

# **Suing Gun Manufacturers: Hazardous to Our Health**

by

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## Executive Summary

The mayors of Chicago and New Orleans have filed lawsuits on behalf of their cities against the gun industry, and two similar lawsuits filed on behalf of private citizens are already moving through the courts, with a mixed verdict rendered in one of the private suits. The Chicago suit and the private suits contend that (1) guns are a public nuisance and (2) gun manufacturers knowingly flood cities with more guns than they could expect to sell to law-abiding citizens, thus aiding criminals to obtain firearms. [The New Orleans lawsuit takes a different tack, alleging that without safety devices which would prevent unauthorized users from firing them, guns violate Louisiana's product liability laws.] The mayors argue that the firearms industry should reimburse their cities for the public health and safety costs associated with treating and preventing firearms injuries.

Gun industry critics and organizations working for stricter gun control laws have compared the suits against the gun industry to those against the tobacco industry. But unlike tobacco, guns produce tangible social benefits. More crimes are prevented by guns in the hands of law-abiding citizens every year than are committed with guns. The savings to cities from these defensive gun uses and the general savings to society from gun ownership dwarf the cost to municipalities of gun violence.

Although fewer than half a million violent crimes reported to the police in 1996 involved firearms, more than 15 studies have shown that citizens use guns in self-defense between 764,000 and 3.6 million times annually — often merely showing the weapon. Criminologist Gary Kleck's estimate of about 2.5 million defensive gun uses annually is perhaps the most reasonable.

- About 3,000 criminals are lawfully killed each year by armed civilians — about three times the number killed by police.
- Another 9,000 to 17,000 criminals are wounded by civilians each year.

Research supports the view that the best defense against violence is an armed response. For example:

- Women faced with assault are 2.5 times less likely to suffer serious injury if they respond with a firearm than if they defend themselves with less effective weapons or offer no resistance.

- According to the Department of Justice, only one-fifth of the victims who defended themselves with firearms suffered injury, compared to almost half of those who defended themselves with weapons other than firearms or who had no weapon.

Not only do guns protect potential victims of crime, they also save society money.

- Even using the statistics most favorable to proponents of lawsuits against the gun industry, the benefits to society of defensive gun use are greater than the costs of firearm crimes by at least \$90.7 million and perhaps as much as \$3.5 billion per year.
- Using more reasonable estimates, the benefits of defensive gun use exceed the costs of firearm crimes by as much as \$38.9 billion — an amount equal to about \$400 per year for every household in America.

There is evidence that one reason the overall rate of serious crime in the U.S. is at a 20-year low is that since 1987, 22 states have made it easier for private citizens to get what are called concealed carry permits. A recent study by University of Chicago economist John Lott found that:

- Concealed carry laws reduce murder by 8.5 percent, rape by 5 percent and severe assault by 7 percent.
- Had liberalized concealed carry laws prevailed throughout the country in any given year, there would have been 1,600 fewer murders, 4,200 fewer rapes and 60,000 fewer severe assaults.

The lawsuits against gun manufacturers are not just bad public policy, they are also dubious as matters of law. The courts have recognized that firearms are no different from many other potentially dangerous products and have consistently held that legislatures should decide whether guns should be legal and widely available. The suits also seek to reverse the well-established tort law principle that manufacturers are not responsible for the criminal misuse of their products.

To derail these lawsuits, Congress could revive legislation — successfully opposed by trial lawyers and antigun groups in 1998 — that seeks to reduce the number of frivolous product liability lawsuits reaching the courts and to punish litigants who file such suits.

Another option would be for the public to file countersuits against their officials on the grounds of public safety. Though unlikely to be successful, such lawsuits would serve notice that the public opposes attempts at restricting access to guns that would place law-abiding citizens at risk but do nothing to deter criminals or reduce crime.

## Introduction<sup>1</sup>

In early 1998, Philadelphia Mayor Edward Rendell proposed that local officials sue gun manufacturers to recover costs related to firearms violence in their cities.<sup>2</sup> Although Rendell later put his plans for a lawsuit on hold, Mayor Marc Morial of New Orleans and Mayor Richard Daley of Chicago have filed suits.<sup>3</sup> Other cities have since filed and still more seem likely to.<sup>4</sup> In addition, two similar lawsuits have been filed on behalf of private citizens. In one case, which resulted in a mixed verdict [discussed in Appendix II], attorney Elisa Barnes sued gun manufacturers on behalf of six families who had lost loved ones to criminal gun use and one man injured by gunfire.<sup>5</sup> And on June 9, 1998, the MacArthur Justice Center at the University of Chicago Law School filed suit on behalf of three Chicago families, each of which had lost young family members in gang-related shootings.<sup>6</sup> The second suit is now moving through the courts.

The Chicago suit and the two private suits contend that (1) guns are a public nuisance and (2) gun manufacturers knowingly flood cities with more guns than they expect to sell to law-abiding citizens, thus aiding and abetting criminals in obtaining firearms. [The New Orleans lawsuit, which takes a different tack, is examined in Appendix I.] The mayors argue that the firearms industry should reimburse their cities for the public health and safety costs associated with treating and preventing firearms injuries. The two private suits seek compensation from the firearms industry for the plaintiffs' suffering plus punitive damages to discourage the industry from allowing its guns to end up on the black market.

The demand that the gun industry pay the costs associated with gun violence parallels the demands in suits brought against the tobacco industry. However, there is convincing evidence that the benefits to society from the use of guns in self-defense and crime prevention outweigh the costs.

The lawsuits discussed in this study all seek redress from the firearms industry for the cost of criminal violence to the plaintiffs (i.e., in the private suit the plaintiffs are individuals who have suffered from criminal gun violence and in the cities' suits the plaintiffs are seeking recompense for the medical and policing costs related to criminal gun use). There are costs associated with gun use other than those related to criminal activities, however. For instance, in 1995 1,225 people died as a result of fatal firearm accidents.<sup>7</sup> In addition, approximately 30,000 people commit suicide in the U.S. each year and guns are used in approximately half of these deaths.<sup>8</sup> On the benefit side, more than 20 million Americans participate in various shooting sports each year, accounting for more than \$30 billion in economic activity.<sup>9</sup> A full accounting of the relative costs and benefits of firearms to society would include all of these factors as well as others. However, since the lawsuits at issue limit their claims for redress to the costs associated with

*“Suits against the gun industry contend (1) guns are a public nuisance and (2) manufacturers flood cities with guns.”*

instances of criminal gun misuse, this study limits its inquiry to the costs associated with criminal gun violence and the benefits associated with firearms used in defense against criminal activities.<sup>10</sup>

After outlining the cases brought against the firearms industry, this study analyzes how guns prevent crime and compares the societal costs and benefits. It also examines the unintended ill effects on law and public safety of the restrictions on the firearms industry sought by the plaintiffs.

## Suing Gun Makers

When Mayor Rendell was considering whether Philadelphia should sue gun makers, the Bureau of Alcohol, Tobacco and Firearms (BATF) collected information and shared it with Pennsylvania's state police in an unprecedented fashion.<sup>11</sup> The data showed that of the 38,000 handguns legally purchased in Philadelphia in 1996, 17 percent, or approximately 6,460, were sold to just over 700 individuals — each of whom bought more than five handguns that year.<sup>12</sup> David Kairys, a lawyer originally consulted by the mayor, concluded that either many of these purchasers were buying guns on behalf of criminals or unlicensed black-market gun dealers were reselling legitimately purchased handguns to ineligible persons.<sup>13</sup>

**The Chicago Lawsuit.** Both overall serious crime and murder rates have dropped in Illinois in general and Chicago in particular, but not as fast or as far as in the nation as a whole. While the national murder rate declined 9 percent in 1997, Chicago saw less than a 4 percent decline.<sup>14</sup> The Illinois murder rate has fallen only 19 percent since 1993, compared to 30 percent nationally.<sup>15</sup> Nearly 500 people die in Chicago each year from gunshot wounds.

Chicago has some of the strictest gun laws in the country. Handgun sales and the private ownership of any handgun not registered before March 30, 1982, are illegal. However, handgun sales are still legal in the suburbs and, according to the lawsuit, suburban sales are the source of Chicago's problems.

Chicago sued gun manufacturers and others on November 12, 1998, for \$433 million the city claims it spent in the previous five years on police, emergency medical care and other costs associated with gun violence. The lawsuit, building on the work that David Kairys did for Philadelphia, alleges that the gun industry oversupplies suburban gun shops, knowing the guns will be sold unlawfully to Chicago residents. This oversupply of guns is a public nuisance analogous to noxious factory emissions, the lawsuit alleges. It also claims that manufacturers advertise gun characteristics that appeal to gang members and other criminals. Among these characteristics are concealability, affordability, fingerprint resistance and the capacity to fire highly destructive ammunition.<sup>16</sup>

*“Chicago claims it spent \$433 million in the previous five years on police, emergency medical care and other costs associated with gun violence.”*

In addition to gun manufacturers and wholesalers, the suit names 12 licensed gun dealers as codefendants. These dealers had sold guns to undercover Chicago police who, the city claims, made clear to the sellers that the guns were being purchased for criminal purposes, by one person on behalf of another or for resale to criminals.

**The Hamilton Suit.** The lead plaintiff in *Hamilton v. Accu-Tek*, the lawsuit filed by tort attorney Elisa Barnes, was Freddie Hamilton, a New York mother who lost her teenage son, Nunzi Ray, to a bullet intended for another teenager.<sup>17</sup> The accused shooter in the Nunzi Ray killing was acquitted in a criminal trial.

Ms. Barnes claimed gun manufacturers distribute a dangerous product in a negligent manner in that they do not track firearms from production to final destination in criminal hands. Various gun control advocacy groups (e.g., the Center to Prevent Handgun Violence and Handgun Control Inc.) declined to join with Ms. Barnes in the suit because, in contrast to traditional negligence cases, she was not going after a particular gun, traced from a particular crime back to a specific manufacturer.<sup>18</sup> She responded that this had been tried and had failed in previous negligence cases against gun makers.

A more important reason why Ms. Barnes did not sue just the gun manufacturers is that the police identified the gun involved in only one of her plaintiffs' cases. None of the manufacturers Ms. Barnes sued had guns tied to these cases. Indeed, Ms. Barnes could not even show whether the guns used against her clients' loved ones were bought from gunrunners by criminals or bought over the counter by lawful gun buyers, then stolen by criminals. Ms. Barnes relied on three critical factors to make her case: a sympathetic judge, testimony from a gun company insider and data on gun sales.

She successfully fought to have the case assigned to semiretired judge Jack Weinstein because he is widely known for his pro-plaintiff solutions to mass injury lawsuits and his penchant for judicial lawmaking. In fact, he presided over an earlier birth defects suit Ms. Barnes brought against manufacturers of the antimiscarriage drug DES. In that case, Judge Weinstein pioneered the theory that in rare circumstances, when consumers were unable to identify the particular makers of a product which had caused harm, manufacturers' liability could be based on their market share.

Her faith in Judge Weinstein's willingness to make new law was vindicated early. In a preliminary ruling, Judge Weinstein declared, "[There may] come a point that the market is so flooded with handguns sold without adequate concern over the channels of distribution and possession that they become a generic hazard to the community as a whole because of the high probability that these weapons will fall into the hands of criminals and minors."<sup>19</sup> Judge Weinstein also allowed Ms. Barnes to expand her plaintiff group to 11 from two.

*"A previous suit pioneered the theory that manufacturers' liability could be based on market share."*

## The Structure of the Firearms Industry

Unlike many other industries, the automotive industry for example, the firearms industry is not vertically integrated — manufacturers do not sell firearms directly to the public and they do not own retail franchises or finance retail purchases. Accordingly, it would be difficult for manufacturers to track gun movements from the factory to their final legal delivery point.

The firearms industry has four commercial components: manufacturers, importers, wholesalers or distributors and retailers. There are more than 75 major domestic firearms manufacturers — those producing more than 500 guns per year — in the United States. There are also hundreds of foreign gun makers, many of whose wares are imported to the U.S. There are several relatively large importers of firearms and some U.S. gun manufacturers act as importers for foreign gun product lines. There are more than 70 full-line distributors (i.e., companies that sell handguns, long guns, ammunition and shooting sport-related merchandise) in the U.S., as well as other wholesalers that distribute only a single product line or specialty items. Finally, although the number of licensed gun retailers has fallen from 270,000 in 1994, the current number of 105,000 is still considerable. Except for certain importers, there is no exclusive sales arrangement between particular retailers, wholesalers and manufacturers. In other words, guns manufactured by one company might be sold to any of more than 70 large distributors, then resold to any of the 105,000 dealers. No manufacturer has any reason for knowing where an individual gun or allotment of guns shipped to a distributor is eventually sold through a retailer.

Retailers, distributors and importers must all be licensed to operate in the U.S. by the Bureau of Alcohol, Tobacco and Firearms (BATF). Before the BATF issues a dealer's license it subjects the applicant to a rigorous background check and fingerprinting, collects a fee and imposes other criteria. The BATF also has strict guidelines for firearms operators concerning the sale and storage of firearms and the paperwork or documentation required. Finally, the agency polices both the public and firearms licensees by (1) tracing the chain of sales from the factory to the wholesaler to the initial retail sale of particular firearms at the request of law enforcement authorities, (2) carrying out on-site inspections of firearms licensees and (3) conducting undercover investigations to curb black market sales.

In the *Hamilton* case, Joseph Vince, a former BATF agent, testified that firearms dealers worked closely with the BATF to fight illegal gun trafficking. He testified, "If [the dealers] see something that is suspicious, they will contact their local BATF office and report that information." He said such cooperation was common and that the dealers are the BATF's "eyes and ears."

The former head of New York's joint city and federal task force on guns and crime testified in *Hamilton* that gun manufacturers and dealers cannot reasonably be expected to combat illegal gun trafficking since such work is dangerous, should be conducted only by authorized law enforcement personnel and might interfere with undercover law enforcement efforts.

Sources: Jack Adkins, American Shooting Sports Council; and Joseph P. Fried, "Expert Witness in Gun Lawsuit Offering Testimony That Helps Both Sides," *New York Times*, January 19, 1999.

Ms. Barnes hoped that testimony from Robert Hass, a former senior vice president for marketing at Smith & Wesson Corp., would prove that the industry knows many of its guns end up in the hands of criminals via black market sales from federally licensed but largely unsupervised firearms dealers. Hass and the BATF both acknowledge that manufacturers do cooperate with the BATF when responding to a request to trace a specific gun. However, Hass claims that the industry, using internal records, could do more to track suspiciously high-volume gun sales to specific retailers — especially when evidence emerges that guns sold by a particular retailer are regularly linked to violent crime. When this occurs, Hass claims, the companies could halt sales to the suspicious dealers. [See the sidebar: The Structure of the Firearms Industry.]

*“The plaintiffs funded a study that found a pattern of gun smuggling from states with lax gun purchase laws to states with relatively strict laws.”*

Third, Ms. Barnes hired corporate consultants National Economic Research Associates (NERA) to search government statistics and reports on guns for evidence of trends. NERA found a pattern of gun smuggling from states like Florida with relatively lax laws to states like New York with relatively strict laws concerning gun purchases. In addition, NERA concluded that more handguns were sold in less restrictive states than could be expected given the levels of legitimate gun ownership, supporting Ms. Barnes’ claim that gun makers knowingly oversupply gun markets with low regulations.

**The MacArthur Suit.** The MacArthur Justice Center’s suit (*Young v. Bryco Arms, Inc.*) was brought on behalf of the families of three victims of handgun violence in Chicago.<sup>20</sup> This suit was more focused than the ones brought by the mayors or Ms. Barnes, since it aimed only at the manufacturers of the guns actually used to commit the crimes cited — Smith & Wesson Corp., Navegar, Inc. and Bryco Arms, Inc. — rather than the gun industry as a whole. The victims had two things in common: they were young and they died as the result of gang shootings:

- Andrew Young, 19, was killed by two gang members who mistook him for a member of a rival gang.
- Salada Smith, 24, was the innocent victim of a drive-by shooting (she was several months pregnant at the time).
- Robert Owens, 15, was killed by a 12-year-old white with orders to kill a couple of black people.

