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## **GUNS, MURDERS, AND THE CONSTITUTION**

### **A Realistic Assessment of Gun Control**

**By Don B. Kates, Jr.**

### **STATEMENT OF DERIVATION**

This study is partially adapted from the following sources: materials for Professor Kates' Stanford University course "American Violence: The Gun Connection"; a paper on women's gun ownership and self-defense (co-authored with Jo Dixon, New York University Department of Sociology); papers in the Gurr and Danto books noted in Kates' biography in the back of this study; and an essay on the Second Amendment published by the San Francisco Barristers' Club, December, 1989.

### **ACKNOWLEDGEMENTS**

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### **PERSONAL NOTE**

Nothing in the discussion that follows is intended, nor should it be construed, as denying the social value of rational gun control (e.g., absolute prohibition not only of handguns but of all firearms), to felons, juveniles, and mentally unstable people or of appropriate prophylactic implementing legislation and (even more important) resource allocation for enforcement.<sup>1</sup> Further rational proposals for promising gun control strategies are outlined in the conclusion of this paper.

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## OVERVIEW

As early as 1976, it was estimated that more had been written about "gun control" than all other crime-related topics combined.<sup>2</sup> Yet this pre-1976 academic literature was both fundamentally flawed and severely biased. The bias stemmed from the crusading zeal of academics who, by their own admission, could "see no reason ... why anyone should own a weapon in a democracy"<sup>3</sup> and who felt gun owners embodied an American soul that is "hard, isolate, stoic, and a killer."<sup>4</sup> Naturally, this bias led academic crusaders to discuss gun ownership as a social pathology rather than as a value-neutral sociological phenomenon. The only admissible study topics were problematic ones: gun accidents, gun violence, and gun ownership among extremist groups.<sup>5</sup> Implicitly, these problems were seen as fairly representing the 50 percent of American households that contain guns; it did not occur to the crusaders that gun ownership might present issues worthy of neutral or nonproblematic study.<sup>6</sup>

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<sup>2</sup> Bruce-Briggs, "The Great American Gun War," *The Public Interest*, Fall 1976.

<sup>3</sup> Sociologist Morris Janowitz, quoted in Tonso, "Social Science and Sagecraft in the Debate over Gun Control," *5 Law & Pol. Q.* 325 (1983).

<sup>4</sup> Historian Richard Hofstadter, applying to gun owners D. H. Lawrence's denunciation of Americans in general. Hofstadter, "America as a Gun Culture," *American Heritage*, Oct. 1970 at 82.

<sup>5</sup> See for example, G. Newton & F. Zimring, *Firearms and Violence in American Life* (1970) (hereinafter cited as Newton & Zimring); Geisel, Roll, & Wettick, "The Effectiveness of State and Local Regulation of Handguns: A Statistical Analysis," *Duke L. J.* 647 (1969); Newton & Zimring n. 10 above; Seitz, "Firearms, Homicides, and Gun Control Effectiveness," *6 Law & Soc. Rev.* 595 (1972).

<sup>6</sup> Compare such more recent nonproblematic work as Hummel, "Anatomy of a War Game: Target Shooting in Three Cultures," *8 J. of Sport Behav.* 131 (1985); Olmsted, "Morally Controversial Leisure: The Social World of Gun Collectors," *11 Symbolic Interaction* 277 (1988); Lizotte & Bordua, "Firearms Ownership for Sport and Protection: Two Not so Divergent Models," *46 Am. Soc. Rev.* 499 (1981); Lizotte & Bordua, "Firearms Ownership for Sport and Protection: Two Divergent Models," *45 Am. Soc. Rev.* 229 (1980); Bordua & Lizotte, "Patterns of Legal Firearms Ownership: A Situational and Cultural Analysis of Illinois Counties," *2 Law & Pol. Q.* 147 (1979).

Thus, until about the mid-1970s academic writing about guns was virtually monopolized by crusaders seeking to validate their contempt and loathing for guns and gun owners. Neutral scholars eschewed the gun issue; the gun lobby, though able to exert great pressure on legislators, was incapable of, and uninterested in, addressing intellectually sophisticated audiences.<sup>7</sup> However unavoidable, this intellectual default (pg.2) was a calamity for gun owners. They might hold their views without feeling any need for factual or scholarly support, but the biased, problem-oriented, pre-1976 literature indelibly shaped the views of many humane and responsible ordinary citizens who did not own guns.

Yet that literature has not proved persuasive to neutral scholars. Writing in 1976, policy analyst Barry Bruce-Briggs noted with astonishment that, despite the literature's enormity, "no policy research worthy of the name has been done on the issue of gun control. The few attempts at serious work are of marginal competence and tainted by obvious bias."<sup>8</sup> Likewise, sociologist William Tonso has used early problematic literature on guns as a case study of Florian Znaniecki's concept of "sagecraft"—the prostitution of scholarship by partisan academic "sages" who invent, select, or misinterpret data to validate preordained conclusions.<sup>9</sup>

## 1. Sagecraft Summarized

Lest the sagecraft concept seem unduly harsh, I will briefly review five particularly insupportable anti-gun claims (they and others are further detailed in the body of this paper):

- a) *The claim that homicide is predominantly a matter of "ordinary law-abiding people" killing a relative or acquaintance because a loaded gun happened to be available during a moment of anger.*

This claim is contradicted by all national and local studies of homicide, which uniformly show that murderers are not "ordinary law-abiding people." Rather, murderers (like gun accident perpetrators) are highly aberrant individuals, characterized by felony records, alcohol and/or drug dependence, and life histories of irrational violence against people around them.<sup>10</sup> (pg.3)

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<sup>7</sup> As used herein "the gun lobby" means such organizations as the National Rifle Association, Citizens Committee for the Right to Keep and Bear Arms, Gun Owners of America, etc., that either formally lobby for "gun rights" or mobilize their members and other gun owners to lobby.

<sup>8</sup> Bruce-Briggs, above.

<sup>9</sup> Tonso, above, applying concepts based on F. Znaniecki, *The Social Role of the Man of Knowledge*, 72-74 (N.Y.: Harpers, 1968).

<sup>10</sup> Straus, "Domestic Violence and Homicide Antecedents," 62 *Bull. N.Y. Acad. Med.* 446 (1986); cf. Bruce-Briggs, "The Great American Gun War," 45 *The Public Interest* 37, 40 (1976):

The calculation of family homicides and accidents as costs of gun ownership is false. The great majority of these killings are among poor, restless, alcoholic, troubled people, usually with long criminal records. Applying the domestic homicide rate of these people to the presumably upstanding citizens whom they prey upon is seriously misleading.

See also Kates, "Firearms and Violence: Old Premises, Current Evidence," in T. Gurr (ed.), 1 *Violence in America*, 203-204 (1989) (hereinafter cited as "Current Research"); Kleck, "Policy Lessons from Recent Gun Control Research," 49 *Law & Contemp. Probs.* 35 (1986) (hereinafter cited as "Policy Lessons") at 40-41, and studies there cited.

- b) *The claim that (though banning all guns may not be politically feasible) banning only handguns would save lives because gun attacks are more lethal than knife attacks.*

In a recent National Institute of Justice survey among about 2,000 incarcerated felons, well over 80 percent of those who had often misused handguns said that if handguns were unavailable they would turn to long guns (rifles or shotguns) instead.<sup>11</sup> Thus, a crucial issue in any handgun ban is that, while handgun wounds are 1.3 to 3 times more lethal than knife wounds, a rifle or shotgun wound kills 5 to 11.4 times more often than a handgun wound. Far from decreasing homicide, if a handgun ban caused only 30 percent of handgun attackers to turn to long guns, the homicide rate might nearly double; if 50 percent switched, homicides could more than triple.<sup>12</sup> Astoundingly, not one academic who argued that banning handguns would save lives (because knives are less deadly) even mentioned the necessary corollary that not controlling long guns would cost lives because rifles and shotguns are far more lethal.

- c) *The claim that comparing American statistics to those of selected gun-banning foreign countries proves that guns cause crime and that banning them reduces it.*

Differentials in international crime rates reflect basic socio-cultural and economic differences that have nothing to do with gun laws. First, Western Europe has not only far less gun violence but also less violence of all kinds *per capita*. Second, this difference between the United States and Western Europe was even greater **before** the latter's gun laws were adopted in the 1920s and 1930s. Third, those laws were adopted to control political violence—to which those countries have always been far more subject than the United States. Fourth, as American violence skyrocketed from the mid-1960s on, violence rates increased even more rapidly in the gun-banning countries (particularly gun violence). And fifth, in such equally crime-free countries as Switzerland, Israel, and New Zealand, there is even more gun availability than there is in the United States.<sup>13</sup>

- d) *The claim that guns are generally not useful and not used for self-defense.*

Gary Kleck recently has found that, while handguns are used in vast numbers of crimes annually, they are used even more often by good citizens to repel crime (pg.4) (approximately 581,000 crimes vs. about 645,000 defense uses annually).<sup>14</sup>

- e) *The claim that there is no individual right to arms because the Second Amendment to the U.S. Constitution protects only the states' right to arm the militia.*

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<sup>11</sup> J. Wright & P. Rossi, *Armed and Dangerous: A Survey of Felons and Their Firearms* 221, table 11.3 (N.Y.: Aldine, 1986) (hereinafter called NIJ Felon Survey).

<sup>12</sup> Policy Lessons at 48-50, Lizotte, "The Costs of Using Gun Control to Reduce Homicide," 62 *Bull. N.Y. Acad. Med.* 539, 541 (1986).

<sup>13</sup> See discussion in Current Evidence at pp. 200ff and below in this paper.

<sup>14</sup> Kleck, "Guns and Self Defense: Crime Control through the Use of Force in the Private Sector," 35 *Social Problems* 1 (1988) (hereinafter cited as *Social Problems*).

Though mere control is constitutional, wholesale prohibition and confiscation is not; the Constitution precludes laws barring responsible, law-abiding adults from choosing to own guns for self-defense. Sanford Levinson, a leading constitutional scholar (who personally opposes gun ownership), recently dismissed academic obliviousness to this clear fact in a paper fittingly entitled "The Embarrassing Second Amendment."<sup>15</sup>

## 2. The National Institute of Justice Evaluation

My condemnation of anti-gun sagecraft should not be misconstrued as an endorsement of such equally baseless pro-gun shibboleths as the obnoxious, reflexive assumption that any form of control that the gun lobby opposes *ipso facto* violates the Second Amendment. But gun lobby nonsense does not justify academic anti-gun crusaders' departure from ordinary canons of scholarship to indulge their personal antipathy to guns and gun owners.

In 1978, the National Institute of Justice funded a review of the whole corpus of then-extant social scientific literature on gun control (hereinafter called the NIJ Evaluation). Done at the University of Massachusetts, this encyclopedic analysis provides the benchmark and point of departure for all later research in the field. Its senior authors began with the expectation that the evaluation would confirm the anti-gun views they admittedly shared. Instead, the evaluation provides an almost unrelieved condemnation of the one-sided, problem-oriented literature of the 1960s and early 1970s.<sup>16</sup><sub>(pg.5)</sub>

The purpose in my paper is to summarize current data on all major aspects of the gun controversy. I shall supplement and update the NIJ Evaluation in light of numerous credible studies that have appeared since the mid-1970s. Predictably, this data has emerged from analyses approaching gun ownership as a social phenomenon to be studied rather than as a problem to be exorcised by polemics thinly disguised as academic discourse.

## 3. Realistic Gun Control Advocacy

Rejection of specious or unproven anti-gun views does not entail accepting equally specious or unproven pro-gun propaganda. By the same token, realistically acknowledging that gun laws cannot overcome basic socio-economic and cultural causes of violence does not justify the gun lobby's myopic rejection of the very concept of control. Rather, if we recognize the limitations of gun control, we free ourselves of unrealistic expectations of what control can accomplish. Such realism precludes only counter-productively utopian legislation: gun laws whose potential enforcement and other costs are likely to exceed their probable benefits. By rejecting such laws, we deprive the gun lobby of a major propaganda device: crowing over gun control's failure to

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<sup>15</sup> Levinson, "The Embarrassing Second Amendment," 99 *Yale L.J.* 635 (1989). See also Kates, "Handgun Prohibition and the Original Meaning of the Second Amendment," 82 *Mich. L. Rev.* 203 (1983); Shalhope, "The Ideological Origins of the Second Amendment," 69 *J. Am. His.* 599 (1982); and J. Malcolm, *Arms for Their Defense: Origins of an Anglo-American Right* (forthcoming from Oxford University Press, 1990).

<sup>16</sup> J. Wright, P. Rossi, & K. Daly, *Under the Gun: Weapons, Crime, and Violence in the United States* (N.Y.: Aldine, 1983); see especially pp. 321ff. Unless otherwise stated all references to the NIJ Evaluation are to this, its final commercially published version, rather than to the NIJ-published version, which is J. Wright, P. Rossi, & K. Daly, *Weapons, Crime and Violence in America: A Literature Review and Research Agenda* (Washington, D.C.: Govt. Print. Off., 1981).

accomplish the miracles its incautious advocates so rashly promise. Philip J. Cook, one of the most scrupulous and sophisticated of academic gun control advocates, puts the issues in perspective:

... handgun control advocates have often given a greatly exaggerated picture of what might be accomplished through gun control. Feasible control programs might be capable of reducing the overall amount of violent crime by a few percentage points, and, if so, these programs may be worthwhile. But handgun control by itself will not make the streets safe.

... the "ideal" gun control program [is] one that does not pose serious barriers to the possession of handguns for legitimate purposes, but does effectively inhibit the use of handguns in crime *by a method which has low cost to the criminal justice system and to the society at large*.<sup>17</sup>

In this connection it is crucial to disavow a myth that has been perpetrated by **both** pro- and anti-gun extremists: that what "control" really means is reducing—eventually banning—guns to all but the military and the police. Of course, the myth is true insofar as it represents the goal of anti-gun crusaders who deny that gun owners have any legitimate interests.<sup>18</sup> But that is not what "control" means, either literally (pg.6) or to the majority of Americans who support it (a majority that includes, surveys show, most gun owners). The literal meaning of "control" is regulation, not prohibition. Likewise, what "control" means to most Americans is reasonable compromise to accommodate both the legitimate interests of responsible gun owners and the clear social need for rational control over deadly weaponry.<sup>19</sup> Regrettably, the trust that is essential for compromise and accommodation has been destroyed by the rancorous condemnation that has characterized the debate over gun control.

#### 4. Respectable Bigotry

We are so inured to the vituperative terms in which the gun debate is carried on that it may be useful to consider the issue in a wholly different context. Recently, a psychiatrist publicized the terrifying story of her repeated vain attempts to control, or have incarcerated, a malicious bi-sexual patient who continued to have promiscuous, unsafe sex with people who didn't know that he had the

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<sup>17</sup> Emphasis added; from the co-author of an unpublished Ford Foundation study, Cook, "A Policy Perspective on Gun Control" (mimeo, Duke U., 1976).

<sup>18</sup> The other co-author of the Ford Foundation study asserts that "... gun owners believe (rightly in my view) that the gun controllers would be willing to sacrifice their interests even if the crime control benefits were tiny." Moore, "The Bird in the Hand: A Feasible Strategy for Gun Control," *2 J. Pol. Anal. & Mgmt.* 185, 187-88 (1983). Compare 93 *Science News* 613, 614 (1968) describing gun ownership as "simply beastly behavior"; Braucher, "Gun Lunatics Silence [the] Sounds of Civilization," *Miami Herald*, July 19, 1982; and testimony of the Presbyterian Church, USA, that "There is no other reason to own a handgun (that we have envisioned, at least) than to kill someone with it," 1985-86 Hearings of Legislation to Modify the 1968 Gun Control Act, House Judiciary Committee, Subcommittee on Crime, v. 1 at 128. See also *Detroit Daily Press* editorial, Jan. 22, 1968:

No private citizen has any reason or need at any time to possess a gun. This applies to both honest citizens and criminals. We realize the Constitution guarantees the "right to bear arms" but this should be changed.

