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Keep Off the Grass!: An Alternative Approach to the Gun Control Debate

LANCE LINDEEN*

INTRODUCTION

“Guns kill people.”¹ Or, “Guns don’t kill people. People kill people.”² Whether guns do or do not kill people, their use breeds many slogans.³ Sloganeering makes for

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1. John W. Mashek, *Guns Kill People*, *Period*, U.S. NEWS & WORLD REP., Apr. 18, 2007, <http://www.usnews.com/blogs/mashek/2007/4/18/guns-kill-people-period.html>. For example, on April 16, 2007, Seung-Hui Cho ushered in the deadliest shooting incident in United States history by a single gunman, with two separate attacks at Virginia Polytechnic University that resulted in the deaths of thirty-two people and the suicide of the gunman. *Deadliest Shootings in the U.S.*, MSNBC.COM, Apr. 16, 2007, <http://www.msnbc.msn.com/id/18140540/>.

2. FRANK E. HAGAN, *INTRODUCTION TO CRIMINOLOGY: THEORIES, METHODS, AND CRIMINAL BEHAVIOR* 226 (6th ed. 2008). This quote, most often ascribed to the National Rifle Association (NRA), is a popular slogan attributed to advocates for gun ownership or opponents of gun control in counterclaims to calls for firearm regulation. *See id.*; cf., e.g., Editorial, *Death by Handguns*, BOSTON PHOENIX, Apr. 25, 2007, <http://thephoenix.com/boston/news/38674-death-by-handguns/>.

3. Examples of anti-gun control slogans include “Ban Criminals, Not Guns”; “When Guns Are Outlawed, Only Criminals Will Have Guns”; and “I Will Give Up My Gun When They Peel My Cold Dead Fingers From Around It.” *Handgun Crime Control—1975–1976: Hearing Before the Subcomm. to Investigate Juvenile Delinquency, of the S. Comm. on the Judiciary, 94th Cong.* 2221 (1976); *see also* In Liberty & Freedom—Slogans, <http://www.inlibertyandfreedom.com/slogans.htm>; Pro-Gun “One Liners”—Defensive Carry Concealed Carry Forum, <http://www.defensivecarry.com/vbulletin/second-amendment-gun-legislation-discussion/995-pro-gun-one-liners.html>.

Pro-gun control stances seem to utilize far fewer slogans: “How many more will have to die

easy thinking on the issue of gun violence,⁴ its causes, and possible policy interventions.⁵ Easy thinking and bumper-sticker slogans oversimplify the debate by casting it as one of whether or not the government should regulate gun ownership (often with a focus on banning handguns)⁶ and, if so, in what manner.

As matters of both opinion and analysis, each side of the gun control debate reckons the imposition or removal of restrictions on gun ownership will have drastic effects. Proponents of gun control argue that increased government regulation of guns will improve public safety and reduce the incidence of gun violence.⁷ On the other hand, opponents of gun control argue that law-abiding citizens will be made *less* safe by their inability to defend themselves against criminal violence or, at an extreme, a predatory government.⁸

Furthermore, opinions from any part of the gun control spectrum are strongly correlated with one's own cultural worldview: base stereotypes are frequently

before we say enough is enough?" Mark D. Tooley, *God Wants Gun Control*, FRONTPAGEMAGAZINE.COM, Apr. 18, 2007, <http://97.74.65.51/readArticle.aspx?ARTID=26144> (quoting statement of Bob Edgar, Chief, Nat'l Council of Churches). *But see* AARON ZELMAN & RICHARD W. STEVENS, DEATH BY "GUN CONTROL": THE HUMAN COST OF VICTIM DISARMAMENT 9 (2001) (arguing that the term "gun control" is itself a slogan). Some pro-gun control slogans revamp anti-gun control mottos. *See* PHILIP J. COOK & JENS LUDWIG, GUN VIOLENCE: THE REAL COSTS 35 (2000) ("I keep hearing this thing that guns don't kill people, but people kill people. If that's the case, why do we give people guns when they go to war? Why not just send the people?") (quoting Ozzy Osbourne, entertainer); EDDIE IZZARD: DRESS TO KILL (Ella Communications 1998) ("And the National Rifle Association says that, 'Guns don't kill people, people do,' but I think, I think the gun helps, you know? I think it helps. I just think just standing there going, 'Bang!' That's not going to kill too many people, is it? You'd have to be really dodgy on the heart to have that."), available at <http://www.youtube.com/watch?v=KsN0FCXw914>.

4. In 2005, there were nearly 31,000 firearms-related deaths in the United States. Associated Press, *Surprising Fact: Half of Gun Deaths Are Suicides: Gun Owners Often Use the Weapons on Themselves, Not Intruders*, MSNBC.COM, June 30, 2008, <http://www.msnbc.msn.com/id/25463844/> [hereinafter *Surprising Fact*].

5. *See* Walter Isaacson, *The Duel over Gun Control*, TIME, Mar. 23, 1981, at 33 (characterizing the gun control debate as lacking substantive content and "dominated by facile slogans, contradictory statistics and arguments that owe as much to passion as to reason"); *see also* DENNIS A. HENIGAN, LETHAL LOGIC: EXPLODING THE MYTHS THAT PARALYZE AMERICAN GUN POLICY (2009) (challenging the logic and substance behind various anti-gun control slogans).

6. The United States Congress has defined a "handgun" as "(A) a firearm which has a short stock and is designed to be held and fired by the use of a single hand; and (B) any combination of parts from which a firearm described in subparagraph (A) can be assembled." 18 U.S.C. § 921(29) (2006). Similarly, the Bureau of Alcohol, Tobacco, and Firearms defines a "handgun" as "[a] weapon originally designed, made, and intended to fire a small projectile (bullet) from one or more barrels, when held in one hand, and having a short stock (grip) designed to be gripped by one hand and at an angle to, and extending below, the line of the bore(s)." BUREAU OF ALCOHOL, TOBACCO & FIREARMS, U.S. DEP'T OF TREASURY, ATF PUB. NO. 7520.1 (9/93), FIREARMS & EXPLOSIVES TRACING GUIDEBOOK 35-40 (1993); *see also* Paul C. Giannelli, *Ballistics Evidence: Firearms Identification*, 1991 CRIM. L. BULLETIN 195, 197-99.

7. *See, e.g.*, COOK & LUDWIG, *supra* note 3.

8. *See, e.g.*, JOHN R. LOTT, JR., MORE GUNS, LESS CRIME: UNDERSTANDING CRIME AND GUN-CONTROL LAWS (2d ed. 2000).

accurate.⁹ In terms of the gun control debate, both pro- and anti-gun control advocates tend to perceive a “risk” associated with gun control: either too little gun control that inevitably leads to intentional shootings and accidents involving guns, or too much gun control that disarms responsible, law-abiding citizens and leaves them subject to threats and predation.¹⁰ Therefore, a person’s perceived risk varies depending on one’s overall worldview.¹¹ “Communitarian”-type people¹² tend to view guns through the prism of

9. See Dan M. Kahan, Donald Braman, John Gastil, Paul Slovic & C.K. Mertz, *Culture and Identity-Protective Cognition: Explaining the White-Male Effect in Risk Perception*, 4 J. EMPIRICAL L. STUD. 465 (2007) (presenting results of a study on the interaction of cultural worldviews with gender and race and their impacts on risk perception). The use of stereotypes to reinforce cultural worldviews was readily apparent during the 2008 U.S. presidential campaign. At a San Francisco fundraiser ten days prior to the Pennsylvania primary, Democratic candidate Barack Obama described disenfranchised, rural Pennsylvania voters: “[T]hey get bitter, they cling to guns or religion or antipathy to people who aren’t like them or anti-immigrant sentiment or anti-trade sentiment as a way to explain their frustrations.” Abdon M. Pallasch, *Their Gift for Gaffe; Says God, Guns Are Only Refuge of Bitter Small-Town Pennsylvanians*, CHI. SUN-TIMES, Apr. 12, 2008, at 2. Obama’s comments were repeatedly interpreted as reinforcing cultural stereotypes based on class and education. See, e.g., Editorial, *Too Busy Tearing Down*, STAR-LEDGER (Newark, N.J.), Apr. 16, 2008, at 14 (“And it doesn’t necessarily follow that people who like guns and/or religion are bigots or anti-immigration. It’s easy to understand how people would take offense or feel that Obama is an elitist in nice-guy clothing.”). Other critics said Obama’s explanation of his remarks at the San Francisco fundraiser also suggested the use of cultural stereotypes that came close to other stereotypical comments based on race. See, e.g., Editorial, *Guns and Bitter*, N.Y. TIMES, Apr. 16, 2008, at A24; Editorial, *Opiate of the Masses?*, JEWISH PRESS, Apr. 16, 2008, <http://www.jewishpress.com/pageroute.do/31346/>. In response to Obama’s remarks, the NRA produced a television advertisement that featured a middle-aged Caucasian male spokesperson dressed in camouflage who drove a pickup truck to a wooded location where he and a young boy carried rifles, apparently on a hunting trip. *Hunter* (NRA television advertisement 2008), available at <http://www.nrapvf.org/Multimedia/ReadVideo.aspx?VideoID=1284273>. Over juxtaposed images of two white men hunting, the ad features images of Obama—an African American male—dressed in a suit. *Id.* The spokesperson-hunter says, “Where is this guy from? [Obama’s] probably never been hunting a day in his life.” *Id.* Presumably, the NRA produced the ad to show the cultural clash between Obama and “gun culture.” See Jonathan Martin, *NRA Plans \$40M Fall Blitz Targeting Obama*, POLITICO.COM, June 30, 2008, http://www.politico.com/news/stories/0608/11452_Page2.html.

10. Dan M. Kahan & Donald Braman, *Cultural Cognition and Public Policy*, 24 YALE L. & POL’Y REV. 149, 158 (2006) [hereinafter Kahan & Braman, *Cultural Cognition*]; Dan M. Kahan & Donald Braman, *More Statistics, Less Persuasion: A Cultural Theory of Gun-Risk Perceptions*, 151 U. PA. L. REV. 1291, 1292 (2003) [hereinafter Kahan & Braman, *Gun-Risk Perceptions*].

11. See Kahan & Braman, *Gun-Risk Perceptions*, *supra* note 10, at 1294; see also MARY DOUGLAS & AARON WILDAVSKY, *RISK AND CULTURE: AN ESSAY ON THE SELECTION OF TECHNICAL AND ENVIRONMENTAL DANGERS* 7–8 (1982) (offering a “cultural theory of risk” perception in which an individual’s perceptions of different societal and personal risks conform to that person’s preferred vision of a good or “ideal” society).

12. Broadly defined, persons holding a “high group or communitarian worldview assume that individuals will ‘interact frequently . . . in a wide range of activities’ in which they must ‘depend on one another,’ a condition that ‘promotes values of solidarity.’” Kahan et al., *supra* note 9, at 468–69 (emphasis omitted). Specific to the risk of gun control, persons with “egalitarian” and “solidaristic” worldviews perceive a risk from incidents—intentional or

negative association—guns signify a history entwined with racism, patriarchy, and indifference to the social benefit of public safety—and as a rallying point for a backward minority that cherishes weapons above all else.¹³ On the other hand, “individualistic” types¹⁴ tend to glorify guns as emblems of a bygone era of freedom when the self-reliant, chivalrous hunter ruled supreme.¹⁵

Regardless of cultural-cognitive differences about perceived risk, either stance on the issue of gun control¹⁶ (and corresponding beliefs (or doubts) in the efficacy of specific gun control regulations)¹⁷ generally presupposes the extreme power and effect

accidental—and crime involving guns due to too little gun control. See Kahan & Braman, *Cultural Cognition*, *supra* note 10, at 158; Kahan & Braman, *Gun-Risk Perceptions*, *supra* note 10, at 1307–08.

13. See Kahan & Braman, *Cultural Cognition*, *supra* note 10, at 158.

14. Broadly defined, persons who maintain a “low group” or “individualistic” worldview assume that individuals must “fend for themselves and therefore tend to be competitive.” Kahan et al., *supra* note 9, at 468 (internal quotation marks omitted). On the perceived risk of gun control, “individual” and “hierarchical” types perceive a risk from disarmed defenselessness due to too much gun control. See Kahan & Braman, *Cultural Cognition*, *supra* note 10, at 158; Kahan & Braman, *Gun-Risk Perceptions*, *supra* note 10, at 1306–08.

15. Ted Nugent, *Why Gun Sales Are Surging*, WACO TRIB.-HERALD, Feb. 8, 2009, available at <http://www.glocktalk.com/forums/showthread.php?t=998154>. Historically, the cultural expression of the gun-toting hunter has been perceived as both a negative and a positive archetype. See, e.g., Daniel Justin Herman, *The Hunter's Aim: The Cultural Politics of American Sport Hunters, 1880–1910*, 35 J. LEISURE RES. 455, 456 (2003) (contrasting “cultural politics” in the United States that offered early perceptions of hunters as “barbaric and backwards men” with later views of hunting as an activity by which men could “recapture an imagined past”).

16. Taking a stance on the *issue* of gun control—whether or not to regulate and, if so, in what manner—is a normative judgment. Compare Charlton Heston, First Vice President, NRA, Speech at the Free Congress Foundation’s 20th Anniversary Gala (Dec. 7, 1997), available at <http://www.vpc.org/nrainfo/speech.html> (identifying the power of government to alter the outcome of a “cultural war” that pits pro- and anti-gun control factions against each other), with Coalition to Stop Gun Violence, Guns, Democracy and Freedom, <http://www.csgv.org/issues-and-campaigns/guns-democracy-and-freedom> (“This idea [of freedom from government oppression], which we call ‘insurrectionism,’ is part of a broader ideological perspective that opposes a strong, activist government in nearly all of its forms. Insurrectionist philosophy degrades the democratic values and institutions that protect all of the freedoms we enjoy as Americans. Gun lobby extremists have been perfectly willing to trample on any freedom that gets in the way of their pursuit of unrestricted private access to firearms (i.e., property rights, access to justice, freedom of information, public safety, etc.). This toxic mix of ideology and firepower has moved beyond rhetoric and resulted in real violence in our country.”).

17. As far as whether or not gun control achieves its objective—typically, the reduction of gun violence—those of differing viewpoints argue over the data. Some critics claim gun control laws fail to alleviate gun violence. See, e.g., David Lampo, *Gun Control: Myths and Realities*, CATO INST., May 13, 2000, http://www.cato.org/pub_display.php?pub_id=4706 (arguing that there is “simply no correlation between gun control laws and murder or suicide rates across a wide spectrum of nations and cultures”). Other critics claim various forms of gun control reduce gun violence. See, e.g., SPECIAL COMM. ON GUN VIOLENCE, AM. BAR ASS’N, REGULATION OF FIREARMS AS CONSUMER PRODUCTS, available at <http://www.abanet.org/gunviol/docs/RegulationofFirearmsasConsumerProducts.pdf> (arguing that federal regulatory authority setting minimum safety standards for domestically manufactured firearms reduces accidental gun shootings by requiring manufacturers to install gunlocks, load indicators, and magazine-

of one essential element—government—in its respective policy prescriptions. Accordingly, most voices in the traditional gun control debate call for the government to enact or repeal laws and formulate policies to achieve a range of ends: from absolute prohibition of firearms to total access to guns, with a variety of prescriptions between the two extremes.¹⁸ However, advocacy for or against gun control to solve the issue of

disconnect safeties.); Colin Loftin, David McDowall, Brian Wiersema & Talbert J. Cottey, *Effects of Restrictive Licensing of Handguns on Homicide and Suicide in the District of Columbia*, 325 NEW ENG. J. MED. 1615 (1991) (contending that the decline in homicides and suicides by firearms in the District of Columbia—with an average of forty-seven lives saved per year—was directly associated with imposition of restrictive licensing of handguns starting in 1976). Insufficient evidence of gun control effectiveness is not necessarily a deterrent to gun control advocacy. See, e.g., CTR. FOR GUN POLICY & RESEARCH, JOHNS HOPKINS UNIV., STATEMENT ON CDC'S RECENT STUDY ON THE EFFECTIVENESS OF GUN LAWS FOR VIOLENCE PREVENTION 1 (2003), available at http://www.jhsph.edu/bin/e/o/Statement_CDC_report.pdf (stating that the lack of evidence showing that gun laws reduce violence does not automatically lead to the conclusion “that gun policies don't work”).

18. At one extreme are those who call for an outright ban on firearms or, at the very least, certain types of firearms. See, e.g., AMITAI ETZIONI & STEVE HELLAND, THE CASE FOR DOMESTIC DISARMAMENT 7 (1992), available at <http://dSPACE.wrlc.org/bitstream/1961/587/1/etzioni-case.pdf> (calling for “domestic disarmament” through absolute prohibition on individual gun use and ownership—including most police—and advocating milita-only use of firearms); David B. Kopel, Editorial, *The Long and the Short of the Handgun Debate*, WASH. POST, June 27, 1992, at A17 (discussing the consequences of Senator Lincoln Chafee's (R-R.I.) proposal to confiscate all handguns); Mike Quigley & Richard M. Daley, Editorial, *Threat to City's Handgun Ban Jeopardizes Safety of All*, CHI. SUN-TIMES, Dec. 20, 2009, at A50 (calling for preservation of Chicago's nearly three-decade-old, total handgun ban).

