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10
11 IN THE UNITED STATES DISTRICT COURT
12 FOR THE CENTRAL DISTRICT OF CALIFORNIA
13 WESTERN DIVISION
14

15 **STEVEN RUPP; STEVEN**
16 **DEMBER; CHERYL JOHNSON;**
17 **MICHAEL JONES;**
18 **CHRISTOPHER SEIFERT;**
19 **ALFONSO VALENCIA; TROY**
20 **WILLIS; and CALIFORNIA RIFLE**
21 **& PISTOL ASSOCIATION,**
22 **INCORPORATED,**

23 Plaintiffs,

24 v.

25 **ROB BONTA, in his official capacity**
26 **as Attorney General of the State of**
27 **California; and DOES 1-10,**

28 Defendants.

8:17-cv-00746-JLS-JDE

**SUPPLEMENTAL SUR-
REBUTTAL EXPERT REPORT
AND DECLARATION OF
RANDOLPH ROTH**

Courtroom: 8A
Judge: The Honorable Josephine
L. Staton

Action Filed: April 24, 2017

¹ Rob Bonta has succeeded former Attorney General Xavier Becerra as the Attorney General of the State of California. Pursuant to Federal Rule of Civil Procedure 25(d), Attorney General Bonta, in his official capacity, is substituted as the defendant in this case.

1 **SUPPLEMENTAL SUR-REBUTTAL EXPERT REPORT AND**
2 **DECLARATION OF RANDOLPH ROTH**

3 I, Randolph Roth, declare under penalty of perjury that the following is true
4 and correct:

5 1. I am a College of Arts and Sciences Distinguished Professor of History
6 and Sociology at The Ohio State University. I previously submitted a supplemental
7 expert report and declaration dated January 6, 2023, in the above-captioned case.
8 My professional qualifications are set forth in that Supplemental Expert Report and
9 Declaration.²

10 2. I have been asked by the Office of the Attorney General of California
11 to respond to Clayton Cramer's rebuttal report, dated February 3, 2023. I will
12 respond point by point.

13 3. This supplemental sur-rebuttal expert report and declaration is based
14 on my own personal knowledge and experience, and, if I am called as a witness, I
15 could and would testify competently to the truth of the matters discussed in it.

16 **A. On the extent of firearms ownership in the early republic.**

17 4. Cramer's attempts to establish that firearms ownership was more
18 ubiquitous than the 50 to 60 percent ownership cited in my declaration are not well
19 supported.³ Cramer does not cite the study that is the gold standard, on which my
20 declaration is based: Alice Hanson Jones' sophisticated and mathematically
21 rigorous clustered random sample of state and county probate records in 1774-

22 ² Since my Supplemental Expert Report in this matter, I have been retained
23 as an expert witness in the follow cases, in addition to those listed in my
24 Supplemental Expert Report: *Association Of New Jersey Rifle and Pistol Clubs v.*
25 *Platkin*, No. 3:18-cv-10507 (D.N.J.); *Cheeseman v. Platkin*, No. 7-:22-cv-04360
26 (D.N.J.); *Ellman v. Platkin*, No. 3:22-cv-04397 (D.N.J.); *Oregon Firearms*
27 *Federation, et al. v. Brown and Roseblum*, No. 2:22-cv-01815-IM (D.OR.);
28 *National Association for Gun Rights v. Brown*, No 22-cv-00404-DKW-RT (D.HI.);
and *National Association for Gun Rights v. Lamont*, No. 3:22-cv-01118 (D.CT.).

27 ³ Clayton Cramer, Supplemental Rebuttal Report, 1-5; and see Randolph
28 Roth Supp. Report, ¶ 15 & n. 9.

1 1775.⁴ Jones stratified her sample to ensure that poorer residents, whose estates
2 were less likely to go through probate, were weighted to reflect their representation
3 in the population. Her data show, as we might anticipate, that firearms ownership
4 was not distributed randomly. Male heads of households were more likely to own
5 firearms than female heads of households, and the wealthy more likely than the
6 poor. Also, firearms ownership was most common among household heads in the
7 Southern colonies, where fears of slave rebellion were most intense, and in New
8 England, where the inhabitants had been in a nearly perpetual state of war from
9 1689 through 1760 with the French and their native allies over control of northern
10 New England and the Maritimes. Firearms ownership was lowest in the Middle
11 Colonies, where Quakers and German pietists comprised a substantial minority of
12 the population.

13 Percent who owned guns

14 Males 52%
15 Females 18%

16 Wealthiest fifth 76%
17 Middle three-fifths 54%

18 Poorest fifth 32%

19 New England 50%
20 Middle colonies 41%
 Southern colonies 69%

24 ⁴ Alice Hanson Jones, *Wealth of a Nation to Be: The American Colonies on*
25 *the Eve of the Revolution* (New York: Columbia University Press, 1980); Jones,
26 *American Colonial Wealth: Documents and Methods*, 3 v. (New York: Arno Press,
27 1977); Jones, "Estimating Wealth of the Living from a Probate Sample," *Journal of*
28 *Interdisciplinary History* 13 (1982): 273-300; and Randolph Roth, "Guns, Murder,
 and Probability: How Can We Decide Which Figures to Trust?" *Reviews in*
 American History 35 (2007): 166-168.

5. Firearms historian Kevin Sweeney reached similar conclusions as Jones. Sweeney, like Jones, studied statistics at the graduate level and has a keen understanding of the complexity of interpreting sources from the past. He examined 4,777 probated estates from 1633 through 1800 and widened the range of our knowledge of firearms ownership to the entire colonial and Revolutionary period.⁵ He discovered, like Jones, that firearms ownership was common, but far from universal as Cramer claims from his limited, unsystematic research. Sweeney found that firearms ownership held fairly steady from the 1630s down to the eve of the Revolution, and he confirmed the regional differences that Jones found. Firearms ownership was highest in the South and lowest in Pennsylvania and New Jersey.

