The Utilitarian and Deontological Entanglement of Debating Guns, Crime, and Punishment in America

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A volume that includes reviews of the constitutional framers’ 1791 debates about the Bill of Rights, a social history of Wild West vigilantism, and multiple regression analyses of policing techniques in American inner cities—such a volume may seem to lack any unity, save for the common denominator of guns in America. Yet, it is one of the many peculiar aspects of the role of guns in the United States that these disparate subjects or forms of discourse cannot easily be separated.

For this reason, the gun question is one of the strangest legal phenomena in modern America. It is a weird combination of uncertainties, in part because of the interplay between utilitarian concerns and deontological arguments. Most relationships between constitutional law and empirics involve constitutional principles that clearly invoke utilitarian concerns in terms of interest-balancing. A free speech or equal protection right, for example, must be weighed against a regulatory interest in preventing some social harm, where the evaluation of the harm may be somewhat aided by empirical inquiries. Sometimes the clash between deontology and empirics becomes sharp. For example, the conservative argument that *Miranda* has significantly reduced confessions raises a second-order concern about how much the reduction in confessions weakened law enforcement,\(^2\) but

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1 *Miranda v Arizona*, 384 US 436, 444 (1966) (finding that the Fifth Amendment privilege against self-incrimination prevents the prosecution from using statements obtained during custodial interrogation unless the government demonstrates the use of specific procedural safeguards to protect the privilege).

also bumps up against the deontological question about the nature of Fifth Amendment rights, to which the cost of *Miranda* is completely irrelevant. With guns, the relationship between utilitarianism and deontology is even more complicated. Many stress the deontological argument that a right to bear arms is an element of democratic self-autonomy or, somewhat more modestly, that aggressive gun control will inevitably interfere with related deontological rights such as the right of privacy protected by the Fourth Amendment. But even when the gun debate turns to utilitarian concerns, there is no consensus on whether the presence of guns is inherently or categorically a social positive or negative, or, assuming guns can both protect and threaten lives, whether the net effect is positive or negative. On a practical level, there is no consensus as to whether we have the capacity to design a solution that will not do more harm than good or whether any net negative effect is inevitable because gun possession is so deeply embedded in American society. As a result, the "gun question" is indeed a mélange of historical, philosophical, constitutional, sociological, and econometric threads. Moreover, the widely held and substantially accurate view that the United States is an exceptionally violent or homicidal nation and the tangled relationship between this violence exceptionalism and the core values that animate liberal constitutionalism make discussion of one aspect of the gun question without addressing others almost impossible.

Though these fundamental divides about the gun question lead to a highly eclectic volume, *Guns, Crime, and Punishment in America* purports to have a fairly singular theme and focus: to avoid extremes of legal argument and social philosophy in favor of "more nuanced and subtle discussions of particular policy interventions" so as "to promote more concrete and less polarized debates about guns" (p 3). In pursuing this goal, the volume explores three major areas of the gun question. First, a discussion of the historical and contemporary values wrapped up with guns in American society leads to the conclusion that, because of the associated values' force, the empirical debate over the utility of guns is a matter that cannot be resolved in general

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3 See, for example, Charles D. Weisselberg, *Saving Miranda*, 84 Cornell L Rev 109, 171–72 (1998) (arguing that the *Miranda* decision does not subject Fifth Amendment rights to a balancing test against the cost to law enforcement of respecting those rights); Schulhofer, 90 Nw U L Rev at 549–56 (cited in note 2) (disagreeing with Cassell's characterization of the Fifth Amendment and treatment of *Miranda* as merely prophylactic).

terms. Next, a discussion of the constitutional thread of the gun question suggests that the constitutional debate over the meaning of the Second Amendment rests clearly on the side of gun control in terms of the state of the law in the courts, but in a sufficiently vague and evasive way that a fair amount of further control can probably be implemented without any resolution of the constitutional debate. And finally, a discussion of policy interventions shows an implicit social consensus that the focal point for addressing gun danger in the United States is somewhere in the chain of transactions between retail dealers and street criminals, but that even designing finely honed enforcement efforts aimed at that focal point provokes some of the same cultural, legal, and empirical debates that animate the larger controversy about the role of guns in America.

I. GUNS AND VALUES

Three essays set the premise of the volume: that rational policy analysis about guns must respect the (often irrational) discourse of cultural value that guns provoke in America. Franklin Zimring shows that America's obsession with deploying broad symbolic values in gun debates often undermines efforts at critical or empirical nuance. Richard Slotkin traces this problem to deeply embedded political and social symbolism at the advent of mass handgun manufacture in the nineteenth century. And Bernard Harcourt describes the manifestations of these traditions in contemporary youth and young criminal minds. Thus, the gun debate is a tangle of two types of sub-debates—one utilitarian and one deontological—that are at once intertwined and equally unsettled.

In terms of public debate and media visibility, as Franklin Zimring's contribution notes, guns generally were not a major political issue in the United States for much of the twentieth century, at least after the passage of legislation dealing with gangland-era machine-gunning violence (pp 29–30). But, for a number of reasons, guns loudly entered public debate a generation ago. The dramatic rise in crime in the 1960s and '70s (p 30), the Kennedy assassination (p 30), the Reagan assassination attempt (pp 36–37), and the rise of the Southern Republicans as a swing political constituency that the pro-gun groups could exploit may all have politically energized both pro- and anti-gun

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5 The controlling precedent is still United States v Miller, 307 US 174, 178 (1939) (holding that the Second Amendment addresses the preservation of the militia, not an individual right of gun ownership), although one appellate court in dictum recently made an interesting gesture in favor of individual rights, see United States v Emerson, 270 F3d 203, 260 (5th Cir 2001) ("We reject the collective rights and sophisticated collective rights models for interpreting the Second Amendment. We hold, consistent with Miller, that it protects the right of individuals . . . to privately possess and bear their own firearms."). cert denied, 536 US 907 (2002).
forces, while recent events like school massacres have kept the debate over guns in the media (p 41). In addition, politicians in Southern and Western states, where gun owners faced no significant regulation, nevertheless entered the fray with new statutes easing restrictions on the possession of concealed handguns, thus exploiting gun rights for their political value as symbols of resistance to federal regulation (p 37).

Though he has been a major scholarly participant in the gun debate, here Zimring steps back to offer a meta-description of the debate as an evolving phenomenon of political rhetoric, noting the key perennial—if irrational—features of the debate. From Zimring's perspective, the gun debate is characterized by five constant elements: the free-lunch syndrome, the gender gulch, handgun centrality, symbolic dominance, and generality of preferences (pp 31–36). Zimring characterizes the promise of substantial reductions in violence from the passage of small and uncontroversial restrictions on guns as the free-lunch syndrome (p 33). The gender gulch refers to a massive gender gap in gun ownership, which simultaneously is accompanied by a greater female propensity toward gun control and opposition to gun possession (pp 34–35). The centrality of handguns in public discussion and the media exaggerates their significance in terms of lethal harm to innocents vis-à-vis long arms and obscures the feasibility of treating handguns and long arms differently for control purposes (pp 35–36). The policy debates about guns still largely involve exchanges of symbolic value sentiments, with those sentiments drowning out the differences among particular programs; small and big proposed changes in gun laws provoke the same reactions (p 32).

In effect, these observations corroborate the volume's thesis, underscored in the Introduction by Bernard Harcourt: given these factors, future constructive discussions of guns and legality will have to be far more particular in treating the nuanced differences among specific approaches (p 3). The approaches that best remain below the political radar and best finesse both constitutional questions and the politicians' fear of the National Rifle Association (NRA) will focus on punishing gun use by those manifestly involved in crime—criminals. The most obvious way to do that is to punish and deter gun-using criminals through enhanced punishments, but that popular approach requires the complement of interdiction or prevention, which in turn entails secondary market controls deploying tracing and registration

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Debating Guns, Crime, and Punishment

mechanisms. But such controls, alas, tend to evoke just the general, often demagogic sentiments that Zimring warns of.