<sup>19</sup> Polls consistently show public support for regulation that is more stringent than in the least gun-restrictive states and less stringent than in the most restrictive (i.e., a permit system that would seek to disarm felons, juveniles, and the mentally unstable **as far as possible without denying ordinary responsible citizens the right to choose to own a gun for family defense**). Cf. Wright, "Public Opinion and Gun Control: A Comparison of Results from Two Recent Surveys," *455 Annals Amer. Acad. of Pol. & Soc. Sci.* 24 (1981); Bordua, "Adversary Polling and the Construction of Social Meaning," *5 Law & Pol. Q.* 345 (1983).

AIDS virus.<sup>20</sup> Doubtless other examples could be cited of people who spread AIDS irresponsibly or even deliberately. But enlightened, liberal people would not jump from a few examples to vilify bi-sexuals or gays or gay rights activists, in general. Enlightened, liberal people rightly see the bigotry of blaming the wrong-doing of an irresponsible, aberrant few on a whole group of innocent, responsible people.

Returning to gun control, we see that studies trying to link gun ownership to violence rates find either no relationship or a **negative** (i.e., cities and counties with high gun ownership suffer less violence than demographically comparable areas with lower gun ownership).<sup>21</sup> Summarizing these and other studies, a recent National (pg.7) Institute of Justice analysis finds the following:

It is clear that only a very small fraction of privately owned firearms are ever involved in crime or [unlawful] violence, the vast bulk of them being owned and used more or less exclusively for sport and recreational purposes, or for self-protection.<sup>22</sup>

Concurrently, it has been estimated that 98.32 percent of owners do not use a gun in an unlawful homicide (over a 50-year, adult life span).<sup>23</sup>

In sum, murderers compose only a small, highly aberrant, malignant, and irresponsible subset of all gun owners. Why, then, is it enlightened and liberal to vilify the 50 percent of American households that have guns as barbaric or deranged ("Gun Lunatics Silence [the] Sounds of Civilization"<sup>24</sup>), "gun nuts," "gun fetishists," "anti-citizens," and "traitors, enemies of their own

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<sup>20</sup> "A Doctor's Horror: Death on the Loose," reprinted from *The Washington Post* by *The San Francisco Chronicle*, May 14, 1989.

<sup>21</sup> See, for example, Murray, "Handguns, Gun Control Law, and Firearm Violence," 23 *Social Problems* 81 (1975); Lizotte & Bordua and Bordua & Lizotte, above; Kleck, "The Relationship between Gun Ownership Levels and Rates of Violence in the United States," in D. Kates (ed.), *Firearms and Violence* (1984); McDowall, "Gun Availability and Robbery Rates: A Panel Study of Large U.S. Cities, 1974-1978," 8 *Law & Pol. Q.* 135 (1986); Bordua, "Firearms Ownership and Violent Crime: A Comparison of Illinois Counties"; Kleck & Patterson, "The Impact of Gun Control and Gun Ownership Levels on City Violence Rates," a paper presented to the 1989 Annual Meeting of the American Society of Criminology (available from the authors at Florida State U. School of Criminology). See also Eskridge, "Zero-Order Inverse Correlations between Crimes of Violence and Hunting Licenses in the United States," 71 *Sociology & Social Research* 55 (1986).

<sup>22</sup> J. Wright & P. Rossi, NIJ Felon Survey 4.

<sup>23</sup> As to the aberrance of homicide perpetrators, see the section of this paper devoted to that issue. Professor Gary Kleck derived his estimate of handgun owner-murderers by comparing handgun homicide data to the number of respondents of a 1987 GSS Survey who answered that they personally owned a gun.

These estimates probably grossly over-estimate the number of **legal** handgun owners who murder. After all, illegal gun owners (a group that composes a substantial proportion of murderers) are disproportionately unlikely either to be asked to respond to a GSS Survey or to incriminate themselves by honestly answering that they own a gun. Prof. Kleck was kind enough to give me this set of estimates as a personal communication. It will eventually appear in an as-yet-untitled book he is preparing for Aldine de Guyter Press (c. 1991), hereinafter cited as Kleck-Aldine.

<sup>24</sup> Braucher, *Miami Herald*, July 19, 1982; see also his Oct. 29, 1981, column "Handgun Nuts Are Just That—Really Nuts."



*patriae*"<sup>25</sup>, to call gun owners sexually warped<sup>26</sup> "bulletbrains"<sup>27</sup> who engage in "simply beastly behavior"<sup>28</sup> and who represent (pg.8) "the worst instincts in the human character"<sup>29</sup>; or to traduce pro-gun groups as the "pusher's best friend"<sup>30</sup> and to describe all group membership as "psychotics," "hunters who drink beer, don't vote, and lie to their wives about where they were all weekend"<sup>31</sup>? Is it enlightened to characterize the murder of children as "another slaughter co-sponsored by the National Rifle Association"<sup>32</sup>; to assert that "The assassination of John Lennon has been brought to you by the National Rifle Association"<sup>33</sup>; and to cartoon gun owners as thugs, vigilantes, intellectually retarded, educationally backward, morally obtuse, or Klansmen?<sup>34</sup>

The NIJ Evaluation accurately describes how anti-gun advocates see gun owners: as "demented and blood-thirsty psychopaths whose concept of fun is to rain death upon innocent creatures both human and otherwise." It is really quite remarkable for such calumnies to issue from people who, rightly, regard it as egregious bigotry when other bigots: seek to blame AIDS deaths on gays whom they revile as sexually warped, moral degenerates who engage in simply bestial behavior; or blame gay rights activists for AIDS because they lobby against ordinances that would close bath houses; describe abortion rights activists as murderers, or "baby butchers"; or describe abortion clinics as "merchants of death"; dismiss all homeless people and welfare recipients as slackers, drug addicts, alcoholics or retarded; or traduce the ACLU as the "best friend" of criminals and drug pushers.(pg.9)

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<sup>25</sup> Wills, "John Lennon's War," *Chicago Sun Times*, Dec. 12, 1980; "Handguns that Kill," *Washington Star*, Jan. 18, 1981, and "Or Worldwide Gun Control," *Philadelphia Inquirer*, May 17, 1981.

<sup>26</sup> The psychiatric evidence for and against this aspersion is discussed infra. Its advocates include Harriet Van Horne (*N.Y. Post* magazine, June 21, 1976, p. 2); Dr. Joyce Brothers, Harlan Ellison ("Fear Not Your Enemies," *Heavy Metal*, Mar. 1981), *U.S. Catholic* magazine (editorial "Sex Education Belongs in the Gun Store," Aug. 1979).

<sup>27</sup> Grizzard, "Bulletbrains and the Guns that Don't Kill," *Atlanta Constitution*, Jan. 19, 1981.

<sup>28</sup> "Gun Toting: A Fashion Needing Change," in 93 *Science News* 613, 614 (1968).

<sup>29</sup> *Washington Post* editorial, "Guns and the Civilizing Process," Sept. 26, 1972.

<sup>30</sup> Guest editorial by Senator Edward Kennedy, "Pusher's Best Friend, the NRA," *New York Times*, Mar. 22, 1989. See also P. Hamill, "A Meeting of NRA's Harlem Branch," *New York Post*, Apr. 4, 1989. *Louisville Courier-Journal Magazine*, Aug. 7, 1988, p.6. ("The National Rifle Association, its propagandists and its supporters work day and night to make sure that every hood in the country can get his hands on a gun. They couldn't be more guilty if they stood there slipping pistols to the drug dealers and robbers. If justice were done, they would be in prison"). In fact (though it has often obtusely opposed even reasonable controls that affect **law-abiding citizens**), the NRA has consistently supported, indeed is the principal architect of, laws comprehensively barring gun ownership by anyone convicted of a felony. Cf. 82 *Mich. L. Rev.* 209-10 (citing state laws dating from the early 20th century and federal laws from the 1930s through the present day).

<sup>31</sup> A remark by N.Y. Governor Mario Cuomo, who subsequently wrote the NRA to apologize because it is "unintelligent and unfair" to "disparage any large group," *Time*, May 27, 1985.

<sup>32</sup> Editorial cartoon, *Milwaukee Journal*, Jan. 22, 1989, p.12J.

<sup>33</sup> Ironically, the assassin, who was himself a gun control advocate, was legally licensed in one of the highly restrictive states that (over the NRA's fervent objection) require licensure to purchase a handgun. Moreover, he obtained his license as a security guard, a status that would carry legal entitlement to a handgun under even the most stringent anti-gun proposals. Jacobs, "Exceptions to a General Prohibition on Handgun Possession," 49 *Law & Contemp. Probs.* 5, 6-7 (1986).

<sup>34</sup> Morin (*Miami Herald*) cartoon, *Arizona Republic*, Mar. 21, 1989 (showing gun store with sign "drug dealers, gangs, welcome"); Herblock cartoon, *Washington Post*, Mar. 21, 1989 ("these guys who want to spray the streets with bullets"); *San Jose Mercury-News*, Mar. 3, 1989 ("I.Q.-47"); *Los Angeles Herald Examiner*, Jan. 31, 1989 (showing "Crips, Bloods, and NRA" as "Three Citizen Groups Opposed to Outlawing Assault Rifles"); and Interlandi cartoon, *Los Angeles Times*, Dec. 16, 1980.

The fact that anti-gun crusaders are commendably eager to oppose racism, gay bashing, and other evils they recognize as bigotry does not excuse their inability to recognize their own bigotry. On the contrary, it compounds that bigotry with myopia, if not hypocrisy.

## 5. The Political Cost of Bigotry

No less important than the issue of bigotry is that this incessant vilification of gun owners precludes reasonable compromise over gun laws. The pro-gun lobby press faithfully reports the philippics and reprints the most abusive anti-gun cartoons to inflame its readers.<sup>35</sup> Why would the gun lobby actually pay royalties to Herblock, Oliphant, etc. to reprint their anti-gun cartoons? Because the gun lobby's purposes are best served by convincing gun owners that they are a hated minority. There can be no greater incentive for monetary contributions to the gun lobby and for fanatic hatred of gun law proposals, no matter how apparently reasonable.

Gun owners are convinced (in part, by bitter experience) that gun laws will be invidiously administered and unfairly enforced; just as important, they believe that gun owners are anathema to persons and groups like the ACLU to whom other Americans look for help against mistreatment at the hands of the state.<sup>36</sup> So gun owners hysterically oppose controls that are substantially similar to ones they readily accept on cars and prescription medicines. This opposition is only natural, given the rancor with which controls are advocated and the purposes avowed by their more extreme advocates. Would driver licensing and automobile registration have been adopted if they had been advocated on the basis that having a car is evidence of moral, intellectual, or sexual incapacity—or that the desired end is to progressively increase regulation until cars are unavailable to all but the military and the police? Would not diabetics and others with chronic illness hysterically oppose the prescription system if doctors were under constant pressure from church groups and editorialists denouncing medication as immoral? Do not gay rights activists vehemently oppose policies (however apparently reasonable) that they see as motivated by enmity to gays and as likely to be administered in that spirit of enmity?

Two clarifications are in order here. First, I recognize that cars, guns, and medicines are different commodities that may require very different policy responses. My point is only that no policy, however rational in the abstract, can succeed if those it regulates see it as motivated by hatred, contempt, and a denial that they have legitimate interests to be considered. Second, I recognize that gun owners respond to anti-gun attacks no less hatefully. But there is a crucial difference: gun owners are (pg.10) not seeking to make their enemies own guns. In contrast, what gun control advocates do by heaping contempt on gun owners is to forever alienate those whose compliance is indispensable if gun laws are to work. However satisfying it may be to anti-gun crusaders to portray gun owners as "demented and blood-thirsty psychopaths whose concept of fun is to rain death upon innocent creatures both human and otherwise," the result is catastrophically counter-productive to the cause of gun control.

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<sup>35</sup> Stell, "Guns, Politics and Reason," 9 *J. Am. Culture* 71, 73 (1986). See for example, *Gun Week*, Feb. 1, 1980, p.2; "Roger Caras Labels NRA 'Collection of Psychotics,'" also see July 8, 1983, and Aug. 30, 1985, issues reprinting anti-gun cartoons.

<sup>36</sup> See examples given and general discussion in Kates, "The Battle over Gun Control," 84 *The Public Interest* 42 (1986) (hereinafter cited as "Gun Control," 84 *The Public Interest*).

## 6. Realistic Control vs. Symbolic Gun Prohibition

Stanford Law Professor John Kaplan (until his death, the leading American authority on narcotics policy) used to talk about anti-gun crusaders' profound ignorance of guns as technological objects, about gun owners and about why and how guns are owned and used. By analogy, we would not want narcotics regulations dictated by people so ignorant of the subject that they thought cocaine was a common vegetable and marijuana was a gas. This type of ignorance leads anti-gun crusaders to formulate proposals that, if effective, would double or even triple the death tolls from gun accidents and assaults.<sup>37</sup>

Such comprehensive ignorance is part and parcel of the anti-gun crusaders' loathing and contempt for gun owners. Anti-gun crusaders often express their pride in knowing nothing about guns because it sets them apart from the barbaric gun lover. Nor do they care that their ignorance precludes their evaluating the viability and pragmatic value of potential control strategies. Their approach is not a great problem for anti-gun crusaders because, ultimately, they are more interested in the symbolic significance of having guns banned than in establishing pragmatic and effective control over guns.

Unlike most Americans (even a majority of gun owners) who seek controls for pragmatic purposes like saving lives, anti-gun crusaders view a ban on guns as an official or symbolic endorsement of their moral superiority and as a simultaneous condemnation of guns and gun owners.<sup>38</sup> That the anti-gun crusader's concern is of symbolic rather than pragmatic value is proven by an astonishing fact: many anti-gun advocates will, at the same time, strongly oppose pornography, narcotics, and other blue laws on the grounds, primarily, that they are unenforceable. Yet the enormous literature these crusaders have produced by advocating gun bans contains **not a single** (pg.11) **attempt to show how a ban would be enforceable.**<sup>39</sup> Though acutely aware of enforceability issues in other contexts, anti-gun crusaders have not tried to show that a gun ban would stop millions of people, who think they have both a constitutional right and an urgent need to own a handgun for family protection, from keeping or getting a gun. The anti-gun crusader ignores enforceability for, at bottom, his opposition to gun ownership is not pragmatic, but symbolic. It parallels the "sophisticated" argument for banning suicide, homosexuality, or pornography—even if it is not enforceable, the ban symbolizes society's condemnation of this morally abhorrent excrescence.

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<sup>37</sup> For instance, the principal spokesman for the National Coalition to Ban Handguns claims a ban would reduce accidental because "law-abiding citizens would then turn to *safer* long guns (i.e., rifles and shotguns) for self-protection." Fields, "Handgun Prohibition and Social Necessity," 23 *St. Louis U. L. J.* 23, 51 (1979) (emphasis added). In fact, long guns are actually both far more dangerous when discharged and, for various technical reasons, far more subject to accident. See discussion below. Thus, if a handgun ban caused long gun substitution, the effect would be to geometrically increase accidental gun fatalities. See discussion in the section on gun accidents below.

<sup>38</sup> For a similar analysis of the motivations underlying Prohibition, see J. Gusfield, *Prohibition: A Symbolic Crusade*.