% probated estates
with firearms, 1770-1775

New England	51
New York	49
Pennsylvania / New Jersey	38
Chesapeake	63
South Carolina	71

6. Sweeney also found differences in firearms ownership by wealth, 1740-1750.

Wealthy

£250+	67
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Middling

£100-249	58
£50-99	54

⁵ Kevin Sweeney, "Firearms Ownership and Militias in Seventeenth and Eighteenth Century England and America," in Jennifer Tucker, Barton C. Hacker, and Margaret Vining, eds., *A Right to Bear Arms? The Contested Role of History in Contemporary Debates on the Second Amendment* (Washington, D.C.: Smithsonian Institution Scholarly Press, 2019), 54-71.

Lower

£25-49 46

£10-24 41

Poor

£0-9 26

7. There are uncertainties in our profession's estimates of firearms ownership, as there are in any scholarly endeavor. Scholars have reflected thoughtfully on the reasons why probate records might lead us to understate or overstate the proportion of households that owned a working gun. But our knowledge of firearms ownership in the colonial and revolutionary period is well-informed, critical, and statistically sophisticated, thanks to Jones and Sweeney. That is why our profession believes the figure of 50 to 60 percent of all households is right. That is not gun ubiquity. But it is certainly not "gun scarcity," a phrase that misstates our profession's understanding of gun ownership in early America.

8. Cramer attempts to question my findings with respect to firearms ownership by falsely associating it with the widely discredited research of Michael Bellesiles on the same issue.⁶ My declaration does not rely on Bellesiles' research or even reach the same general conclusions about the incident of firearms ownership. Cramer does not mention my essay in the special issue of the *William and Mary Quarterly* that, together with the essay he cites from that issue by Gloria Main, debunked the false claim by Michael Bellesiles, *Arming America*, that gun ownership was scarce in early America.⁷ I was at the forefront in our profession in calling Bellesiles to account because I knew from my work and the work of my

⁶ Clayton Cramer, Supplemental Rebuttal Report, 1.

⁷ Randolph Roth, "Guns, Gun Culture, and Homicide: The Relationship between Firearms, the Uses of Firearms, and Interpersonal Violence in Early America," *William and Mary Quarterly*, 3rd series, 59 (2002): 223-240.

1 colleagues that gun ownership was *not* scarce in early America, going back to John
2 Hope Franklin's classic *The Militant South*.⁸ I discussed the work of Alice Hanson
3 Jones in my *William and Mary Quarterly* essay, which notes every statistic from
4 Jones' study that I included in my original declaration and have included in this
5 supplementary declaration.⁹ Gloria Main also discussed Jones' study in the essay
6 that Cramer cites.¹⁰

7 **B. On the limitations of muzzle loading firearms as weapons for**
8 **committing mass murder.**

9 9. Cramer acknowledges the most important conclusion of my
10 declaration: that a single individual could not kill or wound a large number of
11 persons in a matter of minutes or seconds with a single-shot, muzzle loading
12 firearm.¹¹ The mass murder that he cites from Madison County, Indiana, in 1824
13 proves that point: it required seven men equipped with muzzle-loaders to kill three
14 unsuspecting Native men whom they had lured to the scene on false pretenses. In
15 the slaughter that ensued, with firearms and other weapons, the seven men were
16 together able to butcher ten Native women and children.

17 10. But Cramer's claim that axes, clubs, and knives can kill or wound are
18 effective tools for committing mass murder is misleading.¹² The Native man who
19 went on a rampage with an axe at a trading post in Wethersfield, Connecticut, in
20 1686 could kill only two adults and wound another before he was stopped. The two
21 club-wielding robbers in Washington, Connecticut, in 1780, managed to kill only
22 two adults. The other three victims were children. The husband who attacked his

24 ⁸ John Hope Franklin, *The Militant South, 1800-1861* (Cambridge: The
25 Belknap Press of Harvard University Press, 1956).

26 ⁹ Roth, "Guns, Gun Culture, and Homicide," 226-227.

27 ¹⁰ Gloria Main, "Many Things Forgotten: The Use of Probate Records in
28 Arming America," *William and Mary Quarterly*, 3rd series, 59 (2002): 213n3.

¹¹ Clayton Cramer, Supplemental Rebuttal Report, 4.

¹² Clayton Cramer, Supplemental Rebuttal Report, 4-6.

1 family with an axe in Clarksburg, Virginia, in 1805 killed only one adult, his wife.
2 His other eight victims were his children. And the husband who attacked his family
3 with a knife in Hallowell, Maine, in 1806 killed only one adult, his wife. His other
4 7 victims were his children. Cramer's evidence does not show that edged and blunt
5 weapons are effective tools for committing mass murder. It shows instead that
6 infants and children are not capable of defending themselves against attacks by
7 adults.¹³ That conclusion is consistent with the extensive literature in contemporary
8 criminology that shows that young children are killed in the overwhelming majority
9 of cases with weapons other than firearms, because adults can kill children so easily
10 with physical force or everyday household objects.¹⁴

11 11. Recent events also demonstrate the ineffectiveness of edged weapons
12 for committing mass murder as compared to firearms. In our own time, terrorists
13 have tried on a number of occasions to commit mass murder in the United States
14 and Europe with an edged weapon, but they have *never* been able to kill a large
15 number of people before they were restrained or killed. Consider, for instance, the
16 terrorist attack at Ohio State University in November 2016, in which a terrorist, a
17 suicidal Somali undergraduate who was failing all of his courses, rammed his car
18 into a crowd of pedestrians and attacked everyone within his reach with a butcher
19 knife.¹⁵ He wounded five people, but he failed to kill anyone, because students and
20 staff fought, fled, and dialed 911. Campus Police Officer Alan Horjuko rushed to
21 the scene, jumped out of his patrol car, and shot the individual dead within a
22

23 ¹³ For an excellent and rigorously researched study of familicides in the early
24 republic, and of the use of weapons other than firearms to kill large numbers of
25 children, see Daniel A. Cohen, "Homicidal Compulsion and the Conditions of
26 Freedom: The Social and Psychological Origins of Familicide in America's Early
27 Republic." *Journal of Social History* 28 (1995): 725-764.