Richard Slotkin's essay gives a flavor of the symbolic value of guns in American historical lore, and in frontier lore in particular (pp 56–58). Slotkin gives us a historical perspective on why both the empirical and constitutional issues surrounding the gun question seem so fraught with significance and passion (pp 63–64). The mythology of guns is a strange mixture of true American history (pp 60–62) and popular culture (pp 58–59). But as Slotkin shows, what seems peculiar, if not unique, in American history is the legitimacy of private violence and the association of the gun with a form of individual autonomy supposedly consistent with democratic government (pp 54–55). Slotkin describes the strategy—and possibly the sincere intention—of the makers of the famous Colt repeating revolver (pp 59–60). Colt is often credited with the notion of making handguns the great democratic "equalizer" (pp 54, 58). In fact, the modern historian Daniel Boorstin so named the Colt revolver when he remarked that the advent of the Colt coincided with the democratization of the accepted ritual of one-on-one combat to resolve disputes, once limited to aristocratic duels (pp 57–58). Indeed, as Slotkin shows in a nice sociological point, battles with Colt guns were usually more matters of drunken brawling or stealthy lying-in-wait killings (p 58). And more strikingly, Colt himself sold his guns on a counter-egalitarian principle—as a tool to enable the few to rule over the masses (p 60). Indeed, in a remarkable interview, Colt told of his desire to help small-plantation owners resist slave revolts (p 59).

Slotkin's history leads us nicely to Bernard Harcourt's contribution to this debate. Harcourt's essay links the symbolic/mythological value of guns in the Wild West to one of its ironic legacies, the symbolic value of guns among crime-oriented youth in modern America. In a study of incarcerated youth, combining attitude survey questions with semiotic analyses of verbal responses (p 69), Harcourt notes that when these youth speak of guns they often do so with a passion and allure almost sexual (p 86). Harcourt codes the youths' responses and associations into three clusters, which he denominates "action-protection," "commodity-dislike," and "recreation-respect" (pp 83–85). These clusters correspond to the role that actual and imagined guns play in the minds of violence-prone youths: guns are the instruments by which social dominance and respect are achieved on the cusp of fatal thrill-seeking in the action-protection cluster (pp 83–84); they are the almost literal currency of the entrepreneurial capitalism more generally associated with much street crime in the commodity-dislike cluster (p 84); they serve a strange kind of civic value as a symbolic model of a comic version of the Republican-country version of elite
self-governance; and they are also tools to be treated instrumentally and functionally in the recreation-respect cluster (pp 84–85).

II. THE INEXTRICABLE CONSTITUTIONAL THREAD

But in another sense, Slotkin's history leads us back to the constitutional question: if the gun was far more the tool of the powerful and the elite than of the masses, what lesson is to be drawn? From one perspective, this history undoes one of the value-bases for the individual rights Second Amendment argument. On the other hand, it can be used to strengthen that argument if it shows that the benefits of individual gun ownership have always belonged to political elites, so that an evolving Constitution would expand those rights downward. Equality can remain the goal, in other words, but the question is whether we ratchet rights up or down.

In a sense, the Second Amendment question has been a minor sideshow to contemporary constitutional law. But it has also in some ways been a nutshell-epitome of it, a matter of ontogeny recapitulating phylogeny. That is, the constitutional questions about guns appeared fairly recently; as an academic matter, one might say, the constitutional question was invented about twenty years ago, and in an incredibly compressed time has gone through dramatic phases. Sanford Levinson, who can accept credit for bringing the debate into the constitutional mainstream, uses his essay in this new volume to review that history. Levinson discusses the prematurity of the claim by some academics that an individual rights conception of the Second

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7 A discussion of the limitation of early gun ownership to elites (as sometimes abetted by "Civic Republicanism") might logically lead either to undermining or enhancing the constitutional argument for the individual right to keep and bear arms. See Weisberg, 39 Houston L Rev at 13–14 (cited in note 4) (reflecting on the contested empirical finding that colonial gun ownership was both limited in number and by law to high-status men and observing that such a discovery is not categorically decisive in interpreting the Second Amendment). For a comprehensive treatment of the history of the Second Amendment that suggests that any original individual right may have evolved into practical desuetude, see generally Michael C. Dorf, What Does the Second Amendment Mean Today?, 76 Chi Kent L Rev 291 (2000) (arguing that the rejection of an individual rights interpretation of the Second Amendment is justified by the standard tools of constitutional interpretation).

8 Sanford Levinson, The Embarrassing Second Amendment, 99 Yale L J 637 (1989) (discussing the paucity of mainstream academic commentary on the Second Amendment prior to his writing and calling for serious and honest constitutional analysis of the Amendment even if what is discovered does not comport with the dominant politics of legal academia).

9 See, for example, Randy E. Barnett and Don B. Kates, Under Fire: The New Consensus on the Second Amendment, 45 Emory L J 1139, 1143–92 (1996) (defending the consensus around an individual rights conception of the Second Amendment against charges of academic dishonesty and pro-gun conspiracy); Don B. Kates, Jr., Handgun Prohibition and the Original Meaning of the Second Amendment, 82 Mich L Rev 204, 273 (1983) ("Unmistakably the Founders intended the second amendment to guarantee an individual right to possess certain kinds of weapons in the home [for] certain kinds of circumstances."). See also David B. Kopel, The Second Amendment in the Nineteenth Century, 1998 BYU L Rev 1359, 1362 n 1 (enumerating "standard
Amendment is uncontested. The success of the pro-gun academic lobby in getting the individual rights view of the Second Amendment on the law review airwaves (so much so that its leaders were able to proclaim that this thesis had become the “Standard Model”) might be viewed as a rhetorical move pulled off by flooding the law reviews and then scoring the results, but to call it a rhetorical move is hardly to refute it. And it was briefly a brilliant success, in part because it did win considerable acceptance in the mainstream by calling the bluff of constitutional liberals and demanding that they commit to an individual rights model of the Bill of Rights generally even though, or especially because, that view might run counter to their political views and thereby reinforce the anti-majoritarian nature of judicial review. Moreover, for some, the Standard Model is appealing for its sheer historical plausibility. American elites at the turn of the nineteenth century would presumably have thought they had an inalienable right to own weapons. They might even have thought this was the point of the otherwise odd prose of the Second Amendment, rather than that it served to constrain the gun rights of others. This is surely more plausible historically than the view that the elites would have shared modern liberal distaste for guns or concern about poor people’s crime.

There followed a period of sharp debate and purported refutation, ranging from rather tendentious insistence on plain meaning explanations of the Second Amendment suspiciously opposite to the plain meaning arguments by the individual rights advocates, to more nuanced views about the militia clause. Some have insisted that the Amendment is truly just about militias but reconcile this with the general libertarian, anti-government strain in American politics by insisting that “rights of the militia” was and is no frivolous issue. Others have used deep review of the documentary and legislative sources to support the militia view, but largely in a negative way, stressing far

model” writings).

10 See Andrew D. Herz, Gun Crazy: Constitutional False Consciousness and Dereliction of Dialogic Responsibility, 75 BU L Rev 57, 138 (1995) (“[T]he gun lobby is also working hard to flood the law reviews with friendly scholarship from sympathetic law professors and promising law students.”).

11 See Levinson, 99 Yale L J at 658–59 (cited in note 8) (discussing Martha Minow’s thesis on the desirability of encouraging different voices in the legal conversation and the disconnect between liberal scholars’ biases as to the Second Amendment and pro-gun citizens, politicians, and interest groups).

12 See Weisberg, 39 Houston L Rev at 5 (cited in note 4) (discussing the liberal attempt in “Civic Republicanism” to reconcile a partisan desire for a collective Second Amendment right with the historical evidence that that right is an individual one).