<sup>39</sup> Riley is unusually forthcoming on the issue: his 10,000-word jeremiad against the handgun at least mentions enforcement. Indeed, he devotes an entire sentence to the issue; he declares that enforcement will be "strict." Riley, "Shooting to Kill the Handgun: Time to Martyr Another American 'Hero,'" 51 *J. Urb. Law* 491 (1974). Three other gun prohibitionists do seriously examine the issue—but do not demonstrate that a ban would be enforceable! Their views are epitomized by Neier's admission that, because of the impossibility of enforcement, "my proposal to ban all guns should probably be marked a failure before it is even tried." A. Neier, *Crime and Punishment: A Radical Solution* 79 (1975); see also D. Lunde, *Murder and Madness* 28-29 (1976); and R. Sherrill, *The Saturday Night Special*, 271-74.

## PEJORATIVE CHARACTERIZATIONS OF GUN OWNERSHIP

### 1. The Penis Theory<sup>40</sup>

Reviewing unsubstantiated, mostly "derogatory ... speculative literature on the personality characteristics of gun owners," the NIJ Evaluation (p.120) mentions "the psychoanalytic" view that "weapons are phallic symbols representing male dominance and masculine power." The idea of gun ownership as sexual aberration has been casually espoused by such anti-gun luminaries as Arthur Schlessinger Jr., Harlan Ellison, Mike Royko, and Joyce Brothers.<sup>41</sup> The only serious study endorsing this view is by psychiatrist Emmanuel Tanay who sees "the need for a gun" as serving "libidinal purposes ... to enhance or repair a damaged self-image ..., and involving "narcissism ..., [p]assivity, and insecurity".<sup>42</sup>

There is no viable argument for the penis theory as against pragmatic explanations for gun ownership. Psychiatrist Bruce Danto rejects the penis theory because it fails to account for female gun ownership. In fact, 50 percent of those who own a (pg.12) gun only for protection are women (especially black women), even though women are much less likely than men to own guns for sport.<sup>43</sup> This pattern is more accurately explained by a woman's need for protection than by feelings of penile inadequacy.

Dr. Danto also notes that the penis theory would predict that male gun owners would lean toward the largest barrel and bore weapons available. But the respective popularity of guns of different sizes uniformly appears to reflect purely pragmatic concerns.<sup>44</sup> The penis theory is equally incapable of explaining other demographic differentials in gun ownership. When all gun owners are counted (not just those who own for protection alone), survey evidence shows that

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<sup>40</sup> Unless otherwise expressly stated, all references for this section will be found in my lengthier discussion of the topic, co-authored with Dr. Nicole Varzos, "Aspects of the Priapic Theory of Gun Ownership," in W. Tonso (ed.), *The Gun Culture and Its Enemies* (1989).

<sup>41</sup> See, for example, Harriet Van Horne, *N.Y. Post* magazine, June 21, 1976, p.2; editorial "Sex Education Belongs in the Gun Store," *US Catholic* magazine, Aug. 1979; Harlan Ellison, "Fear Not Your Enemies," *Heavy Metal*, Mar. 1981. The view is also espoused by Carl Bakal, *No Right to Bear Arms* 88-90 (1967).

<sup>42</sup> E. Tanay, "Neurotic Attachment to Guns," *The Fifty Minute Hour* (1976).

<sup>43</sup> See Young, "Gender, Region of Socialization and Ownership of Protective Firearms," *51 Rur. Soc.* 169 (1986); Lizotte & Bordua, "Firearms Ownership for Sport and Protection: Two Divergent Models," *45 Am. Soc. Rev.* 229 (1980); Lizotte & Bordua, "Firearms Ownership for Sport and Protection: Two Not So Divergent Models," *46 Am. Soc. Rev.* 499 (1981); Bordua & Lizotte, "Patterns of Legal Firearms Ownership: A Situational and Cultural Analysis of Illinois Counties," *2 Law & Pol. Q.* 147 (1979); and Thompson, Bankston et al., "Single Female Headed Households, Handgun Possession, and the Fear of Rape," paper presented at the 1986 Annual Meeting of the Southern Sociological Society.

<sup>44</sup> While shooting elephants, rhinoceros, and similar animals requires express rifles of .40 caliber or more, .30 caliber non-express weapons suffice for any North American game animal. Not coincidentally, American manufacturers do not make express rifles and .30 caliber rifles are the largest that would ever be owned by Americans, except for the tiny minority of African big game hunters. Likewise, barrel length of rifles and shotguns is a function of the area in which they are expected to be used: long-barrelled guns are owned by those who hunt in open country where long-range accuracy is optimum; short-barrelled guns are used in heavy brush country where long barrels snag when brought into action as game is encountered suddenly and at close range.

gun owners are disproportionately rural, Southern, male, Protestant, affluent and middle class ... [and that] weapons ownership tends to increase with income, or occupational prestige, or both.<sup>45</sup>

The explanations here are, once again, purely pragmatic; hunting is more an activity of rural people generally, and Southerners particularly, than of city dwellers. Among urbanites, guns are most owned by the affluent because they are more likely to hunt—and also to have the money to afford guns and property that they may need to defend. Most guns are owned for sport, and males more than females engage in gun sports. Survey show Protestants are more likely to hunt than Catholics or Jews (Protestantism is most predominant in rural areas); beyond that, Protestants and gun owners both tend to be descended from older American stock, retaining cultural values redolent of the "individualistic orientation that emanated from the American frontier ..."<sup>46</sup> (pg.13)

In contrast, the penis theory has no explanatory value for these demographic trends. Are Protestants or the affluent or rural dwellers or Southerners more subject to feelings of penile inadequacy than Catholics or urbanites or the poor, and so forth? Incidentally, it may be relevant to note that surveys show gun owners are no more hostile to feminism and the women's movement than are non-owners.<sup>47</sup>

Tanay's arguments for the penis theory validate only his own (self-admitted) fear and loathing of guns. He asserts that "the owner's overvaluation of his gun's worth is an indication of its libidinal value to him." Because Tanay never attempts to explain what "overvaluation" means, there is nothing to distinguish guns from the "overvaluation" involved in having other collectibles. People who do not share the passion often marvel at the amounts of time and money spent by others who "over-value" such more or less intrinsically worthless items as old phonograph records, musical instruments, cars, political campaign buttons, stamps, coins, and candelabra.<sup>48</sup> Much the same problem characterizes Tanay's evidence of "narcissistic investment":

Most of the dedicated gun owners handle the gun with obvious pleasure; they look after the gun, clean, polish, and pamper it ... speak of their love and respect for guns.

Most, if not all, collectors revere the objects they collect; they clean and polish them (if coins or antiques) or encase them (if gems or musical instruments) in velvet, suede, or other attractive settings. Are all collectors motivated by feelings of penile inadequacy? Or does Dr. Tanay's depiction of gun owners reflect only his own narrow-minded inability to evaluate the feelings of those who love and respect something he admittedly loathes?

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<sup>45</sup> NIJ Evaluation at pp.107 and 122.

<sup>46</sup> Young, "The Protestant Heritage and the Spirit of Gun Ownership," 28 *J. Sci. Study of Relig.* 300, 307 (1989).

<sup>47</sup> A. Stinchcombe et al., *Crime and Punishment—Changing Attitudes in America* 113 (1980) ("we found no evidence that [the] gun culture is macho").

<sup>48</sup> Compare Olmsted, "Morally Controversial Leisure: The Social World of Gun Collectors," 11 *Symbolic Interaction* 277 (1988) to Olmsted, "Stamp Collections and Stamp Collecting," paper presented at the 1987 Annual Meeting of the Popular Culture Association (available from the author at U. of Calgary, Department of Sociology); Dannefer, "Rationality and Passion in Private Experience: Modern Consciousness and the Social World of Old Car Collectors," 27 *Social Problems* 392 (1980); and "Neither Socialization nor Recruitment: The Avocational Careers of Old Car Collectors," 60 *Social Forces* 395 (1981).

A final point of interest is Dr. Tanay's citation of Freud's view that weapons may symbolize the penis in dreams. This, Freud said, is true of dreams involving any long object (e.g., "sticks, umbrellas, poles, trees") but especially objects that may be viewed as penetrating and injuring ("... knives, daggers, lances, sabers; firearms are similarly used ..."). This passage refers to dreams in general without distinguishing gun owners from others. Dr. Tanay is perhaps unaware of—in any event, he does not cite—other passages more relevant to his argument. In these other passages Freud associates retarded sexual and emotional development not with gun ownership, but (pg.14) with fear and loathing of weapons.<sup>49</sup> The probative importance that ought to be attached to the views of Freud is, of course, a matter of opinion. The point here is only that those views provide no support for the penis theory of gun ownership.

## 2. Gun Ownership as a Cause of Aggression

Obviously, **some** gun owners are highly aggressive, indeed violent, else the United States would not suffer hundreds of thousands of gun crimes each year. The question is: are gun criminals properly considered representative of all gun owners? Or are they a tiny, aberrant minority best understood in the context of the larger aberrant minority of criminals who, with and without guns, commit millions of violent crimes in the United States each year? The recent NIJ felon survey shows that criminals who use guns in their crimes either sporadically or regularly are among the "hardest" of offenders. *Per capita* they have committed not only a larger number of violent crimes (often while armed with knives or weapons other than guns) than other offenders, but more crimes of all kinds.<sup>50</sup>

Nevertheless, the anti-gun "sagecraft" literature has portrayed gun crime as more or less a necessary effect of gun ownership. In a series of articles, Prof. Leonard Berkowitz asserted that guns arouse hostile and aggressive impulses in their owners. To prove this, he conducted laboratory tests supposedly showing that subjects' hostility levels rose, particularly when others who annoyed them were associated with guns in various ways.<sup>51</sup> Evidence of this "weapons effect" is limited and erratic. Other psychologists have been unable to replicate Berkowitz's results; indeed, some found subjects less willing to express hostility against persons whom they associated with weapons.<sup>52</sup>

More important is that, no matter what the results, the design of these experiments precluded Berkowitz's conclusion that a weapon increases **its owners'** hostility and aggressiveness. None of his experiments involved a weapon being possessed by the subject (i.e., the person whose hostility was being tested). In Berkowitz's tests the weapon was associated only with the person against whom hostility would run. Thus Berkowitz was testing not the gun owner's hostility but (pg.15) hostility

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<sup>49</sup> Compare the passage from the 10th Lecture (at 507 of *The Major Writings of Sigmund Freud*, Great Books ed., 1952), which Dr. Tanay does cite, to S. Freud & D. Oppenheim, *Dreams in Folklore* (1958) at 33.

<sup>50</sup> NIJ felon survey above at 65-77.

<sup>51</sup> Berkowitz, "How Guns Control Us," *Psychology Today*, June 1981; Berkowitz, "Impulse, Aggression, and the Gun", *Psychology Today*, Sept. 1968.

<sup>52</sup> See for example, Fischer & Kelm, "Knives as Aggression-Eliciting Stimuli," 24 *Psych. Reports* 755 (1969); Ellis, Weiner, & Miller, "Does the Trigger Pull the Finger? An Experimental Test of Weapons as Aggression Eliciting Stimuli," 34 *Sociometry* 453 (1971); Fraczek & Macauley, "Some Personality Factors in Reaction to Aggressive Stimuli," 39 *J. of Personality* 163 (1971); Turner & Simons, "Naturalistic Studies of Aggressive Behavior," 31 *J. of Personality and Soc. Psych.* 1098 (1975).

against persons his college student subjects associated with guns.<sup>53</sup> Social psychologists who did test the hostility level of both owners and non-owners after actually firing guns could find "no evidence that the presence, firing, or long-term use of guns enhances subsequent aggression."<sup>54</sup>

### 3. Violent Personality or Attitude Characteristics of Gun Owners

Another study attempted to demonstrate the iniquity of gun owners and concluded that they are "violence prone." The conclusion was based on survey data in which what the subjects actually approved was not illegal violence but the use of force necessary to stop crime or aid its victims.<sup>55</sup> A more recent study offers a more neutral assessment that is based on three national surveys: gun owners differ from non-owners only in being more likely to approve "defensive" force (i.e., force directed against violent attackers). In contrast, those exhibiting "violent attitudes" (as defined by approval of violence against social deviants or dissenters) are no more likely to be gun owners than non-owners. Interestingly, the holders of violent attitudes were less likely than the average gun owner to approve of defensive force (perhaps perceiving this force would be directed against violent people like themselves).<sup>56</sup>

In addition to such directly relevant studies, a substantial quantity of macrocosmic evidence exists against both the Berkowitz hypothesis that guns promote violent impulses and the alternative anti-gun hypothesis that gun ownership signifies a violent personality. If either hypothesis were true, then increased gun ownership would be highly correlative with violent crime (i.e., the more guns, the more violence). Yet the consistent result of studies attempting to link gun ownership to violence rates is either no relationship or a **negative** one (i.e., urban and other areas with higher gun ownership have less violence than demographically comparable areas with lower gun ownership).<sup>57</sup> (pg.16)

### 4. Paranoia, Sexism, and Racism

Anti-gun crusaders have traditionally derided gun ownership as a product of exaggerated, unrealistic public fears of crime.<sup>58</sup> Extreme, unrealistic fear of crimes may amount to mental illness;

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<sup>53</sup> See discussion in Toch & Lizotte, "Research & Policy: The Case of Gun Control," in P. Suedfeld & P. Tetlock, *Psychology and Social Advocacy* (forthcoming from Greenwood Press, 1990).

<sup>54</sup> Buss, Brooker & Buss, "Firing a Weapon and Aggression," 22 *J. of Personality & Soc. Psych.* (1972).

<sup>55</sup> Williams & McGrath, "Why People Own Guns," 26 *J. of Communication* 22 (1976).

<sup>56</sup> Lizotte & Dixon, "Gun Ownership and the 'Southern Subculture of Violence,'" 93 *Am. J. of Soc.* 383 (1987).

<sup>57</sup> See for example, Murray, "Handguns, Gun Control Law and Firearm Violence," 23 *Social Problems* 81 (1975); Lizotte & Bordua and Bordua & Lizotte, above; Kleck, "The Relationship between Gun Ownership Levels and Rates of Violence in the United States," in D. Kates (ed.), *Firearms and Violence* (1984); McDowall, "Gun Availability and Robbery Rates: A Panel Study of Large U.S. Cities, 1974-1978," 8 *Law & Pol. Q.* 135 (1986); Bordua, "Firearms Ownership and Violent Crime: A Comparison of Illinois Counties," Kleck & Patterson, "The Impact of Gun Control and Gun Ownership Levels on City Violence Rates," a paper presented to the 1989 Annual Meeting of the American Society of Criminology (available from the authors at Florida State U. School of Criminology). See also Eskridge, "Zero-Order Inverse Correlations between Crimes of Violence and Hunting Licenses in the United States," 71 *Sociology & Social Research* 55 (1986).