28 ¹⁴ See Richard M. Hough and Kimberly D. McCorkle, *American Homicide*
(Los Angeles: Sage, 2017), 94-96, and the references cited there.

¹⁵ New York Times, November 28, 2016.
<https://www.nytimes.com/2016/11/28/us/active-shooter-ohio-state-university.html>

1 minute. Had that terrorist been armed with a semiautomatic firearm with an
2 extended magazine (as has occurred in other terrorist attacks on U.S. soil), many
3 more Buckeyes would have been at risk of being killed or wounded, and Officer
4 Horjuko would have been in mortal danger when he pulled up. But because that
5 individual was armed only with a knife, Officer Horjuko, the lone officer on the
6 scene, had time to get out of his car, pull his weapon, assess the situation, order the
7 attacker to halt, and open fire, reluctantly, from a safe distance when he refused to
8 comply.

9 12. We can see the same dynamic in the terrorist attack in Times Square
10 on New Year's Eve, 2022. Another terrorist traveled from Maine to New York City
11 "to kill people and carry out jihad" with a knife, but he failed to kill anyone, and he
12 was subdued almost instantly by the three police officers he wounded.¹⁶ Simply put,
13 incidents in which large numbers of adults are killed with an edged weapon are
14 vanishingly rare.¹⁷

15 13. Cramer accepts my conclusion that homicide was rare in the early
16 national era in settled areas in the North and Mountain South, and he does not rebut
17 my conclusions about the pattern of weapon use in early America, which shows
18 why muzzle-loading firearms were not commonly used in interpersonal homicides.
19 Because they were kept unloaded in most households, and because it took time to
20 load them, impulsive homicides, like family and household homicides, were almost
21 never committed with a firearm—always less than 10 to 15 percent. Impulsive

22 ¹⁶ New York Times, January 10, 2023.
23 [https://www.nytimes.com/2023/01/10/nyregion/trevor-bickford-federal-terror-](https://www.nytimes.com/2023/01/10/nyregion/trevor-bickford-federal-terror-charges.html)
24 [charges.html](https://www.nytimes.com/2023/01/10/nyregion/trevor-bickford-federal-terror-charges.html)

25 ¹⁷ One example would be the stabbings committed against residents of the
26 James Smith Cree Nation and of Weldon, Saskatchewan, Canada, on September 4,
27 2022, by two brothers. They killed ten adults and wounded eighteen others at
28 thirteen separate locations, so they never confronted more than a handful of victims
at any one time during their attacks.

https://en.wikipedia.org/wiki/2022_Saskatchewan_stabbings

1 homicides with muzzle-loading firearms occurred almost exclusively when people
2 were armed for another purpose, such as hunting or militia training. And that is why
3 firearms use in homicides outside the household rose and fell with the homicide rate
4 in the colonial and early national period. When and where the homicide rate was
5 high, people were more likely to anticipate gunfights and go about armed with
6 loaded firearms.¹⁸ When and where the homicide rate was low, few people carried
7 loaded firearms to defend themselves against a potential assault by another
8 person.¹⁹

9 14. Cramer states that New England's homicide rate was low in the early
10 national era because of the region's "religious values."²⁰ My colleagues and I have
11 discovered, however, that the homicide rate was high in New England in the early
12 and mid-seventeenth century, when Puritans held sway, and disastrous in the 1630s,
13 when the homicide rate was 120 per 100,000 persons per year.²¹ And homicide
14 rates soared in slave South in the years after the Revolution, despite the depth of
15 religious belief and commitment among people in the slave South, both black and
16 white.²²

18
19 ¹⁸ When homicide rates were high, states regulated the weapons used in those
20 crimes. Most impulsive homicides and opportunistic crimes during this period
21 were committed with concealable weapons, like pistols, folding knives, dirks, and
22 Bowie knives, which were regulated at that time.

23 ¹⁹ Randolph Roth, "Why Guns Are and Aren't the Problem: The Relationship
24 between Guns and Homicide in American History," in Jennifer Tucker, Barton C.
25 Hacker, and Margaret Vining, eds., *A Right to Bear Arms? The Contested Role of
26 History in Contemporary Debates on the Second Amendment* (Washington, D.C.:
27 Smithsonian Institution Scholarly Press, 2019), 113-133.

28 ²⁰ Clayton Cramer, Supplemental Rebuttal Report, 4.

²¹ Randolph Roth, *American Homicide* (Cambridge: The Belknap Press of
Harvard University Press, 2009), 37-60.

²² For example, Donald G. Mathews, *Religion in the Old South* (Chicago:
University of Chicago Press, 1977); and Albert J. Raboteau, *Slave Religion: The
"Invisible Institution" in the Antebellum South* (New York: Oxford University
Press, 1978).

1 15. Cramer’s discussion of early firearms technology does not, I believe,
2 contradict the fact that muzzle-loading weapons had limitations as weapons for
3 committing murder, especially mass murder by a lone individual. I have never
4 claimed that muzzle loading weapons were never kept loaded, especially on the
5 frontier. They could not, however, be kept loaded for an extended period of time,
6 and if they were loaded, they had to be stored in the driest place in the house to
7 prevent corrosion. That is consistent with the findings of my research on homicides:
8 that muzzle-loading firearms were seldom used impulsively in homicides,
9 especially in the household, and regularly used by colonists who, with loaded guns,
10 anticipating conflict or with homicidal intent, killed Native Americans, runaway
11 slaves, or political adversaries.

