE, www.bradyunited.org (last visited Jan. 18, 2021).

7. See Ian Ayres & John J. Donohue, *Shooting Down the "More Guns, Less Crime" Hypothesis*, 55 STAN. L. REV. 1193, 1201 (2003).

8. See, e.g., VIOLENCE POL'Y CTR., *supra* note 6; BRADY CAMPAIGN TO PREVENT GUN VIOLENCE, *supra* note 6.

9. *District of Columbia v. Heller*, 554 U.S. 570, 586 (2008).

10. *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010) (quoting *Heller*, 554 U.S. at 599) (emphasis added).

armed and ready for offensive or defensive action in a case of conflict with another person.”¹¹

In *Heller*, the Supreme Court agreed that “Justice GINSBURG accurately captured the natural meaning of ‘bear arms.’”¹²

Yet anti-gun activists ardently oppose any measure that would secure the Second Amendment right to carry a concealed handgun in public for self-defense—be it: (a) An individual state’s adoption of a “shall-issue” or “right-to-carry” (RTC) regime for issuing a concealed handgun license (CHL) to all law-abiding, qualified applicants; (b) allowing for the constitutional carry of firearms (without a permit); or (c) the federal adoption of a law mandating that all states reciprocally recognize handgun licenses issued by other states (just as states recognize the driver’s licenses and marriage licenses issued by their sister states).¹³ Gun-control advocates contend that Americans should be denied their right to bear arms in self-defense because otherwise the nation would descend into anarchy: “Blood would spill” and the streets would run red every time armed citizens had any kind of disagreement in public.¹⁴ But the evidence does not support such a claim.¹⁵ Indeed, when forced to dig into the data, even some of the most adamant opponents of shall-issue laws conceded in 2003 that the scholarly research “establish[es] that these laws have not led to the massive bloodbath of death and injury that some of their opponents feared.”¹⁶

A. Law Enforcement Officers and Police Departments Across the Nation Strongly Support Issuance of CHLs to Qualified, Law-Abiding Citizens

According to economist David B. Mustard, “[e]ven those who vehemently opposed shall-issue laws have been forced to acknowledge that license holders are extremely law abiding and pose little threat.”¹⁷ The President of the Dallas Police Association, who twice lobbied against the Texas concealed-carry law, stated after it was enacted that “[a]ll the horror stories I thought would come to pass didn’t happen. No bogeyman. I think

11. *Heller*, 554 U.S. at 584 (quoting *Muscarello v. United States*, 524 U.S. 125, 143 (1998) (Ginsburg, J., dissenting)).

12. *Id.*

13. See VIOLENCE POL’Y CTR., *supra* note 4.

14. See Editorials, *supra* note 6 (“Blood would spill.”); see also Beckett, *supra* note 6. See generally VIOLENCE POL’Y CTR., *supra* note 6; BRADY CAMPAIGN TO PREVENT GUN VIOLENCE, *supra* note 6.

15. See Ayres & Donohue, *supra* note 7, at 1201.

16. *Id.* (“We conclude that Lott and Mustard have made an important scholarly contribution in establishing that these laws have not led to the massive bloodbath of death and injury that some of their opponents feared. On the other hand, we find that the statistical evidence that these laws have reduced crime is limited, sporadic, and extraordinarily fragile.”).

17. David B. Mustard, *Comment by David B. Mustard*, in *THE IMPACT OF CONCEALED-CARRY LAWS*, in *EVALUATING GUN POLICY*, ch. 8, at 325, 331 (Jens Ludwig & Philip J. Cook eds., 2003).

it's worked out well, and that says good things about the citizens who have permits. I'm a convert."¹⁸

Similarly, the “president and the executive director of the Florida Chiefs of Police and the head of the Florida Sheriff’s Association admitted that despite their best efforts to document problems arising from the law, they were unable to do so.”¹⁹ Mustard further notes: “Speaking on behalf of the Kentucky Chiefs of Police Association, Lt. Col. Bill Dorsey stated, ‘We haven’t seen any cases where a [concealed-carry] permit holder has committed an offense with a firearm.’”²⁰ A sheriff in Campbell County, Kentucky admitted that, prior to the passage of the concealed-carry law, he worried that he would be uncomfortable with the type of people who were applying for concealed-carry licenses, but after the law passed he discovered that “[t]hese are all just everyday citizens who feel they need some protection.”²¹

Law enforcement officers throughout America—not just the self-described “converts” quoted above—support the carrying of firearms by private citizens.²² In a 2013 nationwide survey of more than 15,000 verified law enforcement officers across all ranks and department sizes, 91.3% of respondents affirmed that, “without question and without further restrictions,” they “support[ed] the concealed carry of firearms by civilians who have not been convicted of a felony and/or not been deemed psychologically/medically incapable.”²³ Furthermore, when asked “[o]n a scale of one to five—one being low and five being high—how important do you think legally-armed citizens are to reducing crime rates overall[.]”²⁴ 54.7% of participants ranked the contribution of armed citizens with the top score of “five.”²⁵ A total of 90.4% of law enforcement officers classified legally-armed citizens in the range of three to five on the scale of importance;²⁶ those of the opinion that armed citizens are of relatively little or no importance to reducing crime were a distinct minority of merely 9.6% of respondents.²⁷

Police leadership thinks the same way as the rank and file. The 2016 Annual Survey of its members by the National Association of Chiefs of Police reported that 76% of law enforcement commanders agree that

18. David B. Mustard, *The Impact of Gun Laws on Police Deaths*, 44 J.L. & ECON. 635, 638 (2001).

19. Mustard, *supra* note 17, at 331. See also Daniel D. Polsby & Don B. Kates, Jr., *American Homicide Exceptionalism*, 69 UNIV. COLO. L. REV. 969, 1007 n.90 (1998).

20. Mustard, *supra* note 17, at 331.

21. Terry Flynn, *Gun-Toting Kentuckians Hold Their Fire*, CINCINNATI ENQUIRER, June 16, 1997, at A1.

22. Mustard, *supra* note 17, at 331.

23. See *Gun Policy & Law Enforcement: Survey Results*, POLICEONE (Mar. 4–13, 2013) https://media.cdn.lexipol.com/p1_gunsurveysummary_2013.pdf (detailing question 19).

24. *Id.* (detailing question 20).

25. *Id.*

26. *Id.*

27. *Id.*

“qualified, law-abiding armed citizens help law enforcement reduce violent criminal activity.”²⁸

Regarding concealed-carry permits specifically, the chiefs and sheriffs were asked if their “department[s] support nationwide recognition of state issued concealed weapon permits”: 86.4% answered “Yes.”²⁹

B. Three Successive Appraisals of the Entire Corpus of Firearms Literature—By the Most Distinguished, Non-Partisan Research Institutes in America—Have Concluded That There Is No Good Evidence That Enactment of a “Right-to-Carry” Law Increases Firearms Violence

1. The National Research Council’s 2005 Review

The principal scientific resource of the United States government is the National Academy of Sciences, which was chartered by Congress in 1863 as a private, non-profit, self-perpetuating society of distinguished scholars dedicated to the furtherance of science and technology, and charged with a mandate to advise the federal government on scientific and technical matters.³⁰ The primary operating agency of the National Academy of Sciences is the National Research Council (NRC).³¹ At the beginning of this century, the NRC was asked by a consortium of public and private institutions, including the federal Centers for Disease Control, the National Institute of Justice, and the Joyce Foundation “to evaluate the data and research on firearms.”³² (The Joyce Foundation funds research and advocacy by gun-control proponents, such as the Violence Policy Center, the news organization thetrace.org, and professor David Hemenway of the Harvard Injury Control Research Center).³³ At the behest of these agencies, the NRC undertook “an assessment of the strengths and limitations of the existing research and data on gun violence.”³⁴ Its goal was “to raise the science of firearms research so that it can begin to inform public policy.”³⁵ The NRC surveyed *all* of the scientific literature on firearms regulation—approximately 400 books, science journal articles, and peer-reviewed studies—and in 2005

28. Nat’l Ass’n of Chiefs of Police, *28th Annual National Survey Results*, CRIME PREVENTION RSCH. CTR., <https://crimeresearch.org/wp-content/uploads/2016/07/NACOP-surveyresults-2016.pdf> (last visited Jan. 18, 2021); see Cody Derespina, *Growing Number of Police Chiefs, Sheriffs Join Call to Arms*, FOX NEWS (Jan. 15, 2016), <https://www.foxnews.com/us/growing-number-of-police-chiefs-sheriffs-join-call-to-arms>.

29. Nat’l Ass’n of Chiefs of Police, *supra* note 28.

30. See NAT’L RSCH. COUNCIL, *FIREARMS AND VIOLENCE: A CRITICAL REVIEW*, at iii (Charles F. Wellford, John V. Pepper & Carol V. Petrie eds., 2005).

31. *See id.*

32. *See id.* at 13.

33. See Ellen Alberding, *The Joyce Foundation’s President’s Report*, JOYCE FOUNDATION, <http://www.joycereport.org/#b-2> (last visited Jan. 18, 2021).