At the other end of the spectrum are those who want unfettered access to guns. See, e.g., DAVID B. KOPEL, CATO INST., POLICY ANALYSIS NO. 109, TRUST THE PEOPLE: THE CASE AGAINST GUN CONTROL (1988), available at <http://www.cato.org/pubs/pas/pa109.pdf>. Some critics suggest gun control prohibitions on private gun ownership lack any constitutional foundation. See, e.g., John Aloysius Farrell, Second Amendment Makes Gun Control Unconstitutional, Period, <http://www.usnews.com/blogs/john-farrell/2009/04/23/second-amendment-makes-gun-control-unconstitutional-period.html> (Apr. 23, 2009, 03:50 P.M. EST). One's stance on gun control can also have a political dimension. See Calvin Woodward, *McCain Says He Backs No Gun Control*, WASH. POST, Apr. 19, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/04/19/AR2007041900430.html> (identifying Republican presidential candidate John McCain as believing in “no gun control”).

There are various forms of gun control that regulate access to guns without calling for an outright ban on firearms. See, e.g., Editorial, *Don't Retreat on Gun Control*, STAR-LEDGER (Newark, N.J.), July 22, 2009, at 14 (arguing that New Jersey state laws that severely restrict the granting of legal concealed-carry permits should also apply to out-of-state visitors); Editorial, *Legal, but Still Lethal*, PHILA. INQUIRER, Nov. 28, 2009, at A12 (noting that illegal gun trafficking is a major cause of gun violence and arguing that the rise in shootings by legal gun-permit holders discredits the benefit of concealed-carry-permit laws); David Rosman, *Pirates Abroad, Murders in U.S. Bring Gun Concerns into Spotlight*, MISSOURIAN, Apr. 16, 2009, <http://www.columbiainmissourian.com/stories/2009/04/16/column-pirates-guns-and-money/> (suggesting regulatory control over those firearms that defy “common sense” usage). Most colleges and universities ban concealed weapons (including all guns), and an increasing number of schools now prohibit unconcealed weapons as well. See, e.g., *Colorado State Bans Guns on Campus*, CARLETON PLACE (Toronto), Dec. 5, 2009, at 1. Alternatively, the effort to reduce gun violence through regulation is not limited to the hardware of the gun itself. Some gun control

gun violence offers a myopic perspective, one that merely perpetuates a bloody stasis by analyzing the issue through the narrow lens of regulating *hardware*—guns and ammunition—rather than addressing some of the reasons why people use guns in the first place.

This Comment proposes an alternative solution to reduce gun violence: the broad decriminalization of controlled substances, initially marijuana.¹⁹ In economic terms, drug users (consumers) demand marijuana as a “good” traded by drug dealers (suppliers) in a system of illicit commerce. Unlike suppliers of legal goods, however, suppliers in the prohibited drug trade have neither the ability to draft legally enforceable contracts nor access to the court system to ensure performance.²⁰ Absent legal remedies, drug traffickers resort to violence—typically using guns when weapons are employed²¹—or the threat of violence as tools of their trade to secure supplies, enforce agreements, settle disputes, and protect turf for point-of-sale transactions. For the bulk of marijuana distributed in the United States, the number of suppliers is limited to those willing to break the law—usually large-scale drug trafficking organizations²²—by trafficking in a controlled substance (and frequently using violence to protect their trade).

advocates suggest taxing ammunition or encoding ammunition with serial numbers that are, in turn, stored in individual state databases for tracking purposes. *See, e.g.*, Brad Bumsted, *Gun Owners Dodge Tax on Ammunition*, PITTSBURGH TRIB. REV., Nov. 28, 2008 (describing bill that would outlaw all older, nonserialized ammunition). Separate from gun control advocacy that favors government regulation, some gun control advocates have also endorsed negligence lawsuits against manufacturers. *See Gary Can Sue Gun Industry*, NWI.COM, Jan. 13, 2009, http://nwitimes.com/news/local/article_048825ea-60d3-53d9-8b6b-eb2741050092.html (noting role of the Brady Center to Prevent Gun Violence in private tort litigation against gun manufacturer). However, passage of the Protection of Lawful Commerce in Arms Act (PLCAA), a 2005 federal law that immunizes gun manufacturers from liability for shooting victims, makes a shooting victim’s recovery against a gun manufacturer unlikely. *See* Protection of Lawful Commerce in Arms Act, 15 U.S.C. §§ 7901–02 (2006). Its reach has been limited in by some courts already. *See* *Adames v. Sheahan*, 909 N.E.2d 742 (Ill. 2009), *cert. denied sub nom. Adames v. Beretta U.S.A. Corp.*, 130 S. Ct. 1014 (2009).

19. Under federal law, marijuana is a schedule I controlled substance. 21 U.S.C. § 812(c) Sched. I(c)(10) (2006). In *Gonzales v. Raich*, Justice Stevens, writing for the Court, recognized the possibility that marijuana might be rescheduled under Schedule II based on future findings of medical uses for the drug. *See* 545 U.S. 1, 28 n.37 (2005) (“We acknowledge that evidence proffered by respondents in this case regarding the effective medical uses for marijuana, if found credible after trial, would cast serious doubt on the accuracy of the findings that require marijuana to be listed in Schedule I.”).

20. *See* Paul J. Goldstein, *The Drugs/Violence Nexus: A Tripartite Conceptual Framework*, 15 J. DRUG ISSUES 493, 497–503 (1985); *see also* INT’L BANK FOR RECONSTRUCTION & DEV., WORLD BANK, WORLD DEVELOPMENT REPORT 1997: THE STATE IN A CHANGING WORLD 19 (1997) (defining “the most basic conditions of a stable existence: law and security, trust in contracts, and a sound medium of exchange”).

21. *See, e.g.*, OFFICE OF ATTORNEY GEN., CAL. DEP’T OF JUSTICE, FIREARMS USED IN THE COMMISSION OF CRIMES 5 (2008), *available at* http://ag.ca.gov/publications/Firearms_Report_08.pdf (tallying the number of weapons analyzed by the Bureau of Forensic Services for drug trafficking crimes in rural California: twenty-two were firearms (specifically handguns), which comprised 100% of weapons examined for drug trafficking crimes).

22. *See* NAT’L DRUG INTELLIGENCE CTR., U.S. DEP’T OF JUSTICE, DOMESTIC CANNABIS CULTIVATION ASSESSMENT 2009, at 1 (2009), *available at* <http://www.justice.gov/ndic/>

This Comment considers the stalemate in the debate over gun control as a systemic failure of both gun control adherents and detractors to decrease the incidence of gun violence and, instead, offers an initial step—the decriminalization of marijuana—to reduce some demand for illegal guns and their use in the drug trade. Part I discusses the current problem of gun violence. The Part also includes a discussion of the negative externalities²³ associated with gun misuse. Part II explains the current state of the law regarding firearms with an explanation of the constitutional foundation for the right to bear arms (arguably the first gun regulation in its allowance for gun ownership) and an analysis of *District of Columbia v. Heller*,²⁴ the recent U.S. Supreme Court case that interpreted the United States Constitution in favor of individual gun ownership. Part II also explains why laws alone are an incomplete solution to the problem of gun violence. Part III contrasts arguments for and against gun control regulation. Part IV ultimately concludes that proposals to increase or decrease government regulation of guns fail to strike an important target—the end goal of diminishing or ending gun violence. Part IV offers an alternative solution to reduce gun violence: decriminalization of marijuana as the first important step for reducing some forms of demand for firearms. The Part discusses the externalities of marijuana (both positive and negative), briefly outlines a sample decriminalization plan, and includes suggestions from foreign nations affected by the drug trade in the United States. The Comment concludes by advocating in favor of decriminalizing marijuana as a matter of law and policy in favor of reducing gun violence associated with the currently illicit drug trade.

pubs37/37035/37035p.pdf [hereinafter CANNABIS ASSESSMENT 2009] (discussing the shifting tactics of Mexican drug-trafficking organizations (DTOs) and their increased presence in the U.S.). For example, Mexican and Colombian cartels historically provided most of the marijuana sold in the United States. See Steve Fainaru & William Booth, *Cartels Face an Economic Battle*, WASH. POST, Oct. 7, 2009, at A01. However, approximately half of the current supply sold in the United States comes from domestic production. *Id.* (tracing the rise of domestic, illicit “mom-and-pop marijuana farmers” who threaten the profitability of Mexican cartels’ trade in the United States by competing on the basis of potency and quality of the plant). Due to decriminalization trends that allow the use and production of medical marijuana, small-scale producers cultivate higher-quality crops and retail these goods directly to consumers. *Id.* Unlike importers who must expend resources on purchasing equipment to transport the drug and evade border and law enforcement, small-scale producers invest in equipment to grow stronger, high-potency marijuana, a product increasingly demanded by consumers. *Id.* THC (delta-9-tetrahydrocannabinol) is the primary active ingredient in marijuana that produces a “high” in consumers. See John M. McPartland & Ethan B. Russo, *Cannabis and Cannabis Extracts: Greater than the Sum of Their Parts?*, 1 J. CANNABIS THERAPEUTICS 103, 103 (2001). According to the United States Department of Justice, marijuana has increased in potency in a relatively short time. CANNABIS ASSESSMENT 2009, *supra* at 4. In tested marijuana samples, THC content increased from 9.60% in 2007 to 10.14% in 2008. *Id.*

23. There are various definitions of an *externality*. See, e.g., N. GREGORY MANKIW, PRINCIPLES OF ECONOMICS 205 (2d ed. 2001).

24. 128 S. Ct. 2783 (2008).

I. THE PROBLEM OF GUN VIOLENCE: GOOD TRENDS, BAD TRENDS, AND DWINDLING ACCESS TO DATA

Most policy discussions or debates on guns in the United States are littered with numbers. Historically, the Centers for Disease Control and Prevention (CDC) served as the primary source of funding for research on guns and gun-related injuries.²⁵ Based purely on quantitative data as to cause of injury (ascribing neither intent nor accounting for any other aggravating factors), the CDC's accounting for firearm fatalities shows that the annual total of death by firearms increased from 16,720 deaths in 1962 to 38,505 deaths by firearms in 1994.²⁶ According to the CDC's data, this trend represents an increase of 130% in annual total of deaths by firearms over this thirty-three-year period.²⁷

However, in recent years, the age-adjusted rate of death by firearm injury has leveled off. In 2005 and 2006, the age-adjusted rate remained the same: 10.2 people killed per 100,000 U.S. standard population.²⁸ This two-year consistency closely tracks the average age-adjusted rate of deaths by firearms of 10.24 people killed per 100,000 of the U.S. standard population from 1999–2006.²⁹ As of this writing, the preliminary data from 2007 confirms this trend.³⁰

25. *Surprising Fact*, *supra* note 4.

26. Nat'l Ctr. for Injury Prevention & Control, Ctrs. for Disease Control, Fatal Firearm Injuries in the United States, 1962–1994 (2006), <http://www.cdc.gov/ncipc/pub-res/firarmsu.htm>.

27. *Id.* (specifying that fluctuations and increases in the rate of total firearm-related mortality during this period closely tracked trends in firearm-related homicide).

28. MELONIE HERON, DONNA L. HOYERT, SHERRY L. MURPHY, JIAQUAN XU, KENNETH D. KOCHANEK & BETZAIDA TEJADA-VERA, NATIONAL VITAL STATISTICS REPORTS: DEATHS: FINAL DATA FOR 2006, at 11, 91 tbl.18 (2009), available at http://www.cdc.gov/NCHS/data/nvsr/nvsr57/nvsr57_14.pdf. Some injuries occur with greater frequency in particular age groups; an age-adjusted mortality rate allows for comparison of various injury rates by accounting for differences in age distributions. See Nat'l Ctr. For Injury Prevention & Control, Ctrs. for Disease Control, Definitions for WISQARS Fatal (2007), http://www.cdc.gov/ncipc/wisqars/fatal/help/definitions.htm#age_adjusting. For consistency, all age-adjusted data discussed in this Comment uses the year "2000" as the standardized year. Since all data are compared using the same standardized year, the choice of a specific year for standardization is unimportant. *Id.*

29. See HERON ET AL., *supra* note 28, at 91 tbl.18. Using the CDC's Web-based Injury Statistics Query and Reporting System (WISQARS), compare the overall average age-adjusted rate of firearms deaths against the age-adjusted rate for specific ages and races during the 1999–2006 period. Males in their twenties appear far more vulnerable to the incidence of death by firearm than members of the standard population: males ages twenty to twenty-four (36.6 people killed per 100,000 U.S. standard population) and ages twenty-five to twenty-nine (30.11 people killed per 100,000 U.S. standard population). See Nat'l Ctr. For Injury Prevention & Control, Ctrs. for Disease Control, WISQARS Injury Mortality Report, 1999–2006 (2009), http://webapp.cdc.gov/sasweb/ncipc/mortrate10_sy.html (calculating an age-adjusted rate from 1999 to 2006 by selecting only "firearms" as cause or mechanism of injury; all races and sex as "male" only; the year "2000" as the standardized year for age-adjusting; and "age group" and "race" as the output groups). However, the highest average age-adjusted rate of firearms deaths belongs to black males ages twenty to twenty-four (118.01 people killed per 100,000 U.S. standard population) and ages twenty-five to twenty-nine (99.87 people killed per 100,000 U.S.

Despite recent consistency in the age-adjusted rate of death by firearm injury, no one is injured or dies by firearm without the involvement of a gun. The Bureau of Alcohol, Tobacco, and Firearms (ATF) estimates that approximately 223 million guns “became available” in the United States from the end of the nineteenth century to the near-close of the twentieth.³¹ Of those guns, 80% were manufactured in the United States.³² This estimate includes approximately seventy-seven million handguns, seventy-nine million rifles, and sixty-six million shotguns.³³ Recently, the supply of new handguns has exceeded the quantity of new shotguns and rifles added to the nation’s total stock.³⁴ Within the aggregate total of available firearms, forty million handguns were produced in the United States from the twenty-year period between 1973 and 1993.³⁵

standard population). *Id.* The average age-adjusted rate of firearms deaths among white males was significantly lower for these two age groups: males twenty to twenty-four (23.29 people killed per 100,000 U.S. standard population) and ages twenty-five to twenty-nine (20.04 people killed per 100,000 U.S. standard population). *Id.* Contrast the various firearms death rates listed above with age-adjusted rates of death for motor vehicles during these same time period: there were 15.35 people killed per 100,000 of the U.S. standard population. *Id.* (calculating an age-adjusted rate from 1999 to 2006 for all races, all ages, and both sexes by selecting “motor vehicle, overall” as the cause or mechanism of injury). Then, contrast these rates with the age-adjusted rates of death for all types of injuries during this same period: 55.79 people killed per 100,000 of the U.S. standard population. *Id.* (calculating an age-adjusted rate from 1999 to 2006 for all races, all ages, and both sexes by selecting “all injury” as the cause or mechanism of injury).

30. See JIAQUAN XU, KENNETH D. KOCHANEK & BETZAIDA TEJADA-VERA, NATIONAL VITAL STATISTICS REPORTS, DEATHS: PRELIMINARY DATA FOR 2007, at 6, 20 tbl.2 (2009), available at http://www.cdc.gov/nchs/data/nvsr/nvsr58/nvsr58_01.pdf (noting a 1% decline in the average age-adjusted rate of firearms deaths from 2006 to 2007).

31. MARIANNE W. ZAWITZ, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, GUNS USED IN CRIMES: FIREARMS, CRIME, AND CRIMINAL JUSTICE 2 (1995), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/GUIC.PDF>.

32. See *id.* at 3.

33. *Id.* at 2.

34. *Id.*

35. *Id.* at 3. During this period, the total amount of handguns in American homes increased by approximately 110%. See JOYCE LEE MALCOLM, GUNS AND VIOLENCE: THE ENGLISH EXPERIENCE 242 (2002) (contrasting firearms ownership in England with that of the United States). As to the type and caliber of handguns, domestic producers in the United States produced a wide range of weapons. See ZAWITZ, *supra* note 31, at 3 (itemizing various handguns produced over two decades). Although the number of weapons has increased, the total stock of weapons has not been distributed broadly. Most firearms ownership is concentrated in the hands of relatively few people. See PETER SQUIRES, GUN CULTURE OR GUN CONTROL?: FIREARMS, VIOLENCE AND SOCIETY 92 (2000) (noting the increase in firearms along with a decrease in the number of owners as “[f]ewer and fewer Americans own more and more guns’, and this, in particular has prompted the industry to look for new markets” (quoting TOM DIAZ, THE MAKING OF A KILLING: THE BUSINESS OF GUNS IN AMERICA (1999)). As of 1981, the average gun owner owned 4.5 guns. Edward L. Glaeser & Spencer Glendon, *Who Owns Guns? Criminals, Victims, and the Culture of Violence*, 88 AM. ECON. REV. 458, 458 (1998). Additionally, more than 50% of gun owners owned more than one type of gun. *Id.* Even with the decrease in the number of owners, the concentration of gun ownership has remained relatively consistent. In other words, existing firearms owners own enough weapons to offset the decrease in firearms ownership by the increasing number of Americans who choose not to own guns. *Cf.* Darren K. Carlson,

Some of these guns have been used in crimes. In 1993, of the nearly two million violent crimes involving aggravated assault, murder, rape, and robbery, 582,000 of these reported crimes involved the use of a firearm,³⁶ usually a handgun.³⁷ As an instrument of violence, guns—as compared to sharp objects, blunt objects, or instruments used to choke victims—are particularly deadly.³⁸ Not surprisingly, of the 24,526 murders in 1993, approximately 70% involved firearms.³⁹

Yet, for thousands of incidents of violence perpetrated by people using firearms, considerations of criminal behavior reveal only part of the picture. CDC data on gun violence over the past few decades reveals a consistent trend of intentional self-injury and death.⁴⁰ According to the CDC, suicides involving guns eclipse firearm homicides and accidents in twenty out of twenty-five of these years.⁴¹ In 2005, 55% of the 31,000 firearms deaths in the United States were suicides.⁴² The remaining firearms-related deaths in 2005 involved homicide (40%), accidents (3%), and legal killings (including those of undetermined intent) (2%).⁴³ Although convincing arguments can be made on

Americans and Guns: Danger or Defense?, GALLUP, Jan. 4, 2005, <http://www.gallup.com/poll/14509/americans-guns-danger-defense.aspx> (estimating the concentration of firearms ownership at 4.4 guns per gun owner). Men continue to report greater rates of firearms ownership (49%) than women (33%). *Id.* However, the gun industry may have made inroads into the “under-exploited” female market for guns under the rationale of self-defense and with the aid of feminist advocacy in favor of gun ownership by women. *See* SQUIRES, *supra* at 92–93.