12 **C. California’s gun laws.**

13 16. Cramer’s claim that racism has been the fundamental and enduring
14 motivation for California’s firearms laws is unsupported. Ownership and open carry
15 of firearms was *never* denied to any resident of California on the basis of race,
16 ethnicity, or citizenship status prior to 1923, and *never* denied to a citizen after the
17 1923 law was passed. There is no question that some of our nation’s firearms
18 regulations, especially from the colonial era through the Civil War, sought to
19 disarm citizens because of their race or ethnicity. It is important, however, to place
20 California’s first firearms laws in their proper historical context: the 1853 law
21 which increased the penalty for carrying firearms with hostile intent, the 1855 law
22 which increased the penalty for brandishing a firearm in a threatening manner, and
23 the 1863 law which banned the carrying of concealed weapons altogether. Those
24 laws were not aimed at a particular racial or ethnic group. They represented a step-
25 by-step effort by the legislature to address the state’s high rate of violent crime—
26 crimes that were committed overwhelmingly by Californians of European ancestry.

27 17. First, the 1849 constitutional convention. California’s constitutional
28 convention declined to enact an unrestricted right to the private use, ownership, or

1 possession of firearms, just as Congress did on September 25, 1789, when it
2 adopted what would become the Second Amendment. California's convention did
3 so—as the delegate who spoke about the need to regulate concealed weapons
4 acknowledged—because the delegates believed that private use of firearms had to
5 be regulated at times by statute. The same debate took place at the time the Second
6 Amendment was adopted, as Saul Cornell discovered, with the same result. There
7 were powerful voices in 1789, including Thomas Jefferson, who advocated for an
8 unrestricted private right, but they were outvoted in Congress and in the ratifying
9 legislatures because of concerns not only about the right of free black citizens to
10 use and own firearms, but about mundane matters such as hunting laws. And those
11 laws were soon followed in the early republic by state-level bans on the carrying of
12 concealed weapons. The right to bear arms in military service in a well-regulated
13 militia, organized and governed by the state, was not to be infringed. But private
14 use, ownership, and possession were subject to reasonable statutory limitations if
15 the people and their representatives deemed limitations necessary.²³ California's
16 constitutional convention followed suit, and as Cramer acknowledges, there was no
17 mention during the debate over firearms in California's constitutional convention of
18 race, nor any mention of disarming people of color.

19 18. Second, the 1853 law against carrying weapons with intent to assault.
20 California's legislature did not mention race in the law it passed in 1853 to enhance
21 the sentence for any person who carried a firearm, knife, bludgeon, or any other
22 weapon with the intent to assault another person. The penalty was up to three
23 months in prison and a hundred dollar fine.²⁴

24 ²³ Saul Cornell, *A Well-Regulated Militia: The Founding Fathers and the*
25 *Origins of Gun Control in America* (New York: Oxford University Press, 2006),
26 39-70.

27 ²⁴ S. Garfielde, *Compiled Laws of the State of California: Containing All the*
28 *Acts of the Legislature of a Public and General Nature, Now in Force, Passed at the*
Sessions of 1850-51-52-53. To Which are Prefixed the Declaration of

1 19. Third, the 1855 law against brandishing weapons. California's
2 legislature did not mention race in the law it passed in 1855 to enhance the sentence
3 for any person who drew a deadly weapon, including a gun or pistol, "in a rude,
4 angry and threatening manner, not in necessary self-defense," against another
5 person or persons. The penalty was up to six months in prison and a five hundred
6 dollar fine.²⁵

7
8 Independence, the Constitutions of the United States and of California, the Treaty
9 of Queretaro, and the Naturalization Laws of the United States (1853), 663-664.
10 [https://firearmslaw.duke.edu/laws/s-garfielde-compiled-laws-of-the-state-of-](https://firearmslaw.duke.edu/laws/s-garfielde-compiled-laws-of-the-state-of-california-containing-all-the-acts-of-the-legislature-of-a-public-and-general-nature-now-in-force-passed-at-the-sessions-of-1850-51-52-53-to-which-are-p/)
11 [california-containing-all-the-acts-of-the-legislature-of-a-public-and-general-nature-](https://firearmslaw.duke.edu/laws/s-garfielde-compiled-laws-of-the-state-of-california-containing-all-the-acts-of-the-legislature-of-a-public-and-general-nature-now-in-force-passed-at-the-sessions-of-1850-51-52-53-to-which-are-p/)
12 [now-in-force-passed-at-the-sessions-of-1850-51-52-53-to-which-are-p/](https://firearmslaw.duke.edu/laws/s-garfielde-compiled-laws-of-the-state-of-california-containing-all-the-acts-of-the-legislature-of-a-public-and-general-nature-now-in-force-passed-at-the-sessions-of-1850-51-52-53-to-which-are-p/). "Compiled
13 Laws of California, § 127. If any person shall be found having upon him or her any
14 picklock, crow, key, bitt, or other instrument or tool, with intent feloniously to
15 break and enter into any dwelling house, store, shop, warehouse, or other building
16 containing valuable property, or shall be found in any of the aforesaid buildings
with intent to steal any money, goods, and chattels, every person so offending shall,
on conviction thereof, be imprisoned in the county jail not more than two years; and
if any person shall have upon him any pistol, gun, knife, dirk, bludgeon, or other
offensive weapon, with intent to assault any person, every such person, on
conviction, shall be fined not more than one hundred dollars or imprisoned in the
county jail not more than three months."

17 ²⁵ William H. R. Wood, Digest of the Laws of California: Containing All
18 Laws of a General Character Which were in Force on the First Day of January,
19 1858; . . . Together with Judicial Decisions, Both of the Supreme Court of the
20 United States and of California, to Which are Also Appended Numerous Forms for
21 Obtaining Pre-Emption and Bounty Lands, Etc., Etc. (1861), 334. "Crimes and
22 Punishments, Art. 1904. That any person in this state having, carrying or procuring
23 from another person any dirk, dirk-knife, bowie-knife, sword, sword-cane, pistol,
24 gun or other deadly weapon, who shall, in the presence of two or more persons,
25 draw or exhibit any of said deadly weapons in a rude, angry and threatening
26 manner, not in necessary self-defense, or who shall, in any manner, unlawfully use
27 the same, in any fight or quarrel, the person or persons so offending, upon
28 conviction thereof in any criminal court in any county of this state, shall be fined in
any sum not less than one hundred, nor more than five hundred dollars, or
imprisonment in the county jail not less than one nor more than six months, at the
discretion of the court, or both such fine and imprisonment, together with the costs
of prosecution; which said costs shall, in all cases be computed and collected in the
same manner as costs in civil cases. . . provided, nevertheless, that no sheriff,
deputy sheriff, marshal, constable or other peace officer, shall be held to answer
under the provisions of this act, for drawing or exhibiting any of the weapons
herein-before mentioned, while in the lawful discharge of his or their duties."