34. NAT’L RSCH. COUNCIL, *supra* note 30, at 1.

35. *Id.* at x.

issued what it characterized as “A Critical Review” of this entire body of research.³⁶

The NRC devoted “special attention” to the “right-to-carry” issue because it “is highly controversial, has received much public attention, and has generated a large volume of research.”³⁷ Much of the early research reviewed by the NRC suggested that the passage of right-to-carry laws lowered rates of violent crime by deterring criminals from risking assaults on citizens who might be carrying a concealed firearm.³⁸ The most prominent studies were those by Professor John Lott, who served as the chief economist of the United States Sentencing Commission and held academic appointments at Yale, the University of Chicago, and the University of Pennsylvania’s Wharton School.³⁹ Lott’s “more guns means less crime” thesis argued that RTC laws requiring the issuance of a CHL to any eligible, law-abiding citizen who applied for such a license were strongly associated “with fewer murders, aggravated assaults, and rapes.”⁴⁰ This provoked a great deal of controversy, with strident accusations of shoddy research flying back and forth.⁴¹ Lott’s work was criticized.⁴² For example, law professors Ian Ayres and John Donohue wrote, “we find that the statistical evidence that these laws have reduced crime is limited, sporadic, and extraordinarily fragile.”⁴³ Yet other scholars argued that Ayers and Donohue had selected the particular years they studied to ensure that the data would generate the results they desired, and argued that if Ayers and Donohue had instead “extended their analysis by one more year, they would have concluded” that laws allowing concealed handguns to be carried in public indeed “reduce crime.”⁴⁴ Some economists opined that Ayers and Donohue’s conclusions were “not supported by their own results” and that, in fact, “*even their own estimates* imply fairly consistently large annual benefits [of right-to-carry laws] from reducing crime.”⁴⁵

36. See *id.* at 22–30, 78, 130–33, 156–61, 174–77, 186–92, 242–68. By one count, the NRC reviewed “253 journal articles, 99 books, 43 government publications, and some original empirical research.” See Don Kates & Gary Mauser, *Would Banning Firearms Reduce Murder and Suicide? A Review of International and Some Domestic Evidence*, 30 HARV. J.L. & PUB. POL’Y 649, 654 (2007).

37. NAT’L RSCH. COUNCIL, *supra* note 30, at 121.

38. *Id.*

39. JOHN LOTT, *MORE GUNS, LESS CRIME*, at ix (3d ed. 2010).

40. *Id.* at 57.

41. See Ayres & Donohue, *supra* note 7, at 1197.

42. See, e.g., *id.* at 1201.

43. *Id.*

44. Carlisle E. Moody & Thomas B. Marvell, *The Debate on Shall-Issue Laws*, 5 ECON. J. WATCH 269, 291 (2008) (emphasis added).

45. Florenz Plassman & John Whitley, *Confirming “More Guns, Less Crime”*, 55 STAN. L. REV. 1313, 1317, 1365 (2003) (emphasis added).

The NRC directly addressed the controversy.⁴⁶ After analyzing the extant research at great length,⁴⁷ the NRC “recognize[d] that several independent investigators have used alternative models or data to obtain results that are consistent with Lott’s.”⁴⁸ Consider the views of the late James Q. Wilson, one of the most respected and influential criminologists of the last century.⁴⁹ Wilson was on the NRC committee and he summarized the research this way: “[W]ith only a few exceptions, the studies . . . including those by Lott’s critics, *do not show that the passage of RTC laws drives the crime rates up (as might be the case if one supposed that newly armed people went about looking for someone to shoot).*”⁵⁰ He explained that “some of [Lott’s] results survive virtually every reanalysis done by the [NRC] committee,”⁵¹ and that, “for people interested in RTC [right to carry] laws, *the best evidence we have is that they impose no costs but may confer benefits,*”⁵² because the NRC’s own tabulation of the research results largely confirmed the hypothesis that permissive concealed-carry laws are associated with reduced murder rates.⁵³

Wilson’s conclusion was simple: “In sum, I find that the evidence presented by Lott and his supporters suggests that RTC laws do in fact help drive down the murder rate, though their effect on other crimes is ambiguous.”⁵⁴

Wilson was the only dissenter.⁵⁵ Fifteen out of sixteen members of the NRC deemed Lott’s research more ambiguous than Wilson did, finding that “[w]hile the trend models show a reduction in the crime growth rate following the adoption of right-to-carry laws, these trend reductions occur long after law adoption, casting serious doubt on the proposition that the trend models estimated in the literature reflect effects of the law change.”⁵⁶ They then concluded “that with the current evidence, *it is not possible to determine that there is a causal link between the passage of right-to-carry laws and crime rates.*”⁵⁷ It is vital to bear in mind that, in one researcher’s view, when the NRC conducted its review of firearms literature, “no empirical research ha[d] made a case for shall-issue laws *increasing* crime. Instead, the literature has disputed the magnitude of the *decrease* and whether

46. NAT’L RSCH. COUNCIL, *supra* note 30, at 127.

47. *Id.* at 120–51. The research that the NRC deemed inconclusive included all of Ayers and Donohue’s studies. *See id.*

48. *Id.* at 127.

49. *See* James Q. Wilson, *Dissent to FIREARMS AND VIOLENCE: A CRITICAL REVIEW*, *supra* note 30, at app. A, 270.

50. *Id.* (emphasis added).

51. *Id.* at 269.

52. *Id.* at 270 (emphasis added).

53. *Id.* at 270–71.

54. *Id.* at 271.

55. *Id.* at 269.

56. NAT’L RSCH. COUNCIL, *supra* note 30, at 150.

57. *Id.* (emphasis added).

the estimated decreases are statistically significant.”⁵⁸ Even those most critical of the “more guns means less crime” thesis admitted that *they could not prove the converse*: widespread issuance of concealed handgun licenses causes an *increase* in criminal violence.⁵⁹ Stanford Law School’s Professor John Donohue, perhaps the most prominent and vehement opponent of right-to-carry laws, acknowledged the concern “that our statistical models are simply too blunt an instrument to ascertain the likely modest impact of RTC laws on overall crime,”⁶⁰ and that consequently “[a]ll we can really say is that we know that there is no evidence of *reduction* in violent crime when RTC laws are passed.”⁶¹ Similarly, gun-control advocate Professor Jens Ludwig conceded that the data was woefully incomplete and that any increase in homicides after the enactment of RTC statutes was “not statistically significant.”⁶² Three leading scholars who oppose RTC laws summed up the debate this way:

Whether the net effect of relaxing concealed-carry laws is to increase or reduce the burden of crime, there is good reason to believe that the net is not large. . . . [T]he change in gun carrying appears to be concentrated in rural and suburban areas where crime rates are already relatively low, among people who are at relatively low risk of victimization—white, middle-aged, middle-class males. . . . *Based on available empirical data, therefore, we expect relatively little public safety impact if courts invalidate laws that prohibit gun carrying outside the home, assuming that some sort of permit system for public carry is allowed to stand.*⁶³

However, not all special-interest groups that oppose Second Amendment rights appear to be as forthright about the state of scientific research on criminal violence with a firearm, and they continue to rely on

58. Mustard, *supra* note 17, at 326 (emphasis added).

59. See, e.g., Ayres & Donohue, *supra* note 7, at 1281–82, 1286–87 (disagreeing that RTC laws reduce crime, but admitting that data and modeling problems prevent a strong claim that RTC laws increase crime); Ian Ayres & John J. Donohue, *More Guns, Less Crime Fails Again: The Latest Evidence From 1977–2006*, 6 ECON. J. WATCH 218, 230–31 (2009) (same); David McDowall et al., *Easing Concealed Firearms Laws: Effects on Homicide in Three States*, 86 J. CRIM. L. & CRIMINOLOGY 193, 203–04 (1995) (noting the data sets are inconsistent, and therefore, “our analysis does not allow a firm conclusion that shall issue licensing increases firearms homicides”).

60. John J. Donohue, *Guns, Crime, and the Impact of State Right-to-Carry Laws*, 73 FORDHAM L. REV. 623, 639 (2004).

61. *Id.* at 638 (emphasis added); see also John J. Donohue, *The Impact of Concealed-Carry Laws*, in EVALUATING GUN POLICY 287, 320–25 (Jens Ludwig & Philip J. Cook eds. 2003).

62. Jens Ludwig, *Concealed-Gun-Carrying Laws and Violent Crime: Evidence from State Panel Data*, 18 INT’L REV. L. & ECON. 239, 248–49 (1998).

63. Philip J. Cook et al., *Gun Control After Heller: Threats and Sideshows from a Social Welfare Perspective*, 56 UCLA L. REV. 1041, 1082 (2009) (emphasis added); see also *Moore v. Madigan*, 702 F.3d 933, 937–38 (7th Cir. 2012) (quoting and relying upon the Cook article).

research that has long been discredited.⁶⁴ For example, the Brady Campaign to Prevent Gun Violence claims that “[g]uns in public expose all members of society to great risks” because such “guns are used ‘far more often to kill and wound innocent victims than to kill and wound criminals . . . [and] guns are also used far more often to intimidate and threaten than they are used to thwart crimes.’”⁶⁵ The three words that the Brady Campaign carefully excised from its quotation are “particularly at home.”⁶⁶ Presumably, properly including the full quotation would undermine the Brady Campaign’s argument against the carrying of firearms because the subject of the quoted article (by a scholar named David Hemenway at the Harvard School of Public Health) focused on the keeping of guns *in the home*.⁶⁷

But the flaw in the Brady Campaign’s argument is actually far worse than that because Hemenway was, in turn, relying on several articles by a scholar named A. L. Kellerman—studies that were discredited many years ago.⁶⁸ The NRC concluded that (i) Kellerman’s studies utterly failed to establish that gun ownership increased the risk of violence to the owner, (ii) the studies were incapable of throwing light on “the impact of firearms on homicide or the utility of firearms for self-defense,” and (iii) the studies’ two conclusions “that owning firearms for personal protection is ‘counterproductive’ and that ‘people should be strongly discouraged from keeping guns in the home’” were simply “not tenable.”⁶⁹ Among other things, the NRC pointed out that Kellerman’s studies simply *assumed* that a mere statistical *association* between lawful possession of a gun and a risk of homicide meant that it was the ownership of the firearm by the law-abiding citizen that *caused* the peril to that citizen, when in fact causation could actually be the *reverse*: a citizen’s decision to arm himself might well be *caused* by the homicide risks inherent in, for example, residing in a bad neighborhood or being pursued by a stalker.⁷⁰

64. See, e.g., Motion of Amicus Curiae Brady Center to Prevent Gun Violence for Leave to File an Amicus Brief in Support of Defendants, *Shepard v. Madigan*, 863 F. Supp. 2d 774 (S.D. Ill. 2012) (No. 11-CV-4-5-WDS-PMF).