36. ZAWITZ, *supra* note 31, at 1.

37. *See id.* at 2 (noting that 86% of all reported crimes that involved firearms involved handguns).

38. For example, as of December 28, 2009, New York City reported 461 homicides in 2009. Al Baker, *Homicides Near Record Low Rate in New York City*, N.Y. TIMES, Dec. 29, 2009, at A1. Of these, the use of guns accounted for the vast majority of killings (283 victims, who were shot by people they knew). The aggregate total of three other killing methods—stabbing (ninety victims), blunt force trauma (twenty-eight victims), and asphyxiation (sixteen victims)—did not account for half of the number of homicides involving the use of a gun. *See id.*

39. ZAWITZ, *supra* note 31, at 1. Fifty-seven percent of murders in 1993 involved a handgun. *Id.* at 2. According to the U.S. Department of Justice, “most crime is not committed with guns, [but] most gun crime is committed with handguns.” *Id.* at 1. Firearms, particularly handguns, are so closely linked to crime trends that experts regard even *downward* trends in certain violent crimes as correlated with downward trends in gun use. For instance, one happy trend suggests that the number of law enforcement officers killed in the line of duty from 1976 to 2002 declined along with the number of law enforcement officers killed with handguns. JAMES ALAN FOX & MARIANNE W. ZAWITZ, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, DATA BRIEF: HOMICIDE TRENDS IN THE UNITED STATES: 2002 UPDATE 2 (2004), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/htus02.pdf>.

40. *See Surprising Fact*, *supra* note 4.

41. *Id.*; *see also, e.g.*, HERON ET AL., *supra* note 28, at 11 (calculating firearm suicides as 54.6% of all firearm injury deaths in 2006 with firearm homicides accounting for 41.4%). For both homicides and suicides, firearms account for disproportionate percentage of type of killing method employed. *See generally* Charles C. Branas, Therese S. Richmond & C. William Schwab, *Firearm Homicide and Firearm Suicide: Opposite but Equal*, 119 PUB. HEALTH REP. 114, 114 (2004) (analyzing mortality data in the United States from 1994–1998 to compare occurrence of each type of event).

42. *Surprising Fact*, *supra* note 4.

43. *Id.* (defining “legal killings” as “when police do the shooting”).

both sides as to whether the presence of a firearm in the home increases the risk factor for suicide,⁴⁴ the finality of the use of guns in suicides is beyond question: more than 90% of suicide attempts involving guns result in death.⁴⁵

Perhaps more so than adults, children suffer a unique level of vulnerability to injury or death from guns.⁴⁶ Although high-profile killing sprees⁴⁷ grab a disproportionate amount of media attention,⁴⁸ the everyday proximity of some children to weapons gives

44. *See id.* (paraphrasing public studies that show the presence of a gun to be three to five times more likely in homes that had experienced a suicide as contrasted with homes that did not). The “success” of gun-related suicide may lie more in the nature of a gun as a lethal instrument than the true intent of the person attempting suicide, as intent of attempt could actually be a “cry for help.” *See* Allan Schwartz, Dr. Schwartz’s Weblog, Guns and Suicide, http://www.mentalhelp.net/poc/view_doc.php?type=weblog&id=205&wld=5&cn=9 (Apr. 12, 2007). Although 90% of gun-related suicide attempts result in death, more than 75% of all suicide attempts involve drug overdose, of which 97% of these people are found alive. *Id.* Therefore, the presence of a gun in the home may not necessarily facilitate suicide. *Cf. id.* (“[S]imply making guns less available is not the complete answer to the problem of suicide because it eliminates a method and not the cause of such despair that leads the young to attempt such an awful act.”). *But see* Arthur L. Kellermann, Frederick P. Rivara, Grant Somes, Donald T. Reay, Jerry Francisco, Joyce Gillentine Banton, Janice Prodzinski, Corinne Fligner & Bela B. Hackman, *Suicide in the Home in Relation to Gun Ownership*, 327 *NEW ENG. J. MED.* 467, 467 (1992) (concluding that availability of firearms in the home is associated with increased suicide risk).

45. *Surprising Fact, supra* note 4 (contrasting a 90% suicide “success” rate involving firearms with other methods: “jumping from high places” (34%) and “drug overdose” (2%)). The male preference for using firearms to commit suicide may account for the disproportionate rate of male suicide. For instance, in 2005, boys ages fifteen to nineteen years old “were four times as likely to die from suicide as were adolescent girls.” NAT’L CTR. FOR HEALTH STATISTICS, CTRS. FOR DISEASE CONTROL, HEALTH, UNITED STATES, 2008, at 10 (2009), *available at* [http://www.cdc.gov/nchs/data/08.pdf](http://www.cdc.gov/nchs/data/hus/08.pdf). The data also suggests a male preference for firearms to commit suicide. *See* Ctrs. for Disease Control, National Suicide Statistics at a Glance, Percentage of Suicides Among Persons Ages 10 Years and Older, by Sex and Mechanism, United States, 2002–2006 (2009), <http://www.cdc.gov/violenceprevention/suicide/statistics/mechanism01.html> (stating that during 2002–2006 most suicides among males occurred by firearms (57.7%)). Women seem to prefer poisoning. *See id.* (stating that the greatest percentage of suicides among females occurred by poisoning (38.8%) during that same time period).

46. NAT’L CTR. FOR INJURY PREVENTION AND CONTROL, CTRS. FOR DISEASE CONTROL, CDC INJURY FACT BOOK: PREVENTING INJURIES IN AMERICA: PUBLIC HEALTH IN ACTION 97 (2006) [hereinafter CDC INJURY FACT BOOK] (noting that in 2002, 82% of homicide victims ages ten to twenty-four were killed with firearms).

47. The killings at Columbine High School in 1999 are an example. *See* About.com, Columbine Massacre, <http://history1900s.about.com/od/famouscrimesscandals/a/columbine.htm> (documenting the hours-long mass killing on April 20, 1999, at Columbine High School in Littleton, Colorado).

48. The coverage of the Columbine Massacre is an example. *See, e.g.,* David L. Altheide, *The Columbine Shootings and the Discourse of Fear*, 52 *AM. BEHAV. SCIENTIST* 1354 (2009) (discussing the role of mass media coverage of the Columbine school shootings in distorting public perceptions of violence and levels of actual danger); Stephanie Chen, *Debunking the Myths of Columbine, 10 Years Later*, CNN.COM, Apr. 20, 2009, <http://www.cnn.com/2009/CRIME/04/20/columbine.myths/index.html> (discussing the psychological imprint of the

pause for thought. In a 2003 survey by the CDC, a self-reported 6.1% of students nationwide carried a weapon to school in the thirty days prior to the survey, and, on the receiving end, 9.2% of students nationwide had been threatened with a weapon at least once in the twelve months prior to the survey.⁴⁹ Specific to guns, the Children's Defense Fund noted the first increase in children and teen death rates due to firearms since 1994; in 2005, 3006 children were killed by firearms.⁵⁰ The Children's Defense Fund says 104,419 children and teens died due to gun violence since 1979: 60% of the children were white and 37% percent were black.⁵¹ As a matter of comparison, the number of black children and teens killed by gunfire since 1979 represents an amount ten times greater than the number of blacks lynched throughout U.S. history.⁵²

While gun ownership is associated with the above negative externalities, there may also be positive aspects to owning a gun; in fact, some scholars argue that statistical analysis shows guns have prevented crime.⁵³ Although critics dispute the methodology of using a telephone survey to sample the number of persons who used a gun in self-defense during the past year,⁵⁴ researchers Gary Kleck and Marc Gertz estimate that

Columbine Massacre on the American consciousness, in part due to "media's around-the-clock coverage in the days and weeks following the shooting" on the tenth anniversary of the killings); Patricia Leavy & Kathryn Maloney, Newspaper Coverage of the Columbine and Red Lake School Shootings: Collective Memory, School Violence, and People Like Us, http://www.allacademic.com/meta/p_mla_apa_research_citation/1/0/3/5/2/pages103524/p103524-1.php.

49. CDC INJURY FACT BOOK, *supra* note 46, at 72, 97 (defining a "weapon" as a gun, knife, or club).

50. CHILDREN'S DEF. FUND, PROTECT CHILDREN NOT GUNS 2 (2008), available at <http://www.childrensdefense.org/child-research-data-publications/data/protect-children-not-guns-report-2008.pdf> (cataloging and citing gun statistics from the CDC related to children).

51. *Id.*

52. *Id.* An estimated 3000–3500 blacks were lynched in the United States between the 1880s and the 1960s. See Lynchings: By State and Race, 1882–1968, <http://www.law.umkc.edu/faculty/projects/frtrialship/lynchingyear.html>; see also Mark Potok, Luke Visconti, Barbara Frankel & Nigel Holmes, Op-Chart, *The Geography of Hate*, N.Y. TIMES, Nov. 25, 2007, at 11 (stating that blacks comprise more than 70% of 4700 lynching victims in the United States).

53. See, e.g., Don B. Kates Jr., *The Value of Civilian Handgun Possession as a Deterrent to Crime or a Defense Against Crime*, 18 AM. J. CRIM. L. 113 (1991) (concluding that empirical data reveals a greater rate of armed-citizen deterrence than was expected but that the crime-reductive utility of firearms does not diminish the need for reasonable controls such as "denying firearms of all kinds to felons, juveniles and the mentally impaired"); John R. Lott, Jr. & David B. Mustard, *Crime, Deterrence, and Right-to-Carry Concealed Handguns*, 26 J. LEGAL STUD. 1 (1997) (analyzing cross-sectional time-series data on U.S. counties that had right-to-carry laws in place between 1977 and 1992 and concluding that these counties experienced decreased rates of violent crime without incurring a statistically significant increase in accidental deaths from guns).

54. For example, David Hemenway contends that the Kleck & Gertz study, Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun*, 86 J. CRIM. L. & CRIMINOLOGY 150 (1995) [hereinafter Kleck & Gertz, *Armed Resistance*], is flawed due to overestimation bias that artificially inflates the number of people who defend themselves with guns. See David Hemenway, *Survey Research and Self-Defense Gun Use: An Explanation of Extreme Overestimates*, 87 J. CRIM. L. & CRIMINOLOGY 1430 (1997). Hemenway says even if only a small number of people will answer telephone survey questions inaccurately

firearms prevent over one million criminal incidents per year.⁵⁵ Obviously, people fear guns.⁵⁶ Therefore, there may be at least some degree of deterrent effect associated with the display or use of a weapon to prevent a criminal act.⁵⁷ Regardless of the questionable rigor of the methodology employed in Kleck and Gertz's study, the actual number of prevented criminal incidents due to the intended victim's display or use of a gun will never be known.⁵⁸ Many intended crime victims who protected themselves with a gun do not report such incidents (or fail to report the incident accurately)⁵⁹—perhaps due to the intended victim's doubt as to the legality of her own actions⁶⁰ (i.e., using a firearm to ward off a potential criminal)—or simply because they were not asked about it.⁶¹

Whether or not the costs of guns (such as the associated negative externalities described above) outweigh the benefits of self-protection, the quantitative data seems

(and thus have their responses misclassified), the presence of overestimation bias will severely skew the data and prevent the inference of a reliable conclusion in favor of large numbers of self-defense gun use. *See id.* at 1437–48. According to Hemenway, “Since a small percentage of people may report virtually anything on a telephone survey, there are serious risks of overestimation in using such surveys to measure rare events. The problem becomes particularly severe when the issue has even a remote possibility of positive social desirability response bias.” *Id.* at 1437. *But see* Gary Kleck & Marc Gertz, *The Illegitimacy of One-Sided Speculation: Getting the Defensive Gun Use Estimate Down*, 87 J. CRIM. L. & CRIMINOLOGY 1446 (1997) (countering that Hemenway's analysis relies on data that grossly underestimates defensive gun use in favor of pro-gun control advocacy and selectively excludes an independent survey that confirms the conclusion offered by Kleck and Gertz).

55. *See Surprising Fact*, *supra* note 4; *see also* Kleck & Gertz, *supra* note 54, at 164 (proposing that civilian self-defense gun use ranges from as high as 2.5 million people per year based on the positive responses (claiming some form of gun self-defense) of sixty-six people out of a sample of 5000).

56. *See People: Afraid of What They Don't Understand*, GILES COUNTY OBSERVER, Dec. 13, 2009, http://gilesco.info/index.php?option=com_content&view=article&id=17636:gilescitizen&catid=1:observer&Itemid=55 (offering an explanation that people derive their fear of guns due to their unfamiliarity with guns).

57. *See* NATIONAL RESEARCH COUNCIL, FIREARMS & VIOLENCE: A CRITICAL REVIEW 102–119 (Charles F. Wellford, John V. Pepper & Carol V. Petrie, eds., 2005) [hereinafter FIREARMS & VIOLENCE]; *see also* Kirk R. Williams & Richard Hawkins, *Perceptual Research on General Deterrence: A Critical Review*, 20 LAW & SOC'Y REV. 545 (1986) (arguing broadly that criminal deterrence may emanate from a given criminal's fear of extralegal sanctions); John R. Lott, Opinion, *Why People Fear Guns*, FOXNEWS.COM, Jan. 3, 2004, <http://www.foxnews.com/story/0,2933,107274,00.html> (offering an explanation that people's basic fear of guns gives guns a deterrent effect).

58. *See* FIREARMS & VIOLENCE, *supra* note 57, at 108 (concluding that accurate measurements of the rate of successful deterrence with firearms may never be known because a crime averted “may yield no overt event to count”); Jens Ludwig, *Gun Self-Defense and Deterrence*, 27 CRIME & JUST. 363, 365–66 (2000) (summarizing methodological difficulties with various studies that have attempted to gauge the deterrent effect of guns).

59. Some would-be crime victims may falsely claim to have used a gun to prevent a crime or exaggerate their use of gun if they view “defensive gun use . . . as a socially desirable behavior.” Ludwig, *supra* note 58, at 378–79.

60. *See id.* at 371.

61. *See id.* at 372 (explaining that that the National Crime Victimization Survey does not ask respondents whether they used a gun for self-defense).

to support interpretations that favor either side of the regulatory debate.⁶² However, for the purposes of developing informed government regulations for controlling the negative externalities associated with guns, both pro- and anti-gun control advocates agree that public-health research into the problem of gun violence has significantly diminished.⁶³ Although the CDC has tracked and studied patterns of violence as a public health issue since 1980,⁶⁴ the agency reduced its allocation of resources to the study of gun violence in response to an order from Congress not to engage in research that might support gun control.⁶⁵ In the mid 1990s, the agency spent more than \$2.1 million per year to research guns and gun-related injuries.⁶⁶ The CDC currently spends less than half that amount.⁶⁷ Currently, most gun-related projects at the CDC involve tracking statistics rather than performing policy analysis.⁶⁸ The decreased amount of centralized data leaves more room for the use of selective quantitative data by advocates for and against regulation.⁶⁹ Absent a clear mandate for or against government regulation founded on statistical evidence, advocates frequently turn to legal arguments to advance their causes.⁷⁰

62. See James Q. Wilson, *Dissent*, in FIREARMS & VIOLENCE, *supra* note 57, at app. A (concluding that various quantitative analyses of Right-to-Carry laws suggest these laws confer the benefit of reducing the murder rate without imposing costs). *But see* Charles F. Wellford, John V. Pepper & Carol V. Petrie, *Committee Response to Wilson's Dissent*, in FIREARMS & VIOLENCE, *supra* note 57, at app. B (responding that the scientific evidence of the effect of right-to-carry laws reducing the murder rate "is inconclusive"); *see also* Joel L. Horowitz, *Statistical Issues in the Evaluation of the Effects of Right-to-Carry Laws*, in FIREARMS & VIOLENCE, *supra* note 57, at app. D (concluding that John R. Lott's statistical model (showing that states that adopted right-to-carry laws reduce the incidence of violent crime) is subject to misspecification error because the model fails to include a variety of explanatory variables to account for systematic differences between states that enact right-to-carry laws and those that do not). However, some advocates against gun control insist the negative externalities of armed deterrence by private citizens are eclipsed by the negative externalities associated with the use of firearms by law enforcement. *See, e.g.*, George F. Will, *Are We 'A Nation of Cowards'?*, NEWSWEEK, Nov. 15, 1993, at 94, 93 ("[O]nly 2 percent of civilian shootings involved an innocent person mistakenly identified as a criminal. The 'error rate' for the police, however, was 11 percent, more than five times as high.").

63. *See Surprising Fact*, *supra* note 4.

64. Ctrs. for Disease Control, Violence Prevention at CDC, http://www.cdc.gov/ncipc/dvp/prevention_at_CDC.htm.

65. *See Surprising Fact*, *supra* note 4.

66. *Id.*

67. *Id.* (citing the current CDC budget for firearm-related projects at \$900,000).