13 See, for example, Dorf, 76 Chi Kent L Rev 291 (cited in note 7).

14 See Carl T. Bogus, The History and Politics of Second Amendment Scholarship: A Primer, 76 Chi Kent L Rev 3, 15–21 (2000) (chronicling Akhil Amar’s and possibly Laurence Tribe’s defection from a collective rights reading of the Second Amendment to one that is more closely individualistic via a broad reading of the militia clause).
more the absence of an individual right than the meaningful presence of something else.\footnote{15}

Both sides in the Second Amendment debate may by now have shown their best historical and interpretive hands, and so the debate may be at a standstill. This could mean (a) the debate will fade from public salience despite the combativeness of the advocates, and will be looked back on as a curious constitutional episode; or (b) we have reached a temporary equilibrium, to be followed by a rich, new phase of constitutional theorizing and historical discovery; or (c) in the view of various combatants, the debate is over because one side has unequivocally won.

The first view finds support in the simple fact that the whole debate so far has had little direct effect on American law.\footnote{15} The gun lobby brings many lawsuits to challenge the constitutionality of certain restrictions; occasionally the Second Amendment is raised as a defense to a criminal charge, though virtually never successfully. Legislative debates over guns remain contentious, and the political arguments by the NRA, which have proved fairly powerful in defeating or preventing some types of legislation, are enhanced by their Second Amendment rhetoric. But there is little evidence that the constitutional issue has really played any role: beyond political sound bites and its alliance with policy views, the constitutional issue does not seem to concern legislatures. Actual Second Amendment litigation has been almost nonexistent. A fair speculation is that now that enough stuff has been thrown up on both sides of the constitutional debate, the debate will remain a wash and politicians will continue to argue over the particulars.

The second view would hold that new academic research will further complicate and enrich the issue. Levinson believes we are simply at an early stage of Second Amendment scholarship, debate, and litigation (p 96). But he may be overestimating the richness of the materials, or underestimating how much the gravitational pull of the cultural attitudes described by Zimring and Slotkin will limit the likelihood that any new point of historical research will change the pitch or direction of the gun debate. Nevertheless, Levinson insists on several important complications in the Second Amendment debate that

\footnote{15}{See, for example, Saul Cornell, \textit{Commonplace or Anachronism: The Standard Model, the Second Amendment, and the Problem of History in Contemporary Constitutional Theory}, 16 Const Commen 221. 238–45 (1999) (observing that rather than a right to individual resistance, the Second Amendment was more likely a means of equipping the state to crush internal rebellions).}

\footnote{16}{The recent dictum in \textit{United States v Emerson}, 270 F3d 203, 220–27 (5th Cir 2001), cert denied, 536 US 907 (2002), is a rule-proving exception. See id at 220 ("None of our sister circuits has subscribed to this model, known by commentators as the individual rights model or the standard model.").}
have received little attention so far, but could lead to a new round of scholarly combat. So, for example, Levinson notes that when state constitutions or statutes restrict individual gun ownership they do not necessarily reflect a tolerance for federal control (p 105). Hence much of the state law evidence marshaled against the Standard Model may not refute, and might even support by negative implication, the early understanding of gun rights, at least as against the national government. But Levinson is also explicit about constitutional law as a "cultural product" whose momentum often takes it far from the intent of the authors or the perceptions of the first audience (p 106). Plus, he believes that we have to read the Second Amendment as it applies to state regulation in light of the Civil War Amendments, even if we are to rely on originalism (p 108). The 1866 vision of the right to keep and bear arms, he argues, was "profoundly individualistic," given that Reconstruction states were distrusted to protect the rights of former slaves and white abolitionists against the nascent Ku Klux Klan (p 108).

As for the possibility of a final victory, partisans on both sides use "case closed" rhetoric on occasion. The Standard Modelers, relying on both text and legislative history, continue to deny that they have even been seriously wounded by the collective rights proponents," while historian Garry Wills plays the same part for the collective rights proponents." Somewhat more sober claims come from historians who insist that the legislative history, especially in relation to questions of federalism and comparisons to state constitutions, has clearly demonstrated that the Second Amendment was never meant to have any great significance at all for the role of guns in the United States. This set of scholars adopts various understandings of why the Framers would have bothered to include in the Bill of Rights a rather undramatic provision dealing with state militias."

17 See, for example, Nelson Lund, Outsider Voices on Guns and the Constitution, 17 Const Commen 701, 708 (2000) ("At least as an intellectual matter, the debate about the states' rights versus individual rights interpretations seems now to be essentially over."); Barnett and Kates, 45 Emory L J at 1259 (cited in note 9) ("Almost unanimously, scholars have concluded that the Amendment does indeed present real hurdles to the banning of guns. If there is an intellectually viable response, it has yet to be made."); Joyce Lee Malcolm, Second Amendment Symposium: Panelist, 10 Seton Hall Const L J 829, 836-37 (2000) (commenting that the individual rights conception of the Second Amendment has prevailed, but that many academics cannot accept an honest reading of the Amendment because it does not comport with their partisan agendas); Glenn Harlan Reynolds, A Critical Guide to the Second Amendment, 62 Tenn L Rev 461, 463 (1995) (noting that the Standard Model of individual rights dominates the scholarship, but that within the agreed framework of the Standard Model there is continued room for debate).

18 Garry Wills, To Keep and Bear Arms, NY Rev Books 62-63 (Sept 21, 1995) (implying that the scholars behind the Standard Model are few and beholden to the gun lobby, that their work is inferior, and that the original understanding of the Second Amendment does not comport with the Standard Model).

19 Cornell, 16 Const Commen 221 (cited in note 15).
The closest thing to a settling argument has been provided by Jack Rakove. In a meticulous review of the legislative history, Rakove takes a rather minimalist view of the Second Amendment; he sees the 1787 and 1788 debates at the Constitutional Convention as focused mostly on rather technical, if politically troubled, adjustments in the relative powers of the state and federal governments over the arming of militias. For Rakove, the Amendment does not address grand issues of autonomy and right, but rather signals little more than the Framers’ somewhat condescending acknowledgment of the states’ fear that Congress would put burdensome regulations on the militia. Rakove might therefore implicitly lend support to an important tenet of the pro-gun position—that the Amendment was animated by a fear of national totalitarianism. But Rakove has more mundane things in mind—for him, it was supervisory abuse and neglect by Congress, not totalitarian violence by the federal government, that the Framers agreed to constrain.

A complementary “settling” argument comes from historian Saul Cornell, who declares that the originalist argument for the individual rights approach is based on a false reading of the legislative history and legal context. Cornell therefore might simply accept Rakove’s modest view of the positive role of the Amendment. However, Cornell also temptingly suggests that some “new paradigm” of Second

20 Jack N. Rakove, The Second Amendment: The Highest Stage of Originalism, 76 Chi Kent L Rev 103, 129 (2000). See also Cornell, 16 Const Commen at 228–37 (cited in note 15) (noting that although eighteenth-century Pennsylvania was a relatively pro-gun state, there was no consensus among Pennsylvanians, even among anti-Federalists, as to the necessity of a general right to bear arms, and that Pennsylvania gun laws were very restrictive).

21 Rakove, 76 Chi Kent L Rev at 141–44, 151 (cited in note 20) (noting that during the ratification debates, anti-Federalists were concerned about how the right to bear arms would affect state sovereignty and federalism and were not concerned about a private right to bear arms).

22 See, for example, Jay Simkin, Aaron Zelman, and Alan M. Rice, Lethal Laws 9–12 (Jews for the Preservation of Firearms Ownership 1995) (concluding that “gun control is an essential precondition for genocide”); Daniel D. Polsby and Don B. Kates, Jr., Of Holocausts and Gun Control, 75 Wash U L Q 1237, 1237 (1997) (“[A] connection exists between the restrictiveness of a country’s civilian weapons policy and its liability to commit genocide upon its own people.”); David C. Williams, The Militia Movement and Second Amendment Revolution: Conjuring with the People, 81 Cornell L Rev 879, 901 (1996) (“The immediate (though perhaps not the only) concern prompting the Second Amendment was a fear that the federal government might use its Article I powers to disarm the militia and pave the way for tyranny.”).