65. *Id.* at 7 (quoting David Hemenway & Deborah Azrael, *The Relative Frequency of Offensive and Defensive Gun Uses: Results from a National Survey*, 15 VIOLENCE & VICTIMS 257, 271 (2000)). A typical example of the Brady Campaign’s argument may be found in the unsuccessful brief that it filed in the *Shepard* case in Illinois (where the federal Seventh Circuit Court of Appeals ultimately struck down Illinois’s total ban on carry firearms in public). *Id.*

66. See Hemenway & Azrael, *supra* note 65, at 271.

67. *Id.*

68. See A.L. Kellerman & D.T. Reay, *Protection or Peril? An Analysis of Firearm-Related Deaths in the Home*, 314 NEW ENG. J. OF MED. 1557–60 (1986); A.L. Kellerman et al., *Gun Ownership as a Risk Factor for Homicide in the Home*, 329 NEW ENG. J. OF MED. 1084–91 (1993); A.L. Kellerman et al., *Injuries and Deaths Due to Firearms in the Home*, 45 J. OF TRAUMA 263–67 (1998).

69. NAT’L RSCH. COUNCIL, *supra* note 30, at 117–19 (citation omitted).

70. See *id.* at 118–19.

2. The Centers for Disease Control's 2005 Review

The federal Centers for Disease Control (CDC) is “the nation’s health protection agency,” expressly pledged to “[b]ase all public health decisions on the highest quality scientific data that is derived openly and objectively.”⁷¹ Like the National Research Council, the CDC reviewed the entire corpus of firearms literature and found that it does not support the proposition that increasing the number of law-abiding citizens carrying firearms in public spaces increases gun violence.⁷² The CDC convened an independent task force and, from 2000 to 2002, it conducted “a systematic review of scientific evidence regarding the effectiveness of firearms laws in preventing violence, including violent crimes, suicide, and unintentional injury.”⁷³ The CDC took pains to note that its review involved “systematic epidemiologic evaluations and syntheses of *all available literature* meeting specified criteria.”⁷⁴ Nearly all the members of the task force were physicians or epidemiologists, rather than criminologists or lawyers.⁷⁵ The CDC task force reviewed *all* the firearms literature collected in eleven different databases of public health, medical, sociological, psychological, criminal-justice, legal, economics, and public-policy research.⁷⁶

The CDC concluded that there were insufficient data to support the hypothesis that more firearms carried in public by licensed citizens increases rates of injury in interpersonal confrontations.⁷⁷ The CDC noted that, if anything, the more reliable studies—those of greatest design suitability—indicated that homicide rates went *down* when more carry permits were issued.⁷⁸ Like the NRC, the CDC determined that all of the extant firearms research suffered from systemic flaws that did not permit reliable conclusions and therefore no informed policy recommendation could be made about the carrying of firearms in public.⁷⁹

71. See *Mission, Role and Pledge*, CTR. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/about/organization/mission.htm> (last visited Jan. 18, 2021).

72. See Morbidity & Mortality Wkly. Rep. Recommendations and Rpts., *First Reports Evaluating the Effectiveness of Strategies for Preventing Violence: Firearms Laws*, CTRS. FOR DISEASE CONTROL & PREVENTION, (Oct. 3, 2003) at 11, <https://www.cdc.gov/mmwr/PDF/rr/rr5214.pdf>.

73. See *id.*

74. Robert Hahn et al., *Firearms Laws and the Reduction of Violence: A Systematic Review*, 28 AM. J. PREV. MED. 40, 42 (2005) (emphasis added).

75. See Ctrs. for Disease Control and Prevention, *supra* note 72, at 11.

76. *Id.*

77. *Id.* The CDC “found insufficient evidence to determine the effectiveness of any of the firearms laws or combinations of laws reviewed on violent outcomes. (Note that insufficient evidence to determine effectiveness should not be interpreted as evidence of ineffectiveness.)” *Id.*

78. *Id.*

79. *Id.*

3. *The RAND Corporation's 2018 Review*

In 2018, an updated, all-inclusive survey of firearms research was conducted by The RAND Corporation—a nonprofit, nonpartisan research organization committed to the public interest and dedicated to developing solutions to public-policy challenges.⁸⁰ The RAND Report “builds and expands on earlier comprehensive reviews of scientific evidence on gun policy conducted more than a decade ago by the National Research Council . . . and the Community Preventative Services Task Force.”⁸¹ RAND focused its analysis on studies examining the effects of concealed-carry laws on violent crime outcomes because the NRC (2004) and CDC (2005) found that estimates of such effects were too sensitive to reasonable differences in methods to draw conclusions about the direction or magnitude of the laws’ effects. Because so much more study has been done of this relationship than of any other gun policy and outcome, there is a much richer evidence base to draw on.⁸²

Employing well-established protocols and “guidelines for conducting systematic reviews of a scientific literature,” RAND evaluated all the “observational studies across a range of disciplines” relating to firearms policy, “including economics, psychology, public health, sociology, and criminology.”⁸³ RAND culled the research that failed to meet these exacting, professional inclusion criteria and closely examined the remaining sixty-three studies, taking up where the NRC and CDC left off.⁸⁴ Concealed-carry laws were one of the principal focal points of the RAND Report:

The increased prevalence of concealed weapons could lead to increased crime and violence if disagreements, perceived threats, and conflicts are more likely to result in casualties when a handgun is readily available. Alternatively, concealed-carry laws could lead to reductions in the prevalence or severity of violent crime and mass shootings either because the prospect of encountering an armed victim serves as a deterrent or because victims will more frequently be able to use a gun to defend themselves.⁸⁵

RAND was able to identify “only one study that analyzed how changes in the number of concealed-carry permits related to changes in various types

80. See RAND CORP., *THE SCIENCE OF GUN POLICY: A CRITICAL SYNTHESIS OF RESEARCH EVIDENCE ON THE EFFECTS OF GUN POLICIES IN THE UNITED STATES* (2018). See generally RAND, <http://www.rand.org> (last visited Jan. 18, 2021) (providing objective, rigorous, and multidisciplinary research reports covering a broad scope of fields, all of which are committed to the public interest).

81. RAND CORP., *supra* note 80, at xvii.

82. *Id.* at 175.

83. *Id.* at 15.

84. *Id.* at 15–27.

85. *Id.* at 161.

of violent crime”; that study analyzed “data from [fifty-eight] Florida counties spanning . . . the period before and after the passage of Florida’s shall-issue law.”⁸⁶ The authors of that study concluded that any “effects of changes in per capita concealed-carry permit rates on violent crime” were “uncertain.”⁸⁷ Moreover, the scientists at RAND identified “serious methodological concerns” in nearly all of the pertinent studies, and reluctantly concluded that even the studies that exhibited fewer fundamental shortcomings hopelessly conflicted with one another and therefore provided *no* basis for making policy decisions about the licensed carrying of firearms in public places.⁸⁸ Among the research that the RAND Report found inconclusive were all six studies by Donohue and his colleagues and all six studies by Lott and his colleagues.⁸⁹

Here are the takeaways from the RAND Report:

- “[T]he best available studies provide inconclusive evidence for the effect of shall-issue laws on homicides.”⁹⁰
- “[T]he best available studies provide inconclusive evidence for the effect of shall-issue laws on firearm homicides.”⁹¹
- “[W]e find inconclusive evidence for the effect of shall-issue laws on mass shootings.”⁹²
- “[T]he best available studies provide inconclusive evidence for the effect of shall-issue laws on robberies.”⁹³
- “[T]he best available studies provide inconclusive evidence for the effect of shall-issue laws on assaults.”⁹⁴
- “[T]he best available studies provide inconclusive evidence for the effect of shall-issue laws on rapes.”⁹⁵

The RAND Report unearthed precisely one study suggesting that shall-issue laws increase violent crime.⁹⁶ That analysis, a 2016 article by Professor Steven Durlauf and his colleagues,⁹⁷ merely suggested that shall-issue laws *might* increase violent crime overall—it reached this conclusion only by ignoring its own data on the actual rates for separate

86. *Id.* at 162.

87. *Id.*

88. *Id.* at 175.

89. *See id.* at 182–83.

90. *Id.* at 175.

91. *Id.*

92. *Id.* at 181.

93. *Id.* at 176.

94. *Id.*

95. *Id.*

96. *Id.* at 168.

97. Steven Durlauf et al., *Model Uncertainty and the Effect of Shall-Issue Right-to-Carry Laws on Crime*, 81 EUR. ECON. REV. 32 (2016).

crimes such as assault and murder and instead “aggregat[ing] all violent crimes into a single category.”⁹⁸ The RAND Report conceded that:

Because evidence for the effect of shall-issue laws on each component of violent crime is inconclusive, it could be argued that this single study of the effect of these laws on all violent crimes should not suffice to suggest that there is more than inconclusive evidence for such an effect.⁹⁹

Nonetheless, the RAND Report concluded, based on this solitary journal article on the arcana of statistical modeling, that “there is *limited evidence that shall-issue laws may increase violent crime*”¹⁰⁰—a speculative claim, at best. In truth, that evidence is extremely limited; the Durlauf study *itself* characterized the evidence as “weak”¹⁰¹ and explicitly advised that the “literature on shall-issue carry laws” is not “a body of work from which conclusions may be drawn.”¹⁰² Indeed, the entire point of Durlauf’s article is that “the estimated effects of shall-issue right-to-carry laws on crime” are so “sensitive to modeling assumptions”¹⁰³ that every model will be “fragil[e]” and lawmakers should therefore be very “cautious in using the results from any one particular model to guide policy decisions.”¹⁰⁴

C. RTC Opponents Speculate About Possible Mechanisms By Which RTC Laws Might Increase Crime

As the NRC explained in its exhaustive review of firearms research, statistical studies may “show that violence is positively associated with firearms ownership, but they have not determined whether these associations reflect causal mechanisms.”¹⁰⁵ Even if crime rates go up (or down) after the enactment of a right-to-carry law, we cannot assume that the former *caused* the latter simply because one followed the other. Regardless of the effectiveness of defensive gun use by CHL holders, one would expect a positive association between victim gun possession and victim injury,¹⁰⁶ because those people most at risk of victimization (e.g., because they reside in a dangerous neighborhood) are also the most likely to arm themselves for protection.¹⁰⁷ Going to the doctor has an extremely high positive association with being sick, but that hardly proves that going to the doctor *causes*

98. RAND CORP., *supra* note 80, at 176.

99. *Id.*

100. *Id.*

101. Durlauf, *supra* note 97, at 52.

102. *Id.* at 35.