<sup>58</sup> Thus the pamphlet *How Well Does the Handgun Protect You and Your Family?* by M. Yeager and the Handgun Control Staff of the U.S. Conference of Mayors, 1976 (hereinafter cited as Handgun Control Staff pamphlet) asserts "The probability of being robbed, raped, or assaulted is low enough to seriously call into question the need for Americans to keep loaded guns ...," p. 1, emphasis in original. Compare another Handgun Control Staff pamphlet, J. Alviani & W. Drake, *Handgun Control: Issues and*

anti-gun crusaders epithetically dismiss gun owners as paranoid and gun ownership as a "national paranoia."<sup>59</sup> Moreover, precautionary handgun ownership is commonly held to signify and promote irrational fears, intolerance, and belligerence: "The mere possession of a gun is, in itself, an urge to kill, not only by design, but by accident, by madness, by fright, by bravado."<sup>60</sup>

Yet gun owners do not seem to be more fearful of crime than other members of the general public. Rather, polls and attitude studies suggest that gun owners may actually be less afraid than non-owners.<sup>61</sup> This lesser fear may be explained by a study of "Good Samaritans" who had arrested criminals or rescued their victims. In contrast to the less than 33 percent of Americans who then owned any kind of gun, almost two-and-one-half as many of the Samaritans (81 percent) "own guns and some carry them in their cars. They are familiar with violence, feel competent to handle it, and don't believe they will be hurt if they get involved."<sup>62</sup> (pg.17)

So the charge of paranoia against gun owners seems to be unsubstantiated. What about the charges of intolerance, bigotry, and belligerence? As to sexism, I have already noted that an analysis of two national surveys shows gun owners no more hostile to feminism and the women's movement than are non-owners.<sup>63</sup> As to racism, the result of one local attitude study has been interpreted as showing that gun owners are likely to hold racist views.<sup>64</sup> But the asserted correlation between gun ownership and racism is not borne out by several state and national studies of gun owners' attitudes.<sup>65</sup>

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*Alternatives* at 7: "Certainly the fear of these crimes outweighs the reality, and the need to possess a handgun becomes questionable." See also testimony of former California Governor Edmund G. ("Pat") Brown Sr. in *Hearings* [on S. 2507] *Before the Senate Subcommittee to Investigate Juvenile Delinquency* at 55-56 (1971).

<sup>59</sup> See for example, "A Shooting Gallery Called America," an unpaginated, undated pamphlet by the National Coalition to Ban Handguns (NCBH).

<sup>60</sup> Columnist Sydney Harris in the *Chicago Daily News*, April 11, 1967. See also the views, cited earlier, of historian Garry Wills that "gun fetishists" are "traitors, enemies of their own patria"; "anti-citizens" arming "against their own neighbors," and that "the gun nuts who write me say that their liberty may have to be preserved against their own government, their own fellow countrymen, someday..." See also Williams & McGrath, "Why People Own Guns," 26 *J. of Communication* 22 (1976) (holding gun owners "violence prone" because survey data show that they approve of the use of force to stop crime or aid its victims).

<sup>61</sup> NIJ Evaluation at 120ff. Note that the differences in level of fear are not overwhelming and that the fear differential in one of the studies may be an artifact of its omitting women gun owners from the comparison. See the critique of DeFronzo, "Fear of Crime and Handgun Ownership," 17 *Criminology* 331 (1979) in Hill, Howell, & Driver, "Gender, Fear, and Protective Gun Ownership," 23 *Criminology* 541 (1985). But see the finding that women gun owners are less afraid than non-owners in Thompson, Bankston, Thayer-Doyle, & Jenkins "Single Female Headed Households, Handgun Possession and the Fear of Rape," a paper presented at the 1986 Annual Meeting of the Southern Sociological Society (available from the authors at the Department of Sociology, Louisiana State U., Baton Rouge).

<sup>62</sup> Huston, Geis, & Wright, "The Angry Samaritans," *Psychology Today*, June 1976. The percentage of the general public who owned guns derives from Kleck-Aldine above, chap. 2, from separate percentages of black and white gun owners given in Erskine, "The Polls: Gun Control," 36 *Public Opinion Q.* 455, 459 (1972) on the assumption that 90 percent of the sample was white and 10 percent black.

<sup>63</sup> A. Stinchcombe et al., *Crime and Punishment—Changing Attitudes in America* 113 (1980) ("we found no evidence that [the] gun culture is macho").

<sup>64</sup> Young, "Perceptions of Crime, Racial Attitudes, and Firearms Ownership," 64 *Social Forces* 473 (1985). Kleck-Aldine above, chap. 2, criticizes this conclusion because the data cited does not exclude the alternative possibility that the racist attitudes correlated not with gun ownership *per se* but with the political conservatism of the particular set of gun owners responding to the survey.

<sup>65</sup> For state data please see Lizotte, Bordua, & White, "Firearms Ownership for Sport and Protection: Two Not So Divergent Models," 46 *Am. Soc. Rev.* 499, 503 (1981). For several national datasets, see Kleck-Aldine above, chap. 2.



Analysis of another national poll reveals that, while liberals were less likely to own guns than the general populace, liberals who do own a gun were no less willing to use it, if necessary, to repel a burglar.<sup>66</sup>

The NIJ Evaluation pithily summarizes the contrast between partisan sagecraft and actual social science:

... even in much of the scholarly literature[,] the "typical" private weapons owner is often depicted as a virtual psychopath—unstable, violent, dangerous. The empirical research [we have] reviewed leads to a sharply different portrait ... There is no evidence suggesting [gun owners] to be an especially unstable or violent or maladapted lot; their "personality profiles" are largely indistinct from those of the rest of the population [p. 122].

### **DEFENSIVE GUN OWNERSHIP AS A RESPONSE TO CRIME**

The impossibility of the police preventing endemic crime, or protecting every victim, has become tragically evident over the past quarter century. The issues are illustrated by the ongoing phenomenon of pathological violence against women by (pg.18) their mates or former mates<sup>67</sup>:

**Baltimore, Md.** Daonna Barnes was forced into hiding with her children because, since making threats is not a crime, police could not arrest her former boyfriend for his threats to kill her. On August 11, 1989, he discovered the location of her new apartment, broke in, and shot and stabbed her and her new boyfriend. Released on bail while awaiting trial on charges of attempted murder, the former boyfriend continues to harass Ms. Barnes, who says: "I feel like there is nobody out there to help me. It's as if [I'll have to wait until he kills me] for anyone to take this seriously ..."

**Mishawaka, Ind.** Finally convicted of kidnapping and battery against Lisa Bianco, her husband was sentenced to 7 years imprisonment. On March 4, 1989, he took advantage of release on an 8-hour pass to break into her house and beat her to death.

**Los Angeles, Calif.** On August 27, 1989, Maria Navarro called the sheriff's office to report that her former husband was again threatening to kill her, despite a restraining order she had obtained against him. The dispatcher instructed her, "If he comes over, don't let him in. Then call us." Fifteen minutes later he burst in on her twenty seventh birthday party and shot her and three others dead. Noting that Ms. Navarro's call was part of a perennial overload of 2,000 or more 911 calls that the sheriff's office receives daily, a spokesman frankly admitted, "Faced with the same situation again, in all probability, the response would be the same."

**Denver, Colo.** On February 16, 1989, a mere 9 days after she filed for divorce, Lois Lende's husband broke into her home, beat and stabbed her to death, and then shot himself to death.

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<sup>66</sup> Whitehead & Langworthy, "Gun Ownership: Another Look," 6 *Justice Q.* 263 (1989).

<sup>67</sup> As exemplified by the examples given in the text, I use the terms "husband," "wife," "mate," and "spousal" to include not only actual, ongoing, and legal marriages, but also "common law" marriage (which is legal in some states, but not others) and "boyfriend-girlfriend," as well as estranged and former versions of all these relationships.

**Connecticut.** Late last year Anthony "Porky" Young was sentenced to a year in prison for stripping his girlfriend naked and beating her senseless in front of her 4-year-old son. "He says next time he's going to make my kids watch while he kills me," she says. Despite scores of death threats he has written to her while in prison, the prison authorities will have to release him when his year is up.

Literally dozens of such newspaper stories appear each week around the United States. Even extreme anti-gun advocates must wonder if a society that cannot protect its innocent victims should not leave them free to choose to own a handgun for (pg.19) defense.<sup>68</sup> This section of the paper is devoted to analyzing the arguments offered for denying that choice.

## 1. Police Protection vs. the Capacity to Defend Oneself

Perhaps the single most common argument against freedom of choice is that personal self-defense has been rendered obsolete by the existence of a professional police force.<sup>69</sup> For decades, anti-gun officials in Chicago, San Francisco, New York, and Washington, D.C., have admonished the citizenry that they don't need guns for self-defense because the police will defend them. This advice is mendacious: when those cities are sued for failure to provide police protection, those same officials send forth their city attorneys to invoke

[the] fundamental principle of American law that a government and its agents are under no general duty to provide public services, such as police protection, to any individual citizen.<sup>70</sup>

Even as a matter of theory (much less in fact), the police do NOT exist to protect the individual citizen. Rather their function is **to deter crime in general** by patrol activities and by apprehension after the crime has occurred. If circumstances permit, the police should and will protect a citizen in distress. But they are not legally duty bound even to do that nor to provide any direct protection—no matter how urgent a distress call they may receive. *A fortiori* the police have no duty to, and do not, protect citizens who are under death threat (e.g., women threatened by former boyfriends or husbands).(pg.20)

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<sup>68</sup> All discussion of gun-armed self-defense in this paper is directed to handguns because they are infinitely more efficacious for defense than rifles or shotguns. In contrast to the unwieldy long gun, the short-barrelled handgun is much easier to bring into play at close quarters and much harder for an assailant to wrest away. Consider the situation of a woman holding an intruder at bay while trying to dial the police. With a rifle, this is difficult and hazardous at best. Given only the two-inch barrel of a snub-nosed handgun to grasp, not even the strongest man can lever it from a woman's grip before she shoots him. M. Ayoob, *The Truth About Self-Protection* (N.Y.: Bantam, 1983) 332-33, 341-42, 345-55.

<sup>69</sup> Thus Ramsey Clark denounces precautionary gun ownership as an atavistic insult to American government: "A state in which a citizen needs a gun to protect himself from crime has failed to perform its first purpose"; it is "anarchy, not order under law—a jungle where each relies on himself for survival," R. Clark, *Crime in America* 88 (1971). For similar views, see also Wills, "Handguns that Kill," *Washington Star*, Jan. 18, 1981; "John Lennon's War," *Chicago Sun Times*, Dec. 12, 1980; and "Or Worldwide Gun Control" *Philadelphia Inquirer*, May 17, 1981; editorial: "Guns and the Civilizing Process," *Washington Post*, Sept. 26, 1972.

<sup>70</sup> *Warren v. District of Columbia*, 444 A.2d 1 (D.C. Ct. of Ap. 1981). For similar cases from New York and Chicago, see *Riss v. City of New York*, 22 N.Y. 2d 579, 293 NYS2d 897, 240 N.E. 2d. 860 (N.Y. Ct. of Ap. 1958); *Keane v. City of Chicago*, 98 Ill. App.2d 460, 240 N.E.2d 321 (1968). See also the cases cited in the next two footnotes and *Bowers v. DeVito*, 686 F.2d 61 (7 Cir. 1982) (no federal constitutional requirement that state or local agencies provide sufficient police protection).

An illustrative case is *Warren v. District of Columbia* in which three rape victims sued the city under the following facts. Two of the victims were upstairs when they heard the other being attacked by men who had broken in downstairs. Half an hour having passed and their roommate's screams having ceased, they assumed the police must have arrived in response to their repeated phone calls. In fact, their calls had somehow been lost in the shuffle while the roommate was being beaten into silent acquiescence. When the roommates went downstairs to see to her, as the court's opinion graphically describes it, "For the next fourteen hours the women were held captive, raped, robbed, beaten, forced to commit sexual acts upon each other, and made to submit to the sexual demands" of their attackers.

Having set out these facts, the District of Columbia's highest court exonerated the District and its police, because it is "fundamental [in] American law" that the police do not exist to provide personal protection to individual citizens.<sup>71</sup> In addition to the case law I have cited, this principle has been expressly enunciated over and over again in statute law.<sup>72</sup>

The fundamental principle that the police have no duty to protect individuals derives equally from practical necessity and from legal history. Historically, there were no police, even in large American or English cities, before the mid-19th century. Citizens were not only expected to protect themselves (and each other), but also legally required in response to the hue and cry to chase down and apprehend criminals. The very idea of a police was anathema, American and English liberalism viewing any such force as a form of the dreaded "standing army."<sup>73</sup> This view yielded only grudgingly to the fact that citizens were unwilling to spend their leisure hours patrolling miles of city streets and were incapable even of chasing fleeing criminals down on crowded city streets—much less tracing and apprehending them or detecting surreptitious crimes.

Eventually, police forces were established to **augment** citizen self-protection by systematic patrol to deter crime and to detect and apprehend criminals if a crime should occur. Historically, there was no thought of the police displacing the citizen's right of self-protection. Nor, as a practical matter, is that displacement remotely (pg.21) feasible in light of the demands a high-crime society makes on the limited resources available to police it. Even if all 500,000 American police officers were assigned to patrol, they could not protect 240 million citizens from upwards of 10 million criminals who enjoy the luxury of deciding when and where to strike. But we have nothing like 500,000 patrol officers: to determine how many police are actually available for any one shift, we must divide the 500,000 by four (three shifts per day, plus officers who have days off, are on sick

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<sup>71</sup> 444 A.2d at 6; see also *Morgan v. District of Columbia*, 468 A.2d 1306 (D.C. Ct. of Ap. 1983). To the same effect, see *Calogrides v. City of Mobile*, 475 So. 2d 560 (S.Ct. Ala. 1985); *Morris v. Musser*, 478 A.2d 937 (1984); *Davidson v. City of Westminster*, 32 C.3d 197, 185 Cal. Rptr. 252, 649 P.2d 894 (S. Ct. Cal. 1982); *Chapman v. City of Philadelphia*, 434 A.2d 753 (Sup. Ct. Penn. 1981); *Weutrich v. Delia*, 155 N.J. Super. 324, 326, 382 A.2d 929, 930 (1978); *Sapp v. City of Tallahassee*, 348 So.2d 363 (Fla. Ct. of Ap. 1977); *Simpson's Food Fair v. Evansville*, 272 N.E. 2d 871 (Ind. Ct. of Ap.); *Silver v. City of Minneapolis*, 170 N.W.2d 206 (S. Ct. Minn. 1969); and the other authorities cited in the footnotes preceding and following this one.

<sup>72</sup> See Cal. Govt. Code §§ 821, 845, 846, and 85 Ill. Rev. Stat. 4-102, construed in *Stone v. State*, 106 C.A.3d 924, 165 Cal. Rptr. 339 (Cal. Ct. of Ap. 1980); and *Jamison v. City of Chicago*, 48 Ill. App. 567 (Ill. Ct. of Ap. 1977) respectively; see generally 18 *McQuillen on Municipal Corporations*, sec. 53.80.

<sup>73</sup> See generally 82 *Mich. L. Rev.* above at 214-16, and F. Morn, "Firearms Use and the Police: A Historic Evolution of American Values," in D. Kates (ed.), *Firearms and Violence* (1984).

leave, etc.). The resulting number must be cut in half to account for officers assigned to investigations, juvenile, records, laboratory, traffic, etc., rather than patrol.<sup>74</sup>

Doubtless the deterrent effect of the police helps ensure that many Americans will never be so unfortunate as to live in circumstances requiring personal protection. But for those who do need such protection, police do not and cannot function as bodyguards for ordinary citizens (though in New York and other major cities police may perform bodyguard services for the mayor and other prominent officials). Consider just the number of New York City women who each year seek police help, reporting threats by ex-husbands, ex-boyfriends, etc. To bodyguard just those women would exhaust the resources of the nation's largest police department, leaving no officers available for street patrol, traffic control, crime detection, apprehension of perpetrators, responses to emergency calls and so forth.<sup>75</sup>

Given what New York courts have called "the crushing nature of the burden,"<sup>76</sup> the police cannot be expected to protect the individual citizen. Individuals remain responsible for their own personal safety, with police providing only an auxiliary general deterrent. The issue is whether those individuals should be free to choose gun ownership as a means of protecting themselves, their homes, and their families.<sup>(pg.22)</sup>

## 2. The Defensive Utility of Victim Firearms Ownership—Pre-1980s Analysis

Until recently a combination of problematic data, lacunae, and legerdemain allowed anti-gun advocates to claim "the handgun owner seldom even gets the *chance* to use his gun" and "guns purchased for protection are rarely used for that purpose."<sup>77</sup> The evidence to support this view came from a selective and manipulative rendition of pre-1980s city-level figures on the number of violent felons whom civilians lawfully kill. Because of a lack of any better data, these lawful homicide data were the best available before the 1980s. But anti-gun discussions should have mentioned the major

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<sup>74</sup> See the extended discussion in Bowman, "An Open Letter," *Police Marksman*, July-Aug. 1986.