23 Rakove, 76 Chi Kent L Rev at 158 (cited in note 20) (arguing that the Second Amendment can be read as a reminder to the federal government of its obligation to ensure that the militias are well organized, armed, and disciplined). And in any event, he argues, the constraint was to lie with the militias narrowly defined, not any populist militia of the whole. Id at 131–32 (suggesting that militias could be equated with the entire male population capable of bearing arms, but could also be something less because militias were subject to national and state legislative authority and were no longer pre-constitutionally distinct from those authorities).

Debating Guns, Crime, and Punishment

Amendment scholarship may emerge, one that views the right to bear arms as neither collective nor individual but rather as a "civic right," in the nature of a civic republican right to be exercised by those "capable of exercising it in a virtuous manner." There is something ironic about a key part of Cornell's thesis. In his deft and lawyerly arguments for the originalist collective rights view, Cornell underscores the later eruption of individual rights rhetoric in nineteenth-century state constitutions in order to stress the absence of any such view in 1791. The problem is that even though this makes sense in terms of originalism, it ends up conceding that as a matter of the political culture of constitutional value, the individual rights interpretation of the right to keep and bear arms had purchase in the nineteenth century. Admittedly, the individual rights proponents have not argued for an evolving constitutional view of the Amendment—instead staking their claim on originalism. But Cornell perhaps unwittingly gives a kind of indirect strength to the individual rights view by demonstrating how that view surely entered the discourse of constitutional values in the nineteenth century.

Legal historian Carl Bogus, like Cornell but unlike Rakove, strives to impute some continuing significance to the Amendment. But where Cornell thinks the Amendment might spark rich philosophical debate, Bogus sees it as serving a very specific political purpose. Bogus reviews three historical cases (pp 120–27), from Orville Faubus–era Southern resistance to federally mandated school desegregation, to illustrate that federal-state clashes over the militia have the capacity to raise legally and politically significant questions about the Second Amendment, even once that Amendment is stripped of any conception of noncollective rights. Bogus's challenge is to use these episodes, which obviously ended quickly and decisively in favor of national power, as proof that the Amendment could someday play a role in restraining the fascistic exercises of national power in the name of national emergency. Because Bogus suggests only that states have some

25 Cornell, 29 N Ky L Rev at 657, 678–81 (cited in note 24) (observing that the pure individual and collective rights models are not capable of assimilating complex historical evidence and that a third model characterized by civic rights might be developed in response).
26 See id at 679.
27 See id at 675–77.
28 But see Akhil Reed Amar, The Bill of Rights: Creation and Reconstruction 215–23 (Yale 1998) (stating that the Civil War Amendments sought to redress racism by granting equal rights to armed self-protection); Robert J. Cottrol and Raymond T. Diamond, The Second Amendment: Toward an Afro-Americanist Reconsideration, 80 Georgetown L J 309, 343–46 (1991) (suggesting that the Fourteenth Amendment transformed the meaning of the Second Amendment by extending the prohibition of the violation of the individual right from the national government to the state governments).
29 Bogus's essay pre-dates September 11, 2001, but might he suggest that the Second Amendment be invoked to protest the accretion of federal power in the name of anti-terrorism?
minimal right, the parameters of which are unclear, to provide for their own security, the hypothetical situations in which a state is actually deprived of this right by the federal government may be implausible. In any event, the implausibility of future Second Amendment crises in Bogus's terms might simply mean that the Amendment has been a great success at restraining federal deprivation of the collective right of self-defense.

Caught in the crossfire between individual rightists and collectivists, each marshalling historical evidence to bolster their position and bickering about the validity of the other camp's data points, Christopher Eisgruber proposes that the constitutional question be addressed ahistorically (p 140). Eisgruber reviews original/textualist, "intratextual," and other meaning sources and finds them too equivocal to be useful (pp 142–51). Implicitly taking up the suggestion of a paradigmatic new "civic right," Eisgruber argues that the way to read the constitutional stalemate is that there is a lawyerly tie between binary arguments about individual and collective rights, and that we should therefore attempt a new approach altogether (p 140). Thus, Eisgruber argues that it is pointless to draw specific meanings from the language of the Amendment; instead we should treat it as a trope expressing constitutional significance, a kind of moral imprimatur of political philosophy (p 141). Eisgruber urges that the proper way to read the Amendment is as a spur to conducting future legislative debates over gun control, with the Amendment serving as a kind of ethical prod to engage in those debates on a high-minded, noninstrumentalist or political level, in order to adopt the position most in accord with democratic values.

Eisgruber next asks what sorts of enforceable rights of gun ownership and military service citizens of a free republic ought to have, turning a critical eye on pro-gun arguments that gun ownership is necessary for democratic authority and individual autonomy (p 151). On the former, Eisgruber is perhaps too dismissive of the great quandary of how to refute the anti-dictatorship trope of the gun advocates. He essentially says that the speculative benefit of individual gun ownership in the unlikely event that guns are the last thing available to resist tyranny is outweighed by the threat of antidemocratic violence by widespread gun use (p 152). The rebuttal of the autonomy argument is stronger. But, he argues, this is so complex and empirical a question—he refuses to see it as a deontological one but solely as one of self-

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Might the federal government someday illegitimately nationalize the state militias to fight in Iraq or Afghanistan (pp 133–34)?

30 But Bogus's intellectual acrobatics remain an intriguing effort to sustain some anti-federalist salience to the Second Amendment while also effectively closing the case against the individual rights view with respect to crime-focused gun control measures.
defense—that it should solely be a matter of legislative line-drawing, no different from drugs and medicine (pp 153–54). Eisgruber would concede that his approach works only at a high level of abstraction and does not provide any specific guidance to legislatures or courts on how to draw these lines. Ultimately, Eisgruber may make more sense descriptively than prescriptively, or perhaps predictively, because regardless of whether dramatic new constitutional arguments emerge, they are unlikely to have much effect on policy debates except in the sense that Eisgruber describes.

III. POLICY INTERVENTIONS

The empirical quandary about modern gun control might be put as follows. On the one hand, the great majority of guns in the United States are owned by law-abiding citizens who keep them at home, mostly out of a belief that they offer protection, while occasionally using them for recreation (p 4). This category of gun ownership by itself seems hard for even the most ardent gun control advocates to attack, except in the impressionistic sense that any gun ownership for any supposedly socially useful purpose reinforces dangerous notions about the psychological or instrumental value of guns, thereby encouraging abuses of gun ownership that lead to violence and homicide. Nevertheless, let us stipulate that, however modest the social benefit of this kind of gun ownership, its cost is close to zero. So there are only two questions about it: does this type of gun ownership actually have greater social value than I have stipulated, and conversely, would the efforts needed to curtail other truly harmful forms of gun ownership unduly interfere with this benign kind? On the other hand, with respect to the category of socially harmful gun ownership, we have what I will call the modern Oakland problem. Despite dramatic drops in homicides in major American cities, Oakland, California, stands out—and we do not yet know how atypically—as a frightening site of renewed gun fatalities, with probably most of the killings associated with drug markets and attendant social conflicts, along with horrifying random effects in terms of friends or families of targets or accidental bystanders getting caught in crossfire. Here, the need to get guns out of these hands is inarguable. Notwithstanding the consensus, the ques-

31 See Philip J. Cook and Jens Ludwig, Guns in America: Results of a Comprehensive National Survey on Firearms Ownership and Use 57 (Police Foundation 1996); Gary Kleck and Mark Gertz, Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun, 86 J Crim L & Criminol 150, 167 (1995) (citing a national survey in which 78 percent of gun owners stated that they were willing to use a gun defensively in some way).