103. *Id.* at 52.

104. *Id.* at 34.

105. NAT’L RSCH. COUNCIL, *supra* note 30, at 5.

106. See, e.g., Charles C. Branas et al., *Investigating the Link Between Gun Possession and Gun Assault*, 99 AM. J. PUB. HEALTH 2034, 2037 (2009).

107. NAT’L RSCH. COUNCIL, *supra* note 30, at 5.

illness.¹⁰⁸ Even when statistical associations between gun ownership and homicide could be shown, the National Research Council concluded that no causal link could be demonstrated because of three fatal flaws inherent in all of the extant firearms research:

[T]hese studies do not adequately address the problem of self-selection. Second, these studies must rely on proxy measures of ownership that are certain to create biases of unknown magnitude and direction. Third, because the ecological correlations are at a higher geographic level of aggregation, there is no way of knowing whether the homicides or suicides occurred in the same areas in which the firearms are owned.¹⁰⁹

Therefore, the studies “do not credibly demonstrate a causal relationship between the ownership of firearms and the causes or prevention of criminal violence.”¹¹⁰

RTC critics recently started exploring potential mechanisms by which RTC laws might cause an increase in crime.¹¹¹ Consider the work of Stanford law professor John Donohue, who for the last two decades has been perhaps the most prolific opponent of RTC laws.¹¹² Donohue’s latest research was released in 2017 as a working paper under the auspices of the National Bureau of Economic Research.¹¹³ Donohue’s working paper speculates about five causal mechanisms:

[W]e consider five ways in which RTC laws could increase crime: (a) elevated crime by RTC permit holders or by others, which can be induced by the greater belligerence of permit holders that can attend gun carrying or even through counterproductive attempts by permit holders to intervene protectively; (b) increased crime by those who acquire the guns of permit holders via loss or theft; (c) a change in culture induced by the hyper-vigilance about one’s rights and the need to avenge wrongs that the gun culture can nurture; (d) elevated harm as criminals respond to the possibility of armed resistance by increasing their gun carrying and escalating their level of violence; and (e) all of the above factors will either take up police time or increase the risks the police face, thereby impairing the crime-fighting ability of police in ways that can increase crime.¹¹⁴

108. See Jill J. Ashman et al., *Characteristics of Office-Based Physician Visits, 2016*, NCHS DATA BRIEF, no. 331 (Jan. 2019), <http://www.cdc.gov/nchs/data/databriefs/db331-h.pdf>.

109. NAT’L RSCH. COUNCIL, *supra* note 30, at 6.

110. *Id.*

111. See John J. Donohue et al., *Right-to-Carry Laws and Violent Crime: A Comprehensive Assessment Using Panel Data and a State-Level Synthetic Control Analysis* 4–16 (Nat’l Bureau of Econ. Rsch., Working Paper No. 23510, 2018), <https://www.nber.org/papers/w23510.pdf>.

112. See sources cited *supra* notes 59–61 (exemplifying Donohue’s work in the last two decades).

113. Donohue et al., *supra* note 111, at 1.

114. *Id.* at 5–6.

None of the arguments for these hypothetical mechanisms are persuasive.

1. Crimes By Those Licensed to Carry Concealed Handguns

The data do not support the suggestion that CHL permit holders themselves are responsible for any increase in violent crime.¹¹⁵ Consider the data from Texas: “Acquiring a CHL in Texas requires a background check, fingerprinting, hours of instruction by a licensed instructor, a written exam, and a marksmanship test on a firing range.”¹¹⁶ These regulatory requirements were “expressly devised to make CHL holders a subpopulation that differs dramatically from the average criminal offender.”¹¹⁷ The difference is that the applicants who survive this vetting and winnowing process are “almost universally a law-abiding population,”¹¹⁸ especially when compared to everyone else in Texas.¹¹⁹ Consequently, CHL holders “are responsible for very little of the state’s criminality.”¹²⁰ Overall, non-holders of a CHL in Texas are convicted of serious violent crimes (robbery, assault, intentional killing, etc.) 553.5 times more often than CHL holders.¹²¹ Specifically, those who do not have a CHL account for 839.6 times as many assaults, 583.7 times as many aggravated assaults, and 237.9 times as many intentional killings.¹²²

The Texas experience has been mirrored in other states. For example:

- In the first ten years that Florida granted concealed-carry permits, 457,299 licenses were issued and only eighty-five were revoked because the permit holder committed an offense—a rate just under .02 percent.¹²³
- A year after Nevada began to issue licenses, “[l]aw enforcement officials throughout the state could not document one case of a fatality that resulted from irresponsible gun use by someone who obtained a permit under the new law.”¹²⁴
- After Kentucky’s concealed-carry law had been in effect for a year, numerous police officers and police chiefs confirmed that there had been no

115. NAT’L RSCH. COUNCIL, *supra* note 30, at 7.

116. Charles D. Phillips et al., *When Concealed Handgun Licensees Break Bad: Criminal Convictions of Concealed Handgun Licensees in Texas 2001-2009*, 103 AMER. J. PUB. HEALTH 86, 89 (2013).

117. *Id.*

118. *Id.* at 90.

119. *See id.* at 89. Texas maintains data that allow a comparison between the criminal activity of CHL holders to the rest of the state’s population. *Id.* at 87. A recent study by public health scholars analyzed the figures from 2001 through 2009. *See id.*

120. *Id.* at 89.

121. *Id.* at 88 tbl.1. There were 934 convictions of Texas CHL holders for these crimes in the nine-year study period; total convictions for non-holders numbered 516,958. *Id.*

122. *Id.*

123. Samuel Francis, *Evidence Shows Concealed-Carry Laws are Safe*, LAS VEGAS REV. J., Jan. 18, 1997, at 1D.

124. LOTT, *supra* note 39, at 12–13.

cases in which a concealed-carry permit holder committed an offense with a firearm.¹²⁵

- In South Carolina, between 1989 and 1997, only one permit holder was charged with a felony (a non-firearms related crime), and the charge was dropped.¹²⁶

- In North Carolina, over 26,000 permits had been issued by 1997 and not a single one was revoked as the result of a permit holder committing a crime.¹²⁷

In short, “CHL holders rarely ‘break bad.’”¹²⁸ Applicants who have passed background checks, firearms training programs, and other state licensing requirements tend—unsurprisingly—to be responsible, law-abiding citizens.¹²⁹ Consequently, even staunch gun-control advocates have acknowledged that “[t]he available data about permit holders also imply that *they are at fairly low risk of misusing guns*, consistent with the relatively low arrest rates observed to date for permit holders.”¹³⁰

The Donohue working paper relies on the Texas study discussed above,¹³¹ but nonetheless dismisses its central conclusion that “CHL holders rarely ‘break bad,’”¹³² arguing instead that assessing the theoretical risk of violence by CHL holders by examining the actual crime rates of CHL holders is somehow “misguided.”¹³³

First, we are told that “only a small fraction of one percent of Americans commits a gun crime each year, so we do not expect even a random group of Americans to commit much crime, let alone a group [theoretically] purged of convicted felons.”¹³⁴ Because this is a concession that CHL holders commit very little gun crime, we are unsure how it helps Donohue’s position.¹³⁵ Moreover, the Texas study compared the actual rates of criminal violence for CHL holders and non-holders (not merely isolated incidents) and concluded

125. See Terry Flynn, *supra* note 2.

126. See Mustard, *supra* note 17, at 331; see also Lawrence Messina, *Gun Permit Seekers Not the Criminal Type*, CHARLESTON GAZETTE, July 28, 1997, at C1 (“The sort of people who ask to carry concealed pistols legally in Kanawha County aren’t the sort of people who commit felony offenses, court records show.”).

127. See Lee Anderson, *North Carolina’s Guns*, CHATTANOOGA FREE PRESS, May 31, 1997, at A4.

128. Phillips et al., *supra* note 116, at 9. This same public-health research team recently studied data from four states (Texas, Florida, Michigan and Pennsylvania) and concluded that “the easing of restrictions on CHL access,” to the degree that doing so “increase[s] legal concealed carry rates, will not have an effect on crime rates.” Charles D. Phillips et al., *Concealed Handgun Licensing and Crime in Four States*, 2015 J. OF CRIMINOLOGY 1, 6 (June 16, 2015), <http://downloads.hindawi.com/archive/2015/803742.pdf>.

129. See Phillips et al., *supra* note 116, at 86.

130. Philip J. Cook et al., *supra* note 63 (emphasis added).

131. See Donohue et al., *supra* note 111, at 7 n.9.

132. Phillips et al., *supra* note 116, at 9.

133. See Donohue et al., *supra* note 111, at 7.

134. *Id.*

135. See *id.*

that CHL holders “rarely ‘break bad’”—which is, of course, the central issue.¹³⁶

Second, the Donohue working paper contends that CHL “permit revocations clearly understate the criminal misconduct of permit holders, *since not all violent criminals are caught.*”¹³⁷ But of course that same jejune observation affects *every single crime statistic.*¹³⁸ And this fact actually lends itself to the reason why many, if not all, concealed-carry license holders have a license in the first place—for self-defense because law enforcement is unlikely to protect them.¹³⁹ You are your own first responder.¹⁴⁰ The police cannot be in all places at all times and likely will not be present when you need them to prevent a crime from being committed.¹⁴¹

Furthermore, law enforcement’s record of solving crimes in America is not particularly impressive for a whole host of reasons.¹⁴² The conclusion that police cannot solve violent crimes after the fact is well established by none other than the anti-gun website The Trace.¹⁴³ In January 2019, The Trace and BuzzFeed News released a joint investigation entitled, “Shoot Someone in a Major U.S. City, and Odds Are You’ll Get Away with It.”¹⁴⁴ They found that “[a] shocking number of shootings go unsolved. In some police departments, hundreds of cases aren’t investigated at all.”¹⁴⁵ The investigation lasted one year and was based on data obtained from twenty-two cities.¹⁴⁶

The investigation found that:

- In cities from coast to coast, the odds that police will solve a shooting are abysmally low and dropping. Homicides and assaults carried out with guns lead to arrests about half as often as when the same crimes are committed using other weapons or physical force.
- The odds of an arrest are particularly low when victims survive, in part because those crimes tend to be assigned to detectives whose caseloads are exponentially higher compared to their colleagues in the homicide department, who are often overburdened themselves.