68. *Id.*

69. *See id.*

70. *See, e.g.*, Antonin Scalia & the Reporter of Decisions, *The Right to Own a Gun Is Guaranteed By the Constitution*, in IS GUN OWNERSHIP A RIGHT? 10 (Lea Sakora ed. 2010) (arguing the Constitution unequivocally guarantees private citizens the right to own firearms); John Paul Stevens, *The Right to Own a Gun Is Not Guaranteed By The Constitution*, in IS GUN OWNERSHIP A RIGHT? *supra* at 14 (arguing the Constitution does not guarantee private citizens the right to own firearms); The Brady Center to Prevent Gun Violence, *The Supreme Court Supports the Development of Common Sense Gun Laws*, in IS GUN OWNERSHIP A RIGHT?, *supra* at 53 (arguing Supreme Court interpretations of the Constitution permit reasonable limitations on private citizen access to and ownership of firearms).

II. A HOLLOW POINT: THE SECOND AMENDMENT AS POLICY SUBSTITUTE

Save the issue of abortion, few disputes engender as much emotion and reveal so much misunderstanding as do the various debates over gun control.⁷¹ As with those who advocate for or against access to abortion,⁷² gun regulation proponents and opponents alike all too easily invoke the Constitution—“the law”—to supplement their arguments.⁷³ Each side wields the Constitution as a weapon whose mere invocation will somehow silence the opposition and bring finality to the debate over *policy* regarding guns.⁷⁴ But, it does not.⁷⁵

In the context of guns, debates often devolve into skirmishes about “the right” to own firearms with accusations that the other side fails to provide policy solutions to the

71. See generally Don B. Kates, Jr., *Bigotry, Symbolism and Ideology in the Battle over Gun Control*, 1992 PUB. INT. L. REV. 31, 31–33 (arguing that the rhetoric of highly vocal, extremist, progun and pro-gun control advocates obscures the “pro-control” opinions of a majority of Americans). *But cf.* Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 639–40 (1989) (arguing that substantive analysis of the Second Amendment is conspicuously absent from constitutional discussions); L.H. LaRue, *Constitutional Law and History*, 36 BUFF. L. REV. 373, 375 (1988) (“[T]he second amendment is not taken seriously by most scholars.”).

72. See Douglas Johnson, Nat’l Right to Life Comm., *The Partial-Birth Abortion Act—Misconceptions and Realities* (2003), <http://www.nrlc.org/abortion/pba/PBAa1110403.html>; Planned Parenthood Action Ctr., *Roe v. Wade* (2009), <http://www.plannedparenthoodaction.org/positions/643.htm>; see also LAURENCE H. TRIBE, *ABORTION: THE CLASH OF ABSOLUTES* (1990).

73. See Press Release, Brady Campaign to Prevent Gun Violence, *Statement of Brady President Paul Helmke on Supreme Court Second Amendment Ruling* (June 26, 2008), <http://www.bradiycampaign.org/media/press/view/992>; NRA Inst. for Legislative Action, *Firearm Fact Card*, 2010 (2010), <http://www.nraila.org/Issues/FactSheets/Read.aspx?ID=83>.

74. See, e.g., Garen J. Wintemute, *Guns, Fear, the Constitution, and the Public’s Health*, 358 NEW ENG. J. MED. 1421, 1424 (2008) (arguing that an expansive interpretation of the right to bear arms would promote a sense of entitlement that may weaken “the framework of ordered liberty that makes civil society possible”); see also Editorial, *Our View on The Second Amendment: High Court Has Rare Chance To Guide Gun-Control Debate*, USATODAY.COM, Nov. 14, 2007, <http://blogs.usatoday.com/oped/2007/11/our-view-on-the.html#more> (conjecturing that the Supreme Court’s choice whether to grant certiorari to the then-pending *Heller* case could definitively “alter the nation’s paralytic debate over gun control”). *But see* Editorial, *Our View on Fighting Crime: Firearms Lobby Promotes Get-Guns-Everywhere*, USATODAY.COM, <http://blogs.usatoday.com/oped/2009/07/our-view-on-fighting-crime.html> (July 22, 2009, 12:22 EST) (arguing that gun laws will never be settled in the United States); *cf.* Editorial, *Our View on the Second Amendment: Ruling Reflects America’s Ambivalence on Guns*, USA TODAY.COM, <http://blogs.usatoday.com/oped/2008/06/our-view-on-t-2.html#more> (June 27, 2008, 12:22 EST) (stating that the Supreme Court typically reflects societal equivocation on “hot-button cultural issues” such as gun control).

75. See, e.g., Gregory D. Curfman, Stephen Morrissey & Jeffrey M. Drazen, Editorial, *Handgun Violence, Public Health, and the Law*, 358 NEW ENG. J. MED. 1503 (2008) (stating that the gun control debate implicates public health issues distinct from constitutional questions generally considered by advocates on either side); see also C. Everett Koop & George D. Lundberg, *Violence in America: A Public Health Emergency: Time to Bite the Bullet Back*, 267 J. AM. MED. ASS’N 3075, 3076 (1992) (describing violence—particularly violence involving firearms—as a “public health emergency”).

negative externalities⁷⁶ that accompany some forms of gun ownership.⁷⁷ To be sure, the United States Constitution provides the *legal* foundation that defines the right upon which nearly every gun policy—restrictive or expansive—relies.⁷⁸ Typically, policy debate attempts to expand or contract the “correct” interpretation of the law to further a particular policy goal.⁷⁹ There are substantive, detailed arguments for both expansive and restrictive readings of the Second Amendment.⁸⁰ For all the importance placed on the Constitution in these debates, the law upon which most advocates rely is precisely one sentence long: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed.”⁸¹ Historically, interpretations of the Second Amendment concerned *who* (a person, a citizen, a felon, a militia) has the right to own *what* (handgun, rifle, shotgun, “assault rifle,” semiautomatic)⁸² and *how* these weapons may be used (civilian (licensed, unlicensed, concealed- or open-carry permit) vs. military use).⁸³

76. Some examples of everyday events or actions enjoyed by party *A* but which have negative consequences to those parties around *A* include smoking, using a cell phone, or attending to a “bawling baby” on an airplane. See CHARLES WHEELAN, *NAKED ECONOMICS: UNDRRESSING THE DISMAL SCIENCE* 44–47 (2002). In the case of firearms, the externality imposed by *A*’s owning, possessing, or using a gun may include accidental shooting or death of others or *A* herself. See FIREARM & INJURY CTR. AT PENN, *FIREARM INJURY IN THE U.S.* (2009), <http://www.uphs.upenn.edu/ficap/resourcebook/pdf/monograph.pdf>.

77. See, e.g., Kimberly Barrett, Op-Ed., *Time to Focus on Gun Control*, SHELBY COUNTY REP. (Ala.), Dec. 16, 2009, at 4, available at <http://www.shelbycountyreporter.com/news/2009/dec/15/time-focus-gun-control/> (noting the NRA has no information on its website showing that guns reduce violence); NRA Inst. for Legislative Action, *Firearm Safety in America 2009* (2010), <http://www.nra.org/issues/FactSheets/Read.aspx?ID=120> [hereinafter *Firearm Safety in America*] (contesting pro-gun control arguments claiming that gun control “successes” (e.g., reductions in accidental shootings) are actually attributable to other factors (e.g., education) and therefore that gun control fails to reduce various negative externalities).

78. See THE HERITAGE GUIDE TO THE CONSTITUTION 5 (Edwin Meese III, David F. Forte & Matthew Spalding eds., 2005) (stating that “the views of the people and their civic associations can be expressed and translated into public law and public policy, subject, of course, to the limits established by the Constitution.”). Others argue that these limits change over time. In other words, the legal basis of any policy derived from “energetic political movements” may also be threatened by illegitimacy in the long run due to the impermanency of Supreme Court interpretation of the Constitution. See CASS R. SUNSTEIN, *A CONSTITUTION OF MANY MINDS: WHY THE FOUNDING DOCUMENT DOESN’T MEAN WHAT IT MEANT BEFORE* 3–7 (2009) (arguing for the legitimacy of public judgments (as reflected by the role of citizens or democratically elected representatives)—rather than judicial interpretation—in making constitutional changes over time); Cass R. Sunstein, Op-Ed., *America’s 21st-Century Gun Right*, BOSTON GLOBE, June 27, 2008, at A13 (arguing that the Constitution’s “meaning is not stable over time”).

79. See THE HERITAGE GUIDE TO THE CONSTITUTION, *supra* note 78; see also Sunstein, *supra* note 78.

80. See THE HERITAGE GUIDE TO THE CONSTITUTION, *supra* note 78; see also Sunstein, *supra* note 78.

81. U.S. CONST. amend. II. Twenty-four states have also ratified a specific right to keep and bear arms in their respective state constitutions. GUN CONTROL & GUN RIGHTS: A READER & GUIDE 212 (Andrew J. McClurg, David B. Kopel & Brannon P. Denning eds., 2002).

82. See, e.g., *United States v. Miller*, 307 U.S. 174, 178 (1939) (stating that the Second Amendment protected only the right of citizens to own and carry “ordinary military equipment”

In *District of Columbia v. Heller*,⁸⁴ the Supreme Court answered the question as to *who* has the right to own a firearm, the individual person or a state-supported militia. The Court explicitly decided in favor of the individual person.⁸⁵ Specifically, the Court uncoupled the individual practice of gun ownership from a person's service in a state militia.⁸⁶ In *Heller*, a special policeman attempted to register a handgun in the District of Columbia but was denied due to the District's ban on handgun possession in the home.⁸⁷ The Court struck down the handgun ban as a violation of the Second Amendment.⁸⁸ The Court also found unconstitutional the District's prohibition against making operable *any* lawful firearm for the purpose of self-defense in the home.⁸⁹

While striking down the ban, the Court clarified the language and scope of the Amendment itself.⁹⁰ The Court's opinion in *Heller* distinguished between the *prefatory* clause ("A well regulated militia, being necessary to the security of a free state")⁹¹ and the *operative* clause ("the right of the people to keep and bear arms, shall not be infringed").⁹² The Court firmly stated that the operative clause codifies the right of "the people"⁹³—and, by reduction to a single unit, the individual—to legally own firearms.⁹⁴ Until *Heller*, the Court had never resolved the issue of *who* has the right to keep and bear arms with such clarity.⁹⁵

However, even reliance on *Heller*'s assertion of the individual as possessor of the right to own firearms does not advance *policy* for or against gun ownership. The law tells people what they can and cannot do. Policy focuses on whether people should or should not act. As the *Heller* court noted, gun violence persists despite clarity in the interpretation of the law:⁹⁶ some crime still happens, recreational gun use continues,

for the purpose of serving in the militia when called to do so). *Id.* at 182 (quoting The General Assembly of Virginia, October, 1785).

83. *See, e.g.*, *Presser v. Illinois*, 116 U.S. 252, 264–65 (1886) (holding that a law that forbade "bodies of men to associate together as military organizations, or to drill or parade with arms in cities and towns unless authorized by law, d[id] not infringe the right of the people to keep and bear arms").

84. 128 S. Ct. 2783 (2008).

85. *Id.* at 2790 (clarifying Second Amendment language "'right of the people' . . . unambiguously refer[s] to individual rights, not 'collective' rights, or rights that may be exercised only through participation in some corporate body").

86. *See id.* at 2791 ("Reading the Second Amendment as protecting only the right to 'keep and bear Arms' in an organized militia therefore fits poorly with the operative clause's description of the holder of that right as 'the people.' We start therefore with a strong presumption that the Second Amendment right is exercised individually and belongs to all Americans.").

87. *Id.* at 2788.

88. *Id.* at 2821–22.

89. *Id.* at 2822.

90. *See id.* at 2788–805.

91. *See id.* at 2799–801.

92. *See id.* at 2788–99.

93. *Id.* at 2790.

94. *See id.* ("Nowhere else in the Constitution does a 'right' attributed to 'the people' refer to anything other than an individual right.").

95. *See Ariane de Vogue, Supreme Court Shoots Down D.C. Gun Ban*, ABCNEWS.COM, June 26, 2008, <http://abcnews.go.com/TheLaw/SCOTUS/story?id=5037600&page=1>.

96. *Heller*, 128 S.Ct. at 2821.

and debate over the role of guns in society rages.⁹⁷ Even the rare Supreme Court decision that offers a crystal clear holding only does one thing—it clarifies the *law*. Those who rely on *legal* arguments to resolve the question of how to reduce injury or death from gun use ask the law to do something it cannot: make sound policy.

Thus, proponents or detractors of gun control—whatever the merits of their arguments, as far as policy is concerned—miss the point. Advocates on either side should not rely on the law as a policy argument. An invocation of the law is, in essence, an act of hiding behind the Constitution and not addressing inherent policy concerns such as how to reduce maiming and killing with guns. For policy purposes, merely bickering over the Constitution gives the appearance of acting without really acting.

III. MISSING THE BULL’S-EYE: THE PRO VERSUS CON REGULATION SHOOTOUT

Although the law as to *who* has the right to bear arms may be firmly settled—for now—the debate over the proper policies to reduce the impact of gun violence is not.⁹⁸ Policy makers who champion one side or the other in the gun regulation debate often fail to account for the validity contained in the “other side.”⁹⁹ Consider the essential factors and history that influence and inform each side of the policy debate.

A. Yes, Regulation!

The idea of preventing children from suffering or dying from preventable gun violence is a rational foundation upon which to decide that gun violence should be stopped.¹⁰⁰ Gruesome scenes of suffering from gun violence and perceived government inertia fuel emotional appeals for the prevention of gun violence.¹⁰¹ Despite the disproportionate attention afforded to anecdotal, emotionally satisfying calls for regulation that play on the perception of the United States as a gun-toting nation run amuck,¹⁰² the larger history of gun control in the United States emerged as part of a protracted approach to gun violence.¹⁰³

97. See *supra* notes 7–8 and accompanying text.

98. See *supra* notes 7–8 and accompanying text.

99. See, e.g., *supra* note 18 and accompanying text.

100. Editorial, *Gun Control: Why Is This Difficult?*, PHILA. INQUIRER, Feb. 27, 2009, at A14.

101. Cf. Anahad O’Connor, *Gun-Control Supporters Show Outrage*, N.Y. TIMES.COM, June 27, 2008, http://www.nytimes.com/2008/06/27/washington/27React.html?_r=1&scp=1&sq=Gun-Control%20Supporters%20Show%20Outrage&st=cse (statement of Chicago Mayor Richard M. Daley) (“If they think [the Supreme Court’s decision in *Heller* is] the answer, then they’re greatly mistaken. Then, why don’t we do away with the court system and go back to the Old West? You have a gun and I have a gun and we’ll settle in the streets.”).

102. See, e.g., BOWLING FOR COLUMBINE (Alliance Atlantis & United Artists 2002) (juxtaposing a series of confrontational interviews with stories of victims of gun violence). The film, *Bowling for Columbine*, is one of the highest grossing films of all time under the category “Documentary.” See Box Office Mojo, *Documentary Movies at the Box Office* (2010), <http://boxofficemojo.com/genres/chart/?id=documentary.htm> (calculating total lifetime gross receipts for the film at \$21,576,018). However, not everyone was persuaded by the film’s approach regarding violence in the United States. See A.O. Scott, *Seeking a Smoking Gun in U.S. Violence*, N.Y. TIMES, Oct. 11, 2002, at E13 (“The slippery logic, tendentious

The first two federal gun control laws did not ban firearms but imposed hurdles to reduce the then relatively easy acquisition. The National Firearms Act of 1934 (NFA) regulated fully automatic guns (machine guns), short-barrel firearms (sawed-off shotguns), and other devices (e.g., silencers).¹⁰⁴ Congress passed the law as a tax measure.¹⁰⁵ In hopes that the financial hurdle of a \$200 tax¹⁰⁶ would prevent the easy acquisition of certain firearms,¹⁰⁷ Congress directed the law at big-city gangsters who were notoriously difficult to prosecute.¹⁰⁸ By imposing a tax on a group unlikely to register weapons—much less pay a tax—Congress gave the federal government another enforcement mechanism for breaking organized crime.¹⁰⁹ Prosecution of a case was simple: possession of an unregistered gun without a tax stamp gave prosecutors physical evidence to indict and convict otherwise-elusive leaders of organized crime and others who transacted in the covered firearms.¹¹⁰ Later, drawing upon Congress's enumerated power to regulate interstate commerce under the Commerce Clause,¹¹¹ the Federal Firearms Act of 1938 prevented interstate gun dealers from shipping or selling firearms to fugitives, felons, or people under criminal indictment and required the dealers to obtain licenses to ship firearms.¹¹²

In 1968, Congress responded to the increased incidence of gun-related crimes by passing the Gun Control Act of 1968 (GCA).¹¹³ Rather than focus on the end user, Congress took another aim at the commerce surrounding firearms by amending the NFA.¹¹⁴ In plain terms, the law limits the interstate transfer of weapons to licensed

grandstanding and outright demagoguery on display in 'Bowling for Columbine' should be enough to give pause to its most ardent partisans, while its disquieting insights into the culture of violence in America should occasion sober reflection from those who would prefer to stop their ears.").

103. See *The Right to Bear Arms Interactive Timeline*, CBS NEWS.COM (2008), http://www.cbsnews.com/elements/2002/12/09/in_depth_us/timeline532320.shtml (showing difference of nearly 140-year span of time between ratification of the Second Amendment (1791) and federal passage of the National Firearms Act (1934)).

104. National Firearms Act (NFA), ch. 757, 48 Stat. 1236, 1236–40 (1934) (codified as amended at 26 U.S.C. § 5801 (2006)).

105. See *id.* §§ 2(a)–2(b), 48 Stat. at 1237 (taxing businesses that imported, manufactured, or dealt in certain firearms as well as individuals who transferred or manufactured the covered firearms).

106. See *id.* § 3(a), 48 Stat. at 1237. The amount of the tax—\$200—has not changed since 1934. Bureau of Alcohol, Tobacco, Firearms and Explosives, *History of the National Firearms Act*, <http://www.atf.gov/firearms/nfa/> [hereinafter *History of the National Firearms Act*].