32 See Henry K. Lee, Girl, 16, Killed in Oakland; Teen's Shooting is the City's 109th Homicide of 2003, San Fran Chron A25 (Dec 3, 2003) (reporting that Oakland had 109 homicides through December 2, 2003, five fewer than its 2002 total, which represented a five-year high).
tions are: first, is there any feasible way to do so, and second, is there any way to strip the latter category of gun owners of possession without interfering unduly with the other benign or arguably socially beneficial type of gun ownership.

Here is one way, drawing on the research in this volume, that the empirical problem can be framed. David Kopel lays out the following very logical argument about the role of guns in regard to burglary. Americans unquestionably have far more guns at home than people in peer nations, and while Americans suffer from a higher rate of many violent crime victimizations than residents of most of those nations, the American rate of burglary is lower (pp 401-02). A very good explanation, reasonably abetted by anecdotal evidence of the perceptions of burglars, is that the threat of defensive gun use is a major deterrent in the United States (pp 407-08). This is a clever move by Kopel. First, by paying heed to the interesting complications raised by new research into comparative crime rates among G8 and other developed nations, Kopel undercuts the argument of some gun control advocates that the United States's anomalously high crime rate must logically be tied to its anomalously high gun possession incidence. Instead, the picture is far more complicated and empirically more subtle; there is considerable evidence that American "exceptionalism" is limited to violent crimes and homicide, not overall crime rates that include nonconfrontational burglaries. Second, the utility of guns to prevent burglary bears on the most politically appealing aspect of gun rights: home ownership by people who would never use those guns except as a last line of self-defense. Furthermore, Kopel's hypothesis has the virtue of being at once theoretically logical while also being, ironically, immune to empirical refutation because it is immune to systematic study. How could gun control advocates ever get the numbers on burglary deterrence of this form? How could we ever control the relevant variables to do a cross-national comparison on this point? In this regard, Kopel's argument is less ambitious, but in some ways more powerful, than the controversial arguments about the crime-

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33 See Zimring and Hawkins, *Crime Is Not the Problem* at 27–29 (cited in note 6) (illustrating that rates of crime victimization for most offenses in the United States are not that different from rates in other countries, with the exception of homicide). But see Daniel D. Polsby and Don B. Kates, Jr., *American Homicide Exceptionalism*, 69 U Colo L Rev 969 (1998) (questioning Zimring and Hawkins's implication that American violence exceptionalism is driven by the prevalence of gun ownership rather than overall criminality).

34 To be sure, Kopel cites a number of statistical reports of the frequency with which people retrieved a firearm in response to an intrusion as well as the subcategories of these cases in which the respondent actually confronted and deterred the burglar (pp 403–05). Understandably, though, Kopel cannot measure how many burglaries are deterred ex ante by the fear of encountering an armed resident more accurately than the impressions gleaned from a few anecdotal surveys of prisoners (pp 405–07).
reducing efficacy of shall-issue laws by John Lott, currently the subject of heated refutational re-analysis by John Donohue and Ian Ayres. Of course, if deterred burglars shift their criminality to robberies or other crimes, home gun ownership might not reduce, and might even increase, serious crime. And indeed Kopel concedes that some burglars diversify their portfolios with robberies (pp 408–09). But assuming Kopel is right that home gun ownership is a clear net deterrent, what follows? The not-very-shocking conclusion is that we should avoid extreme forms of gun control that would categorically deny people the right to keep guns in their homes, thereby eliminating the critical mass of privately owned guns needed to deter burglars. But the very reasonableness of Kopel’s position weakens it. He is arguing against the least likely form of gun control on the table—unless he extends his argument to an attack on, say, restrictions on gun shows, which seems hardly plausible. Perhaps the other irony of the Kopel approach is that because the deterrence mechanism is the sheer number of guns, his thesis is consistent with the tragic resignation position of many gun advocates—that crime is a fact of American society that legislation cannot change.

Thus, perfectly consistent with Kopel, and stopping short of a total ban on home ownership of guns, is the possibility of the kind of highly specific legislative or executive intervention that makes for the most interesting discussion in this volume. At least as a matter of political salience, the most plausible interventions meet three criteria. First, the interventions are most directly tied to very visible gun violence, even when they go beyond the fairly uncontroversial notion of tacking higher penalties onto criminals who use guns. Second, the interventions depend far less on the infeasible notion of widespread gun

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37 See Weisberg, 39 Houston L Rev at 42 (cited in note 4):

Finally, Kates and Polsby place a heavy bet on a default cultural theory. They passionately invoke the claim of Colin Greenwood—that ethnic and social factors explain crime, that guns are irrelevant, and that gun prohibition is pointless. They prefer perpetrator theories, by which not government policy but the combination of sheer human perversity and varying convergences of social, political, and economic vectors explain modern crime booms, and therefore incarceration booms, as rationally reactive state policy.
recapture. And third, the interventions are part and parcel of other kinds of research and innovation in new police methods.

Of course, categorical proscription of particular types of guns is conceptually the simplest of approaches, is still one of considerable political salience, and yet is virtually ignored in this volume. This omission may be motivated by the perceived futility of attempting to enact a federal gun ban, given that concerns of federalism and national media attention would incite fierce political opposition. However, the absence of these complicating factors at the local level may contribute to the decisions of a number of states and municipalities virtually to forbid possession, and certainly the public carrying, of handguns and other weapons. Notwithstanding the impracticability of a federal gun ban, local politics are very much part of the gun debate and have occasionally enabled broad generic gun bans whose utility and feasibility the volume does not acknowledge.

At the federal level, the one type of proscription that has shown some political and legal feasibility has been the assault weapons ban. Policy empiricists have been skeptical that bans of this kind could significantly affect crime rates, because, aside from the occasional dramatic multiple killing, murders involving weapons falling under any reasonable definition of the term "assault weapons" still account for a very small number of American homicides. Nevertheless, the assault weapons issue was, along with the Brady Bill, the most notable site of federal debate over the last decade, and it has been debated on very

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39 See Zimring and Hawkins, Crime Is Not the Problem at 200 (cited in note 6):

A specific focus on handguns is an easy choice in the sense that it emerges from a profile of the firearms at risk for every major category of lethal violence. With regard to homicide generally, the per unit involvement of handguns is nine times as great as for long guns, and the concentration in particular subsets of lethal violence, such as robbery, is even greater.

See also Wintemute, Guns and Gun Violence at 81 (cited in note 38) (stating that in the short run the ban on assault-type firearms imposed by the 1994 Crime Bill had beneficial, but modest, effects); David B. Kopel, “Assault Weapons,” in David B. Kopel, ed, Guns: Who Should Have Them? 159, 179–81 (Prometheus 1995) (asserting that assault weapons are only involved in a small percentage of crimes). However, others argue that assault-style weapons account for, among other things, as much as a fifth of all fatal attacks on police officers in the United States. See Violence Policy Center, “Officer Down”: Assault Weapons and the War on Law Enforcement, online at http://www.vpc.org/studies/officeone.htm (visited Jan 7, 2004):

The gun industry's evasion of the 1994 ban on assault weapons and high-capacity ammunition magazines continues to put law enforcement officers at extreme risk. Using data obtained from the Federal Bureau of Investigation, the Violence Policy Center has determined that at least 41 of the 211 law enforcement officers slain in the line of duty between January 1, 1998, and December 31, 2001, were killed with assault weapons.

40 See Public Safety and Recreational Firearms Use Protection Act. 18 USC § 922(v)(1) (2000) ("It shall be unlawful for a person to manufacture, transfer, or possess a semiautomatic assault weapon."); Brady Handgun Violence Prevention Act. 18 USC § 922(s)–(t) (2000) (requir-
revealing political and philosophical terms. Gun control advocates—however little proof they have of the overall harm of "assault weapons"—know that the very term, though ambiguous, galvanizes public support for gun control. Many gun control advocates surely believe that banning assault weapons is the minimal concession that gun control opponents are morally obligated to make—akin to the uncontroversial bans on machine guns and larger military weapons.