The arguments made in *Young* are similar to those made in the Chicago lawsuit and in *Hamilton*. The plaintiffs in *Young* argue that the manufacturers should be held financially responsible for gang violence because “[the defendants] creat[e] and suppl[y] a vast, illicit, underground market in handguns in order to meet the demand for weapons of gang members and juveniles.”<sup>21</sup> As in the Chicago suit, the plaintiffs’ claim that the manufacturers design guns for and market them to gang members is based on the characteristics claimed for the guns.

## Guns: Criminal Misuse and Self-Protection

According to the 1997 Bureau of Justice Statistics figures, 483,000 firearm crimes were reported to the police in 1996. We can derive an upper bound to the number of firearm crimes, 915,000, by multiplying the number of rapes/sexual assaults, robberies and aggravated assaults reported in the 1997 National Crime Victimization Survey, which estimates crimes both reported and not reported to the police, by the percentage of these crimes committed with firearms from the 1997 BJS *Sourcebook*.<sup>22</sup> [See Table I and Figure I.]

“Citizens use guns in self-defense as many as 3.6 million times annually.”

More than 15 studies have shown that citizens use guns in self-defense between 764,000 and 3.6 million times annually.<sup>23</sup> Criminologist Gary Kleck has estimated there are more than 2.5 million defensive gun uses per year.<sup>24</sup> A study sponsored by the National Institute of Justice and carried out by the Police Foundation found an even greater number of defensive gun uses — approximately 2.73 million a year.<sup>25</sup> Either figure is larger than the number of crimes committed with firearms.

The only survey that ever found fewer than 700,000 defensive gun uses (DGUs) per year is the National Crime Victimization Survey, which estimated that guns were used defensively approximately 80,000 times annually.<sup>26</sup> Not surprisingly, supporters of more restrictive firearms laws cite this survey as evidence of the relative infrequency of defensive gun use versus gun crime. The clearest evidence that the NCVS data on defensive gun uses is seriously flawed is that it is radically different from the results of every other survey. Near unanimity is relatively rare in crime studies but, except for the one outlier, it seems to be the case on the issue of DGUs. Among the notable problems with the NCVS are: (1) the respondents were not anonymous, (2) respondents were not directly asked if they had ever used a firearm for self-

TABLE I

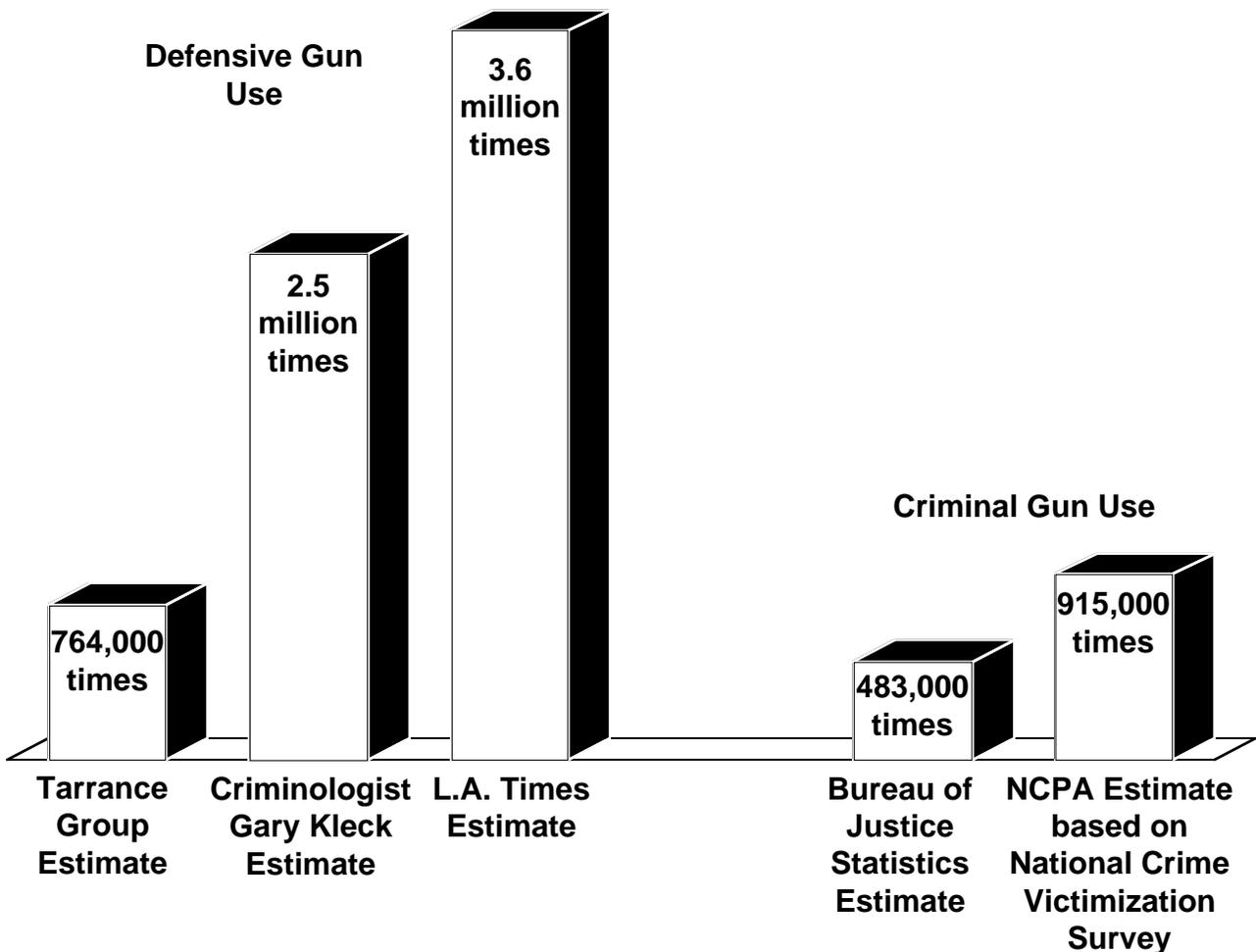
### National Firearms Crimes: High Estimate

	All Crime Incidents (000)	x	Percent Committed with Firearms	=	Firearm Crimes (000)
Murder	19		67.8%		13
Rape/Sex Assault	311		25.0%		78
Robbery	944		42.1%		397
Agg. Assault	<u>1,883</u>		<u>22.7%</u>		<u>427</u>
	3,157		29.0%		915

Sources: Column 1: FBI for murder, BJS, *Criminal Victimization 1997* (NCVS) for other crimes. Column 2: BJS *Sourcebook 1997*, pp. 274-75 for murder, robbery, and agg. assault; rape/sex assault percent implied by overall 29.0 percent and separate murder/robbery/assault shares.

FIGURE I

## Annual Defensive and Criminal Use of Guns



Sources: Gary Kleck, *Targeting Guns: Firearms and Their Control* (Hawthorne, N.Y.: Aldine de Gruyter, 1997); and Kathleen Maguire and Ann L. Pastore, eds., *Sourcebook of Criminal Justice Statistics, 1997*, U.S. Bureau of Justice Statistics.

*“About 3,000 criminals are lawfully killed each year by armed civilians — more than three times the number killed by police.”*

defense but rather simply whether they had done “anything” for self-protection and (3) most violent crimes reported to the NCVS were committed away from home but relatively few people have concealed carry permits. A respondent admitting defensive use would have been admitting — to a government agency — illegal or legally questionable behavior.

Other studies show that criminals fear armed citizens far more than they fear the police.<sup>27</sup> Their fear is reasonable. Approximately 3,000 criminals are lawfully killed each year by armed civilians — more than three times the number killed by the police.<sup>28</sup> For example:

“An additional 9,000 to 17,000 criminals are wounded by civilians each year.”

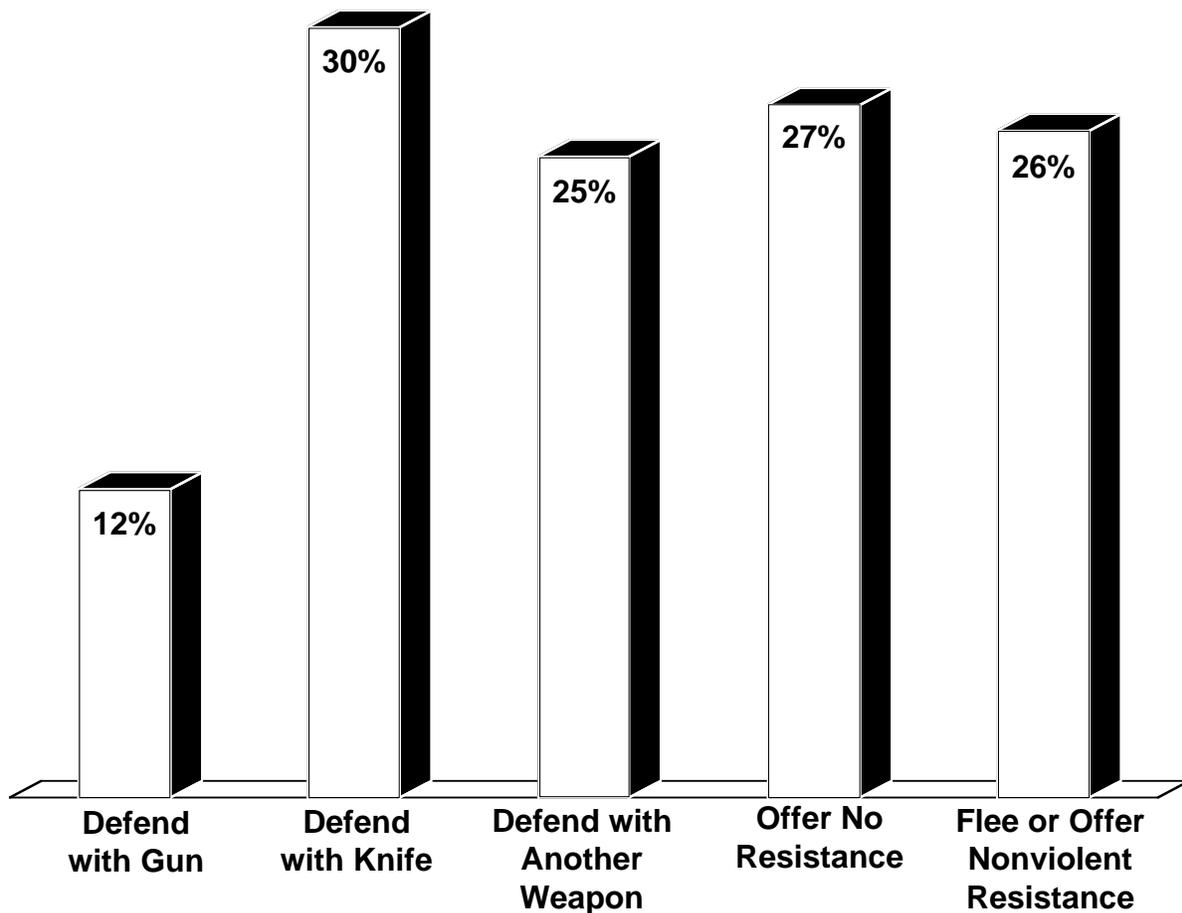
- Leonard Carter, 71, shot and killed an intruder who first attacked Carter on his Philadelphia porch, followed him into his house and threatened to kill him with a knife; the young attacker was found to be under the influence of drugs.<sup>29</sup>
- Karen Walkden, 18, shot and killed her landlord after he grabbed her and said he was going to rape her.<sup>30</sup>
- Using a shotgun, a 15-year-old Houston boy defended his father from two masked housebreakers; one attacker died, the other fled.<sup>31</sup>

An additional 9,000 to 17,000 criminals are wounded by civilians each year.<sup>32</sup> For instance:

- A Massachusetts tanning salon owner who had been maced by two would-be robbers sent them fleeing when he opened fire with his .38 caliber pistol; one man was wounded and was later arrested when he sought treatment for his injuries.<sup>33</sup>

FIGURE II

### Percent of Assault Victims Injured by Type of Resistance



Source: Gary Kleck, *Targeting Guns: Firearms and Their Control* (Hawthorne, N.Y.: Aldine DeGruyter, 1997), p. 190.

- Concealed carry permit holder Vincent McCarthy shot a police officer's attacker, who was enraged over the fact that his wife was receiving a traffic ticket, in the back of the knee.<sup>34</sup>

Far more often, when guns are used to thwart a crime, no shots are fired. In most cases, merely showing the firearm prevents the attack or the crime.<sup>35</sup> For example:

- Using his .357 caliber revolver, Frank Bergamo of Pueblo, Colo., held a would-be housebreaker until police arrived.<sup>36</sup>
- When a Louisiana woman injured during an attempted carjacking retrieved her revolver from under the seat, the would-be car thief fled.<sup>37</sup>

Rather than conceding that guns in the hands of law-abiding citizens deter crime, supporters of gun control argue that citizens do not need guns for self-defense. After all, they say, "that's what we have the police for." But the reality is that at any one time, only 75,000 to 80,000 police are on duty to protect about 271 million people — which is why police primarily investigate crimes rather than prevent them. In addition, the courts consistently rule that the police are not obligated to protect individuals, but only to maintain "public order and safety." Therefore, people's best security against crime is their own willingness to defend themselves.<sup>38</sup>

*"At any one time, only 75,000 to 80,000 police are on duty to protect about 271 million people."*

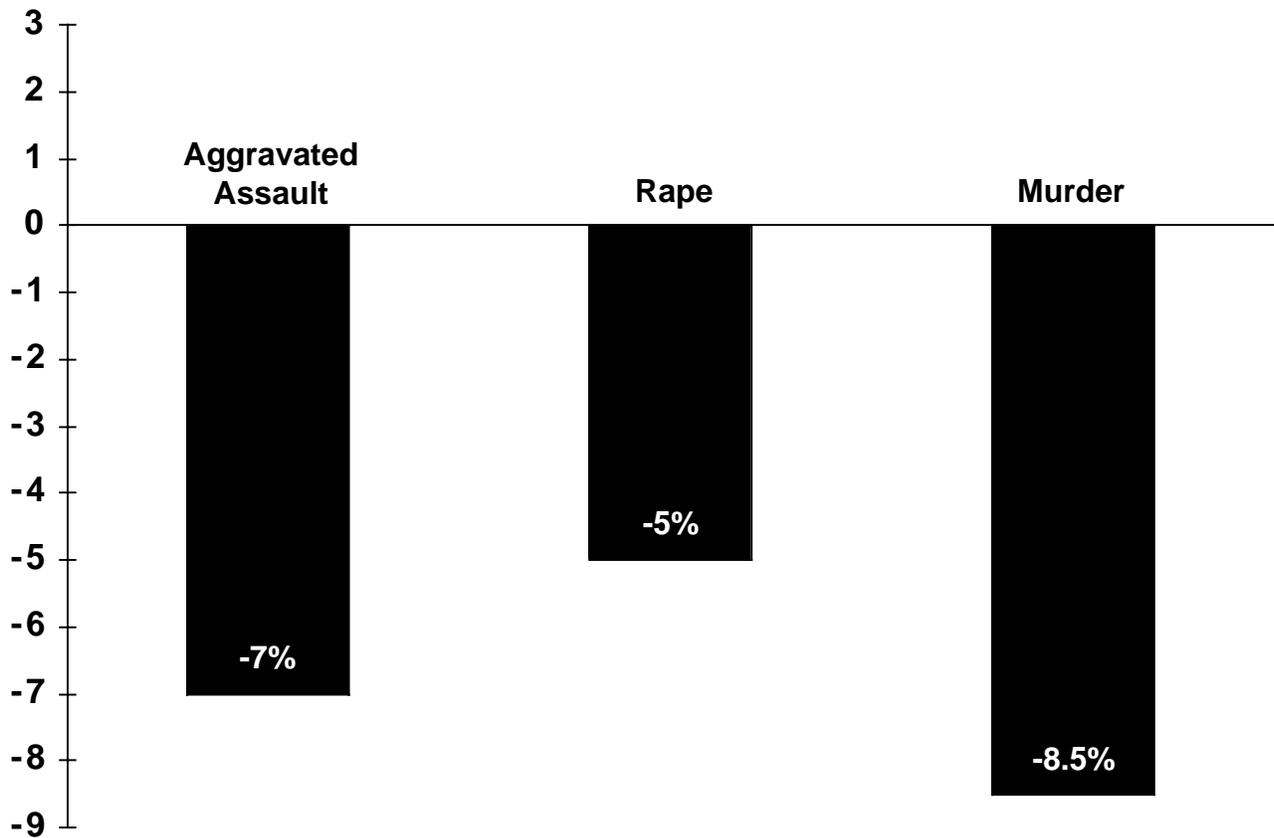
Research supports the view that an armed response works. For example, women faced with assault are 2.5 times less likely to suffer serious injury if they respond with a firearm rather than trying to defend themselves with less effective weapons or by offering no resistance. According to the Department of Justice, only one-fifth of the victims who defended themselves with firearms suffered injury, compared to almost half of those who defended themselves with other weapons or with none.<sup>39</sup> A study of robberies found:<sup>40</sup>

- Of robberies begun, fewer than 31 percent were completed when the victims defended themselves with a firearm, compared to 35 percent when the victims had a knife and more than 88 percent when the victims offered no resistance.
- During those robberies, persons who defended themselves with firearms suffered injury in 17 percent of the cases, compared to 40 percent of cases in which persons defended themselves with knives, 22 percent in which they used other weapons, 25 percent when they did not resist and 35 percent when they tried to flee.