20. Fourth, the 1863 law against carrying concealed weapons. Cramer quotes a senator from Nevada County, from a debate in 1856, who wanted to disarm Hispanics. But Cramer acknowledges that race and ethnicity were not on the minds of legislators when they banned concealed weapons in 1863, using language similar to the concealed carry laws in other states.²⁶

21. The legislature's desperation to do something about violence, including gun violence, is not surprising, not simply because California's homicide rate was at least 65 per 100,000 adults per year in the nine counties studied to date, but because of the high rate of violence by and among Californians of European ancestry. As the table below shows (based on the research of Eric Monkkonen, Clare McKanna, and Kevin Mullen),²⁷ the intra-racial homicide rate of European

²⁶ Theodore Henry Hittell, *The General Laws of the State of California, from 1850 to 1864, Inclusive: Being a Compilation of All Acts of a General Nature Now in Force, with Full References to Repealed Acts, Special and Local Legislation, and Statutory Constructions of the Supreme Court. To Which are Prefixed the Declaration of Independence, Constitution of the United States, Treaty of Guadalupe Hidalgo, Proclamations to the People of California, Constitution of the State of California, Act of Admission, and United States Naturalization Laws, with Notes of California Decisions* (1868). "An Act to Prohibit the Carrying of Concealed Weapons, § 1. Every person not being peace-officer, provost-marshal, enrolling-officer, or officer acting under the laws of the United States in the department of the provost-marshal of this State, State and Federal assessors, collectors of taxes and licenses while in the performance of official duties, or traveler, who shall carry or wear any dirk, pistol, sword in cane, slungshot, or other dangerous or deadly weapon concealed, shall, upon conviction thereof before any court of competent jurisdiction, be deemed guilty of a misdemeanor, and shall be imprisoned in the county jail for not less than thirty nor more than ninety days, or fined in any sum not less than twenty nor more than two hundred dollars. § 2. Such persons, and no others, shall be deemed travelers within the meaning of this act, as may be actually engaged in making a journey at the time."

<https://firearmslaw.duke.edu/laws/theodore-henry-hittell-the-general-laws-of-the-state-of-california-from-1850-to-1864-inclusive-being-a-compilation-of-all-acts-of-a-general-nature-now-in-force-with-full-references-to-repealed-acts/>

²⁷ Eric Monkkonen, "Los Angeles Homicides, 1830-2001 [computer file]" (Los Angeles: University of California at Los Angeles, 2005); Clare V. McKanna, Jr., *Homicide, Race, and Justice in the American West, 1880-1920* (Tucson: University of Arizona Press, 1997); and Kevin J. Mullen, *Dangerous Strangers: Minority Newcomers and Criminal Violence in the Urban West, 1850-2000* (New

Americans—37 per 100,000 adults per year—was lower only than the intra-racial homicide rate of Hispanic Americans—72 per 100,000. And when it came to interracial homicides, people of color came nowhere close to killing European Americans at the rates at which European Americans killed people of color: 13 per 100,000 per year versus 0 for Asian Americans, 30 versus 0 for African Americans, 24 versus 1 for Native Americans, and 27 versus 5 for Hispanic Americans. And European Americans were least likely, along with African Americans, to be murdered by an unknown assailant.²⁸

Intra-racial and Interracial Homicide Rates among Unrelated Adults in California, 1849-1865
per 100,000 persons ages 16 and older per year

	Assailants						% Interracial
	Asian	B	H	NA	W	Unknown Race	
Victims							
Asian	26	0	7	2	13	12	.56
Black	0	31	8	4	30	8	.61
Hispanic	1	1	72	7	54	27	.55
Native American	0	0	17	25	8	24	.66
Non-Hispanic White	0	0	5	1	37	8	.28

22. It should be noted that guns were used in at least half of California homicides.²⁹ The weight of evidence, including the quotations from contemporary

York: Palgrave Macmillan, 2005). Their data are available at <https://cjrc.osu.edu/research/interdisciplinary/hvd/united-states>. See also John Mack Faragher, *Eternity Street: Violence and Justice in Frontier Los Angeles* (New York: W. W. Norton, 2016), whose data are available on the same site; and Randolph Roth, Michael D. Maltz, and Douglas L. Eckberg, "Homicide Rates in the Old West," *Western Historical Quarterly* 42 (2011): 183-184.

²⁸ Randolph Roth, *American Homicide Supplemental Volume: American Homicides*, Table 33, available at <https://cjrc.osu.edu/sites/cjrc.osu.edu/files/AHSV-American-Homicides-5-2010.pdf>

²⁹ Randolph Roth, *American Homicide Supplemental Volume: Weapons*,

1 newspapers that Cramer cites in his essay on the subject³⁰ and that I included in my
2 Supplemental Expert Report, suggests that the California legislature was concerned
3 with all gun violence, not just gun violence by people of color.