By contrast, the assault weapons ban drives gun control opponents to fury, in part because they believe that any definition of "assault weapons" is necessarily so vague or arbitrary as to end up including large varieties of weapons that pose none of the supposed dangers of "assault weapons" and indeed that are close to the core type of recreational weapons. Moreover, even if the definition were tighter, gun control opponents would generally prefer to tackle the subtle issues of licensing and tracing laws than to open the policy path of categorical bans of any kind.

Perhaps recognizing the Maginot lines around each side's position on gun bans, the volume plausibly assumes that the center of gravity of any pragmatic approach to gun-violence reduction is really quite clear in theory: the secondary market in new guns. Yet in exploring such interdictions, the volume proves far more convincingly diagnostically than prescriptively.

One promising sub-area of secondary market interdiction is tracing, explained in great detail by Philip Cook and Anthony Braga. The state and federal governments now cooperate in tracing guns used in crimes back to the dealers who introduced them into the consumer market (p 163). The issues associated with tracing are twofold: (1) What does tracing accomplish? and (2) To what legal remedies may it lead? In theory, as Cook and Braga note, tracing can lead to an informing strategy about interdiction, assist in identifying specific dealers and traffickers as targets of further police action, and serve as a research tool to evaluate the effects of changes in gun control laws (p 164). But traces are limited by their very nature and definition, covering only the first retail sale (p 165). The failure to track subsequent transfers limits the interdictions that can be made in the secondary market. Further, while traces certainly confirm that Federal Fire-
arms Licensees (FFLs) are a problem, traces themselves are not a solution. Nevertheless, traces do reveal an interesting and sobering fact: most crime-traceable guns are fairly new (pp 170–73). The most dangerous guns appear to be relatively new guns that left the hands of FFLs and fairly quickly ended up in the hands of people who were probably ineligible to buy them in the first place. These transferees obtain the guns by presenting false papers, arranging “straw man” purchases, or simply stealing the guns from legal buyers—all with fairly imminent malicious uses of the guns in mind (p 170).

Cook and Braga suggest that if new guns are disproportionately represented both among those guns used in crimes and those recovered by the police, we should find reason for optimism (p 172). Presumably, Cook and Braga infer that the police are looking in the right places, and that increases in enforcement efforts of the sort they describe might yield decreases in gun crimes. It is true that if the much-lamented supply of old guns is not a major factor in crime, then the sheer volume of the gun supply in the United States is not so threatening to us as we might fear. On the other hand, we do not know if police recovery of guns will keep up with, or be overwhelmed by, supplies of new guns. In support of their optimism, Cook and Braga also note that gun-using criminals tend to acquire guns illicitly and use them quickly after they obtain them, often going through a number of guns in very brief criminal careers (p 172). Therefore, they surmise, the most efficient focus of interdiction resources is not the time after the first retail sale of new guns, but at the point of or just after the transfers from the licit to the illicit market—most obviously off-the-books sales by FFLs and sales to straw purchasers—and these transfers, Cook and Braga suggest, are particularly vulnerable to enforcement efforts (p 172). Once again, the optimistic interpretation of the available data may seem sensible in the abstract, but the proof will not be forthcoming until we have a long enough period with enough gun interdictions to test their effect on crime rates.

Additionally, a great number of gun transfers involve quick interstate sales rather than a slow diffusion through long sequences of more local transfers, suggesting a useful role for the Brady Law (pp 178–81). Thus it might seem that a narrow interdiction effort, not a broad supply-side approach, will work best. Such interdiction would especially focus on the small number of FFLs associated with a disproportionate number of traces. As Cook and Braga note, however,

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42 See 18 USC § 922(s)–(t) (requiring sellers to delay completion of sale for up to five business days pending a police background check on eligibility). By imposing a national background check rule, of course, the Brady Law aids enforcement in those states like Illinois that already require checks on intrastate sales but cannot control the importing of guns from states lacking such rules (pp 178–79).
the number of traces can be an unfairly misleading figure, since it may be due to uneven tracing efficiency—and also leaves open the question of the FFL's mens rea, especially where the business is in an unusually high-crime area (pp 176-77).

A natural conclusion is that the federal government, or more specifically the Treasury Department's Bureau of Alcohol, Tobacco, and Firearms (ATF), is the logical medium for conducting the interdiction, on the theory that its panoply of enforcement and investigative powers might be best suited to monitor the quick but elusive diffusion of guns. But as two contributors to this volume demonstrate, the federal role entails costs as well—political problems of federalism inherent in any preemption of state autonomy, as well as institutional problems within the federal justice system inherent in any effort to ensure uniform standards on prosecution. For example, as Daniel Richman shows, the ATF is constantly buffeted by political concerns about excessive central federal powers (p 329) as well as, ironically, a diversion of its resources in favor of Project Exile-type federal prosecutions (pp 330-31), which are in some ways an even more aggressive centralization of national power. As for the general trend toward the federalization of criminal law, Sara Beale argues that the hostility to such federalization demonstrated by the Supreme Court in the *Lopez* and *Morrison* decisions is likely an effort to preserve aspects of federalism in the criminal law and prevent a legislative effort to convert the federal judiciary into a body of ordinary police courts (pp 348-50). The federalization of the criminal law, Beale observes, leads to a federal judiciary that is swamped with cases that it lacks the discretion not to hear (p 354), while federal prosecutors remain free to choose what cases they pursue depending on their available resources (pp 352-55).

The most bizarre problem in dealing with the secondary market is the phenomenon of the gun show, and James Jacobs's treatment of the regulation of gun shows is one of the more sobering contributions to this book. Under the amended Gun Control Act of 1968, people "engaged in the business of selling firearms" must get federal licenses, are forbidden from selling guns to people in certain restricted categories, and are subject to Brady regulations. But the "casual" sellers of

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44 *United States v Morrison*, 529 US 598, 627 (2000) (finding the Violence Against Women Act unconstitutional because it purports to use the commerce power to regulate noncommercial activity).
45 See 18 USC § 923(a) (2000).
46 The categories include out-of-state residents; people under certain ages specified for types of guns; people indicted for or convicted of felonies; those adjudged to be mentally defective or committed to mental institutions; illegal drug users and addicts; persons dishonestly
guns who do not need to have a federal license effectively transform themselves into people engaged in the business of selling firearms when they offer their wares at gun shows (p 301). This loophole may strike some as insane, but Jacobs argues that closing it would be largely quixotic unless this move came as a lesser-included step within a broader scheme to regulate absolutely every sale or transfer of guns (p 308) in the same way we regulate such sales and transfers of automobiles. It may seem wildly cynical of the gun lobby to exploit this strange social phenomenon as a last-ditch protected area for resale, unless the lobby believes that gun shows are some sort of sacred social free space deserving of special legal protection. But it is more likely that the exploitation of the legal difficulty in closing the loophole as a justification for retaining the loophole is a transparently instrumental move by gun advocates to get around licensing laws. Moreover, the difficulty in regulating gun show sales also serves as an example of the general difficulty of fully regulating commerce in any highly fluid secondary market. Gun shows are the standing refutation to arguments that regulation, be it through tort suits, licensing, or the like, can succeed without requiring mass confiscation. Gun shows are a sort of metaphor for the fluidity of markets and social networks.

That the difficulty in regulating gun shows is but one manifestation of a larger economic problem finds support in the disappointing performance of the Brady law (pp 290–94). Although we do not know specifically why the large reduction in gun violence some predicted Brady would achieve did not materialize—were the laws not enforced or enforced and merely ineffective?—Philip Cook and Jens Ludwig suggest that the latter is the more likely supposition. Brady blocked many thousands of gun sales (p 283); but, we do not know how many individual would-be gun purchasers this figure represents or whether these ineligibles found guns by some other means (pp 283–84). Cook and Ludwig suggest that Brady at least obstructed the interstate flow of guns (p 285), but again, because they cannot say whether that supply disruption led to more liquid intrastate transactions or simply revved up the market in illegal guns by increasing their street value, the disruption of the interstate market would not necessarily lead to the predicted crime reduction. Using a natural experiment/matched

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47 18 USC § 922(s)–(t).