136. Phillips et al., *supra* note 116, at 89.

137. Donohue et al., *supra* note 111, at 7 (emphasis added).

138. *See id.*

139. JAMES D. WRIGHT & PETER H. ROSSI, ARMED AND CONSIDERED DANGEROUS 141 (2d ed. 2008).

140. Mark W. Smith, *Assault Weapon Bans: Unconstitutional Laws for a Made-Up Category of Firearms*, 43 HARV. J.L. & PUB. POL’Y 357, 371 (2020).

141. *Id.* at 370–71.

142. *See, e.g.*, Sarah Ryley, Jeremy Singer-Vine & Sean Campbell, *Shoot Someone in a Major U.S. City, and Odds Are You’ll Get Away with It*, TRACE (Jan. 24, 2019), <https://www.thetrace.org/features/murder-solve-rate-gun-violence-baltimore-shootings/>.

143. *See, e.g., id.*

144. *Id.*

145. *Id.*

146. *Id.*

- The chances are even lower if the victims . . . are people of color. When a black or Hispanic person is fatally shot, the likelihood that local detectives will catch the culprit is 35 percent—18 percentage points fewer than when the victim is white. For gun assaults, the arrest rate is 21 percent if the victim is black or Hispanic, versus 37 percent for white victims.

....

The crisis of unsolved shootings isn't confined to cash-strapped cities like Baltimore, but also hits some of America's most affluent metropolises. In 2016, Los Angeles made arrests for just 17 percent of gun assaults, and Chicago for less than 12 percent. The same year, San Francisco managed to make arrests in just 15 percent of the city's nonfatal shootings. In Boston, the figure was just 10 percent.¹⁴⁷

Donahue's observations that not all violent criminals are caught is certainly true, but this provides little solace for the victim lying on the sidewalk outlined in chalk.¹⁴⁸

Finally, the Donahue working paper states that the main reason the crime rates and revocation rates of CHL holders are not important is because the *real* problem is "RTC laws *increase crime by individuals other than permit holders.*"¹⁴⁹ The explanation for this proposition is a series of tentative conjectures piled on one another: "The *messages* of the gun culture, *perhaps* reinforced by the adoption of RTC laws, *can promote* fear and anger, which are emotions that *can invite* more hostile confrontations leading to violence."¹⁵⁰ This assertion appears to be quite speculative. No analysis, figures, crime rates, or statistics are offered to support this assertion.¹⁵¹

Every category of individuals who hold a license from the state—to practice medicine, to drive a car, to carry a handgun—will contain a few people who are unqualified to do so (or who are generally qualified, but in some instances will make a mistake).¹⁵² No screening process is infallible.¹⁵³ All that the Donohue working paper offers on the public-health peril supposedly created by CHL holders is a handful of anecdotes, the first of which involves a CHL holder who shot a man in a movie theater in Florida because the latter was using his cell phone.¹⁵⁴ That incident actually proves the contrary point that not even the most meticulous licensing process and the most rigorous training regime can screen out all those who might one day

147. *Id.* (emphasis omitted).

148. Donohue et al., *supra* note 111, at 7.

149. *Id.* (emphasis added).

150. *Id.* at 7–8 (emphasis added).

151. *See id.*

152. *See, e.g., Ex-Driver's License Office Worker Sentenced for Selling Licenses to Unqualified Drivers*, MAGNOLIA STATE LIVE (Oct. 3, 2019, 2:58 PM), <https://www.magnoliastatelive.com/2019/10/03/ex-drivers-license-office-worker-sentenced-for-selling-licenses-to-unqualified-drivers/>.

153. *See, e.g., id.*

154. Donohue et al., *supra* note 111, at 6.

abuse the CHL privilege.¹⁵⁵ The shooter in the movie theater was a retired Tampa police captain with a distinguished record.¹⁵⁶ Another recent case involved a homicide by a CHL holder who was the pastor of a small-town Baptist church.¹⁵⁷

Donohue's anecdotes are his undoing. Anecdotal evidence is information collected in a casual or informal manner that relies on storytelling and personal accounts.¹⁵⁸ When only a few anecdotes are presented, there is a greater chance that they may be unreliable if they are cherry-picked or otherwise nonrepresentative samples of typical cases.¹⁵⁹ Information gleaned from anecdotes is further skewed by the well-known psychological process of cognitive bias, which means that people are more likely to notice and remember aberrant or unusual examples than typical examples.¹⁶⁰ This is why airplane crashes get more attention than when an airplane lands safely.¹⁶¹ This is why the media is more likely to cover a rare school shooting than to give the same quantum of coverage to a single weekend in gun-controlled Chicago, where more people will be shot by gun-toting criminals in a weekend than in almost any high-profile mass shooting.¹⁶²

Bereft of reliable statistical evidence on handgun violence committed by CHL holders, opponents of the right to keep and bear arms resort to random, poorly documented, unreliable anecdotes.¹⁶³ Consider a website maintained by the Violence Policy Center entitled "Concealed Carry Killers" ("VPC Webpage").¹⁶⁴ "Concealed Carry Killers" purports to keep a running

155. *See id.*

156. *See* Dan Sullivan, *Trial Postponed in Pasco Theater Shooting Due To Stand Your Ground Uncertainty*, TAMPA BAY TIMES (Aug. 24, 2018), https://www.tampabay.com/news/courts/criminal/Trial-postponed-in-Pasco-theater-shooting-due-to-stand-your-ground-uncertainty_171176116/.

157. Heather Tomlinson, *Keith Again Enters Plea of Not Guilty*, COMMONWEALTH J. (Nov. 6, 2013), https://www.somerset-kentucky.com/news/local_news/keith-again-enters-plea-of-not-guilty/article_a64b3f4b-cd60-5d35-bb0f-e4a09271919f.html.

158. *See Anecdotal Evidence*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2020).

159. *See* A. E. Simmons, *The Disadvantages of a Small Sample Size*, SCIENCING (May 14, 2018), <https://sciencing.com/disadvantages-small-sample-size-8448532.html>. It is a classic logical error to draw inductive inferences from a too-small sample size and/or to draw an inference from atypical or exceptional examples. *See id.*

160. *See, e.g.*, David Ropeik, *How Risky Is Flying?*, NOVA, <https://www.pbs.org/wgbh/nova/plane-crash/risky.html> (last visited Jan. 18, 2021).

161. *Id.*

162. Safia Samee Ali, *For Some in Chicago, Gun Violence Is a Daily Reality, Leaving the Same Trauma as Mass Shootings*, NBC NEWS (Aug. 7, 2019, 10:54 PM), <https://www.nbcnews.com/news/us-news/some-chicago-gun-violence-daily-reality-leaving-same-trauma-mass-n1040231> (noting fifty-nine people were shot in a single weekend in Chicago).

163. *See* Amy Swearer, *Debunking the Myth of "Concealed Carry Killers"*, HERITAGE FOUND. (Nov. 5, 2019), <https://www.heritage.org/firearms/commentary/debunking-the-myth-concealed-carry-killers>.

164. *Concealed Carry Killers*, VIOLENCE POL'Y CTR.: CONCEALED CARRY KILLERS, www.concealedcarrykillers.org (last updated Dec. 16, 2020). The site keeps a running tally of what it presents as homicides committed by CHL holders; it is updated periodically. *Id.*

tally of the number of people killed since 2007 by citizens who have permits to carry firearms in public.¹⁶⁵

Although presented as scholarly research, the VPC Webpage is nothing of the sort.¹⁶⁶ It is instead a shifting compilation of gun-violence anecdotes culled from local newspaper clippings, court filings, media websites, and Twitter feeds.¹⁶⁷ Indeed, the VPC terms its webpage a collection of “vignettes.”¹⁶⁸ Each vignette describes a firearm incident supposedly involving a CHL holder that resulted in a fatality and includes a citation to one or more sources, but the VPC acknowledges that its information is incomplete and it urges visitors to the site to contact the VPC to contribute to or to correct the vignettes.¹⁶⁹ The references cited by the VPC for its data on “Concealed Carry Killers” include *Entertainment Tonight*,¹⁷⁰ ESPN.com,¹⁷¹ heavy.com (a website devoted to entertainment, video games, and pop-culture),¹⁷² tasteofcountry.com (an entertainment website about country music),¹⁷³ and even scallywagandvagabond.com, a website dedicated to “[p]opular [c]ulture,” “[s]candal,” and “[g]ossip” that references Twitter tweets and Facebook postings.¹⁷⁴

Even if such “authorities” were credible, most of the VPC’s vignettes on their own terms render themselves irrelevant.¹⁷⁵ By the VPC’s count as of October 26, 2018, since 2007 there have been a total of 1,358 fatal firearm incidents involving “concealed carry killer[s.]”¹⁷⁶ But 534 of those incidents (51%) were not homicides, but suicides.¹⁷⁷ Even a single suicide is a tragedy, but a suicide by an individual who happens to possess a CHL does not make that person a threat to others—only a threat to himself. Moreover, the means of suicide (by firearm or otherwise) are not described in the VPC’s vignettes, so they do not even show that the possession of a CHL—let alone a firearm or a handgun—facilitated the suicide.¹⁷⁸ One does not need a concealed-carry

165. *Id.*

166. *See Total People Killed By Concealed Carry Killers May 2007 to the Present*, VIOLENCE POL’Y CTR.: CONCEALED CARRY KILLERS, <https://concealedcarrykillers.org/wp-content/uploads/2020/04/ccwto-talkilled.pdf> (last visited Jan. 18, 2021). Unfortunately, the VPC has chosen not to paginate its document so citations to it can only be to the PDF file as a whole. *See id.*

167. *See id.*

168. *Id.*

169. *Id.*

170. *Id.* (discussing Iowa case involving Spencer Arnold).