4 23. And finally, the laws of 1917 and 1923. The state of the art in our
5 profession for studying conceal carry laws and licensing laws is to examine not
6 only their language, which had to be race neutral after the passage of the Fourteenth
7 Amendment, but how they were enforced, in the way that Brennan Rivas does in
8 her model studies of firearms laws in the South after the Civil War. Rivas has
9 shown, surprisingly, that conceal carry laws were enforced in the South against
10 both blacks and whites, even after white supremacists regained control at the end of
11 Reconstruction.³¹ We must remember that in many rural counties in California in
12 the early twentieth century, wealthy and middle-class Hispanics retained
13 considerable political power and influence within their communities, which might
14 have blunted the effort to deny Hispanics wholesale the licenses they needed to
15 carry concealed weapons. And that was all the more true in the mid-nineteenth
16 century in rural counties in southern California and throughout the Southwest,
17 where Hispanic residents often formed the majority and Hispanic elites fought
18

19 Tables W58 to W64, available at [https://cjrc.osu.edu/sites/cjrc.osu.edu/files/AHSV-](https://cjrc.osu.edu/sites/cjrc.osu.edu/files/AHSV-Weapons-10-2009.pdf)
20 [Weapons-10-2009.pdf](https://cjrc.osu.edu/sites/cjrc.osu.edu/files/AHSV-Weapons-10-2009.pdf)

21 ³⁰ Clayton E. Cramer and Joseph Olson, “The Racist Origins of California’s
22 Concealed Weapon Permit Law,” Social Science Research Network, posted August
23 12, 2016, 6-7 (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2599851).

24 ³¹ Brennan Gardner Rivas, “The Deadly Weapon Laws of Texas: Regulating
25 Guns, Knives, and Knuckles in the Lone Star State, 1836-1930 (Ph. D. dissertation:
26 Texas Christian University, 2019), available at
27 <https://repository.tcu.edu/handle/116099117/26778>; Rivas, Enforcement of Public
28 Carry Restrictions: Texas as a Case Study,” *UC Davis Law Review* 55 (2021):
2603-2624; and Rivas, “The Problem with Assumptions: Reassessing the Historical
Gun Policies of Arkansas and Tennessee,” *Second Thoughts*, Duke Center for
Firearms Law (Jan. 20, 2022), [https://firearmslaw.duke.edu/2022/01/the-problem-](https://firearmslaw.duke.edu/2022/01/the-problem-with-assumptions-reassessing-the-historical-gun-policies-of-arkansas-and-tennessee/)
[with-assumptions-reassessing-the-historical-gun-policies-of-arkansas-and-](https://firearmslaw.duke.edu/2022/01/the-problem-with-assumptions-reassessing-the-historical-gun-policies-of-arkansas-and-tennessee/)
[tennessee/](https://firearmslaw.duke.edu/2022/01/the-problem-with-assumptions-reassessing-the-historical-gun-policies-of-arkansas-and-tennessee/)

1 bravely to stave off efforts to dispossess them of their land, homes, and rights. The
2 battle for local control was intense, but it is hard to believe that the conceal carry
3 law of 1863 was enforced in a discriminatory way when and where Hispanics and
4 their Anglo allies controlled the courts and the sheriff's office.³²

5 24. There is abundant evidence that the vast majority of the firearms laws,
6 from the Founding Era to the present, were enacted to stem real increases in
7 violence in our society, and were enforced, although with a degree of bias, against
8 whites as well as people of color.

9 **D. Mass murder.**

10 25. Cramer's claim that a mass murder is an assault over twenty-four
11 hours in multiple locations in which at least two persons are killed (and in which at
12 least one more person is killed or wounded) is misleading. In my Supplemental
13 Expert Report, I followed the definition of the Violence Project³³ (which follows
14 the FBI definition of at least four persons killed besides the offender), because my
15 purpose was to focus on the types of homicides at issue in this case—the homicides
16 which have led concerned voters and political leaders in California and in other
17 states, counties, and municipalities to ban extended ammunition magazines and
18 certain classes of semiautomatic rifles. These are shootings that take place in public

19
20 ³² See, for example, the new book by my Ph.D. student and fellow California
21 native Michael Alarid, who is an Associate Professor of History at the University of
22 Nevada-Las Vegas. Michael J. Alarid, *Hispano Bastion: New Mexican Power in the*
23 *Age of Manifest Destiny, 1837-1860* (Albuquerque: University of New Mexico
24 Press, 2022). See also Faragher, *Eternity Street*; and Roth, *American Homicide*,
25 365-368.

26 ³³ The Violence Project defines a mass shooting as “a multiple homicide
27 incident in which four or more victims are murdered with firearms—not including
28 the offender(s)—within one event, and at least some of the murders occurred in a
public location or locations in close geographical proximity (e.g., a workplace,
school, restaurant, or other public settings), and the murders are not attributable to
any other underlying criminal activity or commonplace circumstance (armed
robbery, criminal competition, insurance fraud, argument, or romantic triangle).”
<https://www.theviolenceproject.org/mass-shooter-database/>, accessed October 4,
2022.

1 settings, in which one or two individuals can kill or wound dozens of people in a
2 matter of minutes or seconds: the slaughter of school children and teachers in
3 Newtown and Uvalde, of worshippers in Buffalo or Charleston, and of shoppers in
4 El Paso, not to mention the massacres that have occurred in Sacramento, San
5 Bernardino, and elsewhere in California. Americans want to feel safe in public, in
6 school, and at work. That is why my declaration focuses on mass homicides of
7 public concern.

8 26. The public is also horrified today when they learn of mass violence in
9 the past. That is why our national reckoning in 2021 with the Tulsa Massacre was
10 so difficult for so many Americans, as was our reckoning with the Draft Riots of
11 1863, in which draft resisters and Confederate sympathizers killed, maimed, or
12 terrorized African Americans, orphans, Union soldiers, and supporters of the Union
13 cause for several days. That is why my Supplemental Expert Report focused on
14 those kinds of mass murders in the past.

15 27. When we turn from the Secret Service's definition of mass murder to
16 the Violence Project's definition, the destructive power of certain modern firearms
17 technologies is clear. Yes, a hit-and-run killer, like the one who killed three
18 students and critically injured five others at Michigan State, can empty a ten-round
19 clip in classroom building, run away to the Student Union, empty another ten-round
20 clip, and run away again.³⁴ The law at issue in this case could not stop him. But the
21 law in this case can limit the ability of a lone gunman or pair of gunmen to obtain
22 easily AR-platform rifles used to kill or wound far more people in minutes or
23 seconds at a holiday parade, an outdoor concert, or a packed night club. An angry
24 loner could not commit mass murder on that scale with the technologies of the
25

26
27 ³⁴ New York Times, February 14, 2023.
28 [https://www.nytimes.com/2023/02/14/us/michigan-state-university-
shooting.html?searchResultPosition=8](https://www.nytimes.com/2023/02/14/us/michigan-state-university-shooting.html?searchResultPosition=8)

seventeenth, eighteenth, or nineteenth century. That loner would need accomplices, and lots of them.