<sup>75</sup> Silver and Kates, "Handgun Ownership, Self-Defense and the Independence of Women in a Violent, Sexist Society," in D. Kates (ed.), *Restriction Handguns* at 144-47. Prof. Leddy, formerly a N.Y. officer, cites personal experience:

The ability of the state to protect us from personal violence is limited by resources and personnel shortages [in addition to which] the state is usually unable to know that we need protection until it is too late. By the time that the police can be notified and then arrive at the scene, the violent criminal has ample opportunity to do serious harm. *I once waited 20 minutes for the New York City Police to respond to an "officer needs assistance" call which has their highest priority.* On the other hand, a gun provides immediate protection. Even where the police are prompt and efficient, the gun is speedier.

From "The Ownership and Carrying of Personal Firearms," forthcoming in *Int'l. J. Victimol.* (Emphasis added). Cf. the Riss and Silver cases cited above, as well as *Wong v. City of Miami*, 237 So.2d 132 (Fla., 1970). All emphasize the need for judicial deference to administrators' allocation of scarce police resources as a reason for denying liability for failure to protect.

<sup>76</sup> *Wiener v. Metropolitan Transit Authority*, 433 N.E. 2d 124, 127, 55 N.Y. 2d 175, 498 N.Y.S. 2d 141 (N.Y. App. Div. 1982).

<sup>77</sup> The first quotation is from a book by Nelson "Pete" Shields, the founder of Handgun Control, Inc., *Guns Don't Die, People Do* 49 (1981) (emphasis in original); the second is from Meredith, "The Murder Epidemic," *Science*, Dec. 1986, at p. 46. The point appears as a *leit motif* throughout the Handgun Control Staff pamphlet). To the same effect, please see Newton & Zimring above at 68 and F. Zimring & G. Hawkins, *The Citizen's Guide to Gun Control* (1987) (hereinafter Zimring & Hawkins, 1987) at 31.

defect in judging how many defense uses there were on the basis of defensive killings alone. That excludes as much as 96 percent of all defensive gun uses which did not involve killing criminals but only scaring them off or capturing them without death. This omission speciously minimizes the extent of civilian defensive gun use. Data now available show that gun-armed civilians capture or rout upwards of 30 times more criminals than they kill.<sup>78</sup>

Exacerbating the minimization problem was the highly misleading way opponents of handgun ownership selected and presented pre-1980s lawful homicide data. Some big cities had kept lawful homicide data since the 1910s. Naturally, many more felons were killed by victims in high crime eras like the 1970s and 1980s, or the 1920s and 1930s (when victims tended to buy and keep guns loaded and ready), than in the low crime era of 1945-65. For instance, Chicago figures starting in the 1920s show that lawful civilian homicide constituted 31.4 percent of all homicides (including fatal automobile accidents), that for decades the number of felons killed by civilians roughly equaled those killed by police, and that by the 1970s civilians were lawfully killing about three times as many felons as were police. Yet no mention of Chicago or these data (or comparable Washington, D.C., figures) are found in the anti-gun literature.<sup>79</sup> (pg.23)

Instead, that literature concentrates on Detroit. Even so, the data somehow omit these pertinent facts. In the 1920s, felons killed by civilians constituted 26.6 percent of all homicides in Detroit<sup>80</sup>. As crime rose after 1965, civilian killings of felons rose 1,350 percent (by 1971) and continued rising so that, by the late 1970s, twice as many felons were being lawfully killed by civilians than by police.<sup>81</sup>

Without mentioning any of this, even the most scrupulous of the anti-gun analysts, George Newton and Franklin Zimring, advanced the highly misleading claim that in the 5 years 1964-68 only "seven *residential* burglars were shot and killed by" Detroit householders, and there were only "three cases of the victim killing a *home* robber."<sup>82</sup> This claim is highly misleading because Newton and Zimring have truncated the lawful homicide data without informing readers that they are omitting the two situations in which most lawful defensive homicides occur: robbers killed by shopkeepers, and the homicidal assailant shot by his victim (e.g., the abusive husband shot by the wife he is strangling). Had these two categories not been surreptitiously omitted, Newton and

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<sup>78</sup> In 68-75 percent of instances, the attacker is scared off without being shot at all. See *Social Problems* above at 4. See results reported and analyzed in NIJ Evaluation above at 146; and Hardy, "Firearms Ownership and regulation: Tackling an Old Problem with Renewed Vigor," 20 *Wm. & M. L. Rev.* 235 (1978). See generally "Policy Lessons" above at 44. Even where attackers are shot, in more than five out of six instances they are wounded rather than killed. Id., Cook, "The Case of the Missing Victims: Gunshot Wounds in the National Crime Survey," 1 *J. Quan. Crim.* 91, 94-96.

<sup>79</sup> For the civilian-police comparisons, Silver & Kates, "Handgun Ownership, Self-Defense and the Independence of Women in a Violent, Sexist Society," in D. Kates (ed.), *Restricting Handguns* (1979) at 156. Robin, "Justifiable Homicide by Police Officers," at p. 295, n. 3, of M. Wolfgang, *Studies in Homicide* (1967) notes that 1920s justifiable civilian homicides composed 26.6 percent and 31.4 percent of all homicides in Detroit and Chicago, respectively, and 32 percent of the total homicides in Washington, D.C., in the period 1914-18.

<sup>80</sup> Zahn, "Homicide in the 20th Century," in T. Gurr (ed.), 1 *Violence in America* 221-22 (1989).

<sup>81</sup> M. Dietz, *Killing For Profit: The Social Organization of Felony Homicide* (Chicago: Nelson-Hall, 1983), Table A.1 at 202-203.

<sup>82</sup> Newton & Zimring above at p. 63 (my emphasis).

Zimring's Detroit figure of lawful civilian homicide would have been 27 times greater—not 10 deaths, but rather 270 in the 1964-68 period.<sup>83</sup>

### 3. 1980s Data on the Defensive Efficacy of Handguns

All pre-1980s work has been eclipsed by more recent data, which allow estimation not only of how many felons are killed annually by armed citizens but also of those captured or scared off. This evidence derives from private national surveys on gun issues. Though sponsored by pro- or anti-gun groups, the polls were conducted by reputable independent polling organizations and have all been accorded credibility by social scientists analyzing gun issues.<sup>84</sup> Further evidence of the polls' accuracy is that their results are consistent (particularly their results on defensive gun use), regardless of their sponsorship.<sup>85</sup> Moreover, because the different surveys' data (pg.24) are mutually consistent, any suspicion of bias or falsification may be precluded by simply not using data from NRA-sponsored polls.

Therefore, on the basis of only anti-gun polls, it is now clear that handguns are used as or more often in repelling crimes annually as in committing them, approximately 645,000 defense uses annually vs. about 580,000 criminal misuses.<sup>86</sup> Handguns are used another 215,000 times annually to defend against dangerous snakes and animals. As to their effectiveness, handguns work equally well for criminals and victims: in about 83 percent of the cases in which a victim faces a handgun, he (or she) submits; in 83 percent of the cases in which a victim with a handgun confronts a criminal, the criminal flees or surrenders.

These victim survey data are confirmed by complementary data from a survey among felons in state prisons across the country. Conducted under the auspices of the National Institute of Justice, the survey found that 34 percent of the felons said that

they had been "scared off, shot at, wounded, or captured by an armed victim," [quoting the actual question asked] and about two-thirds (69 percent) had at least one acquaintance who had had this experience.<sup>87</sup>

In response to two other questions, 34 percent of the felons said that in contemplating a crime they either "often" or "regularly" worried that they "might get shot at by the victim," and 57 percent

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<sup>83</sup> Computation from the yearly Detroit homicide figures for "Excusable" and "Justifiable: Civilian" homicides in Dietz above. Because about 10 percent of excusable homicides are nonculpable accidental killings, in computing from the excusable column I have reduced its total by 10 percent. See discussion of justifiable and excusable homicide in *Policy Lessons* above at 44.

<sup>84</sup> See for example, *Social Problems* at 7-9; Wright, "Public Opinion and Gun Control: A Comparison of Results from Two Recent National Surveys," 455 *Annals Amer. Acad. Pol. & Soc. Sci.* 24 (1981); Hardy above and Bordua, "Adversary Polling and the Construction of Social Meaning," 5 *Law & Pol. Q.* 345 (1983).

<sup>85</sup> *Social Problems* at 7-9.

<sup>86</sup> *Id.*

<sup>87</sup> The survey was released by the National Institute of Justice in summary form only. The entire survey with exhaustive analysis has been privately published by Aldine de Guyter Press as J. Wright & P. Rossi, *Armed and Considered Dangerous: A Survey of Felons and Their Firearms* (1986). The survey question and results cited appear at 154.

agreed that "most criminals are more worried about meeting an armed victim than they are about running into the police."<sup>88</sup>

In sum, the claim that "guns purchased for protection are rarely used for that purpose" could not have been maintained by a full and accurate rendition of pre-1980s data; that claim is definitively refuted by the comprehensive data collected in the 1980s under the auspices of the National Institute of Justice and both pro- and anti-gun groups.

#### **4. Anti-Gun Obliviousness to Women's Defensive Needs: (a) The Case of Domestic and Spousal Homicide**

My point is not that opponents of precautionary handgun ownership are oblivious to domestic homicide, but only that they are oblivious (or worse) to the (pg.25) situation of women in such homicides. That obliviousness is epitomized by the failure to differentiate men from women in the ubiquitous anti-gun admonition that "the use of firearms for self-protection is more likely to lead to ... *death among family and friends* than to the death of an intruder."<sup>89</sup> This admonition misportrays domestic homicide as if it were all murder and ignores the fact that around 50 percent of interspousal homicides are committed by abused wives.<sup>90</sup> To understand domestic homicide, we must distinguish unprovoked murder from lawful self-defense against homicidal attack—a distinction that happens in these cases to correlate closely with the distinction between husband and wife.

Not surprisingly when we look at **criminal** violence between spouses, we find that "91 percent were *victimizations of women* by their husbands or ex-husbands ..."<sup>91</sup> Thus, the 50 percent of interspousal homicides in which husband kills wife are real murders—but in the overwhelming majority of cases where wife kills husband, she is defending herself or the children.<sup>92</sup> In Detroit, for

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<sup>88</sup> Id. at 145 and Table 7.2.

<sup>89</sup> Emphasis added. This particular wording derives from the Handgun Control Staff pamphlet at 1 and from the other Handgun Control Staff publication Alviani & Drake above at 8. But the same theme, often expressed in virtually identical language, will be found in almost all critical treatments of precautionary gun ownership. See, for example, Rushforth et al., "Violent Death in a Metropolitan County," 297 *N. Eng. J. Med.* 531, 533 (1977); Drinan, "Gun Control: The Good Outweighs the Evil," 3 *Civil Liberties Rev.* 44, 49 (1976); and Shields above at 49-53 and 124-25.

<sup>90</sup> U.S. Bureau of Justice Statistics release "Family Violence" (April 1984), table 1. See generally Straus, "Domestic Violence and Homicide Antecedents," 62 *Bull. N.Y. Acad. Med.* 446 (1986); "Current Research" at 203-204 and sources there cited.

<sup>91</sup> Figures reported for the period 1973-81 in U.S. Bureau of Justice Statistics release "Family Violence" (April, 1984) at 4 (emphasis added).

<sup>92</sup> See for example, Straus, above Saunders, "When Battered Women Use Violence: Husband Abuse or Self-Defense?" 1 *Violence and Victims* 47, 49 (1986) (hereinafter cited as Saunders-1); Barnard et al., "Till Death Do Us Part: A Study of Spouse Murder," 10 *Bull. Am. Acad. Psych. & Law* 271 (1982); D. Lunde, *Murder and Madness* (San Francisco, 1976) 10 (in 85 percent of cases of decedent-precipitated interspousal homicides, the wife is the killer and the husband precipitated his own death by abusing her); M. Daly & M. Wilson, *Homicide* (N.Y.: Aldine, 1988) at 278 ("when women kill, their victims are ... most typically men who have assaulted them"); E. Benedek, "Women and Homicide," in B. Danto et al., *The Human Side of Homicide* (N.Y.: Columbia, 1982).

It must be noted, however, that not all female defensive killings of husbands are legal. The legality depends on whether the wife reasonably anticipated that the husband's beating would cause her death or great bodily harm. Even where the statutes classify wife beating as a felony her proper resort is to seek prosecution; unless she was in imminent danger of death or great bodily harm, she must submit to beating rather than resist with deadly force. *People v. Jones*, 191 C.A.2d 478 (Cal. Ct. of Ap., 1961); see generally Kates & Engberg, "Deadly Force Self-Defense Against Rape," 15 *U.C.-Davis L. Rev.* 873, 876-7 (1982). When a wife kills only after surviving numerous prior beatings, it may be particularly difficult to convince police or jury that she reasonably believed this time was different—even though the pattern of men who eventually kill their wives is generally one of progressively more severe

instance, husbands are killed by wives more often than *vice versa*, yet men are far more often convicted for killing a spouse—because three-quarters of wives who killed were not even charged, (pg.26) prosecutors having found their acts lawful and necessary to preserve their lives or their children's.<sup>93</sup>

When a woman kills a man, she requires a weapon (most often a handgun) to do so. Eliminating handguns from American life would not decrease the total number of killings between spouses. (If anything, the number would increase because, as we have seen, gun-armed victims may ward off attacks without killing 25-30 times more often than the few times they have to kill). To eliminate handguns would only change the sex of the decedents by ensuring that, in virtually every case, it would be the abused wife, not the murderous husband. After all, a gun is of far more useful to the victim than her attacker. "Husbands, due to size and strength advantages, do not need weapons to kill."<sup>94</sup> Having a gun is not necessary to attack a

victim who is unarmed, alone, small, frail ... [But] Even in the hands of a weak and unskilled assailant a gun can be used ... without much risk of effective counterattack ... [and] because everyone knows that a gun has these attributes, the mere display of a gun communicates a highly effective threat.<sup>95</sup>

Of course, it is tragic when an abused woman has to kill a current or former mate. But such killings cannot be counted as if they were **costs** of precautionary handgun ownership; rather they are palpable benefits from society's and the woman's point of view, if not from the attacker's. Thus, it is misleading (to the point of willful falsehood) for critics of handgun ownership to misrepresent such lawful defensive killings as what they prevented—domestic murder.

A final tangential, but significant, point emerges from statistics on using guns in domestic self-defense: those statistics strongly support the defensive efficacy of firearms. As noted above, "men who batter [wives] average 45 pounds heavier and 4 to 5 inches taller than" their victim.<sup>96</sup> If guns were not effective for defense, a homicidal attack by a husband upon his wife would almost invariably end in the wife's death rather than in his about 50 percent of the time.(pg.27)

## **5. Anti-Gun Obliviousness to Women's Defensive Needs: (b) Attacks by Male Acquaintances**

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beatings until the final one. See Howard above.

<sup>93</sup> Daly & Wilson above at 15 and table 9.1 at 200.

<sup>94</sup> Howard above at 82-83; see also Saunders-1, above: "Men who batter [wives] average 45 pounds heavier and 4 to 5 inches taller than" their victims.