171. *Id.* (discussing Georgia case involving Javaris Crittenton).

172. *Id.* (discussing Massachusetts case involving Stephen Pasceri).

173. *Id.* (discussing Tennessee case involving Chris Ferrell).

174. *Id.* (discussing Iowa case involving Spencer Lee Sloss).

175. *See id.*

176. *See id.*

177. *Concealed Carry Killers Background*, VIOLENCE POL’Y CTR.: CONCEALED CARRY KILLERS, <https://concealedcarrykillers.org/concealed-carry-killers-background/> (last visited Jan. 18, 2021).

178. *See* CONCEALED CARRY KILLERS, *supra* note 166.

license to kill oneself, to purchase a firearm, or to possess a firearm in one's home (where the vast majority of suicides take place).¹⁷⁹

Amy Swearer, a Senior Legal Policy Analyst at the Heritage Foundation, had this to say about the VPC's work:

The anti-gun group defines [a] "non-self-defense incident" to include virtually any fatality involving a concealed-carry permit holder, including ones that do not remotely resemble the type of intentional homicide evoked by the Violence Policy Center's strong claims about public safety.

For example, roughly 40% of the deaths (534 of 1,335) are suicides. While tragic, firearm suicides are not what a term like "concealed-carry killer" brings to mind.

Moreover, analysis of the remaining "non-self-defense" deaths also belies the group's use of the term.

The Violence Policy Center includes many fatalities where the shooter's concealed-carry permit was irrelevant because he or she did not carry a concealed weapon in public while perpetrating the crime.¹⁸⁰

Although the VPC avers that its vignettes are all examples of outrageous gun violence by "concealed-carry killer[s]" that did not involve lawful self-defense, 69 of the 1049 vignettes (7%) state that the investigation of the incident is still "pending."¹⁸¹ Thus the VPC counts as "homicides" cases in which there has been no determination of criminal responsibility, but every one of those cases could have been an instance of lawful self-defense.¹⁸² In a similar vein, the VPC counts as "concealed carry kill[ings]" instances where a firearm owned by a CHL holder was accidentally discharged by a third party—not by the CHL holder.¹⁸³

The vignettes are supposed to be making the case that a shall-issue system for CHLs imperils *public* safety, but 9% (93 of 1049) of these incidents took place *in the home* or involved a person retrieving a firearm *from their home*¹⁸⁴—people can possess firearms in their homes *without* a CHL.¹⁸⁵ Many of the vignettes are described as taking place inside or next to the CHL holder's car or truck,¹⁸⁶ which does not implicate the CHL system because in most states one does not need a CHL to have a firearm, such as a

179. *See id.*

180. Swearer, *supra* note 163.

181. CONCEALED CARRY KILLERS, *supra* note 166.

182. *Id.*

183. *See, e.g., id.* (discussing Florida case involving Thomas Chambers).

184. *See, e.g., id.* Incidents occurring inside the home include the Indiana case involving Jay Byler, the Iowa case involving Spencer Arnold, and the Kentucky case involving William Seidl. *Id.* An example of a case involving the retrieval of a firearm from the home is the Iowa case involving Alexander Kozak. *Id.*

185. *See* District of Columbia v. Heller, 554 U.S. 570 (2008) (holding that it is a fundamental constitutional right to have a loaded, unlocked handgun in one's home).

186. CONCEALED CARRY KILLERS, *supra* note 166 (analyzing Florida case involving Michael Dunn, who returned to his vehicle to get his handgun after the altercation started).

rifle or shotgun, in one's vehicle and in many states even handguns may be stored in a vehicle without a permit.¹⁸⁷

Many of the VPC's homicide vignettes do not indicate that the homicide was committed with a handgun, so the possession of a CHL is not even implicated.¹⁸⁸ Other vignettes affirmatively reveal a homicide committed with a rifle or shotgun (or even by strangulation);¹⁸⁹ again, those have no bearing on the wisdom of a right-to-carry law governing handgun licenses. Even if a person has the right to carry a handgun, that cannot in any way contribute to their committing a crime with a shotgun or rifle—or with a truck, knife, or rope for that matter.

Some vignettes involve homicides where the perpetrator was an off-duty or retired police officer who would have been authorized to carry a handgun even without a “shall issue” CHL system.¹⁹⁰

In addition to information gleaned from tweets and newspaper clippings, the VPC's tabulation does include some data about CHL holders from state law enforcement authorities, but these statistics do not help VPC's case.¹⁹¹ Consider the annual records of violence by CHL holders available from the Michigan State Police.¹⁹² From 2007 to 2017, Michigan recorded 552 fatal incidents involving CHL holders, but 516 of them (94%) were suicides.¹⁹³ In many of the records, there is no indication that a handgun was the means of homicide; at least fifteen of the incidents (2.7%) were vehicular homicides where the drunk driver happened to be a CHL holder.¹⁹⁴ To sum up: at least 96.7% of the VPC's supposed concealed-carry killers in Michigan had absolutely nothing to do with a CHL holder posing a threat to public safety by carrying a handgun outside of the home.¹⁹⁵

Other egregious and misleading errors pervade the VPC's webpage. An analysis of the site in 2012 found that the tally of supposed concealed-carry killers was dramatically inflated by the inclusion of irrelevant incidents

187. *Guide to the Interstate Transportation of Firearms*, NAT'L RIFLE ASS'N (Jan. 1, 2015), <https://www.nrila.org/articles/20150101/guide-to-the-interstate-transportation>.

188. *See* CONCEALED CARRY KILLERS, *supra* note 166.

189. *See, e.g., id.* (discussing the Washington, D.C. navy yard shooting case where Aaron Alexis used a shotgun; Iowa case involving Aaron Scott, who used a rifle to shoot a police officer; Iowa case involving Dennis Koopman who got his rifle out of a truck and shot his estranged wife; and the Florida case involving Tony Villegas who strangled the victim).

190. *See, e.g., id.* (discussing the New York case involving Patrick Sorrentino and Florida case involving retired Tampa Police Captain Curtis Reeves). Under the federal statute known as the Law Enforcement Safety Officers Act (LEOSA), retired and active law enforcement officers are legally allowed to conceal carry firearms nationwide once they satisfy a few criteria. *See* 18 U.S.C. §§ 926B[4], 926C.

191. *See* CONCEALED CARRY KILLERS, *supra* note 166. Kentucky, Michigan, Minnesota, and Texas maintain statistics on deaths involving CHL holders. *See id.*

192. *See Concealed Pistol License (CPL) Reports*, MICH. STATE POLICE, https://www.michigan.gov/msp/0,4643,7-123-1878_1591_3503_4654-77621--,00.html (last visited Jan. 18, 2021).

193. *See* CONCEALED CARRY KILLERS, *supra* note 166.

194. *Id.*

195. *Id.*

where: (i) the killer clearly did not have a license; (ii) the licensee did not kill anyone; (iii) the only death was a suicide; (iv) the death occurred in the CHL holder's home or business where no permit was required to possess a firearm; (v) no handgun was used; (vi) the killing occurred in a restrictive may-issue state; (vii) the homicide was committed by a retired police officer or another individual who would certainly have received a license even in a may-issue state; or (viii) the homicide was obviously premeditated, thereby rendering any CHL superfluous (a person planning to commit murder will surely take a weapon along without regard to whether he or she has a license to carry it concealed).¹⁹⁶ Moreover, the VPC based 32% of the alleged homicides (120 out of 374) on tabulations that made it impossible to verify the account of the incident or to determine whether VPC was double-counting deaths.¹⁹⁷ The VPC's tally of "concealed carry killer[s]" thus proves nothing.

2. Increased Gun Thefts

Donohue's working paper contends that if more law-abiding citizens are given CHLs, more guns will be stolen and used by criminals to commit crimes.¹⁹⁸ The paper asserts that "RTC laws result in permit holders furnishing more than 100,000 guns per year to criminals."¹⁹⁹ This figure is supposedly grounded on data from a web-based survey of gun owners conducted by David Hemenway and his colleagues at the Harvard School of Public Health.²⁰⁰ But that study did not even purport to evaluate any connection between thefts of handguns and state laws that license the carrying of handguns, and Donohue concedes that the survey of gun owners was too small (there were only 1,604 participants) and lacked sufficient detail to provide a reliable estimate of how many handguns are stolen from CHL holders.²⁰¹

The survey asked only whether respondents "currently own *any type of guns*" and "whether *any* of respondents' guns were stolen in the past 5 years."²⁰² Obviously, only thefts of concealable handguns (but not rifles or shotguns) and thefts from licensed citizens carrying those handguns in public (but not thefts of any kind of firearm from a home or business) can even theoretically be blamed on RTC laws. Yet the Donohue working paper does not provide even a single anecdote—let alone actual research—about the

196. See Clayton E. Cramer, Violence Policy Center's Concealed Carry Killers: Less Than It Appears 37–38 (May 2, 2015) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2095754.

197. *Id.* at 1, 13–16, 18, 37.

198. Donohue et al., *supra* note 111, at 10–12.

199. *Id.* at 10.

200. *Id.* at 10. See David Hemenway et al., *Whose Guns Are Stolen? The Epidemiology of Gun Theft Victims*, INJ. EPIDEMIOLOGY (Apr. 10, 2017), at 1, <http://dx.doi.org/10.1186/s40621-017-0109-8>.