As Figure II shows, persons defending themselves with guns during an assault were injured 12 percent of the time, compared to nearly 30 percent for those who attempted self-defense with knives, 25 percent for those using other weapons, 27 percent for those offering no resistance and nearly 26 percent for those who fled or resisted nonviolently. *Firearms are the safest, most effective way to protect oneself against criminal activity.*

FIGURE III

### Impact of Shall-Issue Concealed Carry Laws on Violent Crime



Source: John Lott Jr., *More Guns, Less Crime* (Chicago: University of Chicago Press, 1998).

*“Concealed carry laws reduce murder by 8.5 percent, rape by 5 percent and severe assault by 7 percent.”*

### Concealed Weapons and Crime

The overall rate of serious crime in the U.S. is at a 20-year low. The murder rate has fallen more than 30 percent since 1993 (20 percent in the past two years) and is now lower than in the 1970s.<sup>41</sup> One reason for this drop in crime is liberalized concealed carry laws. Since 1987, 22 states have made it easier for private citizens to get concealed carry permits.<sup>42</sup> A recent study by University of Chicago economist John Lott found that:<sup>43</sup>

- Concealed carry laws reduce murder by 8.5 percent, rape by 5 percent and severe assault by 7 percent. [See Figure III.]
- Had liberalized concealed carry laws prevailed throughout the country in any given year, there would have been 1,600 fewer murders, 4,200 fewer rapes and 60,000 fewer severe assaults.

But not every city or state has experienced the general decline in crime rates.

- States like Illinois that forbid the concealed carrying of firearms have, on average, double the murder rate and a 20 percent higher rape rate than states with liberal concealed carry laws.
- States that allow concealed carry but also allow local officials to decide whether individuals get concealed carry permits have issued relatively few permits and suffer a 30 percent higher murder rate and a 19 percent higher incidence of rape, on average, than states with more liberal laws.

While murder and other violent crime rates are declining in many cities, they are still on the rise in Philadelphia. Pennsylvania liberalized its concealed carry law in 1989, but Philadelphia demanded and received an exemption. The results are troubling.<sup>44</sup>

- Philadelphia has the highest firearms murder rate of the 10 largest U.S. cities.
- Shootings accounted for 80 percent of the more than 400 murders that occurred in Philadelphia in 1997.<sup>45</sup>
- The city estimates that gun violence costs it approximately \$50 million annually in additional policing and health care-related expenses.

## Costs and Benefits of Firearms

In 1997, 13.2 million crimes were reported to the police, of which approximately 1.6 million were crimes of violence.<sup>46</sup> Most violent crimes do not involve guns. As noted above, only 482,954, or just less than 29 percent, of the violent crimes committed in 1996, including 13,391 murders, were committed with firearms.<sup>47</sup> Though still alarmingly high, crime-related firearms injury or death is a relatively rare event.

- Of the victims of nonfatal violent crimes involving a gun from 1987 to 1992, only 3 percent suffered gunshot wounds.
- According to a 1992 survey, only 0.3 percent of injury visits to hospital emergency rooms involved firearm injuries.<sup>48</sup>
- In 1996, approximately 0.2 percent of violence-related injuries treated in emergency rooms involved firearms — including injuries resulting from being beaten with a firearm.<sup>49</sup>

**What Firearm Violence Costs.** Calculating the total cost of crime is difficult, with estimates ranging from as low as \$17.6 billion<sup>50</sup> to as high as \$450 billion<sup>51</sup> annually. [See the sidebar: Crime Victims' Rights.] The figures for the cost of violent crime in these studies show just as wide a disparity, from a low estimate of \$1.4 billion by Patsy Klaus to a high estimate of \$426 billion by Ted Miller, Mark Cohen and Brian Wiersema. The figures

*“Less than 29 percent of the violent crimes were committed with firearms.”*

## Crime Victims' Rights

Victims of crime are numerous and suffer extensive damage as a group. One estimate puts victim costs as high as \$450 billion annually for some 43 million victimizations — more than \$10,000 per crime. It is natural and just that private victims, especially victims of firearms violence, seek redress through the legal system. However, despite the fact that justice for victims should be its goal, the U.S. criminal justice system historically has been callous, viewing victims as pieces of evidence. Private lawsuits against gun producers are a peculiar consequence of the system's unresponsiveness to victims — even though the suits may be unjust to the defendants.

Intentional wrongs including murder and robbery were treated as private torts in Anglo-Saxon history, with economic compensation for the victims as the main remedy. Since private rights to restitution were transferable, victims could sell their rights to those more adept at recovery. The prospect of recovering damages gives victims more incentive to report crimes; at present, U.S. victims report only 40 percent of crimes to the police. The older system encouraged the apprehension of criminals, helped to establish their culpability and assisted in the recovery of damages.

Private suits once played a much larger role in crime suppression than they do today. Our reliance on the state to protect our property rights and control criminals is in most respects less than two centuries old. The evolution toward a government monopoly on crime control originated when kings began declaring more and more ordinary crimes “violations of the king's peace.” Seeking more revenues for the royal coffers, the monarch took away victims' rights to restitution, requiring that offenders pay the king rather than the actual victims.

Yet the private suits worked well and could do so again, as Japan demonstrates today. Japan has by far the lowest crime rate among industrial nations, and its crime rates have fallen steadily since World War II. A primary reason is that Japan's justice system is more victim-oriented and private than ours. The focus is on restoring the victim to his or her original condition. If the criminal shows true contrition, bargains for forgiveness with the victim and negotiates an acceptable settlement package, then public sector punishment is lenient.

Victims' rights have recently been recognized in many state statutes and constitutions. Yet none of these transform criminals' “debts to society” into private, transferable debts to individual victims. A rights-based approach puts justice for victims first. Privatizing more of the demand for and supply of criminal justice services would likely result in less crime. Private suits against gun makers do not move us toward effective rights to restitution for victims by the responsible parties — the criminals.

Sources: Ted R. Miller, Mark A. Cohen, and Brian Wiersema, *Victim Costs and Consequences: A New Look*, U.S. Department of Justice, National Institute of Justice, February 1996; and Bruce L. Benson, *To Serve and Protect: Privatization and Community in Criminal Justice* (New York: New York University Press, 1998).

vary because different researchers included different factors in their calculations. Klaus’s cost figures excluded murder and accounted only for direct costs (lost work time, medical expenses, lost property, etc.), whereas Miller, Cohen and Wiersema included estimates for the numbers of crimes not reported and placed a dollar value on such intangible, hard-to-quantify losses as pain and suffering, emotional trauma and the risk of death from victimization. These intangibles account for more than 77 percent of the cost of crime, according to the authors.<sup>52</sup> Like the estimates of the costs of all violent crime, those of the costs of firearms-related crime vary greatly, ranging from \$253.1 million to \$18.7 billion, as shown in Table II.

Cost estimates like these may be driving the cities’ firearms lawsuits.

Lawyers in Philadelphia pointed out that 80 percent of the medical costs from firearms violence is picked up by taxpayers because the victims rarely have insurance. However, among the general population only about 17 percent are uninsured.<sup>53</sup> This may have something to do with the fact that a substantial portion of gunshot victims have criminal records.

- Between 1985 and 1990, two-thirds of murder victims had prior criminal arrests, averaging four arrests for 11 offenses, and 36 percent had prior firearms-related arrests.<sup>54</sup>
- A study of victims of nonfatal gunshot wounds in Charlotte, N.C., found that 71 percent had been arrested previously and 64 percent had been convicted of a crime.<sup>55</sup>
- A 1995 survey of males arrested in 11 cities showed that 21 percent of the adults and 11 percent of the juveniles had been shot at least once.<sup>56</sup>
- 71 percent of teen-age drive-by shooting victims are “documented” members of street gangs.<sup>57</sup>

*“The estimated costs of firearms crimes range from \$253.1 million to \$18.6 billion per year.”*

<u>Researchers</u>	<u>Average Cost Per Crime</u>	<u>Number of Firearms Crimes</u>	<u>Cost of Firearms Violence (in millions)</u>
Klaus	\$524	483,000	\$253.1
Klaus	\$524	915,000	\$479.5
Zedlewski	\$2,300	483,000	\$1,111.0
Zedlewski	\$2,300	915,000	\$2,104.5
Miller et al.	\$20,360	483,000	\$9,833.9
Miller et al.	\$20,360	915,000	\$18,629.4

TABLE III

## Estimated Benefits from Defensive Gun Use

<u>Researchers</u>	<u>Average Benefit Per Crime Prevented</u>	<u>Number of Crimes Prevented</u>	<u>Immediate Benefit DGU (in millions)</u>	+	<u>Long-Term Benefit DGU* (in millions)</u>	=	<u>Total Benefit (in millions)</u>
Klaus	\$524	764,000	\$400.3		\$169.9		\$570.2
Klaus	\$524	2,500,000	\$1,310.0		\$169.9		\$1,479.9
Zedlewski	\$2,300	764,000	\$1,757.2		\$745.8		\$2,503.0
Zedlewski	\$2,300	2,500,000	\$5,750.0		\$745.8		\$6,495.8
Miller et al.	\$20,360	764,000	\$15,555.0		\$6,601.5		\$22,156.5
Miller et al.	\$20,360	2,500,000	\$50,900.0		\$6,601.5		\$57,501.5

\* LTDGU = criminals killed (3,000) x years of criminal lifespan reduced (10) x number of offenses not committed annually (14) x average cost of crime prevented. LTDGU benefits are discounted at 5 percent annual rate.

*“The estimated benefits from defensive gun use range from \$570.2 million to \$57.5 billion per year.”*

**Benefits of Defensive Gun Use.** Depending on the source, at the low end of reasonable estimates, the annual number of defensive gun uses (764,000) is somewhat lower than the highest estimate of the number of crimes committed with firearms (915,000), while at the high end the number of defensive gun uses (3.6 million) is far greater than either of the two estimates of firearms-related crimes.<sup>58</sup>

The most reasonable estimate of defensive gun use was made by Kleck: approximately 2.5 million annually. If Kleck’s numbers are even close to correct, then the saving to society from the crimes prevented is about five times greater than the cost to society of firearms violence.<sup>59</sup> There are several reasons for believing that Kleck’s research provides the most accurate numbers for defensive gun uses: (1) it was the first survey specifically designed to estimate the number of defensive gun uses; (2) it asked respondents about their own DGUs and those of all members of the household; (3) it inquired about DGUs with all guns, not just handguns; (4) it asked about a recall period of one and five years; and (6) it included detailed questions about whether the respondents actually confronted an adversary, used their guns in some way and did so in connection with a specific crime.

According to Klaus, each crime (excluding murder) costs, on the average, \$524.<sup>60</sup> Another study, by Edwin Zedlewski, estimates the average cost of crime at \$2,300.<sup>61</sup> These two estimates are based on all crime. A third estimate of \$20,360 is based on the cost of firearms crimes alone, drawn from the Miller, Cohen and Wiersema study and a second study by Miller and Cohen on the cost of firearms-related crime injuries.<sup>62</sup>

Using these three estimates, and based on the 483,000 firearms crimes reported to the police, Table II shows that the costs of firearms crime range from \$253.1 million (Klaus) to \$9.8 billion (Miller et al.). If one instead employs the estimate from the victimization survey of 915,000 firearms crimes, the costs range from \$479 million (Klaus) to \$18.6 billion (Miller et al.).

Table III shows the range of total benefits from defensive gun use — both immediate benefits (from crimes prevented) and the long-term benefits (from criminals killed during defensive gun use). As the table shows, using the low-end estimate of 764,000 crimes prevented, the total benefits range from \$570.2 million (Klaus) to \$22.2 billion (Miller et al.); using the Kleck estimate of 2.5 million crimes prevented, the total benefits range from \$1.5 billion (Klaus) to \$57.5 billion (Miller et al.).

In Table IV the net benefits of defensive gun use — that is, the costs of gun violence minus the benefits of defensive gun use — are shown, assuming 915,000 firearms crimes (the number most favorable to proponents of gun lawsuits). The first line in each section shows the net benefit if guns are used defensively 764,000 times (also the number most favorable to proponents of gun lawsuits); the second line shows the net benefit, still assuming 915,000 firearm crimes but using the Kleck estimate of 2.5 million defensive gun uses. With either set of assumptions, there is a positive net benefit to defensive gun use, ranging from \$90.7 million to \$3.5 billion under assumptions most favorable to proponents of gun lawsuits, or from \$1 billion to \$38.9 billion using the Kleck assumptions.

*“Net benefits of defensive gun use range from \$90.7 million to \$38.9 billion per year.”*

<b>TABLE IV</b>			
<b>Net Benefits of Defensive Gun Use</b>			
(in millions)			
<u>Researchers</u>	<u>Total Benefit</u>	—	<u>Total Costs</u> = <u>Net Benefit</u>
Klaus	\$570.2		\$479.5 = \$90.7 <sup>1</sup>
Klaus	\$1,479.9		\$479.5 = \$1,000.4 <sup>2</sup>
Zedlewski	\$2,503.0		\$2,104.5 = \$398.5 <sup>1</sup>
Zedlewski	\$6,495.8		\$2,104.5 = \$4,391.3 <sup>2</sup>
Miller et al.	\$22,156.5		\$18,629.4 = \$3,527.1 <sup>1</sup>
Miller et al.	\$57,501.5		\$18,629.4 = \$38,872.1 <sup>2</sup>
<sup>1</sup> Assuming the defensive gun use number (764,000) and firearms crime number (915,000) most favorable to proponents of the lawsuits.			
<sup>2</sup> Assuming the most credible estimate of defensive gun uses (2.5 million) and NCVS firearms crimes (915,000).			

*“Every day an offender spends hospitalized or in bed at home after a firearm injury is a day he is not committing crimes.”*

Cities are suing to recover the medical costs associated with treating criminals despite the fact that the injuries may represent net savings from defensive gun use.<sup>63</sup> Every day an offender spends hospitalized or in bed at home after a firearm injury is a day he is not committing crimes. The savings are likely to be substantial.

Even those who do not own or carry a gun benefit from widespread gun ownership and shall-issue right-to-carry laws. Armed citizens frequently come to the aid of people under attack. In addition, criminals cannot often know in advance who is armed. And if we imagined a world where neither criminals nor intended victims had firearms, substantial numbers of crimes still would be carried out with other weapons. But only the intended victims would suffer since unarmed persons are less likely than armed persons to attempt to defend themselves against crime. In addition, those people who did attempt to defend themselves without a gun would more likely be injured than they would have been had they been armed with a gun. (See the earlier section “Guns and Self-Protection” for evidence.)