<sup>95</sup> Cook, "The Role of Firearms in Violent Crime: An Interpretative Review of the Literature," in M. Wolfgang & N. Weiler (ed.), *Criminal Violence* 269 (1982) 247; Wright, "Second Thoughts About Gun Control," 91 *The Public Interest* 3, 32 (1988) ("Analysis of the family homicide data reveals an interesting pattern. When women kill men, they often use a gun. When men kill women, they usually do it in some more degrading or brutalizing way—such as strangulation or knifing"); and Saunders, "Who Hits First and Who Suffers Most? Evidence for the Greater Victimization of Women in Intimate Relationships," a paper presented at the 1989 Annual Meeting of the American Society of Criminology (available from Daniel Saunders, M.D., Department of Psychiatry, U. of Wisconsin).

<sup>96</sup> Saunders-1 above at 94.



In arguing against precautionary handgun ownership, anti-gun authors purport to comprehensively refute the defensive value of guns (i.e., to every kind of victim). Yet, **without exception** (and without mentioning the omission), those authors omit any mention of the acquaintance crime to which women are most often subjected. The empirical evidence establishes that "women are more likely to be assaulted, more likely to be injured, more likely to be raped, and more likely to be killed by a male partner than by any other type of assailant."<sup>97</sup> Yet, to a man (and, invariably, they are men), anti-gun authors treat self-defense in terms of the gun owner's fears "that a hostile *stranger* will invade *his* home."<sup>98</sup>

Only by turning a blind eye to acquaintance crime could the Chairman of Handgun Control Inc. claim that "the handgun owner rarely even gets the **chance** to use his gun." That assertion restates the argument of Newton and Zimring and the Handgun Control Staff. They emphasized the unexpectedness of stranger attacks— from which they characterized it as "ludicrous" to think a victim "will have sufficient time to retrieve" her handgun.<sup>99</sup>

As discussed above, even in cases of crime by strangers, this view is supported only by Newton and Zimring's inaccurate and misleading rendition of pre-1980s data, which is further discredited by the data available today. Moreover, in relation to (pg.28) violence against women, the assertion that women would invariably be too surprised by violent attack to use a handgun in self-defense is insupportable. On the contrary, in most instances, the man who beats or murders a woman (often even the rapist) is an acquaintance who has previously assaulted her on one or more occasions.<sup>100</sup> Such crimes commonly occur after a protracted and bellicose argument over a long-simmering dispute. The women's defensive homicide literature shows that such a victim is almost uniquely positioned for self-defense. Knowing the mannerisms and circumstances that triggered or preceded her attacker's earlier attacks, she has

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<sup>97</sup> Browne & Williams above [errata: below].

<sup>98</sup> Zimring & Hawkins (1987) at 32 (emphasis added); Rushforth, Hirsch, Ford, & Adelson, "Accidental Firearm Fatalities in a Metropolitan County (1958-73)," 100 *Am. J. Epidem.* 499, 502 (1975) (deprecating value of gun-armed self-defense, based only on analysis expressly limited to shootings of "burglars, robbers, or intruders *who were not relatives or acquaintances*"—emphasis added); Conklin & Seiden, "Gun Deaths: Biting the Bullet on Effective Control," 22 *Pub. Affairs Rep.* (U. Cal. Inst. of Govt. Studies, 1981) 1, 4 (same: "burglars or thieves" entering home); J. Spiegler & J. Sweeney, *Gun Abuse in Ohio* 41 (same: "burglars, robbers, or intruders"). See also two publications by the National Coalition to Ban Handguns: its undated, unpaginated pamphlet, "A Shooting Gallery Called America," and Fields, "Handgun Prohibition and Social Necessity," 23 *St. Louis U. L. J.* 35, 39-42 (1979); Handgun Control Staff Alviani & Drake, above at 5-7 (considering defense only against the "robber or burglar"); and Shields, *Guns Don't Die, People Do*, as well as Teret & Wintemute, "Handgun Injuries: The Epidemiologic Evidence for Assessing Legal Responsibility," 6 *Hamline L. Rev.* 341, 349-50 (1983); Riley, "Shooting to Kill the Handgun: Time to Martyr Another American 'Hero,'" 51 *J. Urb. L.* 491, 497-99 (1974); I. Block, *Gun Control: One Way to Save Lives* 10-12 (pamph. issued by Public Affairs Committee, 1976); and Drinan above.

<sup>99</sup> Handgun Control Staff pamphlet at 35 and Alviani & Drake above at 6 (paraphrasing almost identically Newton & Zimring at 68):

The handgun is rarely an effective instrument for protecting the home against either the *burglar* or the *robber* because the former avoids confrontation [by striking only unoccupied premises] and the latter confronts too swiftly [for the victim to get his gun].

Compare Zimring & Hawkins (1987) at 31 (emphasis added): "it is rare indeed that a household handgun actually stops the *burglar* [because he strikes when the home is unoccupied], or the home *robber* who counts on surprise and a weapon of his own." See also Riley and I. Block above.

<sup>100</sup> Saunders-1 at 51, 56; Saunders-2; Benedek, "Women and Homicide" at 155-56, 162; Browne & Williams; Browne & Flewelling; and sources there cited.

"a hypervigilance to cues of any kind of impending violence ... [She is] a little bit more responsive to situations than somebody who has not been battered might be." A woman who has [previously] been battered and then is threatened with more abuse is more likely to perceive the danger involved faster than one who has not been abused.<sup>101</sup>

In this connection consider a point that anti-gun crusaders make in another context but ignore in this one. They (rightly) warn victims that a defense gun may be of little use if a person is attacked by a robber who is himself using a gun. The fact is that a gun is so dangerous a weapon that it is extremely risky for a victim to resist—even if the victim has a gun. A basic dictum of police and martial arts training is that even a trained professional should never attack a gun-armed assailant unless convinced that the assailant is about to shoot (in which case there is nothing to lose).<sup>102</sup>

This strong point about the overwhelming power of the person wielding a gun should have provoked academic anti-gun crusaders into at least considering a correlative question: where does the balance of power lie between a victim who has a gun and an attacker armed only with a knife or some lesser weapon? Under those circumstances the victim will usually have the clear advantage (remember Kleck's finding that in 83 percent of cases in which a victim has a handgun, the criminal surrenders or flees). But anti-gun crusaders avoid the embarrassment of admitting that a victim with a gun might have an advantage over a lesser-armed attacker; they either ignore the issue or assume it away. Anti-gun analyses that expressly deal with a situation in which a victim tries to use a gun against an attacker wantonly assumes (pg.29) that the attacker will also have a gun.<sup>103</sup> In fact, however, in 89.6 percent of the violent crimes directed against women during the 10 years of 1973-82, the offender did not have a gun<sup>104</sup>; only 10 percent of rapists used guns<sup>105</sup> and only 25 percent of non-strangers who attacked victims (whether male or female) had any weapon whatever.<sup>106</sup> In sum, the same strong arguments that anti-gun analysts offer against the wisdom of a victim resisting a

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<sup>101</sup> *People v. Aris*, CA.3d [89 Cal. Daily Op. Serv. 8505, 8509 (Cal. Ct. of Ap., Nov. 17, 1989)] (citing and adopting the testimony of expert witness, Dr. Lenore Walker, the leading American authority on battered wife syndrome). See also *State v. Kelly*, 478 A.2d 364, 378 (1984); Schneider, "Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering," 9 *Women's Rts. L. R.* 195 (1986); and authorities there cited.

<sup>102</sup> This is particularly true against a handgun whose short barrel makes it both much harder to wrest away than a long gun and much easier to bring into play at close quarters. See note 68 above.

<sup>103</sup> For instance, although fewer than 10 percent of burglars carry guns, Riley conceptualizes what will ensue if householders with guns confront burglars in terms of "'bedroom shootouts' [which will be] won by alert desperadoes with drawn guns rather than the usually unwarned, sleepy-eyed residents," "Shooting to Kill the Handgun: Time to Martyr Another American 'Hero,'" 51 *J. Urb. L.* 491, 497-98; see also Zimring & Hawkins (1987) at 31; I. Block, *Gun Control: One Way to Save Lives* 10-12 (pamph. issued by Public Affairs Committee, 1976). Neither these nor any other anti-gun treatment ever consider the possibility of a victim with a gun being attacked by a felon without a gun.

<sup>104</sup> U.S. Bureau of Justice Statistics release "The Use of Weapons in Committing Offenses" (Jan. 1986), Table 6.

<sup>105</sup> U.S. Bureau of Justice Statistics release "The Crime of Rape" (March, 1985).

<sup>106</sup> U.S. Bureau of Justice Statistics release "Violent Crime by Stranger and Non-Strangers" (Jan. 1987). Note that this is a different sample (covering the period 1982-84) and that the figure for armed victimizations applies to all victims, not just women.

gun-armed attacker suggest that women with handguns will have the advantage because most rapists and other attackers do not have guns.<sup>107</sup>

At this point it may be appropriate to address the old bugaboo that a woman who seeks to resist a male attacker will have her gun taken away and used against her. I emphasize that this is only a **theoretical** bugaboo: the rape literature contains no example of such an occurrence.<sup>108</sup> Moreover, police instructors and firearms experts strongly reject its likelihood. Not only do they aver that women are capable of gun-armed self-defense,<sup>109</sup> they find women much easier to properly train than men, because women lack the masculine ego problems that cause men to stubbornly resist accepting instruction. Thus, a police academy instructor who simultaneously trained a male police academy class and a class of civilian women "most of [whom] had never held a revolver, much less fired one" found that after one hour on the range and two hours of classroom instruction in the Chattanooga Police Academy's combat pistol (pg.30) course, the women consistently outshot police cadets who had just received eight times as much formal instruction and practice.<sup>110</sup>

## 6. Anti-Gun Obliviousness to Women's Defensive Needs: (c) Rape

Anti-gun academics necessarily neglect analyzing the gun's value in defending against rape because they eschew any mention of rape.<sup>111</sup> This surprising omission cannot be explained as a mere side effect of ignoring acquaintance crimes. After all, many rapists are strangers rather than acquaintances; indeed, many rapes are committed in the course of crimes that anti-gun literature does address, such as robbery and burglary.<sup>112</sup> But, almost invariably, the "intruder" whom anti-gun authors discuss is not a rapist but a "robber" whom they represent as "confront[ing] too swiftly" for rape or a "burglar" whom they represent as only breaking into unoccupied homes.<sup>113</sup>

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<sup>107</sup> Kleck & Bordua, "The Factual Foundation for Certain Key Assumptions of Gun Control," *5 L. & Pol. Q.* 271, 290 (1983).

<sup>108</sup> Silver & Kates above at 159-61.

<sup>109</sup> P. Quigley, *Armed and Female* (1988); M. Ayoob, *In the Gravest Extreme* 38 (1980). Cf. J. Carmichel, *The Women's Guide to Handguns* (N.Y.: Bobbs-Merrill, 1982) 3-4: "... when it comes to shooting, women are not the weaker sex," noting that the leading woman's score equalled the leading man's in recent Olympic handgun competition and that in college shooting where "no distinction is made between men and women," women are coming more and more to dominate ... because women have certain physical and mental characteristics that give them an edge over men"—viz. patience, "excellent hand-eye coordination," and the concentration to perform delicate motor functions time after time.

<sup>110</sup> Hicks, "Point Gun, Pull Trigger," *Police Chief*, May 1975. See also Quigley, Carmichel, & Ayoob above.

<sup>111</sup> See for example Riley, "Shooting to Kill the Handgun: Time to Martyr Another American 'Hero,'" *51 J. Urb. L.* 491, 497-99 (1974); Fields, "Handgun Prohibition," *23 St. Louis U. L. J.* 35, 39-42 (1979); Teret & Wintemute, "Handgun Injuries: The Epidemiologic Evidence for Assessing Legal Responsibility," *6 Hamline L. Rev.* 341, 349-50 (1983).

<sup>112</sup> See generally the U.S. Bureau of Criminal Justice releases "The Crime of Rape" (March 1985), "Robbery Victims" (April 1987), and "Household Burglary" (January 1985).

<sup>113</sup> Handgun Control Staff pamphlet at 35; and Alviani & Drake above at 6 (paraphrasing almost identically Newton & Zimring at 68):

The handgun is rarely an effective instrument for protecting the home against either the *burglar* or the *robber* because the former avoids confrontation [by only striking unoccupied premises] and the latter confronts too swiftly [for the victim to get his gun].

Compare Zimring & Hawkins-1987 at 31.

This obliviousness to women's self-defense in general, and to rape in particular, leaves anti-gun authors free to deprecate the defensive utility of guns on grounds that don't apply to most circumstances in which women use guns defensively. Anti-gun writings correctly stress that it is illegal to shoot to prevent mere car theft, shoplifting, or trespass that does not involve entry into the home itself.<sup>114</sup> In contrast, the law allows a woman to shoot a rapist or homicidal attacker.<sup>115</sup> Also, in some cases a man attacked by another man of comparable size and strength may be hard put to justify his need to shoot, which is far less of a problem for a female victim of male attack.<sup>116</sup> (pg.31)

In short, to the extent academic anti-gun crusaders have made valid points about armed self-defense, these points do not apply to women. The anti-gun crusaders avoid acknowledging attacks on women by the simple device of never mentioning rape, or women's armed self-defense, at all. One anti-gun writer, Robert Drinan, did discuss rape, albeit not entirely voluntarily; he was responding to an article in which I highlighted the issue as justifying women's freedom to choose guns for self-defense. Drinan responded, in essence, that women detest guns and don't want to own them for self-defense.<sup>117</sup> This response is both factually and conceptually erroneous. It is factually erroneous because evidence shows that currently (though not necessarily when Drinan wrote) women constitute one-half of purely precautionary gun owners. It is conceptually erroneous because freedom of choice is a residual value even for things that many or most people do not now—and may not ever—want to choose.

Newton and Zimring's chapter on self-defense dismisses women's concerns about rape (or, presumably, other kind of attack) in one contemptuous sentence to the effect that "women generally are less capable of self-defense [than men] and less knowledgeable about guns."<sup>118</sup> Feminist outrage about this derisive comment may account for the fact that Prof. Zimring's subsequent writings, including his self-defense chapter in a 1987 book, prudently eschew any attempt to deal with women's rights to, or capacity for, self-defense with guns.<sup>119</sup>

Other anti-gun treatments do not specifically address rape beyond their general position that victims should always submit to criminals unless flight is possible: the best way to "keep you alive [is to] put up no defense—give them what they want or run" advises Handgun Control Inc.<sup>120</sup> However unacceptable that advice may be to feminists, at least it avoids the confusion that marks the discussion of gun-armed defense against rape in a pamphlet by the Handgun Control Staff of the U.S. Conference of Mayors. For the first 31 of its 36 pages, the pamphlet harps on the prohibitive dangers of any physical resistance to crime. Throughout, the Handgun Control Staff's argument

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<sup>114</sup> Newton & Zimring at 68.

<sup>115</sup> Cf. Kates & Engberg, "Deadly Force Self-Defense Against Rape," 15 *U.C.-Davis L. Rev.* 873, 877-78ff.

<sup>116</sup> Id. at 879 and 890-94. See also Saunders, "When Battered Women Use Violence: Husband-Abuse or Self-Defense?" 1 *Victims and Violence* 47, 49 (1986)—("men who batter [their mates] average 45 pounds heavier and 4 to 5 inches taller than" the victim).

<sup>117</sup> Drinan, "Gun Control: The Good Outweighs the Evil," 3 *Civil Liberties Rev.* 44, 50-51 (1976).

<sup>118</sup> Newton & Zimring above at 64.

<sup>119</sup> Zimring & Hawkins (1987), chap. 4.