201. Donohue et al., *supra* note 111, at 10 n.17.

202. Hemenway et al., *supra* note 200, at 2 (emphasis added).

theft of *handguns in public*.²⁰³ The working paper offers some news stories about local gun thefts from cars and a vignette about a movie celebrity who had his car stolen when he had two guns stored in the trunk, but even these scraps of evidence do not distinguish between handguns and longarms.²⁰⁴ Moreover, one does not need a CHL to transport a rifle or shotgun in one's car—not even in California²⁰⁵—and one does not need a CHL to transport a handgun in one's car—not even in California.²⁰⁶ A CHL, after all, is used to *carry* a handgun *concealed* in a holster on one's belt or in one's briefcase or purse; if you are authorized to *carry* a handgun on you, then you don't have to leave it in your parked car.²⁰⁷

The Hemenway survey acknowledged the following: (i) its data linking gun theft to guns stored in cars were not statistically significant,²⁰⁸ (ii) “[t]he information we have about gun owners deals with responses at the time of the survey, not at the time of the theft,”²⁰⁹ and most importantly, (iii) “we know almost nothing about the actual event—the type of gun stolen, where the gun was stored (e.g., at home, in the garage)”²¹⁰ Donohue's conclusions are thus undermined by his own references.²¹¹

3. *Enhancing a Culture of Violence*

Donohue's working paper posits that the American South has “a ‘subculture of violence’ predicated on an aggrandized sense of one's rights and honor that responds negatively to perceived insults.”²¹² Donohue then asserts—without any persuasive authority or analysis—that RTC laws somehow “reflect and encourage this cultural response,”²¹³ and that this gun culture “promote[s] violent crime not only by permit holders, but by all those *with or without guns* who are influenced by this crime-inducing worldview.”²¹⁴ The only evidence that Donohue offers for this stunning series

203. See Donohue et al., *supra* note 111.

204. *Id.* at 11.

205. See CAL. PENAL CODE § 25400 (West 2020). Non-concealable firearms (shotguns and rifles) are not covered by California Penal Code § 25400 and therefore are not required to be transported in the trunk or a locked container. See *id.* § 16530.

206. See *id.* § 25610. Pursuant to California Penal Code § 25610, a lawful gun owner may transport a handgun by motor vehicle provided it is unloaded and locked in the vehicle's trunk or in a locked container. *Id.*

207. See *Concealed Weapons Permit*, LEGAL DICTIONARY (Feb. 14, 2019), <https://legaldictionary.net/concealed-weapons-permit/>.

208. Hemenway et al., *supra* note 200, at 3.

209. *Id.* at 4.

210. *Id.*

211. *Id.*

212. Donohue et al., *supra* note 111, at 12.

213. *Id.*

214. *Id.* at 12 (emphasis added).

of claims is a single example of a CHL holder who went to prison for irresponsibly using his handgun to settle a “heated argument.”²¹⁵

If this is merely a rehashing of the theory that CHL holders are dangerous criminals, that notion has already been refuted in the preceding section.²¹⁶ But if Donohue’s sociological claim is meant to be a distinct justification for denying law-abiding citizens their Second Amendment right to armed self-defense, it fails spectacularly. To be sure, “[t]he vernacular of guns suffuses the political and media conversation in ways that politicians and journalists are often not even conscious of, underscoring the historical power of guns in the American experience.”²¹⁷ In the wake of the school shooting in Sandy Hook, Connecticut, Vice President Joe Biden promised prompt policy proposals, saying that he was “shooting for Tuesday” but warning that there is “no silver bullet” for stopping gun violence.²¹⁸ And when the Brady Campaign wanted to publicize its push for new gun-control restrictions, it hired a public relations firm named “Point Blank Public Affairs.”²¹⁹ Professor Donohue himself has a bent for gun metaphors, penning gun-control articles with titles such as *Shooting Down the “More Guns, Less Crime” Hypothesis*,²²⁰ or *The Latest Misfires in Support of the “More Guns, Less Crime” Hypothesis*,²²¹ or the rather more graphic *The Final Bullet in the Body of the More Guns, Less Crime Hypothesis*.²²² Such incorporation of “gun metaphors into our everyday slang says a lot about how deeply imbedded guns are in our culture.”²²³ But to assert that RTC laws insidiously embed “gun culture” in the brains of both “permit holders” and those “without guns,” to the point that even “upstanding citizens” become pistol-packing automatons, is to make an awful lot of a figure of speech.²²⁴

4. Escalating an Arms Race with Criminals

Donohue asserts that RTC laws will create a deadly arms race between CHL holders and criminals: “criminals would . . . arm themselves more

215. *Id.*

216. See discussion *supra* Part II.C.1.

217. Peter Baker, *In Gun Debate, Even Language Can Be Loaded*, N.Y. TIMES (Jan. 15, 2013) at A14, <https://www.nytimes.com/2013/01/16/us/gun-imagery-fills-language-of-debate.html>.

218. *Id.*

219. *Id.*

220. Ayres & Donohue, *supra* note 7.

221. Ian Ayres & John J. Donohue, *The Latest Misfires in Support of the ‘More Guns, Less Crime’ Hypothesis*, 55 STAN. L. REV. 1371 (2003).

222. John J. Donohue, *The Final Bullet in the Body of the More Guns, Less Crime Hypothesis*, 2 CRIMINOLOGY & PUB. POL’Y 397 (2003).

223. Landon Y. Jones, *Loaded Language: The Gun Metaphors That Pervade Our Everyday Slang*, WASH. POST (Apr. 18, 2014), [https://www.washingtonpost.com/opinions/loaded-language-the-gun-metaphors-that-pervade-our-everyday-slang/2014/04/18/40c4053c-c3ed-11e3-b574-8748871856a_story.html?](https://www.washingtonpost.com/opinions/loaded-language-the-gun-metaphors-that-pervade-our-everyday-slang/2014/04/18/40c4053c-c3ed-11e3-b574-8748871856a_story.html?hpid=hp-top-table-border%3Ahomepage%2Fstory)

224. Donohue et al., *supra* note 111, at 8, 12.

frequently, attack more harshly, and shoot more quickly when citizens are more likely to be armed.”²²⁵ But he does not offer even one example of an RTC state where this arms race has occurred.²²⁶ Furthermore, the *only* research that Donohue cites actually undermines his argument.²²⁷ It was an opinion survey of imprisoned felons and, far from concluding that armed victims motivated criminals to start carrying guns, the study actually demonstrated that criminals were *deterred* by the prospect of facing armed resistance.²²⁸ For example:

- 69% of the felons said they knew a criminal who had “been scared off, shot at, wounded, captured, or killed by an armed victim”;²²⁹
- 34% of felons said this had happened to them personally;²³⁰
- 81% agreed that “a smart criminal always tries to find out if his potential victim is armed”²³¹ and avoids that victim if so;²³²
- 40% of the felons said they had, on occasion, decided not to commit a crime because they believed the victim was carrying a gun;²³³
- 58% agreed that “[a] store owner who is known to keep a gun on the premises is not going to get robbed very often”;²³⁴
- 56% agreed that “[a] criminal is not going to mess around with a victim he knows is armed with a gun”;²³⁵ and
- 57% of the felons said they were “more worried about meeting an armed victim than they [were] about running into the police.”²³⁶

None of this should be surprising. The research merely confirms the common-sense expectation that criminals prefer their victims unarmed and defenseless²³⁷—which is precisely how the law generally leaves honest, law-abiding citizens unless the state enacts a right-to-carry statute.

The common-sense notion that disarming law-abiding citizens only encourages more crime and emboldens criminals is not new. In 1764, Cesare Beccaria, an influential Enlightenment thinker, addressed this only decades

225. *Id.* at 13.

226. *See id.*

227. *See id.* at 12.

228. *See id.* at 12 (citing Cook et al., *supra* note 130, at 1081); *see also* WRIGHT & ROSSI, *supra* note 139, at 155.

229. *See* WRIGHT & ROSSI, *supra* note 139, at 155 tbl.7.5.

230. *See id.*

231. *Id.* at 146 tbl.7.1.

232. *Id.* at 145.

233. *Id.* at 155 tbl.7.5.

234. *Id.* at 146 tbl.7.1.

235. *Id.*

236. *Id.*

237. *See id.*

before the adoption of the United States Constitution and the Second Amendment.²³⁸ Beccaria explained:

The laws of this nature, are those which forbid to wear arms, disarming those only who are not disposed to commit the crime which the laws mean to prevent. Can it be supposed, that those who have the courage to violate the most sacred laws of humanity, and the most important of the code, will respect the less considerable and arbitrary injunctions, the violation of which is so easy, and of so little comparative importance? Does not the execution of this law deprive the subject of that personal liberty, so dear to mankind and to the wise legislator; and does it not subject the innocent to all the disagreeable circumstances that should only fall on the guilty? It certainly makes the situation of the assaulted worse, and the assailants better, and rather encourages than prevents murder, as it requires less courage to attack armed than unarmed persons.²³⁹

5. *Impairing Police Effectiveness By Taking Up Police Time*

The Donohue working paper contends that “anything that RTC laws do to occupy police time, from processing permit applications to checking for permit validity”²⁴⁰ is likely to “take up police time” and “thereby impair[] the crime-fighting ability of police,”²⁴¹ which in turn will cause an increase in violent crime.²⁴² This assertion merely piles one conjecture on top of another; it offers no evidence that this causal mechanism has ever been observed in any RTC state. Moreover, it proves far too much, because *everything* that police officers are tasked with doing “take[s] up police time.”²⁴³ Handing out speeding tickets to motorists takes up police time, checking driver’s licenses and car registrations for validity takes up police time, directing traffic outside busy churches on Sunday morning takes up police time, attending court sessions takes up police time, placing and patrolling pedestrian barriers at parades and public demonstrations takes up police time, and responding to 9-1-1 calls takes up police time.²⁴⁴ This is not a sufficient rationale for abridging the Second Amendment rights of law-abiding Americans.