The criminal’s intended victim receives an immediate and substantial benefit from a successful defensive gun use, even though it rarely ends in the death of the offender. And though it is morbid to consider, society enjoys a long-term benefit when the criminal dies. The average offender is criminally active for 20 years, during which he commits, on average, more than 14 serious crimes per year.<sup>64</sup> Twenty percent of criminals have been arrested five or more times for violent crimes and 44 percent from two to four times. These numbers do not include any crimes they got away with.<sup>65</sup>

Other research shows that criminals tend to commit numerous crimes.

- In Philadelphia, just 20 percent of those arrested for nontraffic offenses committed two-thirds of all violent crimes, three-fourths of all rapes and robberies and virtually all murders.<sup>66</sup>
- The same 20 percent had accumulated five criminal arrests by age 18 and had gotten away with dozens of crimes for every one for which they were arrested.<sup>67</sup>
- In another study, while half the criminal population imprisoned in California, Texas and Michigan committed fewer than 15 crimes per year before imprisonment, 25 percent committed more than 135 crimes annually and 10 percent committed more than 600.<sup>68</sup>

We can calculate a rough range of the average annual long-term savings from crimes avoided due to deaths from defensive gun uses.<sup>69</sup> If we assume that the average criminal has his active criminal career cut in half (to 10 years) and that approximately 3,000 criminals<sup>70</sup> are lawfully killed each year, thus avoiding 14 crimes per year averaging \$524 for 10 years, the social benefit is \$169.9 million. Using Zedlewski’s cost estimate of \$2,300, the social benefit is \$745.8 million.<sup>71</sup> If, following Miller, Cohen and Wiersema,

we add the indirect costs of crime, the average total cost of a violent crime is \$20,360, and at 14 crimes per year averted for 10 years the long-term saving from defensive shootings is \$6.6 billion per year. [See Table III.]

The total social benefit from defensive gun uses is equal to the annual savings from non-deadly gun uses plus the annual savings from defensive gun uses in which the criminal is killed. And any number selected is greater than the cost of firearm violence.<sup>72</sup> For instance, even under a best-case scenario for lawsuit proponents, using the NCVS firearms crimes number (915,000), and the Tarrance Group's defensive gun use statistic (764,000), the net benefit from defensive gun use (the total benefits less the total costs) ranges from just over \$90 million annually to \$3.5 billion per year. Using Kleck's more credible estimate for annual defensive gun use, the net benefit ranges from \$1 billion to \$38.9 billion annually. [See Table IV.] The annual net benefit of civilian gun use in the prevention of crime is even greater if the NCVS overestimates firearms crimes and the Bureau of Justice Statistics figures (483,000) are more accurate.

*"The net benefit to society is ignored in the lawsuits."*

This substantial benefit is ignored in the lawsuits. Proponents of stricter gun control routinely ignore or deny the benefits of defensive gun uses due to their unexamined belief that the U.S. would be a safer place if there were fewer guns in private hands. And it is not in the interest of the trial lawyers involved to take note of the benefits of gun ownership, since this would diminish their chances of a substantial jury award or out-of-court settlement. The question is why the mayors are ignoring the myriad benefits that their constituents receive from gun ownership and the harm that would seem to flow from diminishing individuals' responsibility for their actions.

## **Bad Law: Banning Guns by Lawsuit**

Until the *Hamilton* decision, except for cases where materials had been shown to be inferior or workmanship shoddy, gun manufacturers had defended themselves successfully against product liability lawsuits. Of approximately 40 lawsuits against gun makers during the past 20 years (most in the last decade) involving cases in which guns functioned properly, only two made it to trial. One was successful, but its effect was later negated by the state legislature.<sup>73</sup>

Why have lawsuits against gun manufacturers been so unsuccessful in the past? And is anything different about the lawsuits discussed here that might make them more likely to succeed? While each case discussed in this study presents unique arguments by plaintiffs trying either to create new, enforceable manufacturer duties or to extend standard tort law theories in novel ways, they are just as unlikely as past lawsuits to succeed on the merits. The courts are likely to remain disinclined to usurp the legislative function or to destroy existing tort law principles.

*“Courts have consistently held that questions concerning firearms’ legality and availability are for legislatures to decide.”*

**Asking the Courts to Legislate.** The lawsuits discussed here ask the courts to substitute their judgment for the public’s, as expressed through state and national legislatures. In past federal and state gun lawsuits, however, courts have consistently held that questions concerning firearms’ legality and availability are for legislative assemblies to decide.<sup>74</sup>

Federal courts have been nearly unanimous in ruling against the notion that the courts should legislate gun policy. For instance:

- In *Wasylow v. Glock, Inc.*, the court said, “It is the province of legislative or authorized administrative bodies, and not the judicial branch, to advance through democratic channels policies that would directly or indirectly either (1) ban some classes of handguns or (2) transform firearm enterprises into insurers against misuse of their products. Frustration at the failure of legislatures to enact laws sufficient to curb handgun injuries is not adequate reason to engage the judicial forum in efforts to implement a broad policy change.”<sup>75</sup>
- In *Martin v. Harrington & Richardson, Inc.*, the court stated, “Imposing liability for the sale of handguns, which would in practice drive manufacturers out of business, would produce a handgun ban by judicial fiat in the face of the decision by [the legislature] to allow its citizens to possess handguns.”<sup>76</sup>
- In *Delahanty v. Hinckley et al.*, the court ruled that, “[W]hat is really being suggested by plaintiffs, . . . is for this Court, or courts, to indirectly engage in legislating some form of gun control... [H]owever, . . . such legislation should be left to the federal and state legislatures which are in the best position to hold hearings and enact legislation which can address all of the issues and concerns as well as reflect the will of the citizens.”<sup>77</sup>

State courts also have been loath to usurp their legislatures’ lawmaking authority. For instance:

- In *Lovett v. Sturm, Ruger et al.*, the Michigan Circuit Court ruled, “Not only would the application of this theory of strict liability be contrary to case law but it would also be forcing the court to trespass on the lawmaking territory of the legislature. The sale, registration, and use of firearms in this country is an area highly controlled by both state and federal firearms statutes. This court declines to become involved in an activity better left to those in Lansing.”<sup>78</sup>
- The Georgia Court of Appeals in *Rhodes v. R. G. Industries, Inc.*, stated, “The enactment of comprehensive licensing provisions for suppliers and purchasers of handguns is indicia that the legislature

is not inclined to ban the use of such weapons, and that legislators do not feel that the marketing of handguns to the public is an unreasonably dangerous or socially unacceptable activity. We must conclude that the General Assembly does not intend to control further the manufacture, distribution or use of handguns. This court is prohibited from altering the status quo since the legislature's present position is within constitutional limits."<sup>79</sup>

- In *Richardson v. Holland et al.*, the Missouri Court of Appeals decided, "Whether or not the individuals on this court, if members of the legislature, would vote to ban the manufacture or impose strict liability upon the manufacture of Saturday Night Specials [i.e., cheap, easily concealed handguns] is immaterial.... [T]he plaintiff's petition does not, under judicial or common law principles, state a cause of action in strict liability or negligence against F.I.E. This court cannot create one by judicial legislation."<sup>80</sup>

It is clear that the lawsuits considered in this study, especially in the *Hamilton* case filed by Elisa Barnes, call for judicial lawmaking. Ms. Barnes requested Judge Weinstein because of his proclivity for making novel judicial law, and she fought successfully against having him removed when his standing to hear the case was challenged by the defendant gun manufacturers.<sup>81</sup>

To this point, the courts have recognized that further erosion of the separation of powers between the legislative and judicial functions of government is not in the country's long-term best interest.

**Destroying Sound Tort Law Principles.** The suits against the gun makers also would reverse a well-established principle in tort law: manufacturers are not responsible for the criminal misuse of their products. If this principle is discarded, the courts will be crushed under the weight of new lawsuits and it will not be long before extremists among us try to use the law to shut industrial civilization down. Should automobile makers be held responsible for vehicular homicides committed by drunken drivers or people in the grip of road rage? Criminals also use knives, prescription drugs and household products to commit crimes. Should courts hold the manufacturers of these products at fault?<sup>82</sup> Where will the lawsuit parade end?

The courts are fully aware of the potential difficulties posed if manufacturers are held responsible for the criminal misuse or negligent use of nondefective products. Accordingly, they have thus far rejected attempts to alter tort law to single out and punish the firearms industry.

The state of Massachusetts' Continuing Legal Education program recently included a seminar entitled "Gun Litigation." Attorney Anne Kimball argued that attempts to impose liability on firearms manufacturers either because of the inherent nature of the product or its distribution would

*"It is a well-established principle in tort law that manufacturers are not responsible for the criminal misuse of their products."*

fail.<sup>83</sup> Ms. Kimball detailed three legal arguments raised against firearms manufacturers, all of which the courts have thus far uniformly rejected.

- First, firearms manufacturers' products are defective because they are inherently dangerous,<sup>84</sup> they function as intended<sup>85</sup> or they have characteristics that make them desirable and effective (e.g., they are inexpensive, easily concealed and fire when the trigger is pulled).<sup>86</sup>
- Second, firearms manufacturers fail to warn of the dangers inherent in firearms use and from misuse.<sup>87</sup>
- Third, firearms production and distribution is an abnormally dangerous activity<sup>88</sup> or firearms are distributed negligently.<sup>89</sup>

In short, the courts have recognized that firearms are no different from many other potentially dangerous products. They are legal, every reasonable person knows that if misused they are dangerous (the general opinion of the courts could be summed up as “everybody knows that guns are dangerous”) and their sale and marketing are regulated by federal and state governments. Indeed, with more than 240 million firearms in circulation, accidental firearms injuries and deaths are far from “foreseeable” (as claimed in the New Orleans lawsuit) when compared to problems caused by other products in common use. According to the National Safety Council, fewer people die from accidental shootings than from automobile accidents, drowning, burning or smoke inhalation, choking to death or medical misadventures. Though misuse of their products costs thousands of lives each year, neither car dealers nor knife retailers are required to go through a federal licensing procedure that includes providing fingerprints, submitting to a personal history background check and showing proof that certain product storage and inventory mandates are met. Though the news media often publicize accidental firearms injuries to children, far fewer children are injured in the shooting sports than are injured playing any of the major team sports, or even competitive sports not normally considered hazardous — table tennis, for example. In addition, in 1997 approximately 3,100 children age 14 and under died in automobile accidents, 1,050 drowned, 500 died in bicycle accidents and 700 died in fires, while fewer than 250 died from accidental gunfire.<sup>90</sup> [See Figure IV.]

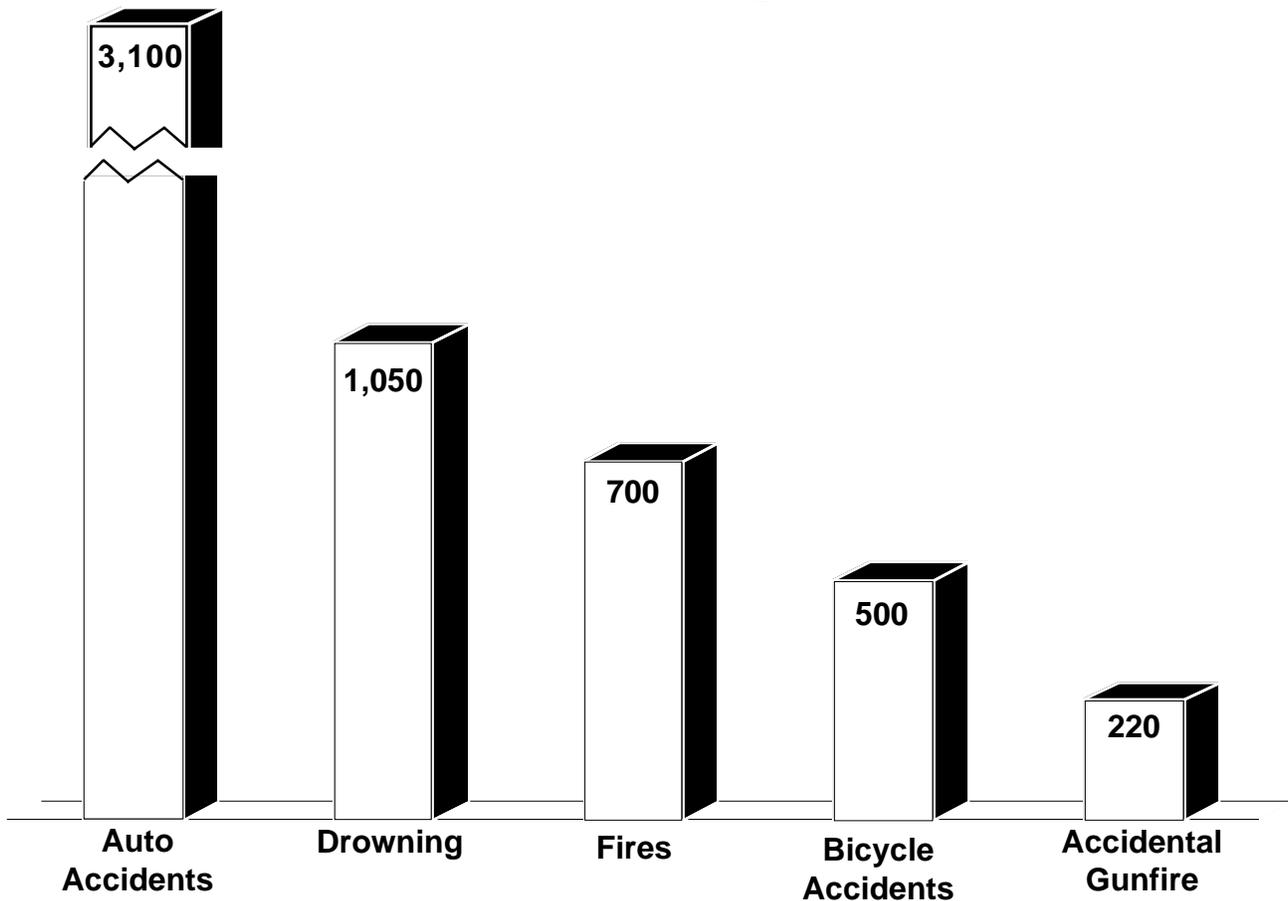
Requiring manufacturers to monitor the sales of guns beyond initial retail sales poses potential privacy concerns. Furthermore, there is no legal justification for imposing higher standards for gun marketing and sales than already exist or are imposed on other product manufacturers.

Courts in both New York and Illinois (the states where *Hamilton, City of Chicago* and *Young* were filed) have already ruled in previous cases on most of the contentions made by the plaintiffs in the lawsuits under way.<sup>91</sup> Among the rulings:

*“Courts have recognized that firearms are no different from many other potentially dangerous products.”*

FIGURE IV

## Accidental Deaths of Children Age 14 and Under, 1997



Source: "Accident Facts 1998," National Safety Council.

*"In 1997 approximately 3,100 children age 14 and under died in automobile accidents, 1,050 drowned, 500 died in bicycle accidents and 700 died in fires, while fewer than 250 died from accidental gunfire."*

- "[T]o impose a legal duty here would create limitless liability. This would be inappropriate because . . . the gun/ammunition manufacturer has no control over the actions of a criminal whose goal might be to randomly kill or seriously injure innocent people."<sup>92</sup>
- "New York does not impose a duty upon a manufacturer to refrain from the lawful distribution of a nondefective product."<sup>93</sup>
- "Plaintiffs allege that based on the large number of injuries and deaths resulting from the use of handguns to commit crime, criminal misuse was foreseeable and the defendant handgun manufacturers and distributors were negligent in marketing its handguns to the general public . . . [and] that the defendant handgun manufacturers and distributors had a duty to determine whether its retailers had taken all reasonable measures to screen prospective purchasers

“A court dismissed the first case pursuing the public nuisance theory against gun manufacturers.”

and a duty to terminate sales to those retailers the defendants knew or had reason to know had a history of sales to persons who had used its handguns in crime. . . . [T]here is no basis for imposing common law negligence upon a handgun manufacturer for injuries sustained by the victims of illegal handgun violence.”<sup>94</sup>

This leaves only the novel claim that guns are a public nuisance.<sup>95</sup> Recently the courts have provided some guidance on this type of claim. *Bubalo et al. v. Navegar, Inc.*, was the first case to pursue the public nuisance theory against gun manufacturers.<sup>96</sup> The court dismissed the case, citing the previous court decisions that *manufacturing* handguns was not in *itself* an ultrahazardous activity, that there could be no liability for merely manufacturing dangerous products and that the *marketing* and *sale* of handguns was also not dangerous activities. Since no injury is the direct result of the manufacture or sale of the firearms, the court concluded that the public nuisance claim was mistaken. Nevertheless, David Kairys and Mayor Rendell reportedly used the case as the model for their possible public nuisance lawsuit.