107. See § 1(a)–(b), 48 Stat. at 1236 (defining prohibited weapons).

108. See *History of the National Firearms Act*, *supra* note 106.

109. See *id.*

110. See *id.*

111. U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . .").

112. Federal Firearms Act, ch. 850, 52 Stat. 1250–52 (1938) (codified as amended at 18 U.S.C. § 922 (2006)).

113. Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 (codified in scattered sections of 18 U.S.C. and 26 U.S.C.).

114. See *History of the National Firearms Act*, *supra* note 106 (analyzing Title II of the Gun Control Act (GCA) of 1968).

manufacturers, importers, and dealers.¹¹⁵ Specifically, the law terminated the practice of purchasing weapons by mail order,¹¹⁶ prohibited sales of any firearms to persons under eighteen and handguns to persons under twenty-one,¹¹⁷ and mandated federal licensure of any business that bought or sold firearms.¹¹⁸

Subsequent gun control measures included the Brady Handgun Violence Prevention Act (Brady Bill)¹¹⁹ and the Federal Assault Weapons Ban (AWB).¹²⁰ Each of these laws focused on narrowing the acquisition of weapons. Amending the 1968 law, the Brady Bill effectively imposed a time period between a person's attempt to legally purchase a gun and the act of obtaining the firearm itself.¹²¹ The AWB banned the manufacture of nineteen military-style semi-automatic weapons with multiple military-style features.¹²² Critics of the latter ban noted that only one to eight percent of all gun crimes involved "assault weapons" prior to the passage of the law.¹²³ Both laws have now expired.¹²⁴

Since the expiration of these highly publicized laws, proregulation advocates have sought to reinstate a ban on assault weapons and to enact laws that prohibit the transfer

115. See 18 U.S.C. § 922(a)(1) (2006).

116. See *id.* § 922(a)(2).

117. See *id.* § 922(b)(1).

118. See *id.* § 922(a)(1)–(2).

119. See Brady Handgun Violence Prevention Act (Brady Bill), 18 U.S.C. § 922(s)(2) (2006); H.R. Rep. No. 103-344, at 7, 10 (1993) (requiring a five-day waiting period for law enforcement to run a check to determine legality of purchase, not to provide a so-called "cooling off" period (as some have explained) for volatile would-be purchasers to gather their senses).

120. Violent Crime Control and Law Enforcement Act of 1994 (Violent Crime Control Act) (VCCA), Pub. L. No. 103-322, § 110102, 108 Stat. 1796, 1996 (1994) (repealed 2004) (banning the manufacture, transfer, and possession of some semiautomatic assault weapons). The term "assault weapon" had no legal significance prior to passage of the ban.

121. See JEFFREY D. MONROE, HOMICIDE AND GUN CONTROL: THE BRADY HANDGUN VIOLENCE PREVENTION ACT AND HOMICIDE RATES 10–12 (2008) (describing two-phase implementation of the law).

122. See CHRISTOPHER S. KOPER, AN UPDATED ASSESSMENT OF THE FEDERAL ASSAULT WEAPONS BAN: IMPACTS ON GUN MARKETS AND GUN VIOLENCE, 1994–2003, at 6 tbl.2-2 (2004), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/204431.pdf> (listing military-style features test); FBI NICS E-Check, [http://www.nicsezcheckfbi.gov/servlet/echeck.http.Index; Infoplease.com, Milestones in Federal Gun Control Legislation, http://www.infoplease.com/spot/guntime1.htm](http://www.nicsezcheckfbi.gov/servlet/echeck.http.Index;Infoplease.com, Milestones in Federal Gun Control Legislation, http://www.infoplease.com/spot/guntime1.htm).

123. See JEFFREY A. ROTH & CHRISTOPHER S. KOPER, U.S. DEP'T OF JUSTICE, IMPACTS OF THE 1994 ASSAULT WEAPONS BAN: 1994–96, at 8 (1999) (noting the low prevalence (one to eight percent) of crimes involving "assault weapons" and the variance of their usage depending upon the definition of "assault weapon" used to categorize these crimes); see also Timothy Wheeler, Op. Ed., *Assault-Weapons Ban, R.I.P.*, NAT'L REV. ONLINE, Sept. 13, 2004, <http://www.nationalreview.com/comment/wheeler200409130630.asp> (noting the reason many criminals did not select semiautomatic rifles as their weapon of choice due to the difficulty of concealment).

124. The Brady Bill expired on Nov. 30, 1998 and was replaced by the computerized National Instant Criminal Background Check System (NICS) maintained by the FBI. FBI NICS E-Check, *supra* note 122; Infoplease.com, *supra* note 122. The Federal Assault Weapons Ban expired on Sept. 13, 2004. Jill Lawrence, *Federal Ban on Assault Weapons Expires*, USA TODAY, Sept. 14, 2004, at 5A.

of weapons from legal to illegal buyers, the “straw buyer” gun trade.¹²⁵ There is currently no federal law prohibiting the intrafamily transfer of a gun as occurred when the wife of James Brady (the former White House Press Secretary who was wounded in a 1981 assassination attempt on President Ronald Reagan and for whom the Brady Bill is named), Sarah Brady, purchased a Remington .30-06 for her son.¹²⁶

Not all laws have focused on particular features of firearms or specific types of commerce dealing with firearms; there have been serious efforts to broadly ban entire types of guns. In the case of handgun control, Rhode Island Senator John Chafee proposed legislation to ban the manufacture, sale, and in-home possession of all handguns.¹²⁷ Few regulatory proposals go to this extreme. However, the Chafee proposal is representative of gun control legislation generally as it tackles the handgun debate by restricting—in fact, eliminating—*legal* supply¹²⁸ (presumably, an illegal supply of handguns would continue to exist, if not flourish, given that some suppliers would continue to illegally manufacture new guns or conduct an illicit trade¹²⁹ in the existing stock of guns). Although an outright ban represents a more exaggerated approach than the more incremental approach of most gun control measures, nearly all gun control laws seek to limit access to weapons.¹³⁰ The Chafee proposal attempts to constrain the supply of guns.

However, there are problems with any regulation that limits supply. First, in the case of handguns, there are readily available substitutes. A sawed-off shotgun is nearly as concealable as a large handgun.¹³¹ Therefore, any criminal who chooses to carry a gun could easily substitute a far deadlier weapon than a handgun that could be concealed nearly as easily as one. Only a small percentage of criminals would need to substitute a sawed-off shotgun for a handgun to dramatically increase injuries and fatalities in the execution of crimes.¹³²

Second, confiscation measures (whether visited upon formerly legal points of sale or homes) would require significant resources to enforce, even if most gun owners were to comply with the law. There would be gun owners—both criminals as well as otherwise-law-abiding citizens¹³³—who would refuse to surrender their arms. As with most criminals today, a law that prohibits firearms would probably serve as a poor deterrent to a person already willing to assault, kill, rape, or steal.¹³⁴ Therefore, for the

125. See Stu Bykofsky, *Who Gave/Sold Scruggs the Gun?*, PHILA. DAILY NEWS, Feb. 23, 2009, at 5.

126. Timothy J. Burger, *Brady Shady on Gun Rules*, DAILY NEWS (N.Y.), Mar. 22, 2002, at 10.

127. Public Health and Safety Act of 1993, S. 892, 103d Cong. § 2 (1993).

128. See *Children and Gun Violence: Hearing on S. 1087 Before the Subcomm. on Juvenile Justice of the S. Comm. on the Judiciary*, 103d Cong. 9 (1993) (statement of Sen. John Chafee) (“Somewhere, in every single family in America, there will be a death as a result of handguns in the very near future because of the prevalence of these guns.”).

129. See John F. McDonald, *An Economic Analysis of Guns, Crime, and Gun Control*, 27 J. CRIM. JUST. 11, 16 (1999).

130. See *supra* notes 16–18 and accompanying text.

131. Kopel, *supra* note 18.

132. See *id.*

133. Law-abiding citizens who value armed defense more than they fear criminal sanction might be willing to subject themselves to penalties by not giving up their firearms. See *id.*

134. See Paul Guppy, *More Gun Control Won't Reduce Gun Violence*, WASH. POL'Y

average criminal, an additional gun restriction would make little difference, other than the increased “street price” for an increasingly scarce commodity, the firearm.¹³⁵

As for typically law-abiding citizens, gun confiscation would marginalize gun owners who would never otherwise choose to break the law. A largely peaceful segment of the population that chose to conscientiously object by retaining guns after imposition of the ban would incur potential costs—if members of that segment were caught by law enforcement—associated with obtaining legal representation, probation, jail time, and social costs, such as an inability to find quality work due to a criminal record. To give citizens the ability to comply, the government would have to provide fair notice of the effective date of the ban. While the bill made its way through both houses of Congress and up to the date of the implementation of the ban, some people would purchase guns merely because the right to do so is threatened.¹³⁶

Enforcement costs for any ban would require a shift in resources away from more serious crimes to accomplish a close-to-zero rate for the possession of firearms and would likely include significant costs of incarceration.¹³⁷ In addition, a reimbursement system for guns, based on the Takings Clause,¹³⁸ may require the government to pay for guns at prices at or, most likely, above the market rate.¹³⁹ Without reasonable compensation, many gun owners would simply refuse to relinquish their guns. If past registration mandates serve as an indicator of compliance, the government would have to pay well above previous market rates to encourage any gun owner to relinquish her weapon.¹⁴⁰ With the average *handgun* selling for a price between \$300 and \$500 today,¹⁴¹ the total sum for compensation alone would represent a significant cost.¹⁴² If firearms prohibition were to include rifles and shotguns (on average, sold at higher prices than handguns), the total cost of compensation would be even higher.¹⁴³ However, without voluntary surrender of these weapons, the total bill for enforcement would likely dwarf compensation costs.¹⁴⁴ In essence, the majority law-abiding

CENTER, JULY, 2007, http://www.washingtonpolicy.org/Centers/Miscellaneous/opinioneditorials/07_guppy_guncontrol.html.

135. See McDonald, *supra* note 129 (outlining a model that shows the effect of gun control limiting supply of firearms thereby increasing the price demanded by sellers who incur more risk for producing or selling illegal firearms).

136. See Soupcoff, *The Hobby Privilege*, REGULATION, Spring 2006, at 72.

137. See DON B. KATES JR., GUNS, MURDERS, AND THE CONSTITUTION: A REALISTIC ASSESSMENT OF GUN CONTROL 21, 35–37 (1990), available at http://www.guncite.com/journals/gun_control_katesreal.html.

138. U.S. CONST. amend. V (stating that “private property [shall not] be taken for public use, without just compensation”).

139. See *Olsen v. United States*, 292 U.S. 246, 255 (1934).

140. Kopel, *supra* note 18 (noting that “[i]n California, only 2 percent of gun owners obeyed a requirement that they register their semiautomatics. In New Jersey, fewer than 2 percent of owners of ‘assault weapons’ have complied with the legal mandate to surrender their guns.”).

141. Lowe’s Gun List, <http://www.lowescertifiedguns.com/lowesgunlist.aspx>.

142. See Kopel, *supra* note 18. The number of guns that people would relinquish is unknown. However, the offering of compensation would almost certainly have to approach the market price for a particular gun to encourage an existing gun owner to sell her firearm. See *id.*

143. See Lowe’s Gun List, *supra* note 141 (listing current prices for handguns as well as rifles and shotguns).

144. See KATES, *supra* note 137; see also GARY KLECK & DON B. KATES, ARMED: NEW PERSPECTIVES ON GUN CONTROL 160 (2001) (discussing significant costs of law enforcement

society—those with and those without guns—would bear tremendous overall social costs in the aggregate while the ban does little more than raise the street price of guns for criminal consumers who would be otherwise undeterred.

B. “From My Cold, Dead Hands!”¹⁴⁵ Don’t Regulate!

Is there such a thing as good gun use? Some would say “yes.”¹⁴⁶ Recreational use, for many, is the primary reason to own a gun.¹⁴⁷ Recreational use can take place in several activities including target shooting, competition, gun showcase/shows, scouting, camping, and hunting.¹⁴⁸ Positive externalities associated with consistent, safe recreational gun use include socializing and increased user facility and familiarity with guns.¹⁴⁹ Although any contact with an unlocked, loaded gun represents some exposure to risk of injury, increased familiarity with these instruments also may yield the benefit of safer, more knowledgeable handling that decreases the risk of accidents.¹⁵⁰ If positive externalities exist, then a government should seek to do what it can to avoid regulating goods or activities in a way that ultimately diminishes or eliminates these positive benefits.

The value derived from gun use by consumers is obviously difficult to estimate. If estimates are accurate, however—the total number of gun owners is nearly two thousand times greater than 30,869 firearms deaths in 2006¹⁵¹—then there is a significant segment of the population who chooses to own guns and presumably derives some value from doing so.¹⁵² Furthermore, the industry that supports gun

house-to-house searches in pursuit of prohibited firearms).

145. Charlton Heston, Speech, President NRA, Speech at the 129th NRA National Convention in Charlotte, North Carolina (May 20, 2000), available at <http://facta-non-verba.blogspot.com/2008/12/charlton-hestons-powerful-nra-second.html>.

146. See JAMES B. JACOBS, CAN GUN CONTROL WORK?, 15, 37, 42 (2002) (noting the individual and social benefits conferred by the use of rifles, shotguns, and some handguns for recreation and competitive shooting as well as the utility of firearms for self defense); see also KLECK & KATES, *supra* note 144, at 179, 286, 308 (discussing the utility derived from self-defense by owning or possessing a firearm).

147. See JACOBS, *supra* note 146, at 40, 42–43.

148. Of course, as discussed previously there is also a deterrent/personal protection value to gun ownership. See Kleck & Gertz, *Armed Resistance*, *supra* note 54; *supra* note 58 and accompanying text.

149. See Kleck & Gertz, *Armed Resistance*, *supra* note 54, at 151.

150. The NRA claims safety classes and training have helped reduce incidents of accidental shootings. Firearm Safety in America, *supra* note 77.

151. Michael Huemer, *Is There a Right to Own a Gun?*, 29 SOC. THEORY & PRAC. 297, 305 (2003); Ctr. for Disease Control & Prevention, All Injuries: Mortality, <http://www.cdc.gov/nchs/fastats/injury.htm>.

152. For example, there are an estimated twenty million target shooters in the United States. Nat’l Inst. for Occupational Safety & Health, Take Aim at Protection Yourself (2009), http://www.cdc.gov/niosh/blog/nsb051809_firingrange.html. In 2008, there were an estimated 250 million privately owned firearms in the United States. NRA Inst. for Legislative Action, More Guns, Less Crime (Again) in 2008 (2008), <http://www.nra.org/Issues/FactSheets/Read.aspx?id=206&issue=007>. As of 2007, approximately one-third of United States citizens owned firearms. *FACTBOX: Guns and Gun Ownership in the United States*, REUTERS, Apr. 17, 2007, <http://www.reuters.com/article/idUSN1743414020070417>. In 2007, the Population Reference Bureau estimated the U.S. population as approximately 302 million

owners also represents a significant investment in infrastructure and resources. A search of nationally registered shooting ranges listed by the NRA reveals hundreds of established facilities.¹⁵³ States such as California, New York, and Pennsylvania each have over 200 shooting ranges.¹⁵⁴

In addition to utilizing shooting ranges, some gun owners also hunt for recreation.¹⁵⁵ Although the number of hunters¹⁵⁶ continues to decline,¹⁵⁷ licensed hunters represent a significant and reliable source of revenue for state and federal wildlife agencies.¹⁵⁸ According to the U.S. Fish and Wildlife Service, the number of hunters declined approximately ten percent from 14 million to 12.5 million in the decade between 1996 and 2006.¹⁵⁹ The loss of an aggregate total of hunters means a corresponding loss of direct revenue for all fifty state wildlife agencies, entities that preserve and sustain wildlife habitats.¹⁶⁰ A ban on guns may further reduce the number of hunters and therefore reduce licensing fees.¹⁶¹ With increased urbanization and a perception of increased costs associated with hunting causing a decline in the number of hunters,¹⁶² those that still choose to hunt clearly derive some recreational value from it despite increased hardship. Also, there are those who derive satisfaction from offering instruction on hunting activities.¹⁶³ An estimated 70,000 people volunteer their time each year to teach gun safety and casualty avoidance in hunting.¹⁶⁴

people. POPULATION REFERENCE BUREAU, 2007 WORLD POPULATION DATA SHEET 2 (2007), available at http://www.prb.org/pdf07/07WPDS_Eng.pdf.

153. Find NRA Near You, <http://www.nrahq.org/shootingrange/findlocal.asp> (search “Choose Your Location”).

154. *Id.*

155. The U.S. Fish and Wildlife Service estimates that hunters took 185 million hunting trips for a total of 220 million days in 2006. U.S. FISH & WILDLIFE SERV., 2006 NATIONAL SURVEY OF FISHING, HUNTING, AND WILDLIFE-ASSOCIATED RECREATION 22 (2007), http://library.fws.gov/pubs/nat_survey2006_final.pdf.

156. Associated Press, *Number of U.S. Hunters Dwindles*, USATODAY.COM, Sept. 2, 2007, [hereinafter *Number of U.S. Hunters Dwindles*] http://www.usatoday.com/news/nation/environment/2007-09-02-fewer-hunters_N.htm (limiting the definition of “hunters” to hunters ages sixteen-years-old and older).

157. *Id.* (marking the most acute drop in the number of hunters in New England, the Pacific states, and the Rocky Mountain area).

158. According to the National Shooting Sports Foundation, hunters and anglers—not taxes—are the most significant source of funding for state fish and game departments and serve as the largest demographic of conservationists. See NAT’L SHOOTING SPORTS FOUND. INC., THE HUNTER AND CONSERVATION (2006), <http://www.nssf.org/lit/HunterConservation.pdf> (estimating that hunters’ license fees generate more than \$1.1 billion in revenue a year for state fish and game departments).