238. See CESARE BECCARIA, AN ESSAY ON CRIMES AND PUNISHMENTS, BY THE MARQUIS BECCARIA OF MILAN, WITH A COMMENTARY BY M. DE VOLTAIRE, A NEW EDITION CORRECTED (Albany, W.C. Little & Co. 1872).

239. *Id.* at 145–46. See also John Bessler, *Private: The Birth of American Law: An Italian Philosopher and the American Revolution*, AM. CONST. SOC’Y, (Sept. 16, 2014), <https://www.acslaw.org/expertforum/the-birth-of-american-law-an-italian-philosopher-and-the-american-revolution/> (explaining Beccaria’s influence on George Washington, John Adams, and Thomas Jefferson).

240. Donohue et al., *supra* note 111, at 13.

241. *Id.* at 6.

242. See *id.* at 12.

243. *Id.* at 6.

244. See Jeff Asher & Ben Horwitz, *How Do the Police Spend their Time? You Might be Surprised*, N.Y. TIMES, June 20, 2020, at A18.

The Donohue working paper even blames the *police-killing* of CHL holder Philando Castile—shot seven times by police during a traffic stop for a broken tail light—on Minnesota’s RTC law, because “[t]he presence of more guns on the street can complicate the job of police as they confront (or shy away from) armed citizens.”²⁴⁵ We are told that it is no “surprise that police in the United States kill a lot more people than police in other industrialized nations—not that they have fewer criminals than we have; there are just many fewer people walking around with guns, and police feel a lot more nervous.”²⁴⁶ Donohue recognizes that, “[o]bviously, [CHL holder Castile] wasn’t doing anything wrong, but he ended up getting killed anyway.”²⁴⁷

D. The Fundamental Fallacy of Opponents to Right-to-Carry Laws Is That They Deem Restrictions on Carrying a Handgun for Self-Defense to Be a Question of Social Policy Rather Than a Matter of Constitutional Right

Second Amendment opponents would thus have people believe that the shooting of Philando Castile by a government-employed police officer is a “social cost” imposed by a right-to-carry handgun-licensing regime.²⁴⁸ They insist that, because “defensive gun uses can be socially costly and contentious even if they do avoid a robbery or an assault,”²⁴⁹ the preferred course—the “superior social policy”—apparently is for the victim to suffer a beating, robbery, rape, or murder rather than be allowed to defend himself with a firearm.²⁵⁰ But the right to bear arms in self-defense is not about a cost-benefit analysis—it is about the human right to life, the United States Constitution, and that same right found in most state constitutions.²⁵¹ A fundamental individual right does not evaporate because society finds it inconvenient or inefficient.²⁵² That is the entire point of individual rights: “Rights permit their

245. Donohue et al., *supra* note 111, at 12–13.

246. Patt Morrison, *Does Carrying a Gun Make You Safer? No. In Fact, Right-to-Carry Laws Increase Violent Crime*, L.A. TIMES (Aug. 2, 2017), <http://www.latimes.com/opinion/op-ed/la-ol-patt-morrison-asks-john-donohue-guns-20170802-htmstory.html>.

247. Maura Ewing, *Do Right-to-Carry Gun Laws Make States Safer?*, ATLANTIC (June 24, 2017), <https://www.theatlantic.com/politics/archive/2017/06/right-to-carry-gun-violence/531297/> (“Obviously, that right-to-carry holder [Castile] wasn’t doing anything wrong, but he ended up getting killed anyway.”).

248. *See id.*

249. *See* Donohue et al., *supra* note 111, at 5.

250. *See generally id.*

251. *See, e.g.*, PA. CONST. of 1776 cl. XIII, *reprinted in* THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA, (Francis Newton Thorpe ed. 1909) (“That the people have a right to bear arms for the defence of themselves and the state”); WIS. CONST. art. I, § 25 (“The people have the right to keep and bear arms for security, defense, hunting, recreation or any other lawful purpose.”). For a list of all forty-four state arms guarantees from 1776 through current times, see Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 TEX. REV. L. & POL. 191 (2006).

252. Leif Wenar, *Rights*, STAN. ENCYCLOPEDIA OF PHIL. (Feb. 24, 2020), <https://plato.stanford.edu/archives/spr2020/entries/rights/>.

holders to act in certain ways . . . even if some social aim would be served by doing otherwise.”²⁵³ The justification for the right to bear arms is not that it is sound social policy, but that it is a fundamental human right recognized as an enumerated fundamental constitutional right.²⁵⁴

In spite of the categorical nature of the Second Amendment, many lower courts—mostly in the politically-progressive, so-called “blue states”—have in fact superimposed a form of cost-benefit analysis over the constitutional text, repeatedly sanctioning flagrant denials of Second Amendment rights by citing one of the judge-made “tiers of constitutional scrutiny.”²⁵⁵ In the context of other constitutional rights, such as the First Amendment, the Equal Protection Clause, or the Due Process Clause, the courts have, since the middle of the twentieth century, applied one of three “tiers” of judicial scrutiny—“strict scrutiny,” “intermediate scrutiny,” or “rational basis review.”²⁵⁶ After the *Heller* decision, many lower courts turned to this tiers-of-scrutiny framework as a means of justifying draconian restrictions on the right to keep and bear arms.²⁵⁷ This scrutiny analysis is problematic for a variety of reasons.²⁵⁸ First, the tiers-of-scrutiny framework is entirely made up—it was invented by judges in the 1960s as a way of diluting free speech rights.²⁵⁹ Second, this type of cost-benefit balancing analysis is antithetical to the Supreme Court’s decision in *Heller* that the Second Amendment right *should not* be “subjected to a freestanding ‘interest-balancing’ approach” such as the tiers of scrutiny.²⁶⁰ And finally, it is fundamentally at odds with the nature of the Second Amendment right—which, as the Court in *Heller* again explained, “is the very *product* of an interest balancing by the people,” an interest balancing that “elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.”²⁶¹

Indeed, many rights enshrined in our Constitution—e.g., the Fourth Amendment right against warrantless searches, the Sixth Amendment right to counsel, and the Fifth Amendment right against self-incrimination—make it harder for police to act, shield criminal defendants, and sometimes allow

253. *Id.*

254. See Halbrook, *supra* note 1, at 47.

255. See *N.Y. State Rifle & Pistol Ass’n v. City of New York*, 883 F.3d 45, 63 (2d Cir. 2018), *cert. granted*, 139 S. Ct. 939 (2019) (upholding New York City’s virtual ban on taking a handgun outside of the home, based solely on a declaration by a retired police official that doing so would be “a potential threat to public safety”); *Drake v. Filko*, 724 F.3d 426, 429–30 (3d Cir. 2013) (upholding New Jersey’s denial of carry licenses to all but a select few because it did not burden Second Amendment rights, and if it did, it would be upheld under intermediate scrutiny).

256. See Joel Alicea & John D. Ohlendorf, *Against the Tiers of Constitutional Scrutiny*, 41 NAT’L AFFS. 72, 72–73 (2019).

257. *Id.* at 73.

258. See *id.*

259. *Id.* at 74.

260. *District of Columbia v. Heller*, 554 U.S. 570, 634 (2008).

261. *Id.* at 635.

guilty murderers and rapists to go free, thereby imperiling public safety.²⁶² As the Supreme Court has recognized—based on an originalist interpretation of the Second Amendment—“[t]he right to keep and bear arms . . . is not the only constitutional right that has controversial public safety implications. All of the constitutional provisions that impose restrictions on law enforcement and on the prosecution of crimes fall into the same category.”²⁶³

With the Second Amendment, as with the other provisions of the Bill of Rights, “[t]he very enumeration of the right takes out of the hands of government . . . the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. A constitutional guarantee subject to future judges’ assessments of its usefulness is no constitutional guarantee at all.”²⁶⁴ The Second Amendment’s right to bear arms “necessarily takes certain policy choices off the table” and the public disarmament of law-abiding citizens is one policy choice that is no longer available to the government.²⁶⁵

Accordingly, judges should not be allowed to balance our Second Amendment rights away through a judge-made “tiers of scrutiny” analysis. But even if such a public-policy balancing approach *were* appropriate, the analysis in this Article shows that the available evidence would not be sufficient to justify broad restrictions on the right to bear arms under any form of heightened constitutional scrutiny.²⁶⁶

III. CONCLUSION

With this Article, I have sought to put on a “litigator’s hat” and assess the available criminological and statistical evidence proffered by gun-control advocates who argue that there will be highly negative—even catastrophic—consequences in America if individual states continue recent trends and adopt “shall-issue” or “right-to-carry” regimes for issuing CHLs. In doing so, it appears unlikely that any sort of material restriction on the carrying of handguns in public by law-abiding, responsible Americans would withstand constitutional scrutiny under either an intermediate or strict scrutiny standard of review.

Of course, it is possible that future federal courts will not be permitted to make such a determination given that gun ownership and self-defense should not be subject to debates applying any sort of utilitarian-inspired cost-benefit analysis. Fundamental rights under the United States Constitution, including the Second Amendment’s right to keep and bear arms, may not be written out of American life by legislation or regulation short of an Article V constitutional amendment—an observation made by

262. *McDonald v. City of Chicago*, 561 U.S. 742, 783 (2010).

263. *See id.*

264. *Heller*, 554 U.S. at 634.

265. *Id.* at 636.

266. *See* discussion *supra* Part II.B.

none other than the late Justice of the Supreme Court, John Paul Stevens.²⁶⁷ Thus, properly viewed, social science research on the consequences of RTC laws should be relevant *only* to the question whether “We the People” should *amend* the Constitution to *eliminate* the existing fundamental right to bear arms.

267. John Paul Stevens, *Repeal the Second Amendment*, N.Y. TIMES (Mar. 27, 2018), <https://www.nytimes.com/2018/03/27/opinion/john-paul-stevens-repeal-second-amendment.html>.