The cases discussed in this study provide no new basis in law for making gun manufacturers insurers against the misuse of their products via the judiciary.<sup>97</sup> But even if a legal basis could be found, holding manufacturers responsible for gun violence and misuse would be unsound public policy.<sup>98</sup>

## Bad Public Policy: Disarming Citizens

The Lott study on the impact of concealed carry laws confirms something policy analysts have long suspected: the increased risk or cost associated with crime due to liberalized gun laws discourages some violent criminals from committing further crimes. Other offenders either shift their criminal activities to areas where citizens are known to be less able to effectively defend themselves or shift from crimes of force such as armed robbery to crimes of stealth such as burglary.

The ultimate result of successful lawsuits against gun manufacturers would be to reduce access to firearms, thus making citizens less safe. Public safety would be impaired in less direct ways as well.<sup>99</sup> In Philadelphia, Mayor Rendell’s staff calculated that the cost of filing the city’s lawsuit would have exceeded \$1 million.<sup>100</sup> There is no reason to think that Chicago’s lawsuit will cost less — and under current law and judicial holdings it is unlikely to succeed, meaning public money and time that could have gone toward law enforcement will be wasted.

It also is unlikely that the gun industry would cease to produce and sell firearms, even if it were to lose in the courts. The general public supports gun use, according to public opinion polls that show only 16 percent of Americans favor banning handguns and fewer than 5 percent favor banning rifles.<sup>101</sup>

*“Public opinion polls show that only 16 percent of Americans favor banning handguns and fewer than 5 percent favor banning rifles.”*

Instead, it is likely that the price of firearms would increase to cover expanded liability insurance coverage, sales monitoring programs and personalized gun safety technologies.<sup>102</sup> Another possible outcome is that smaller gun manufacturers or those with slim profit margins would go bankrupt while more successful firms would survive, shifting from the civilian to the police and military gun markets.<sup>103</sup> This also would drive up the cost of firearms to civilians.

Relatively affluent Americans would still be able to purchase guns for self-defense and sport, while the urban poor (typically minorities), who already suffer the most from criminal depredation, would not. The poor experience nearly twice as much violent crime as do others.

- Inner-city residents are approximately 33 percent more likely to suffer a violent crime than suburban residents and 40 percent more likely than rural residents.
- Blacks, who make up a disproportionate share of the population of large urban areas, are three times as likely as whites to be robbed and twice as likely to suffer aggravated assault, and they make up half of all murder victims although they represent only 12.6 percent of the population.<sup>104</sup>

Thus higher gun prices would disarm precisely those individuals who are most likely to face violent crime and who would most benefit from easier access to guns and widespread gun ownership.<sup>105</sup>

If gun makers either went bankrupt or virtually ceased civilian production, the value of guns would increase and the black market in firearms would grow. The law allows private citizens to sell some or all of their guns without regulation as long as theirs is not a regular business enterprise. As gun values rise, private sales of firearms would likely increase, with some people amassing entire arsenals “off the books.” In addition, the higher prices that guns would fetch on the black market would make gun thefts more profitable and thus more likely. Since retail firearms sales to private citizens currently subsidize the cost of guns to local police, federal agents and the military, the price of guns to law enforcement and military personnel would increase.

## **Securing Citizen Access to Firearms**

Despite the strong evidence that guns provide a net social benefit, more municipalities seem intent on filing suit against the gun industry in the future. Is there a way to head off these lawsuits? Both legislative and judicial options may exist.

**Tort Reform.** To stem the rising tide of product liability lawsuits, during the last decade state and federal legislators have considered bills that seek to reduce the number of frivolous suits and punish litigants who file such

suits. During 1997 and 1998 Congress considered several bills that would reform the tort liability system. For example, proposed legislation would have limited the liability of small business by capping punitive damage awards at \$250,000 or no more than two times the amount awarded in compensatory damages, whichever was less.<sup>106</sup> In addition, federal legislation would have limited attorneys' fees and instituted a "loser pays" principle whereby unsuccessful plaintiffs would have to pay the defendant's trial-related costs.

The American Bar Association and the nation's trial lawyers successfully lobbied to derail federal legislation. Their lobbying efforts were bolstered by those of such antigun groups as the Violence Policy Center. Anti-gun organizations demanded that the firearms industry be exempted from the legislation's provisions, comparing the exemption they sought to the exemption of the tobacco industry contained in the bill.

In contrast to federal efforts, state tort reform efforts have been relatively successful. The American Tort Reform Association claims that 45 states and the District of Columbia have enacted at least some of its legislative proposals during the past decade — though only five states have thus far enacted comprehensive product liability reform and these reform laws are being challenged in the courts.

Until recently the National Rifle Association (NRA), the largest gun rights education and advocacy organization in the nation, had been silent on the progress of the public gun lawsuits.<sup>107</sup> But the NRA recently announced its intention to mount a full-scale lobbying campaign in Congress and in key states to preempt the lawsuits. The NRA's efforts will focus on reviving product liability legislation, limiting the fees that cities can pay to attorneys and enacting state constitutional provisions limiting the ability of cities to sue gun makers.

In the NRA's favor is its long and successful history of helping politicians who support its legislative agenda. In addition, it has been a prime force behind the enactment of liberalized concealed carry laws. The NRA also has lobbied for state firearm preemption laws prohibiting cities from passing local ordinances that limit the sale or possession of firearms. The NRA's efforts have already borne fruit. In February 1999 the Georgia Legislature passed a bill blocking lawsuits by Georgia cities against the firearms industry, and Governor Roy Barnes signed it.<sup>108</sup>

At the federal level, it is doubtful that product liability and tort reform legislation helpful to the firearms industry will be enacted, since the Clinton administration has vowed to veto such bills. Efforts might be more successful at the state level. However, in states like Illinois, California and Massachusetts, where public opinion favors much stricter gun control and legislatures historically have been hostile to the firearms industry and consumers, it seems unlikely that the NRA's efforts will succeed.

*"Only five states thus far have enacted comprehensive product liability reform laws and these laws are being challenged in the courts."*

*“Countersuits would serve notice that the public opposes attempts at restricting access to guns.”*

**Countersuits.** Another option would be for the public to file countersuits on the grounds of public safety. Courts have held that the government is not legally obligated to protect individuals but is instituted to secure public order and safety. Absent a police state with an officer in every household, the police could not protect every citizen even if they were obligated to do so. In view of the proven effectiveness of guns as both a personal defense against and a general deterrent to crime, if city officials successfully restrict access to guns, they will reduce public safety and abet criminals.

Therefore, the general public and crime victims might join in class action suits against those officials. Under the common law, when private citizens take actions that threaten the public’s health or welfare, courts can enjoin the actions and require compensation for those harmed. Public officials should be held to the same standard, if not a higher one.

As a rule, public officials cannot be sued for their legislative and administrative actions, and federal, state and city governments have sovereign immunity, exempting them from lawsuits unless they specifically waive the privilege. Thus class action suits might be unsuccessful. However, they would serve notice that the public opposes attempts at restricting access to guns that place citizens at risk but do nothing to prevent criminals from getting guns or to reduce crime.

Already one such suit has been announced. In December 1998 the Second Amendment Foundation, a gun-owner advocacy and education organization, notified the U.S. Conference of Mayors that it was sponsoring a “damage action” suit brought by 12 constitutional law professors against the cities of Chicago and New Orleans for “conspiracy to violate civil rights, abuse of process and undue burden on interstate commerce.”<sup>109</sup> In addition, in Wyoming a conference report has been approved on a bill that would encourage the state attorney general to intervene on behalf of gun manufacturers and dealers in liability lawsuits.<sup>110</sup>

## Conclusion

Though much has been made of the comparison between the gun lawsuits and the recently settled tobacco lawsuits, there is much to distinguish guns from cigarettes. Guns do not cause harm to the user or third parties in normal use and they are not addictive. That guns are potentially dangerous is widely known and has never been disputed by the firearms industry. Unlike tobacco, guns produce a multitude of tangible social goods: pleasures for those involved in the shooting sports, U.S. national security, police-led crime prevention and criminal apprehension efforts and effective personal defense against crime. Only a small fraction of firearms, less than 1 percent, are ever involved in violence. The clearest evidence that even the mayors suing the

gun industry believe guns are beneficial is the fact that they arm police. *It is not that guns are bad, it is that some people use them badly.*

There is no more valid rationale for suing gun manufacturers for the improper use of their products than there would be for suing knife manufacturers or manufacturers of various blunt objects that are used in violent crimes, all of which can result in costs to governments.

When filing their lawsuits, Mayors Daley and Morial cited the substantial burden that gun-related violence imposes on the public coffers of their cities. It is clear that the cost of gun violence is substantial and, unlike the fiscal benefits provided by defensive gun use, relatively easy to measure or quantify. It is difficult to account for both the number of crimes prevented and the saving to society from crimes not committed or thwarted by defensive gun use. However difficult to quantify, this study shows that the benefits of the widespread availability of guns exceed the costs of gun violence. More crimes are prevented by guns in the hands of law-abiding citizens every year than are committed with guns. And the saving to cities from these defensive gun uses and the general saving to society from gun ownership dwarf the cost to municipalities of gun violence.

*“The saving to society from defensive gun use far exceeds the cost of gun violence.”*

NOTE: Nothing written here should be construed as necessarily reflecting the views of the National Center for Policy Analysis or as an attempt to aid or hinder the passage of any bill before Congress.

## **Appendix I: The New Orleans Suit**

In a surprise move on October 30, 1998, Marc Morial of New Orleans became the first mayor to file a lawsuit against gun manufacturers, retailers and wholesalers.<sup>111</sup> The suit claims that gun manufacturers should be held financially responsible for the health and policing cost of gun violence. However, in a number of ways it differs from other lawsuits mentioned in this study. First, although it was brought in the city's name, it is being financed and litigated entirely by antigun activists at the Center to Prevent Handgun Violence and several prominent trial attorneys involved in nationwide tobacco litigation. Because the attorneys are working on a contingency fee basis,<sup>112</sup> no public funds will be spent — avoiding the problem of diverting limited public funds from important social goals. Second, rather than claiming that guns are a public nuisance, the lawyers argue that guns as they currently are manufactured are unreasonably dangerous in design and thus run afoul of Louisiana's product liability law. The lawsuit is based on an unfounded supposition: that gun makers have suppressed the introduction of safety devices which would prevent unauthorized users from firing guns.

Except when there were clear design flaws, faulty workmanship or inferior materials, lawsuits against gun manufacturers arguing that guns are unreasonably dangerous have been brought many times in the past and have failed. Unlike tobacco, to which guns have been compared, firearms are not dangerous when used responsibly. The courts have noted that upholding claims against gun makers would be tantamount to banning certain types of firearms and would put courts in the position of establishing public policy — a job more appropriate to legislatures.

The New Orleans lawsuit alleges that the gun industry has willfully kept safety devices off the market, making firearms unreasonably dangerous. This argument is problematic for a number of reasons. One type of safety device, a trigger lock, is widely available to the general public. Gun manufacturers have not suppressed the development or sale of trigger locks, but many gun owners have been unwilling to purchase or use them and state and federal governments have been unwilling to mandate their use.

However, trigger locks seem not to be the goal of the gun control activists and lawyers pushing the New Orleans suit. They apparently want more personalized, “smart gun” devices like those currently under development at several gun companies. For instance, Colt is attempting to construct a personalized safety device that would allow a gun to fire only when activated by a signal sent out by a computer chip contained in a ring or bracelet worn by the owner. But high-tech devices like the ones under development at Colt are still years away from general use. Even after they are fully developed they will have to be tested for safety and reliability before they are sold to the public.<sup>113</sup> At this point, marketing them would be irresponsible — and would open firearms makers to standard liability lawsuits.

In addition, Kristen Rand of the antigun-ownership Violence Policy Center points out that, as a practical matter, the theory of inadequate safety could be “unwieldy to prove because there are so many different types of guns and different types of potential safety devices.”<sup>114</sup> Gun safety devices are one area of technology where a one-size-fits-all mandate likely would cause more harm than good.<sup>115</sup>

That the police do not trust these technologies to work as advertised is obvious: in states where smart gun legislation has been considered, police have requested and received exemptions from the proposed laws. If the police are not mandated to use an unproven technology, why should citizens be?

As a matter of policy and law, legislators and consumer product safety regulatory agencies will determine if and when safety devices are viable and safe enough to merit mandated inclusion on firearms. Judges have neither the expertise nor the authority to make such determinations. Accordingly, they routinely have deferred to those who do have such specialized knowledge or authority. To take any other position would be irresponsible.<sup>116</sup>

## **Appendix II: The *Hamilton* Verdict**

On February 11, 1999, after six days of deliberation, the jury in the *Hamilton* case rendered its verdict.<sup>117</sup> In what jury members admitted was a tortuous compromise, for the first time ever a jury held some gun manufacturers liable for shooting injuries on the basis of negligent marketing and distribution practices.<sup>118</sup> Although post-trial interviews revealed that eight of the 11 jurors opposed finding either negligence or liability, the jury found 15 of the 25 manufacturers at least partially to blame for three of the seven shootings in question and awarded damages in one. It found six companies negligent but decided that their negligence did not contribute to any of the plaintiffs' injuries. It found six companies negligent and liable but did not require them to pay damages. And it found three companies negligent and liable in one case and ordered them to split \$500,000 in damages — despite the absence of evidence linking the companies' products to the plaintiff's injuries. The jury found no negligence or liability for the other 10 manufacturers.

On several occasions during the deliberations the jury informed Judge Weinstein that it was hopelessly deadlocked — in one instance members even indicated that tempers were flaring. Judge Weinstein refused to allow a hung jury and declare a mistrial. In post-trial interviews members of the jury stated that they came to a compromise verdict simply to get the trial over with. The jurors indicated that they rejected the plaintiffs' contention that gun makers oversupplied to states with lax laws guns that were then illegally sold by black marketers in states with more stringent laws. Instead, they determined that gun makers who did not forbid their distributors from dealing with retailers who sold guns at gun shows were negligent in their distribution practices.

In response to the verdict, Richard Feldman, executive director of the American Shooting Sports Council, said, "It's as if the jury threw darts at a target to decide who they would blame and who would be exonerated. . . the verdict is being appealed and we fully expect the decision to be reversed."<sup>119</sup>

Even if this verdict is overturned on appeal, it seems likely to set a precedent which bolsters the cities' lawsuits.

## Notes

<sup>1</sup> Jack Adkins, W. W. Caruth III, Morgan Reynolds, John Lott, Richard Feldman, Bill Parkerson, Dorman Cordell, John Goodman, Merrill Matthews, Fred Crombie and Krishonne Chester all contributed to the successful completion of this study by providing the author with information and data sources, carefully reviewing and commenting on it and creating the graphics contained in it. I thank each of them for their help, apologize to anyone who provided help but whom I have forgotten to name and absolve all but the author for any remaining errors.

<sup>2</sup> Mayor Rendell first mentioned the possibility of such a suit in 1997, but he did not propose it until 1998. The mayors' threats have been reported by, among others, Matt Bai, "Targeting Gun Makers," *Newsweek*, April 13, 1998, p. 37; Pam Belluck, "Weary of Gun Violence, Chicago Considers Suit," *New York Times*, June 12, 1998; John Lott, "Keep Guns Out of Lawyers' Hands," *Wall Street Journal*, June 23, 1998; and Mark Cohen, "Half-Cocked," *Philadelphia* magazine, June 1998, pp. 29-40.