<sup>120</sup> Shields, *Guns Don't Die, People Do* at 124-25. To the same effect see Riley, "Shooting to Kill the Handgun: Time to Martyr Another American 'Hero,'" 51 *J. Urb. L.* 491, 497-98 (1972); Zimring & Hawkins (1987); Newton & Zimring; and the Handgun Control Staff pamphlet above.

against precautionary gun ownership consists of warning against handguns or **any other** form of physical resistance—the risk of **any kind** of physical resistance is so high that victims should always submit to attackers.<sup>121</sup> (pg.32)

But when they finally got to rape, the Staff offers a startling *volte face*—all the more startling because the pamphlet lacks an explanation, much less a justification, of its contradicting all that preceded it. The Handgun Control Staff blithely announces that women don't need handguns to resist rape because of "the effectiveness of other means of resistance such as verbal and physical resistance".<sup>122</sup> Yet, if the authors believe their own prior warnings, "physical resistance" is prohibitively dangerous. For example, the pamphlet's twice repeated its point (each time in italics) that "*a victim is more than eight times as likely to be killed when using a self-protective measure*" of any kind,<sup>123</sup> and it contained a more general admonition (again in italics) that "*victims who resist experience much higher rates of fatality and injury.*"<sup>124</sup>

The Handgun Control Staff's pamphlet also points out that many rapes do not occur in the victim's home but in places where she presumably would not be legally entitled to carry a gun. However, this highlights the fact that most rapes *do* occur in the victim's home where she is entitled to have a gun (in all but a few jurisdictions like Washington, D.C., where victims are not permitted guns for self-defense). In short, most rapes occur where a woman may legally have a gun, and the empirical evidence is that in 83 percent of the cases it will protect her from being raped.

## 7. Incidence of Injury to Handgun-Armed Victims Who Resist Criminal Attack

Some readers may object that the preceding section of this paper shirks the crucial issue of victim injury by veering onto the side issue of intellectual honesty. Yes (they may say), the Handgun Control Staff's discussion of rape is inconsistent to the point of dishonesty; nevertheless, the pamphlet does marshal impressive data that victims who resist are often seriously hurt or killed.<sup>125</sup>

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<sup>121</sup> As discussed *infra*, the primary problem with the Handgun Control Staff pamphlet is that the evidence, upon which it posits the rate of injury to gun-armed resisters, is fundamentally flawed because it applies to resistance with all kinds of weapons and does not break out gun-armed resistance.

<sup>122</sup> Handgun Control Staff pamphlet at 33. The pamphlet cites no statistics to show that rapists are less likely than robbers or burglars to injure or kill victims who resist, nor could they be since rapist, robber and burglar are often one and the same. See for example, Bureau of Justice Statistics releases *Household Burglary* (January 1985) and *Robbery Victims* (1987).

<sup>123</sup> Handgun Control Staff pamphlet at 18; also at p. 2 (also in italics).

<sup>124</sup> Handgun Control Staff pamphlet at 17. See also pp. 16 and 18, respectively, for the admonitions (again in original italics) that "*victims who take self-protective measures are more likely to be injured than victims not using such measures*" and that "*a victim is three times more likely to be injured when taking a self-protection measure than when not.*" See also p. 11 ("the likelihood of being seriously injured during a robbery is directly related to taking a measure of self-protection" rather than submitting); p. 14 ("running away or reasoning with the offender ... [is] less likely to result in injury to the victim"); p. 19 ("those taking a self-protective measure accounted for 58 percent of the emergency room treatments and their injuries were twice as serious, judged by the mean days of hospitalization"); and again on p. 19 (of victims hospitalized after rape, mugging, or assault, compared to nonresisters, "the seriousness of injury was five times as great for those using a weapon for self-protection"); and p. 30 (injuries in aggravated assault are "more likely to be serious if the victim physically resists the offender").

<sup>125</sup> A point that the pamphlet never makes—but that emerges quite forcefully from neutral evaluations of the evidence—is that submission does not ensure that the victim will escape injury or death. Felons may injure victims at the outset to ensure compliance with the demands and to foreclose resistance, or felons may [errata: injure] or execute victims gratuitously. See for example, Cook, "The Relationship Between Victim Resistance and Injury in Noncommercial Robbery," 15 *J. Legal Stud.* 405, 406 (1986).

Do those data not validate (pg.33) Zimring, Hawkins, and Handgun Control Inc. in teaching that victims ought to submit to rapists, robbers, or other violent criminals: the best way to "keep you alive [is to] put up no defense—give them what they want or run."<sup>126</sup>

The short answer is the Handgun Control Staff's pamphlet presents data that are irrelevant to the risk of injury to victims who resist with a handgun. The pre-1980s data do not deal with guns specifically. The information gives only a conglomerate figure for the percentage of victims injured or killed when resisting physically in any way. This conglomerate figure includes some few victims who resisted with a gun; many more who used knives, clubs, or some makeshift weapon; and many who resisted totally unarmed. It is crucial to distinguish resistance with a gun from all other kinds of resistance, because a gun differs **qualitatively** in its defensive value. Criminals generally select victims who are weaker than themselves. Only a gun gives weaker, older, less-aggressive victims equal or better chances against a stronger attacker. As even Zimring and Hawkins state, guns empower "persons [who are] physically or psychologically unable to overpower [another] through violent physical contact."<sup>127</sup>

The difference is evident in post-1978 National Crime Survey data, which do allow us to distinguish victim injury in cases of gun-armed resistance from victim injury in cases where resistance was with lesser weapons, and from victim injury in cases of nonresistance. Ironically, the results validate the anti-gun critics' danger-of-injury concerns for every form of resistance **except** a gun. The gun-armed resister was actually much less likely to be injured than the nonresister who was, in turn, much less likely to be injured than those who resisted without a gun. Only 12 to 17 percent of gun-armed resisters were injured. Those who submitted to the felons' demands were twice as likely to be injured (gratuitously). Those resisting without guns were three times as likely to be injured as those with guns.<sup>128</sup> (pg.34)

I emphasize that these results do *not* mean that a gun allows victims to resist regardless of circumstances. In many cases submission will be the wiser course. Indeed, what the victim survey data suggest differs startlingly from both pro- and anti-gun stereotypes: keeping a gun for defense may induce sober consideration of the dangers of reckless resistance. The low injury rate of these victims may show that gun owners are not only better able to resist, but to evaluate *when* to submit,

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<sup>126</sup> To avoid confusion, we should note that (a) Handgun Control Inc., currently the most important organization in the anti-gun lobby, has no direct link to the Handgun Control Staff, a nonlobbying "research" organization that fell into desuetude in the 1970s, and that (b) Professors Zimring and Hawkins are academic gun control advocates with no direct link to either organization. The "give them what they want" language is from Shields, *Guns Don't Die, People Do* (at 124-25), which relies heavily on the Handgun Control Staff's research. Zimring, Hawkins, and Newton take the same position; see also Riley, "Shooting to Kill the Handgun: Time to Martyr Another American 'Hero,'" 51 *J. Urb. L.* 491, 497-98 (1972).

<sup>127</sup> Zimring & Hawkins (1987) above at 15. Curiously, they make this point in discussing how guns aid weaker people to victimize stronger ones—a crime pattern that is comparatively rare, to say the very least. The point is unaccountably missing from their later chapter on "Guns for Self Defense" to which it is far more relevant.

<sup>128</sup> *Social Problems* at 7-9. The National Crime Surveys are conducted under auspices of the National Institute of Justice (NIJ). Census Bureau interviewers contact a nationally representative sample of about 60,000 households every 6 months and record information from personal interviews concerning the crime victimization experience of all household members aged 12 or older. Cook, "The Relationship between Victim Resistance and Injury in Noncommercial Robbery," 15 *J. Legal Stud.* 405, 406 (1986).

than are nonowners who, having never seriously contemplated those choices, must suddenly decide between them.

## 8. The "Submission Position" Advocated by White, Male Academia

By the "submission position," I mean, of course, the view embraced by various anti-gun scholars that victims should submit to felons rather than offering forcible resistance **of any kind**. If an attacker cannot be "talked out" of his crime, the victim should comply to avoid injury.<sup>129</sup> Not insignificantly, academic proponents of the submission position are all white males.<sup>130</sup>

This white male's viewpoint is significant insofar as the submission position is conditioned by the relative immunity to crime that its proponents enjoy because of their racial, sexual, and economic circumstances. In general, the submission position literature does not even mention rape. Equally significant, it treats robbery as the once-in-a-lifetime danger it is for a salaried, white, male academic. His risk of meeting a robber is so low that he is unlikely to keep a gun ready for that eventuality. Moreover, submitting once in his life to losing the money in his wallet may well be "the better part of valor" for a victim who can replace that money at his bank's automatic teller machine and can minimize the loss by taking it off his taxes. A very different calculus of costs and benefits of resisting may apply either to

an elderly Chicano whom the *San Francisco Examiner* reports has held onto his grocery by outshooting fifteen armed robbers [while] nearby stores have closed because thugs have either bankrupted them or have casually executed their unresisting proprietors ... [or to] welfare recipients whom robbers target, knowing when their checks come and where (pg.35) they cash them ... [or to] the elderly trapped in deteriorating neighborhoods (such as the Manhattan couple who in 1976 hanged themselves in despair over repeatedly losing their pension checks and furnishings to robbers).<sup>131</sup>

Regrettably, for many victims, crime is not the isolated happenstance it is for white male academics.<sup>132</sup> Let us imagine a black shopkeeper, perhaps a retired Marine master sergeant who has

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<sup>129</sup> The preeminent submission exponents include Zimring & Zuehl, "Victim Injury and Death in Urban Robbery: A Chicago Study," 15 *J. Legal Stud.* 1 (1986); Skogan & Block, "Resistance and Injury in Nonfatal Assaultive Violence," 8 *Victimology* 215 (1983) and Wolfgang, "Victim Intimidation, Resistance, and Injury: A Study of Robbery" (paper presented at the Fourth International Symposium on Victimology, Tokyo, 1982). Prof. Wolfgang's ethically based support for banning guns is detailed in Benenson, "A Controlled Look at Gun Controls," 14 *N. Y. L. For.* 718, 723 (1968). As to Prof. Zimring's pragmatically based anti-gun views (which Prof. Block shares), see generally Newton & Zimring & Zuehl at 37-38.

<sup>130</sup> Their views have been strongly criticized by a female criminologist (who is, nevertheless, not **pro-gun**) on the ground that for victims to submit encourages crime. Ziegenhagen & Brosnan, "Victim Responses to Robbery and Crime Control Policy," 23 *Criminology* 675, 677-78 (1985).

<sup>131</sup> "Gun Control," 84 *The Public Interest* above at 45 and 46.

<sup>132</sup> A recent U.S. Department of Justice study concludes that, over their lifetimes, 83 percent of American children now aged 12 will be victims of some kind of violent felony, 52 percent will suffer two or more such offenses, and 87 percent will have property stolen on three or more occasions. In all these crime categories, blacks will be much more frequently victimized than whites. *New York Times*, March 9, 1987, n. above 13. Cf. Sherman, "Free Police from the Shackles of 911," *Wall Street Journal*, March 20, 1987. Minneapolis police records show that in 1986 "23 percent of all the robberies, 15 percent of all the rapes, and 19 percent of all the assaults and disturbances" occurred repeatedly at only .3 percent of the city's commercial and residential addresses; "a mere

invested his life savings in the only store he can afford following his "20-years-and-out" career. Not coincidentally, the store is in an area where robbery insurance is prohibitively high or unobtainable at any price. In deciding whether to submit to robbery or resist, he and others who live or work in such areas must weigh a factor that finds no place in the submission position literature: that to survive they may have to establish a reputation for not being easily victimized.<sup>133</sup> The submission position literature is equally oblivious to special factors that are important to rape victims; even one rape—much less several—may cause catastrophic psychological injury that may be worsened by submission and may be mitigated by even an unsuccessful attempt at resistance.<sup>134</sup>

By no means am I arguing that resistance with guns (or without) is optimum for crime victims in any or all situations. I am just adding factors that really ought to be considered by well-salaried, white, male intellectuals who presume (as I certainly would not) to tell people who are most often crime victims what is best for them. Scholars, however learned, are presumptuous to pontificate on what is best for a victim whose values and situation they may not share. Consider the reflections of a woman who (without a gun) successfully resisted rape:

I believed he would kill me if I resisted. But the other part was that I would try to kill him first because I guess that for me, at that time in (pg.36) my life, it would have been better to have died resisting rape than to have been raped. I decided I wasn't going to die. It seemed a waste to die on the floor of my apartment so I decided to fight.<sup>135</sup>

## COMPARISONS AMONG NATIONS AND OVER TIME

Anti-gun crusaders are addicted to comparing the United States to foreign nations, a comparison that probably constitutes the single most pernicious source of misinformation and misunderstanding of gun regulation issues. This misinformation and misunderstanding (both are also involved in comparisons across time) result from a grotesque mix of statistical misrepresentation with partisan selection and presentation, and from sheer historical ignorance.

Such comparisons are used to argue that gun ownership causes crime, which supposedly results in the United States having more homicides *per capita* than selected other countries that virtually prohibit gun ownership. In fact, determinants of the relative amounts of violence in nations are socio-cultural and institutional. The effects of such basic determinants cannot be offset by any gun control strategy, no matter how well-crafted and rigorous. Reducing availability of any other kind of weapon, including guns, cannot radically decrease crime because the number of guns that are illegally available will always suffice for those who are determined to obtain and misuse them.

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5 percent of all the addresses ... produced 64 percent of all the calls for police service." Needless to say, it is unlikely that any of those who have to live or work at those repeatedly victimized addresses are white male academics.

<sup>133</sup> See for example, "'There's This Place in the Queens It's Not Such a Good Idea to Rob'" *Wall Street Journal*, October 20, 1971 (Puerto Rican shopkeeper reported to have shot more violent criminals in a year than had any New York City police officer in an entire career).

<sup>134</sup> Kates and Engberg, "Deadly Force Self Defense Against Rape," 15 *U. C. Davis L. Rev.* 873, 879-80, n. 20, and 898ff. (1982).

<sup>135</sup> Quoted in Silver & Kates above at 139.



## 1. International Homicide Rates vs. Gun Availability and Socio-Cultural Differences

Two socio-cultural differences that result in widely different murder rates come immediately to mind. The first is the unknown (to Americans) fact that each year hundreds of men in Japan murder their families and then kill themselves. This tradition is so much a part of Japanese culture that it was not even a crime until fairly recently. Japanese murder rates remain admirably low because they exclude these "family suicides."<sup>136</sup>

The second involves comparing America's high murder rate to Europe's far higher suicide rate. Sociologist Seymour Martin Lipset has suggested that cultural factors cause disturbed Americans to strike out against others whereas disturbed Europeans turn their violence on themselves. This difference helps explain the details (pg.37) of American and European statistics set out in the International Intentional Homicide Table on page 42 of this study.

In contrast, blaming gun owners explains nothing because that interpretation is flatly inconsistent with international statistical evidence. If gun ownership were a major "cause" of crime and if gun availability were a major factor in the amount of criminal homicide, then first, nations where gun availability is more widespread than in the United States would uniformly have appreciably higher murder rates than the norm for demographically comparable nations.<sup>137</sup> And second, nations that ban or severely restrict gun ownership would have appreciably lower homicide rates than the United States. Yet the International Intentional Homicide Table shows that in nations where gun availability exceeds the United States (e.g., Israel, New Zealand, and Switzerland<sup>138</sup>), the

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<sup>136</sup> R. Markman & D. Bosco, *Alone with the Devil*, 342ff. (1989); indeed, 17 percent of all Japanese homicides consist of children killed by their parents. See also Jameson, "Parent-Child Suicides Frequent in Japan," Mar. 28, 1981, *Hartford Courant*.