48 See James B. Jacobs and Kimberley A. Poter, Keeping Guns out of the “Wrong” Hands: The Brady Law and the Limits of Regulation, 86 J Crim L & Criminol 93, 117–19 (1995) (arguing that, among other factors, the size of the preexisting stock of unregistered guns, the lack of public visibility of small guns compared to cars, and the potential disincentives to registration under a regime where some applicants are presumptively ineligible combine to make gun registration far less feasible than automobile registration).
Debating Guns, Crime, and Punishment

Cook and Ludwig find no evidence of an actual decline in the homicide rate contemporaneous with the implementation of the Brady law.\(^9\)

Another approach that has been widely advocated, but that may prove futile, involves civil lawsuits. Perhaps because of the lower burden of proof and the less stigmatic remedy, one might argue that civil suits against gun sellers can be more effective than individual criminal cases. Civil suits are arguably even more effective than purely regulatory approaches, which depend on inevitably over- and under-inclusive bureaucratic rules. But the difficulties in pursuing civil remedies turn out to be perfectly predictable once we realize that the vague reasonableness standards put to tort juries and the attendant opportunities for highly contextual and re-frameable fact patterns relate to the core constitutional and cultural dilemmas about the role of guns in society. That is, “reasonableness” discussions in the jury room in a tort case might all too well replicate the national “symbolic values” wars that Zimring, Slotkin, and Harcourt have depicted. The doctrinal medium for this symbol-war in tort suits is the causation requirement, which in the case of gun suits might be quite diffuse. To illustrate this diffusion, David Kairys stresses the evident (if potentially misleading) fact that only a tiny percentage of FFLs sell the guns that lead to the majority of crimes (p 365). He goes on to argue that the occasional gun crime provokes home purchase of guns, which in turn wind up being used in suicides (p 368). Moreover, he laments that episodic terrifying events like Columbine only worsen the problem by provoking more gun purchases (p 369)—demonstrating just what a sociological Gordian knot this is.

Kairys’s solution is to advocate for the recent litigation experiment in public nuisance suits (pp 372–74), brought largely by municipalities (p 364). A local government may seem an especially attractive plaintiff in regard to an issue where opponents of gun control rely on federalist deference to state and local authority. The tobacco litigation has of course shown that the states, if not localities, can serve as highly coordinated instruments of anti-industry civil prosecution. Moreover, nuisance law, as Kairys explains, is neither fault-based nor strict liability—it is a looser notion pertaining to interference with the common right (pp 369, 372). It is a sort of tort against the civic order, with civil society as the plaintiff—or, for another loose analogy, it invites the petit jury to serve as a kind of civic grand jury on a matter of social policy. In a sense, nuisance law is a litigation vehicle for Eisgruber’s

\(^9\) Cook and Ludwig find some evidence for a decrease in suicides attributable to Brady (pp 292–93).
vision of a civic debate about the role of guns in a democracy (pp 140–41).

A logical consequence of the nature of a public nuisance suit is that the remedy cannot be a damage award to individuals, but rather some sort of abatement injunction, with damages only to the extent of logistical costs incurred by the governmental plaintiff (p 377). Kairys implicitly assumes that juries will make the “policy” decision against guns, even where legislatures cannot (because their instruments are too cumbersome) or simply will not—presumably because legislatures are politically captured while their constituents may not be. In fact, to the extent that Kairys specifies the content of his imagined abatement injunction, he suggests the very mechanisms that remain so controversial in legislatures: requiring sellers to monitor their buyers or forbidding them to make multiple sales or enroll at gun shows (p 373). Indeed, the one obstacle to these suits, which Kairys holds out as an end run around a politically captured legislature, has been a pattern of gun-industry-inspired legislative constraints on these common law actions, which Kairys traces back to a type of legislative encroachment on the judiciary rarely seen since colonial days (pp 374–75).

But even where the legislature has not forbidden these suits, the picture of litigation success that Kairys paints seems dubious. For the suits to succeed, juries would have to share Kairys’s confidence that manufacturers have both total control of the lawsuits and high-level knowledge of the harms they cause. There is no guarantee juries would favor these aggressive remedies. But even if they were so inclined, and legislatures restrained from preventing the suits, judges, acting in their gate-keeping capacity, have been very stingy about permitting the public nuisance claim ever to get to the juries without, for example, refining the nuisance doctrine to require proof that the manufacturers “control and create,” rather than merely contribute to, the downstream harm (pp 376–77). However attractively flexible the public nuisance tort appears to Kairys, judges still view it as a legal doctrine subject to highly limiting formal doctrinal constraints. Moreover, judges may react not only to the empirical arguments about the correlation or causal link between a manufacturer’s distribution and downstream crime, but also to some more normative sense of what is reasonable to expect from manufacturers for whom the majority of customers are exercising what they and others consider a moral and possibly an inherently legal right. Nevertheless, while acknowledging the likely opposition by the legislature and executive and noncoopera-

50 Moreover, the ATF has not cooperated with the city-plaintiffs in these cases, refusing to provide the computerized records of its trace calls (p 379), a kind of executive nullification to complement the broader legislative retrenchment.
Debating Guns, Crime, and Punishment

tion by judges and juries, Kairys optimistically notes that even the greatly successful tobacco litigation started out very slowly (p 379).

In addressing more conventional tort suits, Mark Geistfeld shows that judicial rejection of suits against gun dealers is consistent with tort law, not because of a lack of causation or fine points about the misuse of a product, but because self-defensive use of a gun is sufficiently well established that legitimate self-defense has priority over third-party interests. That is, the appropriateness of strict liability as a doctrine to aid tort plaintiffs is ultimately a matter of the net "social value" of the activity (p 394). And that social value in turn depends on whether strict liability's benefits to private parties to the lawsuit might be outweighed by net harm to the legitimate interests of others—in this case self-defending gun owners for whom strict liability might unduly reduce access to guns (p 394). In Geistfeld's highly refined reading, courts have wrongly finessed the strict liability issue by saying that guns do not meet the key criterion for the application of strict liability—that they are still dangerous even when reasonable care is exercised (p 389). Moreover, Geistfeld argues that guns should not be dealt with under a reasonable care/negligence standard because the careful manufacturer cannot prevent the ardent criminal from finding a gun (p 387). Ultimately, because the imposition of strict liability requires an inquiry into the social value of the activity (p 394), Geistfeld suggests that courts have reached the right conclusion, if for the wrong reasons. Here, self-defense wins the argument for gun defendants: strict liability would unfairly raise the price of handguns to law-abiding self-defenders (pp 394–95). So it is simply true that the externality that lawful self-defenders impose on innocent third parties is acceptable under tort law. The interdiction of civil tort suits does not solve, but simply reinforces, the obstacles to gun control.