<sup>3</sup> On October 30, 1998, New Orleans Mayor Morial beat both Rendell and Daley to the punch by filing suit against gun manufacturers (see Appendix I for a discussion of the New Orleans lawsuit). Daley subsequently had Chicago's city attorneys file suit on November 12, 1998. See, for example, Paul M. Barrett, "Chicago Sues Gun Makers in the Battle's Second Shot," *Wall Street Journal*, November 11, 1998; John Jeter, "Chicago Files Suit against Gun Makers, Dealers," *Washington Post*, November 13, 1998; and Gary Washburn and Abdon Pallasch, "City Takes on Gun Industry," *Chicago Tribune*, November 13, 1998. On January 27, 1999, two more municipalities filed suits. Bridgeport, Conn., sued the firearms industry, claiming that guns are responsible for "urban decay" in minority neighborhoods, and the mayor of Miami/Dade County, Fla., followed New Orleans' strategy of attempting to force gun makers to make childproof guns. See "Connecticut Suit to Blame Gunmakers for Decay in Minority Areas," *Dallas Morning News*, January 27, 1999, and "Dade Sues Gunmakers for Kids' Sake," *Miami Herald*, January 27, 1999.

<sup>4</sup> Tim Cochran, executive director of the 500-member U.S. Conference of Mayors, which includes the mayors from all U.S. cities of more than 30,000 people, indicated that approximately 70 percent of his members would file suit against the gun industry in the near future. See Gary Fields, "Cities Plan to Go after Gun Industry in Court," *USA Today*, December 15, 1998. On January 6, 1999, Atlanta Mayor Bill Campbell announced his intention to file suit against gun manufacturers. See Maria Saporta, "Mayor Sues as Gun Industry Comes to Atlanta," *Atlanta Journal-Constitution*, January 7, 1999.

<sup>5</sup> Paul M. Barrett, "Aiming High, a Lawyer Goes after Gun Manufacturers; Has She Got a Shot?" *Wall Street Journal*, September 17, 1998. The verdict is discussed in Appendix II.

<sup>6</sup> Michael Bologna, "Suit Seeks to Hold Gun Makers Responsible for Gang Violence," *BNA Product Safety & Liability Reporter*, July, 3, 1998, pp. 615-16.

<sup>7</sup> This was the lowest rate since the National Center for Health Statistics began keeping records and according to the National Safety Council, at 0.5 fatalities per 100,000 population, is well below the rates of death due to motor vehicle accidents (16.3), falls (5.3), poisonings (3.7), drownings (1.5), fires (1.2) and suffocation by ingested object (1.1). The number of accidental firearm deaths is less than half what it was in 1930, even though the U.S. population has doubled and the number of firearms owned has more than quadrupled. These data can be found on the internet at [www.nra.org/research/1998\\_nra\\_fact\\_card.htm](http://www.nra.org/research/1998_nra_fact_card.htm).

<sup>8</sup> Bureau of the Census, *Statistical Abstract of the United States, 1997*, p. 103.

<sup>9</sup> Surveys conducted by the U.S. Fish and Wildlife Service, the International Association of Fish and Wildlife Agencies and the National Shooting Sports Foundation have found that recreational shooting sports generate more than \$30.9 billion in annual economic activity. Indeed, 99 percent of firearms use is neither to prevent nor commit crimes but for sport and recreation. See Sporting Arms and Ammunition Manufacturers Institute, Inc., *Market Size and Economic Impact of the Sporting Firearms and Ammunition Industry in America* (1998 Revised Edition), SAAMI Background Paper #2.

<sup>10</sup> To the extent that the public bears the costs of accidental firearm injuries and deaths, an argument could be made for including these in any cost calculation in the public lawsuits. However, there is no good reason for believing that absent guns, the U.S. suicide rate would decline. Gun ownership rates bear no relation to suicide rates either nationally or internationally. Nationally, suicide rates are highest in urban areas while household gun ownership is highest in rural areas. Internationally, some countries with higher gun ownership rates than the U.S. have lower suicide rates (e.g., Israel has greater gun availability but only 7.3 suicides per 100,000 population compared to a U.S. rate of 11.5). And many countries with very strict gun laws and very low gun ownership rates have much higher suicide rates than the U.S. (e.g., Luxembourg = 15.1, Denmark = 22, Germany = 15.8, and Japan — with almost no private firearm ownership = 14.3 per 100,000 population). The only reasonable conclusion to draw from the evidence is that people intent on committing suicide will use the most effective means available, whether guns, automobile exhaust (1996, 2,000 suicides using gas or vapor), rope (1996, 4,700 suicides by hanging), or drugs

(1996, 3,000 intentional drug overdose deaths). Removing guns from the U.S. would be unlikely to significantly reduce the number of suicides and the related costs, so there is no reason for including gun suicides as a cost of gun violence. See Don B. Kates, "Gun Laws around the World: Do They Work?" *The American Guardian*, October 1997, pp. 48-49, 60-62.

<sup>11</sup> The BATF does not routinely track all handgun sales. Usually it undertakes gun traces or searches only for individual guns seized or discovered by police in connection with a crime. For example, if a gun was seized in a raid of a "drug house," the police might want to know if the firearm had been used in previous crimes and how it reached the drug house. They would send a ballistic sample (a bullet fired from the gun into ballistic gelatin) and, if available, the gun's identification numbers to the BATF. The BATF would then check computers for a ballistics match and call gun dealers, asking them to check their records to see if they had sold the gun. This is called a firearms trace. In Philadelphia, however, the BATF did not act on a request to trace a particular gun, but instead contacted gun dealers and manufacturers to determine how many handguns they sold in Philadelphia and to whom.

<sup>12</sup> For an excellent discussion of the limited usefulness of BATF gun-tracing data, see Paul Blackman, "The Uses and Limitations of BATF Tracing Data for Law Enforcement, Policymaking, and Criminological Research," *Journal of Firearms and Public Policy*, Fall 1998. Among the limitations Blackman discusses are the minimal number of guns the BATF attempts to trace or succeeds in tracing, the rules for excluding guns and efforts to trace them, and the limited information gun traces provide. The BATF notes that it does not attempt to trace guns if it is unlikely to succeed, and the trace information "ONLY reflects trends relating to those firearms for which a trace request is submitted [not guns used in crime overall] and is only as accurate as the information provided by trace requesters."

<sup>13</sup> Kairys and the state police reached this conclusion even though gun control advocates have pushed for "one gun a month" sales laws, arguing that no one could legitimately need to buy more. By this standard, the average of nine guns purchased by the 700 individuals in question in Philadelphia would not seem excessive. In addition, it seems curious that Philadelphia is considering suing gun manufacturers for the possible malfeasance or criminality of the 700. If retailers are selling firearms illegally, they and their purchasers should be arrested or sued.

<sup>14</sup> 1997 Chicago Police Department Annual Report, January 1, 1998.

<sup>15</sup> Illinois Criminal Justice Information Authority, "On Good Authority, Trends in Illinois Crime 1993-1997," available on the University of Illinois, Chicago website (<http://oicj.acsp.uic.edu/publicindex.cfm?metaSection=Publications&metaPage=OGA0105>).

<sup>16</sup> As discussed in a later section of this study, each of these characteristics also appeals to law-abiding gun buyers, especially those who are applying for or have received concealed carry permits.

<sup>17</sup> Firearms manufacturer Accu-Tek was the lead defendant in the *Hamilton* case.

<sup>18</sup> In addition to 25 gun manufacturers, *Hamilton* named 20 distributors or wholesalers and three trade associations as defendants. Judge Jack Weinstein dismissed the case against the trade associations and the wholesalers in mid-trial on the grounds that since no data had been presented concerning distributors' relative market shares, blame could not be fairly apportioned.

<sup>19</sup> Barrett, "Aiming High, a Lawyer Goes after Gun Manufacturers; Has She Got a Shot?" In ruling against dismissal, Judge Weinstein ignored the fact that far fewer than 1 percent of the guns in private hands are used in crimes each year. See Morgan O. Reynolds and W. W. Caruth III, "Myths about Gun Control," NCPA Policy Report No. 176, December 1992, National Center for Policy Analysis, pp. iii, 3-5; and Gary Kleck, *Targeting Guns: Firearms and Their Control* (Hawthorne, N.Y.: Aldine de Gruyter, 1997), p. 92.

<sup>20</sup> Bologna, "Suit Seeks to Hold Gun Makers Responsible for Gang Violence."

<sup>21</sup> *Ibid.*

<sup>22</sup> For crimes in which guns are used, see Kathleen Maguire and Ann L. Pastore, eds., *Sourcebook of Criminal Justice Statistics, 1997*, U.S. Bureau of Justice Statistics. See also Michael R. Rand, *Criminal Victimization, 1997*, U.S. Bureau of Justice Statistics National Crime Victimization Survey, December 1998. A second way to calculate the number of firearm crimes from the 1997 NCVS is to multiply 28.7 percent — the percentage of crimes of serious violence committed with firearms according to the BJS — by the NCVS's 3,138,000 attempted and completed rapes and sexual assaults, aggravated assaults and robberies. To complete the firearm crime calculation one then adds in the number of firearm murders from the BJS *Sourcebook*. There is a slight discrepancy between these two calculations. In this study, the author erred on the side of caution and used the higher firearm crime derivation in his calculations.

<sup>23</sup> All of these studies are cited in Kleck, *Targeting Guns: Firearms and Their Control*, pp. 150, 187-89.

<sup>24</sup> *Ibid.*, p. 151.

<sup>25</sup> Ibid., p. 188.

<sup>26</sup> Michael R. Rand, *Guns and Crime: Handgun Victimization, Firearm Self-Defense, and Firearm Theft*, Bureau of Justice Statistics Crime Data Brief, April 1994.

<sup>27</sup> James D. Wright and Peter H. Rossi, *Armed and Considered Dangerous: A Survey of Felons and Their Firearms* (Hawthorne, N.Y.: Aldine de Gruyter, 1986).

<sup>28</sup> Using FBI/Supplementary Homicide reports and other data, Kleck calculated there are between 1,400 and 3,200 legal civilian defensive homicides each year. This contrasts with the 578 justifiable homicides (by police and civilians) reported in the U.S. Department of Justice, *Crime in the U.S. 1997*, p. 24. Among the reasons the U.S. Department of Justice count is low: not all states or law enforcement jurisdictions report justifiable homicide data to the FBI, and most defensive gun uses which result in death are never adjudicated. Rather they are “no billed” or ruled “excusable” by the grand jury, and excusable homicides are not recorded by the FBI. See Gary Kleck, *Point Blank: Guns and Violence in America*, (Hawthorne, N.Y.: Aldine de Gruyter, 1991), pp. 111-17. The only other independent source of data on self-defense killings found that between 6.5 percent and 12.1 percent of all civilian killings are ruled justifiable, which coincides with Kleck’s finding that between 5.6 percent and 13 percent of civilian killings are legally defensive.

In addition, civilians kill far more criminals each year than do police but are far less likely to shoot an innocent person. On average, U.S. citizens kill approximately 30 people each year whom they mistake for intruders. By contrast, police kill more than 330 innocent people annually. See John R. Lott Jr., *More Guns, Less Crime* (Chicago: University of Chicago Press, 1998).

<sup>29</sup> *Philadelphia Daily News*, October 10, 1997.

<sup>30</sup> *Woodland Hills (Calif.) Daily News*, April 24, 1998.

<sup>31</sup> *Houston Chronicle*, October 14, 1997.

<sup>32</sup> Reynolds and Caruth, “Myths about Gun Control,” p. 10; and Kleck, *Targeting Guns: Firearms and Their Control*, p. 163. Kleck reports that the number of defensive woundings each year could actually range up to 200,000, based on surveys which indicate that 8 percent of the more than 2.5 million defensive gun users reported wounding the criminal. This figure could be high since it is not clear how the defender “knew” he wounded the would-be assailant, and it is higher than the percentage of woundings reported by police officers who had fired their guns defensively. However, it could also be accurate. There are approximately 150,000 gun woundings each year, many of them criminals shooting other criminals, and surveys of criminals and evidence from courts show that those wounded while committing crimes often go untreated by medical professionals — especially when the wounds are minor — or get treatment from medical professionals who do not report the wounds.

<sup>33</sup> *Salem Evening News*, June 30, 1998.

<sup>34</sup> *Orlando Sentinel Tribune*, May 16, 1998.

<sup>35</sup> Lott, *More Guns, Less Crime*, p. 3.

<sup>36</sup> *Chieftain*, Pueblo, Colo., July, 14, 1998.

<sup>37</sup> *Daily Star*, Hammond, La., December, 6, 1997.

<sup>38</sup> See Jeffrey R. Snyder, “A Nation of Cowards,” *The Public Interest*, 1993.

<sup>39</sup> Rand, *Guns and Crime: Handgun Victimization, Firearm Self-Defense, and Firearm Theft*.

<sup>40</sup> Kleck, *Targeting Guns: Firearms and Their Control*, p. 190. Guns are used defensively most often in and around the home to prevent assault and burglary. In countries with lower gun ownership rates, such as Great Britain, Canada and the Netherlands, almost half (43 percent, 44 percent and 48 percent, respectively) of all burglaries are “hot” (i.e., committed while the homes are occupied), compared to just 9 percent in the U.S. Various studies have shown that U.S. burglars spend more time and effort attempting to ensure that the homes they invade are unoccupied. The main reason for this is fear of confronting an armed homeowner. See, for instance, Lott, *More Guns, Less Crime*, p. 5; Kleck, *Targeting Guns: Firearms and Their Control*, pp. 182-84; and George Renger and John Wasilick, *Suburban Burglary: A Time and Place for Everything* (Springfield, Ill.: Charles Thomas, 1985).

<sup>41</sup> Morgan O. Reynolds, “Crime and Punishment in America: 1998,” NCPA Policy Report No. 219, September 1998, National Center for Policy Analysis.

<sup>42</sup> Nine states already had concealed carry laws, making the total number of right-to-carry or shall-issue states 31. In right-to-carry states, once a citizen meets certain objective criteria (e.g., shows proof of having never been convicted of any felony or a misdemeanor domestic assault or judged mentally incompetent and passes tests on firearm safety and firearm laws), the issuing

authority must issue a permit. In these states, discretion to issue permits is taken out of the hands of law enforcement officials and politicians.

<sup>43</sup> Lott, *More Guns, Less Crime*.

<sup>44</sup> Joyce Howard Price, "City Considers Anti-Gun Lawsuit," *Washington Times*, June 23, 1998.

<sup>45</sup> In 1995, Philadelphia's exemption from the state's right-to-carry concealed carry law was ended, putting Philadelphia residents on the same footing as other Pennsylvanians. In the first year after concealed carry was liberalized, while violent crime as a whole continued to rise, the number of murders fell from 432 to 414. During the same period, the arrest rate for violent crime decreased. It is too early to tell whether the change in the law has affected Philadelphia's crime rate.

<sup>46</sup> Maguire and Pastore, eds., *Sourcebook of Criminal Justice Statistics*. According to the National Crime Victimization Survey, the estimated number of crimes, as distinguished from those reported to the police, topped 36 million in 1996 and the estimated number of violent crimes was greater than nine million.

<sup>47</sup> Ibid. This figure is 68 percent of a total of 19,645 total murders. Marianne Zawitz, citing the 1993 NCVS, states that 29 percent of the victims of violent crimes reported that they faced an offender with a firearm. This number is likely overstated since it includes instances where the victim assumed but did not see a gun. See Marianne Zawitz, *Guns Used in Crime*, Bureau of Justice Statistics Selected Findings, July 1995. Kleck, on the other hand, citing *Criminal Victimization, 1994*, U.S. Bureau of Justice Statistics, states that only 14 percent of all violent crime victims faced offenders with guns. See Gary Kleck and Mark Gertz, "Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun," *Journal of Criminal Law and Criminology*, Fall 1995.

<sup>48</sup> Marianne W. Zawitz, *Firearm Injury from Crime*, Bureau of Justice Statistics Selected Findings, U.S. Department of Justice, 1996.