159. *Number of U.S. Hunters Dwindles*, *supra* note 156.

160. *See id.*

161. If firearms are banned, then there may be some reduction in consumer demand for firearms and therefore activities associated with guns. See McDonald, *supra* note 129, at 12–13. In addition to approximately \$1.1 billion hunter’s licensing fees, hunters contributed \$22.9 million to the U.S. economy in 2006. See U.S. FISH & WILDLIFE SERV., *supra* note 155, at 4, 23.

162. *Number of U.S. Hunters Dwindles*, *supra* note 156.

163. See Katherine A. Vittes & Susan B. Sorenson, *Recreational Gun Use by California Adolescents*, 32 HEALTH EDUC. & BEHAV. 751, 763 n.1 (2005).

164. *Id.* at 763 n.1. These totals do not include park rangers, game wardens, and the small number of people working as hunting guides.

In addition to activities associated with the use of guns, there is a value associated with the exercise of a Constitutional right.¹⁶⁵ The United States hosts a long-standing libertarian¹⁶⁶ (or even contrarian)¹⁶⁷ approach toward refusing to yield to prohibitions. In other words, some people choose to purchase and own guns just because they can. Other people who would never consider purchasing, possessing, or even holding a firearm also derive some value from the idea that others possess the relative freedom to do so.¹⁶⁸ Some people even find value in the right to obtain a gun as part of a tie-in sale.¹⁶⁹

As with increased sales of liquor during prohibition¹⁷⁰ or the sales of radar detectors in areas that mandate a fifty-five mile-per-hour speed limit for driving,¹⁷¹ the positive value of exercising an economic choice derives from the understandable reaction of some people who do not like being told they cannot do something they believe is reasonable to do.¹⁷² As evidenced by surging gun sales before¹⁷³ and after¹⁷⁴ the 2008

165. See Bryan Caplan, *A Cerebral Defense of Gun Rights*, LIBRARY OF ECON. AND LIBERTY, Apr. 19, 2008, http://econlog.econlib.org/archives/2008/04/a_cerebral_defe.html.

166. THE FEDERALIST NO. 46, at 243 (James Madison) (Ian Shapiro ed., 2009) (“Besides the advantage of being armed, which the Americans possess over the people of almost every other nation, the existence of subordinate governments, to which the people are attached, and by which the militia officers are appointed, forms a barrier against the enterprises of ambition, more insurmountable than any which a simple government of any form can admit of.”); Daniel Doherty, *Guns, Rights, the Libertarian Fantasy, and the Rule of Law* (Feb. 4, 1998) (unpublished manuscript), available at <http://www.potowmack.org/398resp.html>.

167. Cf. Soupcoff, *supra* note 136 (stating that shooting is enjoyable because it is restricted).

168. See Lindsey Pilcher, Op-Ed., *Not Everyone Has a Blast with Gun Use*, THE JOURNAL.COM (Webster Groves, Mo.), Apr. 7, 2005, <http://media.www.webujournal.com/media/storage/paper245/news/2005/04/07/Opinioneditorial/Not-Everyone.Has.A.Blast.With.Gun.Use-914466.shtml>.

169. See *US Car Dealer in Free Gun Offer*, BBCNEWS.COM, May 23, 2008, <http://news.bbc.co.uk/2/hi/americas/7416120.stm> (describing a tie-in sale offered by a car dealership in Butler, Missouri: customers of Max Motors received the option to choose a handgun or a \$250 gas card with the purchase of a car or truck).

170. See LAURENCE BERGREEN, *CAPONE: THE MAN AND THE ERA* 346 (1994) (identifying public distaste for Prohibition and booming consumer demand for alcohol sales as indicated by gangster Al Capone’s control of approximately 20,000 speakeasies). See generally FREDERICK LEWIS ALLEN, *ONLY YESTERDAY: AN INFORMAL HISTORY OF THE 1920s*, at 212–33 (Perennial 2000) (describing the unintended consequences of ratification of the Eighteenth Amendment that banned the sale of alcohol in the United States: increased alcohol sales and innovations that facilitated increased alcohol consumption such as the hipflask, bootlegging, and the speakeasy); EDWARD BEHR, *PROHIBITION: THIRTEEN YEARS THAT CHANGED AMERICA* (1996) (analogizing the thriving trade in controlled substances in the current “war on drugs” to robust liquor sales during Prohibition); MICHAEL A. LERNER, *DRY MANHATTAN: PROHIBITION IN NEW YORK CITY* (2007) (tracing resistance to Prohibition in New York City—regarded by the temperance movement as “the liquor center of America”—with its thriving sales of illegal alcohol and failed enforcement efforts).

171. See, e.g., Rich Truesdell, *2001 Radar Detector Buyer’s Guide*, MOTOR TREND.COM, Oct. 21, 2002, http://www.motortrend.com/womt/112_0107_2001_radar_detectors/history.html (noting the increase in sales of radar detectors following federal implementation of fifty-five mile-per-hour speed limit on superhighways following 1973 Arab oil embargo).

172. During the 1920s, many Americans defied a constitutional ban on alcohol. See, e.g.,

Presidential election, people derive some economic value from simply exercising their “right” to buy a gun.¹⁷⁵ Recent rumors regarding the Obama Administration’s possible policy proposals for the elimination of concealed weapons, resurrection of an assault weapons ban, and limitations on the number of handguns that may be purchased per month resulted in a considerable increase in gun sales.¹⁷⁶ Obama’s stated position on gun control probably fueled part of the speculative purchase of firearms.¹⁷⁷ Whether fed by rumor, love of recreation, tie-in-derived consumer satisfaction, or the mere exercise of a right, demand for legitimate ownership of firearms exists.¹⁷⁸ Instead of focusing on the demand for guns, demand of another sort can and should be the focus of reducing gun violence: the demand for illegal drugs.

IV. IT’S HIGH TIME: FREE THE DRUGS, REDUCE GUN VIOLENCE

The idea of drug decriminalization or legalization of drugs was not unique to economists such as Milton Friedman¹⁷⁹ or political pundits such as William F.

ALLEN, *supra* note 170, at 86 (tracing Americans’ “spirit of deliberate revolt [against Prohibition] which in many communities made drinking ‘the thing to do’”). Some Americans openly defy recent smoking bans. *See e.g.*, Angie Leventis Lourgos & Jackie Bange, *Despite Smoke Ban, Defiance Smolders*, CHI. TRIB., Nov. 25, 2009, at C1 (reporting on smokers’ violation of Illinois smoking ban in Chicago bars). In some cases, Americans have defied federal rules regarding the importation of prescription drugs en masse. *See, e.g.*, Nathan Thornburgh, *Drug Costs: The Canadian Cure*, TIME, Nov. 24, 2003, at 19 (describing nearly \$640,000 in cost savings to the city of Springfield, Massachusetts over a four-month period as the city itself encouraged municipal workers to import cheaper prescription drugs from Canada).

173. Kirk Johnson, *Buying Guns, for Fear of Losing the Right to Bear Them*, N.Y. TIMES, Nov. 7, 2008, at A20.

174. *See Obama Election Prompts Surge in US Gun Sales*, GUARDIAN.CO.UK, Nov. 7, 2008, <http://www.guardian.co.uk/world/2008/nov/07/uselections2008-barackobama>.

175. *See, e.g.*, Kevin Bohn, *Gun Sales Surge After Obama’s Election*, CNN.COM, Nov. 11, 2008, <http://www.cnn.com/2008/CRIME/11/11/obama.gun.sales/>.

176. *See* Brian Todd, *NRA to Target Obama in Ad Blitz*, CNN.COM, July 1, 2008, <http://www.cnn.com/2008/POLITICS/07/01/nra.obama/index.html#cnstText>.

177. *See* Lynn Sweet, *Obama’s 2003 IVI-IPO Questionnaire May Be Getting Closer Scrutiny*, CHI. SUN-TIMES, http://blogs.suntimes.com/sweet/2007/12/sweet_column_obamas_2003_iviip.html (Dec. 11, 2007, 09:34) (reprinting questionnaire and Obama’s responses). In response to question 35 “Do you support legislation to ban the manufacture, sale and possession of a handgun?”, Obama answered,

While a complete ban on handguns is not politically practicable, I believe reasonable restrictions on the sale and possession of handguns are necessary to protect the public safety. In the Illinois Senate last year, I supported a package of bills to limit individual Illinoisans to purchasing one handgun a month; require all promoters and sellers at firearms shows to carry a state license; allow civil liability for death or injuries caused by handguns; and require FOID applicants to apply in person. I would support similar efforts at the federal level, including retaining the Brady Law.

Id.

178. *See* Bohn, *supra* note 175 (identifying an increase in firearms sales immediately following 2008 national election).

179. Milton Friedman consistently advocated for the legalization of drugs for decades. *See e.g.*, Milton Friedman, *Prohibition and Drugs*, NEWSWEEK, May 1, 1972, 104; Interview by

Buckley.¹⁸⁰ An increasing number of Americans support an end to marijuana prohibition.¹⁸¹ This Comment endorses the decriminalization of marijuana as an initial step to reduce the negative externality of some gun ownership: gun violence. Other than the illegal nature of its product in trade, the drug market is no more complex, from an economic standpoint, than the market for alcohol or cigarettes: the laws of supply and demand determine the price of narcotics and sellers must protect their stock and their access to markets.

A. The Drug Trade

The price of marijuana in the United States is artificially inflated by prohibition.¹⁸² Prohibition enforcement, through the detection and arrest of drug distribution networks and seizure of drugs, increases the street price of the good.¹⁸³ Prohibition imposes additional risks and costs on marijuana production and distribution.¹⁸⁴ Only those

Randy Paige with Milton Friedman, (1991), available at <http://www.druglibrary.org/schaffer/misc/friedm1.htm> (“The violence [of the drug trade] is due to prohibition and nothing else. How much violence is there surrounding the alcohol trade. There’s some, only because we prohibit the sale of alcohol to children, which we should do, and there’s some because we impose very high taxes on alcohol and, as a result, there’s some incentive for bootlegging. But there’s no other violence around it.”). Friedman was not alone among economists calling for legalization. In 2005, Friedman joined 500 economists in calling for legalization of marijuana. See Quentin Hardy, *Milton Friedman: Legalize It!*, FORBES.COM, June 2, 2005, http://www.forbes.com/2005/06/02/cz_qh_0602pot.html (identifying economists’ endorsement of a report detailing the costs of marijuana prohibition enforcement and the potential tax revenue from sales of the legalized drug).

180. See William F. Buckley Jr., *Free Weeds*, NAT’L REV. ONLINE, June 29, 2004, <http://www.nationalreview.com/buckley/buckley200406291207.asp> (calling for the legalization of marijuana).

181. See Lydia Saad, *U.S. Support for Legalizing Marijuana Reaches New High*, GALLUP, Oct. 19, 2009, <http://www.gallup.com/poll/123728/U.S.-Support-Legalizing-Marijuana-Reaches-New-High.aspx#> (finding 44% of Americans in favor of legalizing marijuana but 54% opposed).

182. See Mitchell S. Rosenthal, *The Logic of Legalization: A Matter of Perspective*, in SEARCHING FOR ALTERNATIVES: DRUG-CONTROL POLICY IN THE UNITED STATES 226, 227 (Melvyn B. Krauss & Edward P. Lazear eds., 1991).

183. See Timothy Lynch, *Tabula Rasa for Drug Policy*, in AFTER PROHIBITION: AN ADULT APPROACH TO DRUG PROBLEMS IN THE 21ST CENTURY 3 (Timothy Lynch ed., 2000).

184. Absent a legal market to sell their goods, dealers incur increased “prohibition costs” estimated as at least 400% higher than those costs would be if the drug were sold legally or the current prohibition laws were not enforced. Based on estimates for marijuana sales and production in California, low-quality marijuana retails on the illegal market for \$300 to \$350 per pound. Estimated costs for “backyard” production of marijuana (a non-DTO producer who did not take advantage of economies of scale or select a particularly potent strain of marijuana to command a higher selling price and increased profits) were approximately \$75 per pound. See *Legalizing Marijuana: Issues to Consider Before Reforming California State Law: Hearing Before the Public Safety Comm.*, Cal. 2009-10 Sess. 1 State Assem. (Cal. 2009) (statement of Rosalie Liccardo Pacula, Senior Economist, The RAND Corp.), available at http://www.rand.org/pubs/testimonies/2009/RAND_CT334.pdf (using data derived from black market conditions in California to supplement thesis that prohibited marijuana is “substantially more expensive to purchase” than it would be if sold legally).

dealers who evade law enforcement efforts to disrupt supplies¹⁸⁵ and bring their product to market¹⁸⁶ by selling drugs to retail (“street”) dealers or directly to consumers realize profits from the trade.¹⁸⁷ Therefore, those dealers who successfully execute sales command a premium on the sale of their product.¹⁸⁸

Prohibition of the drug itself may lead to even more violence. The amount of law enforcement resources devoted to prohibition creates greater incentives for drug suppliers to use violence for at least two reasons.¹⁸⁹ First, the black market share of the drug’s production increases as enforcement reduces legal exceptions for a drug,¹⁹⁰ including those legal uses for marijuana.¹⁹¹ Second, enforcement creates turnover

185. See OFFICE OF NAT’L DRUG CONTROL POLICY, NATIONAL DRUG CONTROL STRATEGY: 2009 ANNUAL REPORT 23–27, <http://www.whitehousedrugpolicy.gov/publications/policy/ndcs09/2009ndcs.pdf> (noting the use of aerial reconnaissance and marijuana extraction missions to combat violent incursions from Mexican DTOs on U.S. territory).

186. See generally TREVOR BENNETT & KATY HOLLOWAY, DRUG-CRIME CONNECTIONS 248–52 (2007) (detailing the structure and function of illicit drug markets at various stages from importation to retail sale).

187. In 2006, Mexican DTOs were estimated to have earned \$8.6 billion in revenue from distributing marijuana in the United States. Fainaru & Booth, *supra* note 22. As a point of comparison, combined federal and state drug control expenditures routinely total approximately \$34 billion dollars. See OFFICE OF NAT’L DRUG CONTROL POLICY, NATIONAL DRUG CONTROL STRATEGY, FY 2003 BUDGET SUMMARY 2 (2002) (calculating total federal drug budget at over \$18 billion in 2001); OFFICE OF NAT’L DRUG CONTROL POLICY, FACT SHEET: DRUG DATA SUMMARY 5 (1998) (using data from most recently available government figures in 1991 when state and local governments spent over \$15.9 billion on drug control activities); see also *Leaders: How to Stop the Drug Wars*, ECONOMIST, Mar. 7, 2009, at 15 (reinforcing estimate of \$40 billion in drug control expenditure in the United States “to eliminate the supply of drugs”).

188. Despite disruptions in profitability due to small-scale domestic production in the United States, marijuana remains a highly profitable good. Mexican cartels typically maintain vertical integration of their production from cultivating the marijuana in the field down to retailing the product in American cities. Unlike trafficking in other drugs such as cocaine (a drug grown by farmers in South America that is then purchased and retailed by “middle men” traffickers), Mexican marijuana cartels avoid higher costs associated with paying a price markup from farmers. See Fainaru & Booth, *supra* note 22. The Mexican DTOs have responded to the increase in domestic U.S. marijuana production and high consumer demand by cultivating crops on U.S. public lands, with a concentration of production in California, Oregon, and Washington. See CANNABIS ASSESSMENT 2009, *supra* note 22, at 2–3, 23–25. These DTOs have used guns to protect their crops. *Id.* at 25 (summarizing incident involving three Bureau of Land Management (BLM) biologists held at gunpoint).

189. JEFFREY A. MIRON, DRUG WAR CRIMES: THE CONSEQUENCES OF PROHIBITION 43–57 (2004) (outlining the role of drug prohibition enforcement in generating violence).

190. *Id.* at 44.

191. For example, in the United States there is some legal production of marijuana for scientific research and medical purposes. Succeeding the role of the National Institute of Mental Health in 1974 as the sole legal source for marijuana in the United States, the National Institute on Drug Abuse maintains a contaminant-free stock of marijuana of “predictable potency.” See Nat’l Inst. on Drug Abuse, Provision of Marijuana and Other Compounds For Scientific Research—Recommendations of The National Institute on Drug Abuse National Advisory Council (1998), <http://www.drugabuse.gov/about/organization/nacda/MarijuanaStatement.html>. Critics contend that the potency of the current stock is insufficient to enhance scientific progress

among suppliers: when the police arrest a drug dealer, they remove that supplier from the market; other suppliers—who use violence to enforce their claims to territory and markets—move in to fill the vacuum of business left by the arrested supplier.¹⁹² The jockeying for dominance of the market, to establish reputation, and ultimately control of some portion of the market results in still more violence.¹⁹³ Enforcement may also lead to additional violent consequences as dealers avoid legal dispute-resolution mechanisms (for issues not related to drugs) and government diverts resources away from countering other violent, non-drug-related crimes to enforce drug prohibition.¹⁹⁴

In the absence of a transparent and legal market, the drug trade thrives in a world of shadows. Without legal remedies to enforce contracts, guarantee the physical safety and quality of supplies, or uphold humane labor practices, the drug trade turns to its own methods of control and enforcement. These methods often involve the use of

and inferior to the scientific potential of marijuana available on the street. See Editorial, *Marijuana Research*, SCI. AM., Dec. 2004, at 8 (endorsing an expansion of the legal stock of marijuana to include higher potency, “medically interesting” strains for research including “the approximately 60 cannabinoids that might have medical applications”). Critics also note unintended consequences of the current system: development of a black market for research marijuana. *Id.* (describing the research marijuana trade as one in which “‘buyers’ trad[e] journal co-authorships to ‘sellers’ who already have a marijuana stockpile or license”).