The final approach to secondary market interdiction is all about local policing. It is one thing to arrest people for violent crimes and enhance their punishments for gun use, and, as noted, that approach has become an attractive (though perhaps inefficient) policy for the federal government. It is another to engage in prevention by exploiting the resources of search and seizure law to catch people in the act of possessing guns they are not entitled to possess, targeting those in the pool of people most likely to have gotten guns illegally through the secondary market and to ultimately use them in criminal violence. Of course, varieties of substantive bans on large categories of guns, such as the assault weapons ban, are in a sense aimed at this purpose, but that technique is a separate matter. Rather, the focus of the more finely tuned empirical discussions in this book is the interdiction of users of fairly small guns that are illegally possessed because they violate more conventional gun possession laws.
In a meticulous empirical treatment of the problem, Jeffrey Fagan and Garth Davies find that a certain kind of aggressive police action might address the new Oakland phenomenon. Fagan and Davies, in contrast to other academics who have written about innovative police techniques, carefully parse types of new policing, distinguishing at least three categories: "community policing," which deploys police in non-law-enforcement tasks to improve neighborhood life more generally (p 192); "order-maintenance policing" (OMP), which stresses prosecutions for minor infractions that offend the local aesthetics and general quality-of-life and might thereby depress residents' commitment to local order (p 194); and, their real focus, "directed patrol," which involves aggressive use of stops/searches and seizures on any legal ground to interdict people believed to be carrying illegal guns or otherwise engaged in serious crime (p 194), with police resources focused on neighborhoods disproportionately represented in those crimes. At least the latter two categories of policing invoke obvious concerns about racial profiling. In this volume, Jerome Skolnick and Abigail Caplovitz address that subject with a useful review of the law, policy, and empirical debates over this heterogeneous phenomenon and also offer sensible recommendations for constraining police discretion in order to prevent it. But it is Fagan and Davies who offer the more striking insights into the racial implications of OMP and directed patrol, especially the implications for police action concentrated on guns and violence (pp 207-09).

Fagan and Davies note that although OMP in New York City morphed somewhat into a version of directed patrol, the jury is out on whether it significantly reduced criminal violence in the Giuliani era (pp 205-06). They then focus on the directed patrol efforts in San Diego, Boston, Kansas City, Indianapolis, Jersey City, and Pittsburgh, and note that studies there suggest some notable success in terms of increased ratios of recovery of illegal guns to police stops, along with some evidence of reduction in violent-crime arrests, gun homicides, homicides generally, gun shots fired, and hospitalizations for gun injuries (p 197). They then return to New York and take a

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51 Fagan and Davies's treatment of these police efforts tells us far too little about what legal rationales or pretexts the police used to ensure that the stops were legal under the Fourth Amendment and, as a related matter, do not tell us how contingent the legality of the stops was on the substantive gun laws the police were enforcing. For a helpful discussion of some of these issues, see Wintemute, Guns and Gun Violence at 70-73 (cited in note 38) (citing earlier work by Fagan himself, as well as others).

52 Indeed, Fagan and Davies were wise to be cautious because arguably the jury is now in, with recent research suggesting that OMP did not influence the drop in crime; instead, the sheer increase in the per capita number of police did. Steven D. Levitt, Understanding Why Crime Fell in the 1990s: Four Factors That Explain the Decline and Seven That Do Not, J Econ Persp (forthcoming 2004) (noting also as dominant explanations an increase in incarceration, legalization of abortion, and the reversal of the crack-cocaine epidemic).
whole new tack in examining OMP—they re-analyze New York data not by the large category of boroughs, but by precincts within boroughs, compared in terms not of OMP arrests for minor offenses, but in terms of stops on suspicion of guns, drugs, or violent crime (pp 199–201). Thus, in a sense, they replicate a kind of directed patrol program within the OMP project.

The results are weird. The New York figures, based on official stop-and-frisk records and multiple regression analysis, reveal that directed patrol stops for violence, and to some extent for drugs, seem to reduce gun homicide and overall homicide deaths among Hispanics but not among African-Americans (pp 202–06). The results are especially striking given that the stop-and-arrest rates for African-Americans, especially for weapons, were far higher than for other groups (pp 207–08). Fagan and Davies speculate that racial profiling, beyond questions of constitutional validity or political sensitivity, may be iatrogenic (p 209). They suggest that as African-Americans perceive more frequent police stops and arrests, the result is either some loss of respect for law or a weakening of stigma (pp 208–09). This merits further inquiry. Another possible explanation, only barely hinted at here, is that if African-Americans feel hostile toward the police, they will deny the police the street intelligence on which a more productive stop strategy may rely.

Of course, there are ways to avoid the dangerous political effects of actual or perceived profiling—some involving legally or politically imposed constraints on profiling in its various forms, but others in the area of more “community-oriented” policing. Thus, Jenny Berrien and Christopher Winship offer the solution of church-police relations in a review of a Boston program deploying prestigious local ministers in the service of the police. Notably, the ministers did not put most of their energies into crime-prevention counseling with youth; rather, they formed partnerships with the police to reform police conduct, in fact and in perception, and thereby helped vouch to local residents the good faith of the police (p 239). At one point in recent Boston history, that church-police partnership seemed to correlate with dramatic decreases in youth homicides, but, alas, a worrisome increase in youth homicide in Boston has recently occurred (pp 243–44). The authors rather awkwardly skirt this issue, implicitly hoping that the church-police partnership will someday prove manifestly crime-reducing (p 244). Of course, controlling the variables in this kind of experiment may be impossible. On the other hand, the Boston program epitomizes a category of program that seems so noble in intention and inarguably useful for reasons other than manifest crime reduction that it

53 Fagan and Davies find the white rate too low to produce useful results (p 205).
is likely to be sustained even in the absence of evidence of crime-reduction and might someday be conducive to further study. So we are left with the ethical question of how much to invest in highly virtuous programs with clearly beneficial but highly diffuse effects, when there is little chance of any assurance that they will produce a measurable, concrete reduction in homicide levels.

CONCLUSION

And that question leads to another that bears on the wisdom of so eclectic a book. As I noted at the start, the heterogeneity of such a volume is understandable and even apt in an area of law where broad constitutional arguments so entangle with street-level policy debates, and where both are complicated by the visceral political sentiments and real and mythical cultural history associated with guns in America. The danger, however, is of becoming so entranced by the interrelationships among these things that one fails to separate them in deciding precisely what one is trying to accomplish in a particular scholarly effort.

It may seem that the sophisticated intellectual position is to note that dissensus about the moral value of guns in our culture complicates any resolution of empirical issues about the wisdom of specific interventions against gun violence. But the next step in sophistication is to recognize the differences among (a) treating deontological moral and constitutional views on guns or gun rights (or other rights) as matters distinct from, though arguably trumping, utilitarian notions about stopping gun violence; (b) pragmatically recognizing how these value disputes stand as obstacles to empirical resolution; (c) stepping outside the role of policy analyst altogether and into the role of social historian, tracing the complicated relationship of deontological and utilitarian notions about guns. In short, the danger is to become so absorbed by the interrelationship among these things as to doubt or lose interest in the possibility of disinterested, value-free social science.

This is a danger embraced by one contributor to this volume, but it is largely avoided by the volume as a whole. The danger is always present when social values and empirical analyses get tied up in each other. It is fine, for example, to adopt Eisgruber’s idea of a civic de-

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54 In what is surely the least useful contribution, Dan Kahan asserts what he considers the paradox: parties to the gun debate are so motivated by political sentiments that they can never be persuaded by empirical analysis, but at the same time American political discourse is nevertheless obsessed with consequentialist values (pp 44-45). Kahan concludes that the public—and presumably legislative—debate should abdicate any expectation of empirical resolution and modestly aim at least for more cordial debate about the political sentiments (p 49). This position mixes non sequiturs with superficial understanding of cultural values and their contingencies, and ends in a faux-tragic resignation about the possibility of utilitarian projects that disrespects the very premises of the empirical contributions to the volume.
bate about the role of guns in a democracy, so long as one recognizes it as a debate about constitutional values that do not necessarily aim at reducing gun violence. It is also fine, of course, for some constitutional arguments to rely on empirical assessments of policy as a matter of conventional legal interest-balancing. It is fine for advocates of the Boston church initiative to promote its program, even in the face of doubts as to its crime-reduction capacity, if it clearly serves other goals. It is unavoidably true that our legislators and public pundits will mask or distort or suppress—and sometimes even honestly complement—empirical questions with discussions of cultural values. But scholarly appreciation of these phenomena is very different from scholarly usefulness to those very legislators and pundits. We should not want policy analysts to conduct a theater of values; we should want them to do the math.