<sup>49</sup> Bureau of Justice Statistics, "Violence-Related Injuries Treated in Hospital Emergency Departments," August 1997.

<sup>50</sup> Patsy A. Klaus, *The Cost of Crime to Victims: Crime Data Brief*, Bureau of Justice Statistics, 1994. Klaus's estimate includes only the direct cost to victims of crime (including medical expenses and lost work time). She estimated that crimes of violence (excluding murder) cost society approximately \$1.4 billion per year. Her figure is undoubtedly low since it does not include costs related to murder and the medical costs include only the out-of-pocket expenses; medical costs covered by insurance or picked up by the public were not accounted for.

<sup>51</sup> Ted R. Miller, Mark A. Cohen and Brian Wiersema, *The Extent and Costs of Crime Victimization: A New Look, 1996*, National Institute of Justice, January 1996.

<sup>52</sup> Economists debate the merits of categories such as "pain and suffering" and "quality of life." While Klaus undoubtedly undercounts the cost of crime, Miller, Cohen and Weirsema's estimates may be too high; the truth is likely somewhere in between. The key to comparing the costs of firearm violence with the benefits of defensive gun use (DGU) is to use the same cost/savings estimate for the average cost per crime when figuring the average benefit from a crime prevented; there is no good reason for assuming that crimes prevented would have been less expensive than crimes committed. Indeed, there is at least one reason for assuming that the savings for the average crime prevented due to DGU is higher. Crimes prevented would have been by definition violent crimes since they involved a face-to-face confrontation between the person targeted as a victim and the attempted victimizer, and as a rule violent crimes are more expensive than nonviolent property crimes (at least when intangibles such as the cost of pain and suffering and victimization are included).

<sup>53</sup> Seventy-three percent of those with health insurance have coverage through their employers — the point being that criminals and former criminals are far less likely to be gainfully employed and thus have employer-provided health insurance than is the general population.

<sup>54</sup> Zawitz, *Firearm Injury from Crime*, p. 5.

<sup>55</sup> Richard C. Lumb and Paul C. Friday, City of Charlotte Gunshot Study, 1994, Department of Criminal Justice, University of North Carolina, cited in Kleck, *Targeting Guns: Firearms and Their Control*, p. 3.

<sup>56</sup> Zawitz, *Firearm Injury from Crime*, p. 5.

<sup>57</sup> Don B. Kates and Gary Kleck, *The Great American Gun Debate* (San Francisco: Pacific Research Institute for Public Policy, 1997), p. 13.

<sup>58</sup> See Note 25 concerning how firearm crime numbers were determined using the NCVS.

<sup>59</sup> Kleck's "Defensive Gun Use" numbers were first presented in his book *Point Blank: Guns and Violence in America*, based upon a "National Self-Defense Survey" he and a colleague developed. *Point Blank* won the Michael Hindelang Award in 1993

from the American Society of Criminology for the best criminology book in the past three years.

<sup>60</sup> Klaus, *The Cost of Crime to Victims: Crime Data Brief*. In this study, the costs of crime are calculated by multiplying the number of firearm crimes in the 1997 *Sourcebook of Criminal Justice Statistics* (483,000) by the average cost per crime as presented in the studies cited. The average benefit of defensive gun use is calculated by multiplying the average cost of crime by the number of defensive gun uses as calculated in Kleck (approximately 2.5 million). Many crimes are never reported, and violent crimes like rape, assault and murder often involve higher costs (e.g., medical expenses and lost workdays) than nonviolent crimes like theft, which has a \$55 average cost. Thus it is likely that both the benefits of defensive firearm use and the costs of criminal gun misuse are higher, but there is no reason to assume that the cost/benefit ratio of criminal to defensive gun use is significantly different. Many firearm crimes and successful instances of defensive gun use likely are never reported.

<sup>61</sup> Edwin W. Zedlewski, *Making Confinement Decisions*, National Institute of Justice, 1987.

<sup>62</sup> The figure of \$20,360 is derived from two studies of tangible costs — direct costs and indirect productivity losses — to victims of gunshot wounds. Miller, Cohen and Wiersema, *The Extent and Costs of Crime Victimization: A New Look*, 1996, p. 9, found tangible costs of \$18,360 per firearm crime in 1996; multiplied by the 915,000 firearm crimes estimated in the NCVS, this produces total tangible costs of \$16.8 billion. More than \$13.4 billion of this total is accounted for by 13,000 murders, which cost more than \$1.03 million each. A more recent study by Miller and Cohen, “Costs of Gunshot and Cut/Stab Wounds in the United States, with Some Canadian Comparisons,” *Accident Analysis and Prevention*, Vol. 29, No. 3, 1997, pp. 329-41, estimated the tangible costs of gunshot wounds solely caused during the commission of a crime at \$20.67 billion in 1992: \$16.9 billion for 18,007 fatal shootings at \$938,000 each and \$3.77 billion for woundings requiring either hospitalization or emergency room treatment. Since the costs of firearm injury alone are higher in the later study, a critic might claim that I am trying to underestimate the cost of firearm violence. The total cost of firearm murders differs due to the substantial decrease in murder since 1992. To answer possible critics, I have used the higher of the two estimates of the average cost per firearm murders when calculating the total cost of firearm crime. However, the \$3.77 billion cost of nonfatal injuries in connection with firearm crimes in one study is higher than the cost of nonfatal firearms crimes both with and without injuries in the other. To further satisfy critics, I have recalculated the cost of nonfatal firearms crimes. I multiplied the number of nonfatal firearm injuries by the average cost of firearm crime as calculated in Miller, Cohen and Wiersema (i.e., \$18,360 x 82,300 = \$1,511 billion). Subtracting that number from \$3.77 billion gives \$2.259 billion (this avoids double-counting of nonfatal firearm injuries). \$2.259 billion was then multiplied by 81 percent to account for the 19 percent average decline in serious crime since 1993 — for a total of \$1.829 billion in added costs of firearm crime due to nonfatal firearm injuries. Adding this to the Miller, Cohen and Wiersema estimate gives us a total adjusted cost estimate of \$18.629 billion or \$20,360 per firearm crime.

<sup>63</sup> One might question whether the public should be picking up the cost of injury to criminals stemming from either felon-on-felon violence or a lawful defensive gun use. This discussion is not meant to ignore or trivialize the fact that many innocent people are murdered and injured every year by firearms. Nor is it meant to imply that when a criminal is a victim of a gun homicide his murderer should not be pursued. The law must not turn a blind eye to any murder or violent crime, even when the victims are criminals. However, the discussion is meant to highlight the fact that figures for lost lifetime earnings or lost productivity due to gun homicides are probably overstated; many murder victims were not productive members of society.

<sup>64</sup> Peter W. Greenwood, *Rand Research on Criminal Careers: An Update on Progress to Date* (Santa Monica, Calif.: Rand Corp., 1980). Morgan Reynolds notes that surveys of prisoners conducted in Wisconsin in 1990 and in New Jersey in 1993 indicated that prisoners had committed 12 non-drug-related crimes on average the year before their incarceration. Morgan Reynolds, “Crime and Punishment in America: 1998,” p. 16.

<sup>65</sup> Stuart J. Miller, Simon Dinitz and John P. Conrad, *Careers of the Violent* (Lexington, Mass.: D. C. Heath and Company, 1982).

<sup>66</sup> Paul E. Tracey, Marvin E. Wolfgang and Robert M. Figlio, *Delinquency Careers in Two Birth Cohorts* (New York: Plenum Press, 1990).

<sup>67</sup> *Ibid.*

<sup>68</sup> Zedlewski, *Making Confinement Decisions*. Zedlewski found that at 187 crimes per year, the average criminal is responsible for \$430,000 in crime costs — an average of \$2,300 per crime. Zedlewski points out that his estimate for the average number of crimes per felon per year was highly skewed because of a phenomenal number of crimes committed by a few super-predators. While more than 50 percent of the criminals interviewed reported committing fewer than 15 crimes per year, 25 percent committed more than 135 and 10 percent committed more than 600 crimes annually. For the purposes of this study, when calculating the “Long-Term Benefit of Defensive Gun Use” the author uses the average number of crimes per year (14) cited in Greenwood, *Rand Research on Criminal Careers: An Update on Progress to Date*, 1980. This number is similar to the numbers calculated by others; see Note 64.

<sup>69</sup> Cumulative long-term crime-related social benefit from terminal defensive gun uses (LBDGU) is calculated by multiplying the number of criminals (C) killed by the number of years their active criminal lifespan is reduced (Y) by the number of offenses not committed (O) by the average cost of crime (A):  $LBDGU=C*Y*O*A$ . This cumulative number increases each year as more criminals are killed in defensive shootings. Since all things being equal, a crime committed in the present is more costly than the same crime committed in the future, the future social benefits from any one year's criminal deaths should be so reduced — which would make the future social benefit of any single year's killings less, but still substantial. All LBDGU calculations use a 5 percent annual discount rate.

<sup>70</sup> Kleck, *Targeting Guns*. Even if one uses Kleck's low-end calculation of 1,400 legal civilian killings, the LBDGU is still substantial.

<sup>71</sup> If Zedlewski's numbers are closer to the truth and most criminals do commit approximately 187 crimes per year, the LBDGU is about 10 times greater.

<sup>72</sup> The case of Bernard Goetz in New York provides powerful anecdotal evidence of the benefits of defensive gun use. In 1984 Goetz, who had been robbed on several occasions, became a hero to some and a pariah to others when he shot four youths on the subway who were trying to rob him. Between the time Goetz fended off the attack and turned himself in, subway crime went down by half. After a lengthy and very public trial, Goetz was acquitted of attempted murder — but convicted under New York's strict gun control laws of carrying an unlicensed firearm. Three of the four youths whom Goetz shot later wound up in jail or prison: one for raping and beating a pregnant woman and the other two for robbery. Of the four teenage criminals, the only one whose crime career ended was Darrell Cabey, who was permanently paralyzed and brain-damaged. In a perverse twist, in 1996 Cabey's family won damages in the amount of \$43 million in a civil lawsuit against Goetz.

<sup>73</sup> Cohen, "Half-Cocked." Since Cohen's report, two more cases against gun manufacturers have come and gone. One (*Bubalo et al. v. Navegar, Inc.*) was dismissed by a federal court. The second (*Halberstam v. S. W. Daniels*) went to the jury, which found for the defendant gun manufacturer.

<sup>74</sup> Timothy A. Buman, *The Compendium of United States Firearms Products Liability Cases* (Atlanta: Cozen and O'Conner, 1995). More detailed information, including quotes from the final decisions on a number of the cases cited, comes from a packet of materials prepared for the U.S. Conference of Mayors crime task force by the American Shooting Sports Council.

<sup>75</sup> *Wasylow v. Glock, Inc.*, No. 94-11073-DPW, slip. op. (D. Mass. April 4, 1996).

<sup>76</sup> *Martin v. Harrington & Richardson, Inc.*, 743 F.2d 1200 (7th Cir. 1984).

<sup>77</sup> *Delahanty v. Hinckley et al.*, 686 F. Supp. 920 (D.D.C. 1986, aff'd, 900 F.2d 608 (D.C. Cir. 1990).

<sup>78</sup> *Lovett v. Sturm, Ruger et al.*, No. 93-30-474, slip. op. at 4 (Cir. Ct. Cty. of Genesee, Mich. 1995).

<sup>79</sup> *Rhodes v. R. G. Industries, Inc.*, 325 S.E.2d 465, 467 (Ga. Ct. App. 1984).

<sup>80</sup> *Richardson v. Holland et al.*, 741 S.W.2d 751, 757 (Mo. Ct. App. 1987).

<sup>81</sup> A recent case indicates that the best efforts of Ms. Barnes and Judge Weinstein to target gun manufacturers may ultimately be in vain. *Halberstam v. S. W. Daniels* in the U.S. District Court's Eastern Division of New York was, until *Hamilton*, the only gun case in federal courts to pass judicial scrutiny and actually go to a jury. The federal jury cleared the gun manufacturer of all liability in the killing of a young Hasidic Jewish student. The jury found the manufacturer not responsible for what is done with its products once they are sold. This case is of special relevance to *Hamilton* since the presiding judge was Jack Weinstein — which probably explains why it reached the jury in the first place.

<sup>82</sup> The 1987 Murder Analysis report for Chicago showed that 54 percent or 374 of Chicago's 691 murders were committed with guns (with the .38 revolver leading the list); kitchen knives were second on the list with 88 murders. Among the other murders, 54 people were beaten or strangled to death by hand, 29 were killed with pocket knives, 10 with baseball bats and two with forks. Nationally, murders committed with firearms have increased 13 percent since 1964 to 68 percent, but 32 percent of murders are still committed with weapons other than guns. See Maguire and Pastore, eds., *Sourcebook of Criminal Justice Statistics*.

<sup>83</sup> Anne G. Kimball, "Firearms Litigation Is Not the Next Wave in Product Liability Cases," Boston, Mass., Continuing Education, 1997, pp. 11-16. Though this paper presents a thoughtful discussion of the history of firearms liability litigation, the current evidence suggests that Ms. Kimball was entirely too optimistic concerning the future of firearms litigation. One might suggest that she underestimated both the depth of some people's animosity toward firearms and the ingenuity and greed of her colleagues before the bar. For evidence of this see Elaine McArdle, "Lawyers, Guns and Money: Firearms Litigation Ready to Explode," *Lawyers Weekly USA*, November 30, 1998, pp. B2-B5.

<sup>84</sup> The courts rejected this argument in, among other cases, *Patterson v. Rohm-Gesellschaft*, 608 F.Supp. 1206 (N.D. Tex. 1985).

<sup>85</sup> The courts rejected this argument in, among other cases, *DeRosa v. Remington Arms Co.*, 509 F. Supp. 762, 769 (E.D. N.Y. 1981).

<sup>86</sup> The courts rejected this argument in, among other cases, *Moore v. R. G. Indus., Inc.*, No. C-82-1417-MHP, slip. op. at 8 (N.D. Cal. Aug. 29, 1984) aff'd, 789 F.2d 1326 (9th Cir. 1986). This case is directly on point in both the public and private lawsuits coming out of Chicago. Gun manufacturers do advertise guns as inexpensive, easily concealed, corrosion resistant, etc., but these characteristics appeal to average gun owners and are of paramount importance to the large and growing number of people carrying concealed handguns.

<sup>87</sup> The courts rejected this argument in, among other cases, *Mavilia v. Stoeger Indus.*, 574 F. Supp. 107 111 (D. Mass. 1983). The courts have recognized this as one of the most specious arguments made concerning firearms. Firearms carry extensive warnings concerning their safety features and safe handling; newer guns even have warnings on their barrels.

<sup>88</sup> The courts rejected this argument in, among other cases, *Shipman v. Jennings Firearms*, 791 F.2d 1532, 1534 (11th Cir. 1986).

<sup>89</sup> The courts rejected this argument in, among other cases, *Forni v. Ferguson*, 648 N.Y.S. 2d 73 (1996).

<sup>90</sup> "Accident Facts 1998," National Safety Council: [www.nsc.org/lrs/statinfo/af8.htm](http://www.nsc.org/lrs/statinfo/af8.htm).

<sup>91</sup> While Chicago may not have grounds to sue gun manufacturers, it may have grounds for action against the dealers. On announcing the lawsuit, Mayor Daley played videotapes of purportedly illegal gun purchases made by undercover police officers. If the dealers in question broke the law as claimed, it is not clear why Chicago did not pursue criminal cases against them. That it did not hints the cases may be more about winning money than preventing gun violence.

<sup>92</sup> *Forni v. Ferguson et al.*, No. 132994/94, slip. op. at 11 (N.Y. Sup. Ct. Aug. 2, 1995).

<sup>93</sup> *Forni v. Sturm, Ruger & Co. et al.*, No. S8613, slip. op. at 77 (N.T. App. Div. 1st Dept. Oct. 1, 1996).

<sup>94</sup> *Riordan v. Int'l Armament Corp.*, 477 N.E. 2d 1293, 1295-96 (Ill. App. Ct. 1985).