28. It is up to the voters and public officials to decide whether to pass such laws and the courts to determine their constitutionality. Such laws address a real danger and will deter such crimes, if not prevent them altogether. Cramer's list of attacks in which three or more people were killed or wounded over a space of twenty-four hours proves that our nation has a homicide problem, but it does not address the threat that certain kinds of modern firearms technologies pose in the hands of an angry, embittered individual who declares war on our society.

E. Motivation.

29. Cramer's unsystematic research on multiple murders is also misleading when it comes to understanding the motives and mental states of today's mass murderers. He neglects the work of every scholar and journalist who has written thoughtfully about the problem after engaging in systematic research, most notably James Alan Fox and Jack Levin, the preeminent authorities in the field.³⁵ The motives Cramer cites, such as greed or jealousy, are not particular to mass killers; they are common human emotions. Likewise, the mental states he describes, such as intoxication, depression, or schizophrenia, are experienced by millions of Americans every day. What sets mass murderers apart? Why are they, as lone individuals or as partners with another lone individual, ready to declare war against their classmates, coworkers, or society? And why is it so hard to prevent them from killing?

³⁵ James Alan Fox and Jack Levin, *Extreme Killing: Understanding Serial and Mass Murder* (Thousand Oaks: Sage, 2012); and Jack Levin and James Alan Fox, *Mass Murder: America's Growing Menace* (New York: Plenum Press, 1985). For an outstanding investigation by a journalist into the complexities of a particular mass murder, see Dave Cullen, *Columbine* (New York: Twelve, 2009).

1 30. Consider, for example, the superb scholarship of Kathleen Newman,
2 who studied school shooters in *Rampage*.³⁶ The fundamental problem, according to
3 Newman, is the way that students who contemplate mass murder perceive
4 themselves as *marginal*, even if they have not been bullied or abused by their
5 classmates. They feel *socially isolated*: a feeling that can be all the more intense,
6 according to Newman, in close knit rural or suburban communities, where it can be
7 difficult for people to find peers who share their feelings or interests. Newman
8 grants that psychosocial problems can “magnify” the students’ feelings of
9 marginality and isolation. But what moves school shooters to action are *cultural*
10 *scripts* that are readily available in the media, especially social media. The scripts
11 offer alienated individuals a way to “solve” their problems and assert their
12 masculinity through mass violence. And once they embrace those scripts, the
13 pressure to act grows more and more intense, especially if they share their plans
14 with a confidante or on social media. Incentives to act also increase, according to
15 Newman, because mass violence offers isolated young males a way to send a
16 message, assert their masculinity, gain fame, and attack the adult power structure
17 and adolescent social hierarchy that they feel has betrayed them.

18 31. Newman offers an excellent list of warning signs that students and
19 teachers should look for. But none of the students who Newman studied were on
20 the verge of expulsion, imprisonment, or compulsory commitment to a mental
21 institution. They could not have been taken out of school or forced into treatment.
22 And what distinguished them was not their feelings, but the *extremity* of their
23 feelings—feelings that nearly every adolescent feels at one time or another. That is
24 why most would-be school shooters, like most adult mass killers, fly under the
25 radar. They are hard to distinguish from their peers. However, Newman does cite
26

27 ³⁶ Katherine S. Newman, *Rampage: The Social Roots of School Shootings*
28 (New York: Perseus, 2004), especially 229-270.

one more important precursor of mass murders in schools that does distinguish some young men: access to a firearm.

F. Mental health.

32. Cramer's claim that mental illness is the fundamental cause of mass murder and that access to mental health services will solve the problem is also misleading. First, people who are mentally ill are no more likely to commit violent assaults than people who are not mentally ill. There are, as Janet Colaizzi has found, specific kinds of mental illness that can predispose a person to violence: for example, acute schizophrenia, if it leads to hallucinations, hearing voices, and paranoia.³⁷ It appears that the mass murderers in Aurora, Colorado, and in Tucson, Arizona, suffered from such an illness.³⁸ But the vast majority of Americans who suffer from schizophrenia are under treatment; and it is impossible in a free society to force people with potentially dangerous forms of schizophrenia to take their medications or to commit them to mental institutions against their will, if they have yet to commit serious acts of violence. Our criminal justice system can intervene only when it is too late.

33. Second, criminologists have explored as a matter of urgency the relationship between violence and mental illness. But they have done so not by looking at mental illness in isolation, as Cramer does, but in the context of other factors that may lead to violence, to determine if mental illness is truly an important factor. For example, in the research that my colleagues and I conducted recently on the relationship at the county level between homicide and the opioid epidemic for European Americans, 1999–2015, we looked at suicide as a proxy for severe

³⁷ Janet S. Colaizzi, *Homicidal Insanity, 1800-1985* (Tuscaloosa: University of Alabama Press, 2002); and Colaizzi, "Predicting Dangerousness: Psychiatric Ideas in the United States, 1800-1983" (Ph.D. dissertation: Ohio State University, 1983).

³⁸ See https://en.wikipedia.org/wiki/2012_Aurora_Colorado_shooting and https://en.wikipedia.org/wiki/2011_Tucson_shooting.