192. MIRON, *supra* note 189, at 45.

193. *Id.*

194. See Lynch, *supra* note 183, at 8–9. Other costs of prohibition include time and resources lost due to incarceration as well as general disrespect and cynicism toward the law and legal system due to disproportionate sentences meted out to otherwise law-abiding citizens for marijuana possession. See, e.g., *Life in Marijuana Case*, N.Y. TIMES, Jan. 28, 1972, at 17 (reporting on life sentence given to thirty-four year old Houston, Texas man for possession of one pound of marijuana). The use or possession of weapons in drug trafficking provides for automatic sentence enhancement in federal court cases. See Eva S. Nilsen, *Indecent Standards: The Case of U.S. Versus Weldon Angelos*, 11 ROGER WILLIAMS U. L. REV. 537, 538–39 (2006) (discussing the fifty-five year sentence given to a twenty-five year-old man for selling marijuana along with money laundering and possessing firearms when drug dealing). Severe penalties combined with the behavior of the police may also explain deterioration in public respect for the law under prohibition. See ARTHUR D. HELLMAN, LAWS AGAINST MARIJUANA: THE PRICE WE PAY 28–29, 150–58 (1975) (discussing disproportionate sentences and the role of police perjury in fostering disrespect for the legal system). Some allege that the drug war has also fueled extensive police perjury and other forms of corruption. See Joseph D. McNamara, *Has the Drug War Created an Officer Liars’ Club?*, L.A. TIMES, Feb. 11, 1996, at M1 (describing pervasive police testimony in drug-possession cases that the drugs seized as evidence were in “plain view” to justify warrantless search and seizure). In July 1992, the New York City mayor commissioned former New York State Justice Milton Mollen to investigate corruption within the New York City Police Department. Two years later, the product of the commission—the Mollen Report—famously described the erosion of police values and predilection for perjured testimony, especially in cases dealing with drugs or crimes related to areas of the City with heavy drug presence. See COMMISSION TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION AND THE ANTI-CORRUPTION PROCEDURES OF THE POLICE DEPARTMENT, COMMISSION REPORT: ANATOMY OF FAILURE: A PATH FOR SUCCESS (1994). But see Myron W. Orfield, Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75 (1992) (detailing the particular effectiveness of the “exclusionary rule”—the component of the Fourth Amendment that excludes evidence seized in violation of the Amendment—on the Narcotics section of the Chicago Police Department).

violence—in particular, gun violence—to maintain “stability” and enforcement in drug markets. In the drug trade, guns are an essential tool of commerce.

At the street level, gangs and dealers fight over the control of turf to safeguard the delivery and sale of drugs. For protection and enforcement, these dealers and gangs resort to easily concealed handguns. To increase market share, competing dealers and gangs use violence (or the threat of violence) to dominate specific areas of turf or access to customers. Violence ensues. Because drugs are illegal, the supply is as abundant or as scarce as the rate of success in defying drug-prohibition enforcement. In other words, the more that police and other authorities crack down on the drug trade, the greater the value of the turf and the supply of drugs. As a general measure, a drug-prohibition approach in the United States (as opposed to a public health or medical approach as in many European countries and parts of Latin America)¹⁹⁵ increases the value of the object of the regulation—drugs and the access to buy and sell them. As a matter of broad generalization, the greater the degree of drug-prohibition enforcement, the more valuable and contested the drug trade is.¹⁹⁶ Thus, more violence ensues.

The exact amount by which the legalization of some drugs would reduce gun violence cannot be stated with certainty. The most reliable estimates come from the Bureau of Justice Statistics (BJS), which relies on self-reporting from inmates incarcerated at the time of the sample to account for the interaction of drugs and crime. These estimates underreport the overall level of crime as not every offender is caught or convicted, and some offenders will refuse to list drugs as their motivation to commit a crime for which they were tried and convicted. According to the BJS, as of 2004, roughly 17% of state prisoners and 18% of federal inmates reported committing the crimes for which they were convicted to obtain money for drugs.¹⁹⁷

Also, the Uniform Crime Reporting Program (UCR) of the Federal Bureau of Investigation (FBI) estimated that 5.3% of the approximately 15,000 homicides in 2006 occurred during a narcotics felony.¹⁹⁸ This estimate does not include data for murders committed during activities associated with, but peripheral to, the commission of narcotics felonies (e.g., armed robbery, gang/criminal retaliation or protection activities, etc.). In the case of violent crimes, this data indicates that 27.7% of prisoners reported that they were under the influence of drugs and alcohol at the time of the offense.¹⁹⁹

Obviously, at some level there is some lack of precision in determining the effect of legalization of specific drugs in reducing gun violence. However, the legalization of drugs will make some drugs available in a safer, legal context to the degree that black market demand is reduced. In turn, the decrease in demand for illegal drugs means a reduction in market size, and therefore, the use of violence to perpetuate it. *Some drug-*

195. *Leaders: How to Stop the Drug Wars*, *supra* note 187.

196. See Jeffrey A. Miron, *Violence, Guns, and Drugs: A Cross-Country Analysis*, 44 J.L. & ECON. 615, 617 (2001) (contrasting drug and gun laws and enforcement actions across developed countries).

197. CHRISTOPHER J. MUMOLA & JENNIFER C. KARBERG, U.S. DEP'T OF JUSTICE, DRUG USE AND DEPENDENCE, STATE AND FEDERAL PRISONERS, 2004, at 6 (2007).

198. Bureau of Justice Statistics, *Drug Use and Crime* (2008), <http://bjs.ojp.usdoj.gov/content/duc/duc.cfm> (providing the 5.3% estimate for “narcotics felony” defined as “drug trafficking or manufacturing”).

199. *Id.* at 5.

related violence would decrease. In proposing this recommendation, however, one must consider the perpetuation of gun violence due to noncriminal activity. This Comment does not address these activities.

As to specific drugs and policies, this recommendation offers a first step: select marijuana as the sole drug for decriminalization, at least in the short term. In the long term, other narcotics such as cocaine, ecstasy, and heroin may be considered. However, the decriminalization of marijuana would serve as the benchmark for success or failure of administering decriminalization and legalization of other narcotics. As a policy experiment, the decriminalization of marijuana will probably not lead to a complete cessation of drug-related gun violence; only a broad legalization program including such drugs as heroin, cocaine, and ecstasy will offer the possibility of achieving that objective. As a realistic political goal, however, decriminalization of marijuana would provide guidance and a gradual approach—legally, economically, and socially—to consider more comprehensive legalization efforts.²⁰⁰

As an eventual next step, this recommendation proposes that individual states legalize, cultivate, and distribute marijuana through existing outlets used to retail liquor. By offering the sale of marijuana through these outlets, the legal sales of the drug would overlap with the tax structure and regulations in place for the sale of liquor. Obviously, there would be some difficulty in reducing the demand for marijuana during hours or days when these outlets were closed. However, any person or entity that sold illegal marijuana during these “off hours” would also be forced to compete with the state supply of marijuana during liquor store operating hours. Only those individuals with premium quality illegal drugs or particularly low costs could compete against the state around the clock if the state supply is sold at a market rate.

This Comment does not argue for immediate legalization of marijuana (or any current controlled substance) based on the current social²⁰¹ and political²⁰² climate. A

200. See Jeffrey A. Miron, *Commentary: Legalize Drugs to Stop Violence*, CNN.COM, Mar. 24, 2009, <http://www.cnn.com/2009/POLITICS/03/24/miron.legalization.drugs/index.html> (adopting a more comprehensive recommendation but detailing U.S. Attorney General Holder’s announcement that the Drug Enforcement Agency will no longer raid medical marijuana distributors in California as a gradual step on the way to reconsidering drug prohibition).

201. Despite an increase in the number of Americans who support making marijuana legal, the majority of Americans do not. See Saad, *supra* note 181 (identifying 54% of Americans as opposed to marijuana legalization).

202. There is little evidence to suggest that, as *President*, Barack Obama supports legalization of marijuana. See, e.g., Sam Stein, *Obama Takes Pot Legalization Question During Townhall (VIDEO)*, HUFFINGTON POST, Mar. 26, 2009, http://www.huffingtonpost.com/2009/03/26/obama-takes-pot-legalizat_n_179563.html. However, as recently as 2004, then-Illinois State Senator Obama offered a highly critical perspective on the war on drugs and called for the decriminalization of marijuana. See Bernd Debusmann, *Obama, Drugs and Common Sense*, <http://blogs.reuters.com/great-debate/2009/12/23/obama-drugs-and-common-sense/> (Dec. 23, 2009, 07:59EST) (“The war on drugs has been an utter failure. We need to rethink and decriminalize our marijuana laws . . . We need to rethink how we’re operating in the drug war. Currently, we are not doing a good job.” (quoting Obama)). Rhetoric aside, the Obama Administration has relaxed prosecution of medical marijuana. See Associated Press, *Medical Marijuana Arrest Guidelines Eased*, CBS NEWS.COM, Oct. 19, 2009, <http://www.cbsnews.com/stories/2009/10/19/politics/main5395248.shtml>. On a personal level, Obama left no doubt as to his own experience with marijuana. See Barack Obama “*I Inhaled Frequently*” “*That Was the*

broad call for drug legalization would likely engender intense, varied opposition²⁰³ and imperil the effort to recalibrate the approach to gun violence by decriminalizing a single, widely available drug. Instead, this Comment argues that decriminalization of marijuana possession and use will free scarce state resources²⁰⁴ and set a precedent for relaxing drug prohibition in an increasingly receptive environment²⁰⁵ without incurring a counterproductive social and political backlash, particularly to the negative externalities of drug use.

B. Externalities of Drug Use

Some people like to take drugs.²⁰⁶ Drug use of any kind provides a positive externality to users by altering the user's normal consciousness.²⁰⁷ In a general sense, the user seeks a high or state of consciousness that is otherwise unavailable or not

Point," YOUTUBE, http://www.youtube.com/watch?v=cpBzQI_7ez8 (showing Obama answering questions before a live audience) ("I inhaled frequently. That was the point.").

203. See, e.g., Bernadine Healy, *Legalize Marijuana? Obama Was Right to Say No*, <http://www.usnews.com/health/blogs/heart-to-heart/2009/02/04/legalize-marijuana-obama-was-right-to-say-no> (Feb. 4, 2009) (citing the need to protect adolescent health as the "stronger imperative" to a recalibrating policy in favor of legalizing marijuana).

204. See Associated Press, *supra* note 202 (discussing shift in priorities away from prosecuting medical marijuana use). *But see* MIRON, *supra* note 189, at 78 (arguing that decriminalization of drugs is an insufficient solution to reducing violence because an illegal market—enforced by violence—still exists for drugs).

205. See Elizabeth Sprague, *Pot No Longer Focus of Anti-Drug Campaigns*, CBS NEWS.COM, July 15, 2009, <http://www.cbsnews.com/stories/2009/07/15/national/main5161388.shtml> (noting change in focus of antidrug campaigns away from marijuana and toward a message geared to combat illicit use of prescription drugs). U.S. reaction to Mexico's proposals to decriminalize drugs has become more muted with that country's actual decriminalization of certain drugs in 2009. Compare Danna Harman, *Debate Far from Over for Mexico's Drug Bill*, CHRISTIAN SCI. MONITOR, May 10, 2006, at World 4 (quoting San Diego Mayor Jerry Sanders as calling a proposed Mexican decriminalization "appallingly stupid") with Sara Miller Llana, *Mexico Quietly Decriminalizes Drug Use*, CSMMONITOR.COM, Apr. 24, 2009, <http://www.csmonitor.com/World/Global-News/2009/0824/mexico-quietly-decriminalizes-drug-use> (identifying U.S. drug czar Gil Kerlikowske's "wait and see" approach to Mexico's decriminalization of certain drugs). California has taken the lead in shifting social attitudes and legal approaches toward marijuana. See, e.g., Jessica Greene, *Assembly Plants Seed for Legal Pot in California*, NBCBAYAREA.COM, Jan. 12, 2010, <http://www.nbcbayarea.com/news/politics/Planting-the-Seed-for-Legal-Pot-81222877.html> (discussing legislation that "would allow adults over 21 to possess, smoke and grow marijuana" while netting the state a fifty dollar fee per ounce sold). Other states also allow legal use of the drug, albeit for a narrow list of uses. See, e.g., David Kocieniewski, *New Jersey Vote Backs Marijuana for Severely Ill*, N.Y. TIMES, Jan. 11, 2010, at A1 (reporting on New Jersey's recent approval of the use of marijuana for "patients diagnosed with severe illnesses" such as AIDS, Lou Gehrig's disease, muscular dystrophy, multiple sclerosis, and cancer).

206. See *U.S. Leads the World in Illegal Drug Use*, CBS NEWS.COM, July 1, 2008, <http://www.cbsnews.com/stories/2008/07/01/health/webmd/main4222322.shtml> (identifying the United States as the country with "the highest level of illegal drug use in the world").

207. See ANDREW WEIL, *CHOCOLATE TO MORPHINE: UNDERSTANDING MIND ACTIVE DRUGS* 15–16 (2004).

easily replicated in the user's everyday consciousness.²⁰⁸ To achieve the heightened state—euphoria, calm, relaxation, excitement, etc.—the user need only take a drug.²⁰⁹ Users seek a heightened state for a variety of reasons: to promote or inspire creative activity, facilitate social interaction, relieve boredom, alter a mood, explore one's self or one's thoughts, enhance physical or sexual pleasure, engage in religious observation, treat or manage disease (or a medical condition), improve social or cultural acceptance within a group, reduce or extinguish physical or psychological pain, or generally to enhance sensory experience.²¹⁰ A chronic user or drug addict may take drugs merely out of habit or an inability to escape addiction.²¹¹ Whether for recreational purposes or to further addiction, consumption of drugs provides utility to the user.²¹²

In an economic sense, the question is a cost-benefit issue as to whether the benefits of marijuana decriminalization—among which this Comment argues would be a reduction in gun violence—outweigh the costs for eliminating enforcement.²¹³ In our current system, in which marijuana is illegal, the user pays a higher price for drugs to achieve this utility than she would if the degree of enforcement were significantly relaxed or if the drug itself were legal: the illegal nature of the drug restricts supplies and drives up prices.²¹⁴ When users²¹⁵ are willing to pay a higher price for a particular

208. *Id.*

209. *Id.* at 15.

210. *See id.* at 15–23.

211. *Id.* at 23. Some users may develop a tolerance for drugs (at least at certain dosages). However, the transition from recreational use to addiction (a condition where the drug user can no longer control use of the drug) may take a variety of forms and does not occur in all users. *See* DAVID MOORE & JAMES JEFFERSON, HANDBOOK OF MEDICAL PSYCHIATRY 61–63 (2004). Drug abuse and drug dependence are clinically distinct. *See* Jeffrey H. Samet, *Drug Abuse and Dependence*, in CECIL MEDICINE 174–75 (Lee Goldman & Dennis Ausiello eds., 2008). Drug abuse may involve taking too much of a drug or mixing the drug with other chemicals or alcohol. Drug dependence is “the more severe disorder and frequently is associated with physiologic [e.g., tolerance and withdrawal] and psychological manifestations.” *Id.* (defining tolerance as “either a need for increased amounts of the substance to achieve the desired effect or a diminished effect with continued use of the same amount of the substance” and withdrawal as “a characteristic syndrome with sudden abstinence” that “may be relieved or avoided if the same or a closely related substance is taken”).

212. *See, e.g.*, Bethany White, Louisa Degenhardt, Courtney Breen, Raimondo Bruno, Jaclyn Newman & Phoebe Proudfoot, *Risk and Benefit Perceptions of Party Drug Use*, 31 ADDICTIVE BEHAVIORS 137, 137–42 (2006) (arguing that harm reduction or antidrug campaigns may need to acknowledge benefits of drug use for drug users to find harm reduction messages credible). *But see, e.g.*, Dr. P. Body's Learning/Fun Center, Doctor P. Body Explains What You Should Know about Drugs & Alcohol (2007), <http://www.drpbody.com/drugs.html> (arguing that the positive feeling derived from drug use is fleeting and actually causes harm [disutility] to the user).

213. *See* Melvyn B. Krauss & Edward P. Lazear, *Introduction in SEARCHING FOR ALTERNATIVES: DRUG-CONTROL POLICY IN THE UNITED STATES*, *supra* note 182, at xxiv.

214. *See* Lynch, *supra* note 183, at 6; *see also* MIRON, *supra* note 189, at 7 (stating that drug prohibition increases some productions costs of supplying drugs by increasing risk factors for sellers and incentivizing corruption among law enforcement and elected officials). Under prohibition, the premium paid for illegal drugs results in the transfer of wealth to criminals. *See* WILLIAM RHODES, STACIA LANGENBAHN, RYAN KLING & PAUL SCHEIMAN, WHAT AMERICA'S DRUG USERS SPEND ON DRUGS, 1988–1995, at 4, (2007), *available at* <http://www.ncjrs.gov/>

good—in this case, currently illegal drugs—then prohibition of the good through legal penalties on production and consumption is economically inefficient.²¹⁶ Despite this economic inefficiency, supporters of prohibition argue that there are distinctions between legal goods and the dangers inherent to drugs.²¹⁷

According to prohibition supporters, drugs cause addiction and a slew of negative externalities.²¹⁸ Broadly defined, addiction to a particular good occurs if a user consumes a good and experiences an increase in desire to consume that good.²¹⁹ From an economic standpoint, however, addiction itself does not provide a complete or consistent rationale for maintaining the prohibition of drugs.²²⁰ On the basis of prohibiting addictive goods, then, the government would have to outlaw all manner of currently legal and likely addictive goods—such as coffee,²²¹ social networking,²²² video games,²²³ television,²²⁴ travel,²²⁵ alcohol,²²⁶ tobacco,²²⁷ etc.—to align the current

ondcppubs/publications/pdf/retail.pdf (calculating dollar expenditures by Americans for illegal drugs at \$57 billion in 1995 of which marijuana comprised \$7 billion in expenditures during this period).