<sup>95</sup> NERA's research gathered for *Hamilton* does not bolster the negligence argument. First, NERA admits that its research has important flaws, mainly because it assumes that every gun crime is committed with a different gun — which is how NERA came to its oversupply figures. However, even NERA recognizes that illicit guns are used repeatedly. In addition, as the author showed earlier, a hard-core 10 to 25 percent of criminals commit almost half of all crimes, and they do not use a different gun for each crime. Second, the size of the civilian gun stock is not known with certainty. The best estimates could be off a few million or tens of millions (see Kleck, *Targeting Guns: Firearms and Their Control*, pp. 64-70, 96-100, on the problems with gun research data). According to Kleck, underreporting of gun ownership is common. Third, only a couple of gun manufacturers sell directly to licensed gun dealers. Most sell to federally licensed firearms wholesalers who then ship guns all over the country. While manufacturers undoubtedly know which wholesalers receive their guns, they do not track or have the authority to track which retailers purchase their guns from wholesalers. Finally, nothing changes the fact that firearms manufacturers ship only to licensed gun dealers. The intervening actors in any criminal misuse of a firearm should, by legal precedent, provide manufacturers with ironclad protection against civil liability for gun misuse.

<sup>96</sup> *Bubalo et al. v. Navegar, Inc.* (U.S. District Court, Northern District of Illinois, Eastern Division).

<sup>97</sup> Almost every editorial page that has commented has noted the lack of a legal basis for and been critical of the gun lawsuits. Editors have routinely argued that if these lawsuits succeed they will establish a terrible precedent in product liability law. See, for example, "When Lawsuits Make Policy," *Economist*, November 21-27, 1998, pp. 17-19, 27-29; "Courtroom Cowboys," *Wall Street Journal*, November 16, 1998; "Mayors Go Gunning for Guns," *Investor's Business Daily*, November 18, 1998; "Cities Are Making a Basic Error in Litigious Attacks on Gun Makers," *Tampa Tribune*, November 23, 1998; "Boston Gun Suit a Shot in the Dark," *Boston Herald*, November 22, 1998; "Gun Lawsuits Miss the Mark," *Miami Herald*, November 13, 1998; and "Money from Guns," *San Diego Union-Tribune*, December 4, 1998.

<sup>98</sup> The polling firm DecisionQuest found in a recent survey that 66 percent of Americans do not believe gun manufacturers should be sued for crimes committed with guns. Only 19 percent of those polled supported such suits. NRA Crimestrike, *Crime Watch Weekly*, January 19, 1999, and Southwestern Legal Foundation News Release, January 19, 1999.

<sup>99</sup> One very indirect and difficult-to-measure way that a finding for the plaintiffs in these lawsuits might threaten public safety is by heightening the fears of the most antigovernment members of the militia movement. Militia members might conclude that the suits are aimed at disarming the largely law-abiding public and respond with violence.

<sup>100</sup> Price, “City Considers Anti-Gun Lawsuit.”

<sup>101</sup> John R. Lott, “Gun Shy,” *National Review*, December 21, 1998, pp. 46-48. Furthermore, a 1996 poll found that more than 60 percent of Americans felt that citizens should be allowed to carry concealed handguns and only 5 percent felt that manufacturers or retailers should be held responsible for firearm misuse. Eighty-four percent felt that the individual who used the firearm illegally should be held responsible. See the Tarrance Group, *A Survey of Voter Attitudes in the United States*, July 21-22, 1996: [www.assc.org/afcsurvey.html](http://www.assc.org/afcsurvey.html).

<sup>102</sup> See Appendix I for a discussion of personalized gun safety technologies, a key point in the New Orleans lawsuit.

<sup>103</sup> Several facts indicate that the real aim of the lawsuits is to bankrupt the gun industry. First, as argued earlier, the lawsuits are weak as a matter of law. Second, the firearms industry is relatively small (approximately \$2 billion in sales per year) and lacks the resources to fight even a fraction of the threatened lawsuits. The industry could suffer the “death of a thousand cuts” long before the last suit filed gets a hearing.

<sup>104</sup> *Statistical Abstract of the United States 1997* (Washington, D.C.: U.S. Commerce Department, 1997); and *National Crime Victimization Survey 1996* (Washington, D.C.: Bureau of Justice Statistics, 1997).

<sup>105</sup> Only 34.5 percent of black households possess firearms, compared to 44.4 percent of white households. Black households with less than \$10,000 annual income have an even lower rate of gun ownership, 15.4 percent. These numbers suggest that black households suffer more crime at least in part because they are less likely to be armed and thus are easier prey for criminals. See Kleck, *Targeting Guns: Firearms and Their Control*, p. 101.

<sup>106</sup> The legislation defined small business as companies with fewer than 25 full-time employees and annual revenues of less than \$5 million.

<sup>107</sup> Its inaction was premised on its mission: to represent lawful firearm users. The NRA joined the battle against the lawsuits because it recognized that a successful attack on the industry would “deprive [its] members of their rights.” See Robert Suro, “In Policy Shift, NRA Will Lobby for Gun Makers,” *Washington Post*, January 15, 1999.

<sup>108</sup> This legislation would scuttle the lawsuit Atlanta Mayor Bill Campbell filed February 4, 1999, against the firearms industry. Campbell vowed to challenge the legislation in court. David Firestone, “Gun Lobby Begins a Concerted Attack on Cities’ Lawsuits,” *New York Times*, February 9, 1999. Since this time, legislators in several other states, including Texas, Kansas, South Dakota and Tennessee, have introduced bills that would either limit the liability of gun makers and distributors for the negligent or criminal misuse of their products or forbid cities from filing liability suits.

<sup>109</sup> See the Second Amendment Foundation website: [www.saf.org](http://www.saf.org).

<sup>110</sup> Information on the bill SF 128 can be found on the National Rifle Association website: [www.nra.org](http://www.nra.org).

<sup>111</sup> Leslie Tamar Snadowsky, “Firearms Makers Face Suit,” *Dallas Morning News*, October 31, 1998.

<sup>112</sup> They will receive 20 percent of any settlement or 30 percent of any court judgment. See Matt Labash, “Lawyers, Guns, and Money,” *Weekly Standard*, February 1, 1999, pp. 25-29, for a detailed examination of the origin of the New Orleans suit and information concerning the motives and strategies of the lawyers involved.

<sup>113</sup> According to a 1996 report by the Sandia National Laboratory, user-specific or “smart gun” technology is years away, and the police have expressed skepticism about it. See D. R. Weiss et al., *Smart Gun Technology Project Final Report*, 1996, Sandia National Laboratories, Albuquerque, N.M. See also Iver Peterson, “‘Smart Guns’ Set Off Debate: Just How ‘Smart’ Are They?” *New York Times*, October 22, 1998.

<sup>114</sup> Barrett, “Other Cities May Follow New Orleans in Anti-Gun Suit, but Fight Will Be Hard.”

<sup>115</sup> Ultimately, talk of safety devices misses the mark. Even the best safety devices, whether trigger locks or “smart technology” devices, would have drawbacks encouraging some owners either not to use them or to disable them. In some instances, the devices themselves could make the guns less useful or less safe. In addition, determined criminals would be able to defeat such devices as they do other low-tech and high-tech anticrime technology. More important than any safety device are the intentions of and care taken by the person using the gun.

<sup>116</sup> In what might seem an ironic turn of “justice,” if New Orleans’ suit or any of the other cities’ suits are ultimately successful, Mayor Morial may have placed himself and the city at risk from similar suits. Why? In February 1998, in an effort to upgrade the New Orleans police department arsenal, the city became, in effect, a gun dealer by trading more than 8,000 confiscated guns and 715 police department issue Beretta 9mm. semiautomatic pistols to gun dealers for 1,700 Glock 9mm. pistols. The pistols traded in have been redistributed and resold across the nation. This transaction could pose a serious liability problem for New Orleans in the future, should any of these guns be traced to crimes. See Labash, “Lawyers, Guns, and Money.”

<sup>117</sup> Rick Hampson, "Gun Jury: Some Makers Negligent," *USA Today*, February 12, 1999; Rick Hampson, "Gunmakers See Mixed Verdict in Liability Suit as Defeat," *USA Today*, February 15, 1999; Robert Suro, "Gun Makers Found Liable in Shootings," *Dallas Morning News*, February 12, 1999; Vanessa O'Connell and Paul M. Barrett, "Gun Makers Are Set Back in Jury Verdict," *Wall Street Journal*, February 12, 1999.

<sup>118</sup> For the best description of the infighting among the jurors, see Vanessa O'Connell and Paul M. Barrett, "Open Season: How a Jury Placed the Firearms Industry on the Legal Defensive," *Wall Street Journal*, February 16, 1999.

<sup>119</sup> "New York Verdict Expected to Be Overturned on Appeal," American Shooting Sports Council (ASSC) press release, February 12, 1999.

## About the Author

**H. Sterling Burnett** is Senior Policy Analyst at the National Center for Policy Analysis. Mr. Burnett, who holds an M.A. in Applied Philosophy from Bowling Green State University, is an expert on the conjunction between ethics and public policy. He has worked on environmental issues including environmental ethics, global warming, endangered species and property rights, and on gun policy issues. In 1998, Mr. Burnett won a James Madison Award from the Second Amendment Foundation for a Knight-Ridder syndicated editorial exchange with Sarah Brady of Handgun Control Inc., in which he argued that the Brady law waiting period had been ineffective and did not deserve to be reauthorized. He currently serves as the Vice President of Conservation on the board of Dallas' oldest conservation organization, The Dallas Woods and Waters Conservation Club, and as an advisor to the American Legislative Exchange Council's Energy, Environment, Natural Resources and Agriculture Task Force. He has been a Brand Visiting Chair of Free Enterprise and Public Policy at Howard Payne University and a Graduate Fellow at the Political Economy Research Center. Mr. Burnett's articles have appeared in numerous newspapers, professional journals and books including *USA Today*, *Investor's Business Daily*, *Dallas Morning News*, *Ethics* and *International Studies in Philosophy*. His television appearances have included CNN and Fox News, and he appears weekly as a guest policy expert on Money Radio in Los Angeles.

## About the NCPA

The National Center for Policy Analysis is a nonprofit, nonpartisan research institute founded in 1983 and funded exclusively by private contributions. The mission of the NCPA is to seek innovative private-sector solutions to public policy problems.

The center is probably best known for developing the concept of Medical Savings Accounts (MSAs). Sen. Phil Gramm said MSAs are “the only original idea in health policy in more than a decade.” Congress approved a pilot MSA program for small businesses and the self-employed in 1996 and voted in 1997 to allow Medicare beneficiaries to have MSAs.

In fashioning the 1997 budget deal, members of Congress relied on input from the NCPA’s Center for Tax Policy. The Balanced Budget Act incorporated key NCPA ideas, including the capital gains tax cut and the Roth IRA. Both proposals were part of the pro-growth tax cuts agenda contained in the Contract with America and first proposed by the NCPA and the U.S. Chamber of Commerce in 1991. Two other provisions — an increase in the estate tax exemption and abolition of the 15 percent tax penalty on excess withdrawals from pension accounts — also reflect NCPA proposals.

The NCPA has also developed the concept of taxpayer choice — letting taxpayers rather than government decide where their welfare dollars go. Sen. Dan Coats and Rep. John Kasich have introduced a welfare reform bill incorporating the idea. It is also included in separate legislation in the House sponsored by Rep. Jim Talent and Rep. J. C. Watts.

Another important area is entitlement reform. NCPA research shows that elderly entitlements will require taxes that take between one-half and two-thirds of workers’ incomes by the time today’s college students retire. A middle-income worker entering the labor market today can expect to pay almost \$750,000 in taxes by the time he or she is 65 years of age, but will receive only \$140,000 in benefits — assuming benefits are paid. At virtually every income level, Social Security makes people worse off — paying a lower rate of return than they could have earned in private capital markets. To solve this problem, the NCPA has developed a 12-step plan for Social Security privatization.

The NCPA has also developed ways of giving parents the opportunity to choose the best school for their children, whether public or private. For example, one NCPA study recommends a dollar-for-dollar tax credit up to \$1,000 per child for money spent on tuition expenses at any qualified nongovernment school — a form of taxpayer choice for education.

The NCPA’s Environmental Center works closely with other think tanks to provide common sense alternatives to extreme positions that frequently dominate environmental policy debates. In 1991 the NCPA organized a 76-member task force, representing 64 think tanks and research institutes, to produce *Progressive Environmentalism*, a pro-free enterprise, pro-science, pro-human report on environmental issues. The task force concluded that empowering individuals rather than government bureaucracies offers the greatest promise for a cleaner environment. More recently, the NCPA produced

*New Environmentalism*, written by Reason Foundation scholar Lynn Scarlett. The study proposes a framework for making the nation's environmental efforts more effective while reducing regulatory burdens.

In 1990 the center created a health care task force with representatives from 40 think tanks and research institutes. The pro-free enterprise policy proposals developed by the task force became the basis for a 1992 book, *Patient Power*, by John Goodman and Gerald Musgrave. More than 300,000 copies of the book were printed and distributed by the Cato Institute.

A number of bills before Congress promise to protect patients from abuses by HMOs and other managed care plans. Although these bills are portrayed as consumer protection measures, NCPA studies show they would make insurance more costly and increase the number of uninsured Americans. An NCPA proposal to solve the problem of the growing number of Americans without health insurance would provide refundable tax credits for those who purchase their own health insurance.

NCPA studies, ideas and experts are quoted frequently in news stories nationwide. Columns written by NCPA experts appear regularly in national publications such as the *Wall Street Journal*, *Washington Times* and *Investor's Business Daily*. NCPA Policy Chairman Pete du Pont's radio commentaries are carried on 290 radio stations across America. The NCPA regularly sponsors and participates in *Firing Line Debate*, which is aired on 302 public broadcasting stations. The NCPA each year sponsors several one-hour televised debates on the PBS program *DebatesDebates*.

According to Burrelle's, the NCPA reached the average household 10 times in 1997. More than 35,000 column inches devoted to NCPA ideas appeared in newspapers and magazines in 1997. The advertising value of this print and broadcast coverage was more than \$90 million, even though the NCPA budget for 1997 was only \$3.6 million.

The NCPA has one of the most extensive Internet sites for pro-free enterprise approaches to public policy issues. All NCPA publications are available online, and the website provides numerous links to other sites containing related information. The NCPA also produces an online journal, *Daily Policy Digest*, which summarizes public policy research findings each business day and is available by e-mail to anyone who requests it.

### **What Others Say about the NCPA**

*"...influencing the national debate with studies, reports and seminars."*

— **TIME**

*"...steadily thrusting such ideas as 'privatization' of social services into the intellectual marketplace."*

— **CHRISTIAN SCIENCE MONITOR**

*"Increasingly influential."*

— **EVANS AND NOVAK**



Suing the Gun Industry masterfully reveals the many details contributing to the intractability of the gun debate."-New York Law Journal"Second Amendment advocate or gun-control fanatic, all Americans who care about freedom need to readSuing the Gun Industry."-Bob Barr, Member of Congress, 1995-2003, and Twenty-First Century Liberties Chair for Freedom and Privacy, American Conservative.Â By suing sellers and manufacturers, who have deeper pockets than the assailants, victims seek to improve their chances of receiving compensation.Â Gun violence is a public health problem. Each year in the United States, tens of thousands of

Until further notice, all posts pertaining to gun deals, sales, and of course the distribution of 3d printing files are prohibited. Please come discuss what we can do, because it may only be a matter of time before this and all firearms-related subreddits are removed from the site. In this subreddit, we value Freedom of Speech as much as we value The Right to Keep and Bear Arms. They alleged that guns are a public nuisance and that gun manufacturers have negligently distributed and marketed guns.<sup>11</sup> A third theory was initially used in the New Orleans lawsuit. The City of New Orleans argued that guns as they are currently manufactured violate Louisiana's product liability laws.<sup>12</sup> One or more of these theories are alleged in most of the city lawsuits against gun manufacturers. Based on these theories, the plaintiffs argue that the firearms industry should reimburse them for the public health and safety costs associated with treating and preventing firearms injuries