1 depression. We found that homicides were strongly correlated with suicides with
2 firearms ($r = .64$), because such suicides are highly correlated with firearms
3 ownership, as measured by the Cook Index of Firearms Ownership, a well-validated
4 measure that looks at the percentage of suicides committed with a firearm ($r = .79$).
5 Having a firearm in the home elevates the risk of suicide dramatically, because
6 suicide attempts with firearms are far more lethal than suicide attempts by other
7 means, except for falls from heights. But when we looked at the relationship
8 between homicides and suicides without firearms—a measure of severe depression
9 that is not confounded by the level of firearms ownership—the bivariate
10 relationship was insignificant ($r = .03$). When we looked at all of the variables in
11 our database together, it was firearms ownership, not suicides, that elevated the risk
12 of homicide.³⁹

13 34. We discovered, however, following the work of Case and Deaton on
14 “deaths of despair,”⁴⁰ that emotions such as anger, worry, pain, stress, and sadness,
15 as self-reported in the national Gallup-Healthways survey, were a significant
16 contextual factor in elevating European American homicide rates at the county
17 level. And as we know from studies of individuals who commit mass murders, such
18 as Newman’s study of school shooters, what they have most in common is not
19 severe mental illness, but feelings, such as anger, hatred, and bitterness: sometimes
20 toward coworkers or classmates; sometimes toward people of particular ethnicities,
21 faiths, genders, or political persuasions; and sometimes toward people who simply
22 appear to enjoy the love, happiness, success, respect, and sense of community that
23 mass murderers feel they have been unjustly deprived of.⁴¹

24 ³⁹ Richard Rosenfeld, Randolph Roth, and Joel Wallman, “The Opioid
25 Epidemic and Homicide in the United States, *Journal of Research in Crime and
26 Delinquency* 58 (2021): 1-46.

27 ⁴⁰ Anne Case and Angus Deaton, *Deaths of Despair and the Future of
28 Capitalism* (Princeton: Princeton University Press, 2020).

⁴¹ For an excellent summation by criminologists of the ways in which

1 **G. Technology.**

2 35. It is impossible in our free society to ensure that everyone feels loved,
3 respected, and successful, especially because so many people in our society whom
4 we might consider successful do not feel that way, because their ambitions are
5 unrealistic. It is also impossible to prevent people from resenting others who are
6 successful and from blaming others for their personal failures. And it is impossible
7 to require that people learn from failures so they can do better in the future, or come
8 to grips with personal losses or setbacks, which is hard even for those of us who
9 would never harm another person.

10 36. That is why many citizens, criminologists, and policymakers seek to
11 limit access to technologies that give angry, alienated individuals the power to kill
12 on a massive scale—planes, fertilizer, explosives, and even trucks (rental
13 companies are now asked by state and local law enforcement agencies to keep track
14 of suspicious rental patterns that may indicate that a person is intent on doing
15 harm).⁴² Accidental deaths have declined dramatically in the United States since
16 1950, but the primary cause has not been changes in personal behavior. It has been
17 bans on unsafe products, such as dangerous toys or cars not equipped with air bags
18 and seat belts.⁴³

19 despair, personal setbacks, depression, and grievances work together to drive a
20 person to mass murder, see Jillian Peterson and James Densley, “We Profiled the
21 ‘Signs of Crisis’ in 50 Years of Mass Shooting. This is What We Found,” *New York*
Times, January 26, 2023.

22 [https://www.nytimes.com/interactive/2023/01/26/opinion/us-mass-shootings-](https://www.nytimes.com/interactive/2023/01/26/opinion/us-mass-shootings-despair.html)
[despair.html](https://www.nytimes.com/interactive/2023/01/26/opinion/us-mass-shootings-despair.html)

23 ⁴² See, for example, “NYPD Warned Truck Rental Companies of ‘Suspicious
24 Indicators,’” Yahoo News, November 1, 2017, [https://www.yahoo.com/news/nypd-](https://www.yahoo.com/news/nypd-visited-truck-rental-companies-234200765.html)
[visited-truck-rental-companies-234200765.html](https://www.yahoo.com/news/nypd-visited-truck-rental-companies-234200765.html); and “Potential Indicators of
25 Suspicious Activities Related to Rental Trucks,” Florida Safe, Florida Department
of Law Enforcement, [http://www.fdle.state.fl.us/s4/Home/Documents/Tripwire-](http://www.fdle.state.fl.us/s4/Home/Documents/Tripwire-Related-to-Rental-Trucks.aspx)
[Related-to-Rental-Trucks.aspx](http://www.fdle.state.fl.us/s4/Home/Documents/Tripwire-Related-to-Rental-Trucks.aspx).

26 ⁴³ See, for example, John C. Burnham, “Why Did the Infants and Toddlers
27 Die? Shifts in Americans’ Ideas of Responsibility for Accidents—From Blaming
28 Mom to Engineering,” *Journal of Social History* 29 (1995): 817-837; Burnham,

1 37. Voters and public officials who support bans on extended magazines
2 and on certain classes of semiautomatic rifles have never sought to disarm
3 Americans. They have sought to keep unsafe products—in this case, products
4 designed for the sole purpose of killing and wounding the maximum number of
5 people possible in the shortest amount of time—off the market. These types of
6 safety measures are appropriate in addressing premeditated crimes, like mass
7 shootings and terrorist attacks, by reducing the accessibility and ease of acquiring
8 those dangerous products.⁴⁴

9
10 I declare under penalty of perjury that the foregoing is true and correct.

11 Executed on February 24, 2023 at Columbus, Ohio.

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16 Randolph Roth

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Accident Prone: A History of Technology, Psychology, and Misfits of the Machine
23 Age (Chicago: University of Chicago Press, 2009); and Patricia G. Schnitzer, M.
24 Denise Dowd, Robin L. Kruse, and Barbara A. Morrongiello, “Supervision and
 Risk of Unintentional Injury in Young Children,” *Injury Prevention* 21 (2015): e63-
 e70.

25 ⁴⁴ As discussed in my Supplemental Expert Report, restrictions on the
26 carrying of certain concealable weapons, such as dirks and Bowie knives, sought to
27 address their use in opportunistic crimes that were occurring at alarming rates
28 during the early national period. Restricting the carrying of dangerous products and
 weapons used in premeditated crimes today would not be effective in protecting the
 public from those crimes.