215. According to the 2008 National Survey on Drug Use and Health, in 2008, approximately 20 million Americans (or approximately 8% of the population aged twelve years and older) were “current illicit drug users” based on their use of illegal drugs within the month prior to the survey. OFFICE OF APPLIED STUDIES, U.S. DEP’T OF HEALTH & HUMAN SERVS., 2008 NATIONAL SURVEY ON DRUG USE AND HEALTH 15 (2008) [hereinafter 2008 NATIONAL SURVEY ON DRUG USE]. Marijuana remains the most commonly used illicit drug. According to the 2008 National Survey on Drug Use and Health, the rate of marijuana use remained roughly unchanged from 2007. In 2008, approximately 15 million Americans (6.1% of the population aged twelve years and older) used marijuana whereas approximately 5.8 % of the population aged twelve years and older used the drug in 2007. *See id.* at 1, 16.

216. *See* Jeffrey A. Miron, *Drug Legalization and the Consumption of Drugs: An Economist’s Perspective*, in SEARCHING FOR ALTERNATIVES: DRUG-CONTROL POLICY IN THE UNITED STATES, *supra* note 182, at 69.

217. *See id.* at 69–70. Prohibitionists also support current laws against drugs for moral reasons. These critics support prohibition because drugs are “bad.” *See* WILLIAM J. BENNETT, JOHN J. DILULIO & JOHN P. WALTERS, BODY COUNT 140–41 (1996).

218. Miron, *supra* note 216, at 69–70.

219. *Id.* at 69.

220. *Id.* at 70.

221. *See* Angela Stewart, *Scientists Find Coffee Really Is Addictive*, SEATTLE TIMES, Oct. 3, 2004, at A2 (summarizing research on effects of caffeine abstinence and the conclusion that even a single cup of coffee can cause addiction in users).

222. *Social Networking: An Internet Addiction?*, CBS NEWS.COM, June 24, 2008, <http://www.cbsnews.com/stories/2008/06/24/earlyshow/main4205009.shtml> (noting the immense popularity of social networking websites such as MySpace and Facebook).

223. *See* David Becker, *When Games Stop Being Fun*, CNET NEWS, Apr. 12, 2002, <http://news.cnet.com/2100-1040-881673.html> (analyzing the nature of video game addiction and its effects).

224. *See* James Hibberd’s *The Live Feed*, <http://www.thrfeed.com/2009/07/poll-24-lost.html> (July 21, 2009, 15:24) (listing the all-time most addictive television shows).

225. *See* Posting of Daniel Hamermesh to *Freakonomics: The Hidden Side of Everything*, <http://freakonomics.blogs.nytimes.com/2008/12/22/travel-addicts/> (Dec. 22, 2008, 10:54 EST) (discussing a couple’s personal addiction to travel).

226. *See* Robert M. Morse & Daniel K. Flavin, *The Definition of Alcoholism*, 268 J. AM. MED. ASS’N. 1012 (1992). In their article, Morse and Flavin set forth a revised definition of

prohibition against drugs with the rationale that the law should simply ban addictive goods.²²⁸ If a person has a complete understanding of the effects of consuming a particular good, her individual choice to consume that good does not justify prohibition.²²⁹

If the economic rationale for banning drugs does not justify prohibition, then advocates against drug prohibition must answer criticisms that drugs create negative externalities.²³⁰ Drugs do cause a host of negative externalities for consumers as well as society as a whole; under the current regime of prohibition, the total cost for drugs involve costs beyond just the purchase price paid by the drug user.²³¹ These costs include property stolen (or damaged) as well as governmental and private expenditures on health, legal, and incarceration expenses.²³² Additional externalities may include direct physiological and psychological effects on the user and other people.²³³ Were the federal government to decriminalize drugs—in this case, marijuana—the price of drugs would likely decline.²³⁴ Since most drugs have been illegal prior to the government's collection of economic and health data, however, there is a lack of evidence to support a comprehensive analysis of postprohibition externalities.²³⁵

In the case of marijuana, there is evidence to support a brief discussion of possible externalities that may result from decriminalizing that particular drug. Due to the decrease in price, there is a possibility that marijuana use will increase.²³⁶ How much

alcoholism:

[A] primary, chronic disease with genetic, psychosocial, and environmental factors influencing its development and manifestations. The disease is often progressive and fatal. It is characterized by impaired control over drinking, preoccupation with the drug alcohol, use of alcohol despite adverse consequences, and distortions in thinking most notably denial. Each of these symptoms may be continuous or periodic.

Id. at 1012; *see also* Daniel E. Falk, Hsia-ye Yi & Susanne Hiller-Sturmhöfel, *An Epidemiologic Analysis of Co-Occurring Alcohol and Tobacco Use and Disorders: Findings from the National Epidemiologic Survey on Alcohol and Related Conditions*, 29 ALCOHOL RES. & HEALTH 162, 162 (2006), available at <http://pubs.niaaa.nih.gov/publications/arh293/162-171.pdf> (outlining co-occurring alcohol and tobacco addiction).

227. Am. Heart Ass'n, *Nicotine Addiction* (2010), <http://www.americanheart.org/presenter.jhtml?identifier=4753> (analyzing the nature of nicotine addiction and its effects).

228. *See* Miron, *supra* note 216, at 69–70.

229. *Id.* at 70.

230. *Id.*

231. *See* Paul Taubman, *Externalities and Decriminalization of Drugs*, in *SEARCHING FOR ALTERNATIVES: DRUG-CONTROL POLICY IN THE UNITED STATES*, *supra* note 182, at 92–93.

232. *Id.* at 93.

233. *See id.* at 97–105 (offering, for example, possible externalities to the health of fetuses, infants, and children as well as spouses).

234. *See id.* at 106.

235. *See* Miron, *supra* note 216, at 73.

236. *See* Taubman, *supra* note 231, at 106. *But see* Edwin Meese III, *Drugs, Change, and Realism*, in *SEARCHING FOR ALTERNATIVES: DRUG-CONTROL POLICY IN THE UNITED STATES*, *supra* note 182, at 288 (arguing that a reduction in price for available and legal drugs would “most certainly lead to an increased demand”). At best, estimates are mixed as to whether and by how much marijuana use would increase with decriminalization and lower prices. *See* JEFFREY A. MIRON, *THE EFFECT OF MARIJUANA DECRIMINALIZATION ON THE BUDGETS OF MASSACHUSETTS GOVERNMENTS, WITH A DISCUSSION OF DECRIMINALIZATION’S EFFECT ON MARIJUANA USE AN*

marijuana use would increase due to cheaper prices is not known.²³⁷ The notion that marijuana use will dramatically increase assumes a latent demand for the drug that would be unleashed as soon as enforcement abated.²³⁸ The evidence is unclear whether the price effects of cheaper, decriminalized marijuana, rather than a change in consumer preferences due to the government's decriminalization decision itself (assuming that at least some people who presently decline to consume marijuana out of "respect for the law" or on the basis of drugs as being "bad"), would increase consumption.²³⁹

Furthermore, since some individuals presently buy illegal marijuana, there is little reason to assume these individuals will do otherwise should marijuana become available at cheaper prices.²⁴⁰ In other words, it is likely that some people who presently use marijuana would also choose to continue to use the drug under a decriminalization plan.²⁴¹ The prevalence of those adults who have used illegal marijuana at least once in their lifetime²⁴² also suggests that many of those who have had or continue to have an interest in using the drug²⁴³ may not necessarily be compelled to alter their individual consumption patterns (and thus substantially increase overall consumption trends) *solely* because the drug has been decriminalized.²⁴⁴

In addition to consumption pattern externalities, a variety of negative consequences are attributed to marijuana use.²⁴⁵ Among these, there is some data indicating that pregnant mothers who smoke marijuana deliver lower-birth-weight babies.²⁴⁶ Also, other negative externalities of marijuana such as "gateway usage" to harder drugs, loss of worker productivity, spousal and parental abuse,²⁴⁷ impairment of motor skills

UPDATE OF MIRON (2002A), at 6–7 (2008), *available at* http://www.economics.harvard.edu/faculty/miron/files/decrim_update_2007.pdf (summarizing results of literature review of studies that find evidence of increased marijuana consumption as a result of decriminalization of the drug in various states).

237. See Miron, *supra* note 216, at 75 (suggesting that estimates of increased consumer demand for cheaper drugs may be overstated if those estimates are based on extrapolations from elasticities of current consumers of illegal drugs).

238. See *id.* at 72.

239. *Id.* at 75.

240. See *id.* at 73.

241. *Id.*

242. As of 2008, an estimated 102 million Americans (aged twelve and older) had tried marijuana. 2008 NATIONAL SURVEY ON DRUG USE, *supra* note 213, at 242 tbl.G.1. This number accounts for approximately 41% of Americans in this age group. *Id.* at 243 tbl.G.3.

243. An estimated 3.9 million Americans (or approximately 15% of past-year marijuana users (aged twelve years and older) use marijuana 300 or more days per year. *Id.* at 29. Presumably, these individuals currently use marijuana almost daily. Therefore, an increase in consumption in these users would not dramatically increase aggregate consumption.

244. See Miron, *supra* note 214, at 73.

245. The negative attributions ascribed to marijuana consumption have been many. However, studies incorporating data used to substantiate claims have been subject to various methodological issues and often draw from extreme cases, such as those admitted to drug treatment programs. See MIRON, *supra* note 189, at 63, 69.

246. See Taubman, *supra* note 231, at 98–99 (citing one study in which approximately 30% of the women who used marijuana while pregnant delivered babies with a seventy-nine-gram decrease in weight and a nearly 10% decrease in length).

247. This negative externality is often assigned to drug use in general. A few studies have

resulting in dangerous driving,²⁴⁸ and health effects such as bronchitis, emphysema, and bronchial asthma.²⁴⁹ Behavior associated with the impairment itself (i.e., a marijuana user's condition of being "stoned") may also be a negative consequence in cases of custodial neglect or violent behavior. However, as with any negative externality associated with marijuana use, presumption of a substantial increase in the incidence of those negative externalities requires evidence that decriminalization will result in a substantial increase in consumption.²⁵⁰ To date, critics have introduced scant evidence to show that decriminalization of marijuana will result in substantial increases in the aggregate levels of various externalities.²⁵¹

Perhaps more certain are the positive externalities—reductions in or elimination of various external costs associated with prohibition enforcement—that would follow decriminalization. The logic is simple: if the law decriminalizes marijuana consumption, the costs of law enforcement, incarceration, and criminal procurement activity would disappear or decline dramatically.²⁵² In other words, reduction in enforcement of prohibition will result in the reduction of the costs associated with prohibition.²⁵³

Not all externalities from decriminalizing marijuana will be negative. By not prosecuting marijuana consumption, scarce government resources would be made available to prosecute violent crimes such as robbery, arson, rape, and murder.²⁵⁴ In addition, limited jail and prison space would be made available in proportion to the number of offenders no longer prosecuted and incarcerated under prohibition.²⁵⁵ Also, there would be a reduction in police practices that some find distasteful, such as wiretapping, property seizure, and paramilitary activities.²⁵⁶ And, absent the devotion of police and elected officials to prohibition, decriminalization would reduce incentives for corruption.²⁵⁷

The ultimate question is whether society is willing to tolerate any increase in negative externalities associated with decriminalization or whether this country prefers

focused on the relationship between drug use and spousal or parental welfare. However, the studies did not employ randomized assignment of subjects to control groups. *See id.* at 100. This author could not locate any reliable studies that suggest marijuana directly causes abuse.

248. In comparison to the impairment caused by legally available alcohol, marijuana may cause equivalent or less impairment in motor skills required for driving performance. *See, e.g.,* Alfred Crancer, Jr., James M. Dille, Jack C. Delay, Jean E. Wallace & Martin D. Haykin, *Comparison of the Effects of Marihuana and Alcohol on Simulated Driving Performance*, 164 SCIENCE 851, 851 (1969).

249. JustThinkTwice.com, <http://www.justthinktwice.com/drugfacts/marijuana.cfm>.

250. *See* James Ostrowski, *Answering the Critics of Drug Legalization*, in SEARCHING FOR ALTERNATIVES: DRUG-CONTROL POLICY IN THE UNITED STATES, *supra* note 182, at 300.

251. *See id.* at 300–01.

252. *See* Joel W. Hay, *The Harm They Do To Others: A Primer on the External Costs of Drug Abuse*, in SEARCHING FOR ALTERNATIVES: DRUG-CONTROL POLICY IN THE UNITED STATES, *supra* note 182, at 203. Procurement may include robbery and theft of property for cash to secure drugs or crime associated with the drugs themselves.

253. *Id.*

254. *See* Lynch, *supra* note 183, at 9.

255. *See id.*

256. *Id.* at 8.

257. *Id.* at 8–9.

the current aggregate levels of negative externalities—including the gun violence that accompanies the drug trade²⁵⁸—in favor of continued prohibition.²⁵⁹

C. A Sample Legalization Plan

Although this Comment offers decriminalization of marijuana as a crucial first step toward reducing gun violence, this Comment also briefly considers legalization of various drugs and the state's rule in guiding the drug market. To account for these negative externalities, the state should vary the level of taxation on the legalized drug. Absent reliable data to suggest a particular level of tax, each state could impose a tax on legal marijuana equal to that imposed on liquor. Individual states may have to vary the amount of this tax up or down depending on the level of use and the respective increase or decrease in negative externalities associated with legal (i.e., price rationed) use of marijuana. Legislators and those with a vested interest in imposing taxation to capture revenues from demand should impose minimal increases in taxation in order to prevent the emergence of a shadow market that offers the drug at a cheaper price (without the tax).

Again, the “minimum” level of this taxation will have to be determined by market demand. As contrasted with an estimated \$44 billion dollars in annual enforcement costs to maintain prohibition of narcotics, federal, state, and local governments stand to earn roughly \$33 billion in revenue from the legalization of some drugs.²⁶⁰ The funds from the tax could be funneled directly to drug treatment programs, research to diminish the detrimental health effects of smoking marijuana, and drug education programs for users. A state supply of drugs would also provide the opportunity for standardization of the product, which would reduce the presence of health-impairing contaminants.²⁶¹

D. Not Just the United States

A cross-country comparison also has direct relevance for any domestic decision to legalize drugs. Aggregating the costs and benefits of legalizing drugs at only the country level (i.e. accounting for the effects of the drug trade in the United States alone) fails to provide an accurate portrait of the issue. Recently, a commission led by the former heads of state of three Latin American nations (specifically, Brazil, Mexico, and Columbia, which are nations that serve as key growers and suppliers of illegal drugs imported into the United States) called the drug war “a failure” for its inability to lower the demand for drugs.²⁶² In a follow-up editorial to the *Wall Street Journal*,

258. See Ira Glasser, *Drug Prohibition: An Engine for Crime*, in SEARCHING FOR ALTERNATIVES: DRUG-CONTROL POLICY IN THE UNITED STATES, *supra* note 182, at 271.

259. See Milton Friedman, *The War We Are Losing*, in SEARCHING FOR ALTERNATIVES: DRUG-CONTROL POLICY IN THE UNITED STATES, *supra* note 182, at 66–67.

260. See Miron, *supra* note 196.

261. See John P. Morgan, *Prohibition Is Perverse Policy: What Was True in 1933 Is True Now*, in SEARCHING FOR ALTERNATIVES: DRUG-CONTROL POLICY IN THE UNITED STATES, *supra* note 182, at 408.

262. Jose de Cordoba, *Latin American Panel Calls U.S. Drug War a Failure*, WALL ST. J., Feb. 12, 2009, at A9.

former Presidents Cardoso, Zedillo, and Gaviria publicly challenged the U.S. policy of “eradication, interdiction and criminalization of [drug] consumption.”²⁶³ The three leaders cited the weapons trade across the U.S.-Mexico border and intracountry violence as direct byproducts of the drug prohibition approach.²⁶⁴ In their recommendations, the leaders proposed “the possibility of decriminalizing the possession of cannabis for personal use” in all nations afflicted by the current trade.²⁶⁵

CONCLUSION

A successful reduction of gun ownership’s negative externalities will not be met by the binary approach of whether to increase or decrease gun regulation. Resolution of some of these negative externalities requires a reconsideration of the gun violence issue itself. To solve the affliction of gun violence, public policy must reduce the demand for weapons. Dithering over the imposition or removal of government restrictions on gun ownership will have a drastic effect: the continuation of a bloody status quo. Tailoring public policy to reduce the deadly alloy of the drugs-and-guns demand by decriminalizing lucrative illicit drugs will improve public safety almost immediately. Of course, such a policy will not solve all crime: criminals will still steal, assault, rape, and kill. Criminals, however, will no longer have the proceeds from the sales of at least one highly lucrative drug to pick up the tab.

263. Fernando Henrique Cardoso, César Gaviria & Ernesto Zedillo, Op-Ed., *The War on Drugs Is a Failure*, WALL ST. J., Feb. 23, 2009, at A15.

264. *Id.*; see also Miron, *supra*, note 196 (outlining general drug-related violence in Mexico as a result of U.S. prohibition of drugs).

265. Cardoso et al., *supra* note 263, at A15. The legalization message endorsed by these leaders has not just been rhetorical. In August 2009, Mexico decriminalized small-scale possession of marijuana, cocaine, LSD, and heroin. Llana, *supra* note 205 (identifying relatively scant reaction in the United States to Mexico’s decriminalization of certain drugs).