<sup>137</sup> Likewise studies of geographical areas within the United States should show those areas with higher gun ownership having more murder. Yet the consistent result of studies attempting to link gun ownership to violence rates is either no relationship or a **negative** one (i.e., urban and other areas with higher gun ownership have less violence than demographically comparable areas with fewer gun owners. See for example Murray, "Handguns, Gun Control Law, and Firearm Violence," 23 *Social Problems* 81 (1975); Lizotte & Bordua and Bordua & Lizotte above; Kleck, "The Relationship between Gun Ownership Levels and Rates of Violence in the United States," in D. Kates (ed.), *Firearms and Violence* (1984); McDowall, "Gun Availability and Robbery Rates: A Panel Study of Large U.S. Cities, 1974-1978," 8 *Law & Pol. Q.* 135 (1986); Bordua, "Firearms Ownership and Violent Crime: A Comparison of Illinois Counties"; Kleck & Patterson, "The Impact of Gun Control and Gun Ownership Levels on City Violence Rates," a paper presented to the 1989 Annual Meeting of the American Society of Criminology (available from the authors at Florida State U. School of Criminology). See also Eskridge, "Zero-Order Inverse Correlations between Crimes of Violence and Hunting Licenses in the United States," 71 *Sociology & Social Research* 55 (1986).

<sup>138</sup> For discussion of U.S., Swiss, and Israeli law and practice, see Kates, "Handgun Prohibition and the Original Meaning of the Second Amendment," 82 *Mich. L. Rev.* 204 at n.193 and 264ff.; cf. "Swiss Army: A Privilege of Citizenship," *Los Angeles Times*, p. 1, Oct. 1, 1980; "Israeli Official Urges Firearm in Every Home," *Gun Week*, June 29, 1979; "Order by Israel Puts Even More Guns on the Street," *Los Angeles Times*, July 5, 1978.

The anti-self-defense basis of Anglo-American gun control theory is so unusual that it produces profound differences not only in policy and administration from those prevailing in other countries but also in understanding superficially similar gun laws. One such deceptive similarity is that the laws in New York City, England, Switzerland, and Israel all require a permit to own a handgun. Indicative of the profound differences among those requirements is that permit issuance for the purpose of personal defense is routine in Israel and Switzerland, administratively discouraged by New York City, and nonexistent in England. In 1984 an attack on a Jerusalem cafe by three terrorists armed with automatic weapons was terminated when handgun-carrying Israeli civilians shot them down, *The Economist*, Apr. 7, 1984, p. 34.

Equally significant are differences in policy about civilian possession of automatic weapons. Either an ordinary rifle or an assault rifle or any other fully automatic weapon requires a permit in England; since 1934, possession of a fully automatic weapon in the United States has required registration and been subject to a prohibitive tax. As of 1986, purchasing new assault rifles or other fully automatic weapons is totally forbidden in the United States. But in Switzerland and Israel the government **distributes** automatic

homicide rates are as low as those of the highly gun-restrictive Western European and British Commonwealth countries to which America is frequently and aversely compared. Moreover, the two nations that most severely (pg.38) restrict gun ownership (punishing violation with death), Taiwan and South Africa, both have far higher apolitical murder rates than the United States.

## 2. Historical Ignorance and the Anti-Gun Crusade

Likewise, historical evidence refutes attributing differential international violence rates to differences in gun laws rather than to socio-institutional and cultural differences. People who attribute low violence rates in Europe to banning guns are apparently unaware that low rates **long preceded** the gun bans.<sup>139</sup> In fact, stringent gun laws first appeared in the United States, not Europe—despite which, high American crime rates persisted and grew.<sup>140</sup> Ever-growing violence in various American states from the 1810s on led those states to pioneer ever-more-severe gun controls.<sup>141</sup> But in Europe, where violence was falling, or was not even deemed an important problem, gun controls varied from lax to non-existent. During the 19th century in England, for instance, crime fell from its high in the late 1700s to its idyllic low in the early 1900s—yet the only gun control was that police could not carry guns.<sup>142</sup>

In considering reasons for the historical differences between United States and British homicide, Prof. Monckkonen rejects conventional explanations including gun ownership, remarking

Virtually every analysis put forward to explain the [comparatively] very high United States homicide rate has been ahistorical ... Had they been proposed as historical, they would have floundered quickly for the explanatory inadequacy of these "pet" theories becomes immediately apparent in a historical context.<sup>143</sup> (pg.39)

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weapons to the general population by the millions. I was once asked by a puzzled Israeli why Americans think they have to personally own guns: "If they have to live or be in dangerous areas, why don't they just check a handgun or submachine gun out of the police armory?" The idea that American law would seek to prevent law-abiding citizens threatened by violence from arming themselves had never occurred to him and, on explanation, the idea was incomprehensible.

<sup>139</sup> See generally Gurr, "Historical Trends in Violent Crime: A Critical Review of the Evidence," in 3 Annual Review of Crime and Justice (Beverly Hills: Sage, 1981); C. Greenwood, *Firearms Control: A Study of Armed Crime and Firearms Control in England and Wales*, chap. 1-3 (London: Routledge & Kegan Paul, 1971); Morn, "Firearms Use and Police: An Historic Evolution of American Values," *Firearms and Violence* above at 496-501.

<sup>140</sup> Morn, *id.*, Kates, "Toward a History of Handgun Prohibition in the United States," *Restricting Handguns* above at 13-14.

<sup>141</sup> For instance, in the South, the U.S. region that from earliest times had the highest murder rates, gun law experimentation included the following: the only state law that completely banned handgun sales (S.C., 1902; repealed 1966); the earliest bans on "Saturday Night Specials" (Tenn., 1870; Ark., 1881; Ala., 1893; Tex., 1907; Va., 1925); the earliest registration laws (Miss., 1906; Ga., 1913; N.C., 1917); and three states in which a permit was required to purchase a handgun (N.C. 1917; Mo., 1919; Ark., 1923).

<sup>142</sup> Greenwood, Morn, above.

<sup>143</sup> Monckkonen, "Diverging Homicide Rates: England and the United States," in T. Gurr, *Violence in America*, v. 1 at 81 (1989). He rejects gun ownership as a reason for the homicide differential, citing a point that it made below in greater detail. Even those who see guns as the reason do not contend that their removal could reduce American homicide by more than 50 percent; yet if American homicide were reduced by 50 percent, its rate would still be 500 percent greater than the British rate.

When most European countries finally began enacting gun laws in the post-World War I period, the motivation was not crime (with which those countries had been little afflicted) but terrorism and political violence from which they have continued to suffer until today far more than the United States.<sup>144</sup> This difference is reflected in a practice that helps to keep official English murder rates so admirably low: English statistics do not include "political" murders (e.g., those by the IRA), whereas American statistics include every kind of murder and manslaughter. The different purposes of European versus American laws are evidenced by their diametrically opposite patterns: many of the "Saturday Night Special" laws that American states enacted to deal with 19th-century crime have banned all but standard military-issue revolvers (i.e., the very expensive large, heavy Colt). In stark contrast, such military caliber arms were the first guns banned in post-World War I Europe, the purpose being to disarm restive former soldiers and the para-military groups they formed.<sup>145</sup>

Moreover, the claim that greater gun availability causes higher United States crime rates can only explain the rates of violence **with guns**. If gun availability were the explanation for higher crime rates, rather than socio-cultural and institutional differences, gun banning countries would have less gun crime than the United States, but roughly the same rates of non-violence. But, in fact, the rate of United States violence **without guns** is so great it exceeds the rate of violence in other comparable nations, both with and without guns (combined). That comparison applies not just among the United States and gun banning countries, but also among the United States and countries where guns are even more available (such as New Zealand, Switzerland, and Israel). These facts utterly refute the notion that greater gun availability is the major factor in violence differences among the United States and other nations.

England's leading gun control analyst sardonically disposes of the issues with two rhetorical questions. First, how do those who blame "lax American gun laws" for the far higher U.S. rate of gun crime explain the country's also having far more knife crimes? Do they think that Englishmen must get a permit to own a butcher knife? Second, how do those who attribute U.S. gun murders to greater gun availability explain the far higher U.S. rate of stranglings and of victims being kicked to death? Do they think that Americans "have more hands and feet than" Britons? Flatly asserting that, no matter how stringent the gun laws, there will always be enough guns (pg.40) in any society to arm those desiring to obtain and use them illegally, the analyst attributes grossly higher American violence rates "not to the availability of any particular class of weapon" but to socio-cultural and institutional factors that dictate

that American criminals are more willing to use extreme violence; [quoting a report of the British Office of Health Economics]: "One reason often given for the high numbers of murders and manslaughters in the United States is the easy availability of firearms ... But the strong correlation with racial and linked socio-economic

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<sup>144</sup> Naturally, anti-gun academic crusaders do not credit the availability of guns in the United States for the country's relative lack of political violence. They (quite correctly) attribute that lack to socio-cultural and institutional differences between the United States and Europe. Yet it does not occur to the anti-gun academic crusaders to attribute international crime differentials to socio-cultural and institutional differences rather than to differences in gun ownership.

<sup>145</sup> L. Kennett & J. L. Anderson, *The Gun in America: The Origins of a National Dilemma* 213 (Westport, Conn.: Greenwood, 1976); M. Jossierand, *Les Pistolets, Les Revolvers, et Leurs Munitions* (Paris: Crepin-Leblond & Cie, 1967) [in English transl., with co-authorship and additional material by J. Stevenson, *Pistols, Revolvers, and Ammunition* (New York: Bonanza, 1967)], chap. 9.

variables suggests that the underlying determinants of the homicide rate relate to particular cultural factors."<sup>146</sup>

### 3. American Murder Rates in the 1960s through 1980s

If increasing gun ownership caused American murder rates to rise in the 1960s, did it also cause them to stabilize in the 1970s and fall in the 1980s? The theory that widespread gun ownership causes murder seemed plausible to Americans in the 1960s when ever-increasing gun sales went hand in hand with (actually were a reaction to) ever-increasing crime rates. But this interpretation is exploded when the time frame is expanded to include statistics from the 1970s and 1980s. In those decades, handgun ownership continued to rise by about 2 million per year, so that the American handgun-stock increased from between 24 and 29 million in 1968 to between 65 and 70 million in 1988. Yet homicide actually fell somewhat, and handgun (and other gun) homicides decreased markedly.<sup>147</sup> The point is even more striking when compared to the English homicide rate: in 1974 the American rate was 40 times the English; 15 years (and 30 million more American handguns) later, the American rate was only ten times greater.<sup>148</sup> Since this change occurred in decades during which English gun law severity increased, both administratively and by added legislative restrictions, the trend cannot be explained by attributing murder to widespread gun availability.

The attribution is further undermined if violent crimes are differentiated by type. Anti-gun academic crusaders do not claim that buying a handgun suddenly turns otherwise law-abiding people to rape, robbery, and burglary. Yet such crimes (and murder, during these crimes) have grown spectacularly since the mid-1960s. In (pg.41) contrast, domestic homicides did not increase as sages theorized. (Indeed, the approximate 100 percent increase in handguns during 1968-79 was followed by a 26.6 percent decrease in domestic homicide from 1984 on—despite adding another 2 million handguns in 1980 and in each succeeding year.<sup>149</sup>)

### 4. Concealment of the Declining American Murder Trend

Anti-gun sages have seized on a new device so they do not have to deal with embarrassing facts. They conceal declining American homicides (particularly gun homicides) by combining suicide and murder statistics, producing an "Intentional Homicide" rate that they then claim to be

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<sup>146</sup> Greenwood & Magaddino, "Comparative Cross-Cultural Statistics," in *Restricting Handguns* above; see also Greenwood above.

<sup>147</sup> For instance, in 1974, when the total U.S. population was 211 million, handguns were involved in approximately 11,125 murders (54 percent of all murders). By 1988 the total U.S. population was 245 million and handguns were involved in around 8,275 murders (45 percent of all murders), a 27 percent decline in handgun homicide. Homicide by all means had declined almost 10 percent. In the 20-year period from 1966 to 1985, murders with guns declined from 64.8 percent of the total murder rate to 58.7 percent.

<sup>148</sup> Compare Monckkonen above at 81 to the International Intentional Homicide Table.

<sup>149</sup> Browne & Flewelling, "Women as Victims or Perpetrators of Homicide," a paper presented to the 1986 Annual Meeting of the American Society of Criminology (available from the Family Res. Lab., U. of New Hampshire). Straus, "Domestic Violence and Homicide Antecedents," 62 *Bull. N.Y. Acad. Med.* 446, 450 (1986); Brown & Williams above [errata: below].

"caused" by widespread gun ownership.<sup>150</sup> Yet these same anti-gun academics continue to compare the American **murder** rate (alone) to the murder rates of specially selected foreign countries—without mentioning that virtually every country they select to compare has an enormously higher suicide rate than the United States. For instance, Prof. Baker, the originator of the combined homicide-suicide approach, compares American and Danish murder rates, placing great emphasis on the fact that the American rate is higher by about 7 per 100,000 population. Yet Baker somehow forgets to mention that making the same comparison of suicide rates would show the Danish have 16.5 more deaths per 100,000 than the Americans. Nor, of course, does Baker mention that when suicide and murder figures are combined, the Danish death rate per 100,000 is almost 50 percent higher than the American.<sup>151</sup>

Despite their reliance on international murder comparisons, none of the anti-gun academics who apply the combined murder-suicide approach (in describing American figures) follow the combined approach when making those international comparisons. Could that omission have anything to do with the following facts that emerge from the International Intentional Homicide Table on the next page? Of 18 nations for which figures were available, the United States ranks only eleventh in intentional homicide. The U.S. combined homicide and suicide rate is less than half the suicide rate alone in gun-banning Hungary and less than one-third the suicide rate alone of gun-banning Rumania. New Zealand ranks sixteenth despite a rate of gun ownership that far exceeds the U.S. rate. The lowest rate on the table is for Israel, a country that actually encourages and requires almost universal gun ownership.<sup>(pg.42)</sup>

### INTERNATIONAL INTENTIONAL HOMICIDE TABLE

Note: Table is based on figures from two different sources (as further specified below). Insofar as they are given therein, all figures are from the 1983-86 averages in Killias' Tables 1 & 2.\* If Killias does not give figures, those numbers are from the latest year listed for the country in United Nations Demographic Yearbook, 1985 (published 1987). Figures from Killias are in boldface; all other figures are in ordinary type.

Country	Suicide	Homicide	Total
RUMANIA	66.20	n.a.	66.20 (1984)
HUNGARY	45.90	n.a.	45.90 (1983)
DENMARK	28.70	0.70	29.40 (1984)
AUSTRIA	26.90	1.50	28.40 (1984)
FINLAND	24.40 (1983)	<b>2.86</b>	27.20
FRANCE	21.80 (1983)	<b>4.36</b>	26.16
SWITZERLAND	<b>24.45</b>	<b>1.13</b>	<b>25.58</b>

<sup>150</sup> See for example, Teret, "Public Health and the Law," 76 *Amer. J. Pub. Health* 1027, 1028 (1986); S. Baker et al., *The Injury Fact Book*, 90-1 (1984); Teret & Wintemute, "Handgun Injuries: The Epidemiologic Evidence for Assessing Legal Responsibility," 6 *Hamline L. Rev.* 341 (1983).

<sup>151</sup> Compare Baker, "Without Guns Do People Kill People?" 75 *Amer. J. Pub. Health* 587 (1985) (comparing U.S. and Danish murder) to International Intentional Homicide Table.

BELGIUM	<b>23.15</b>	<b>1.85</b>	<b>25.00</b>
W. GERMANY	<b>20.37</b>	<b>1.48</b>	<b>21.85</b>
JAPAN	20.30	0.90	21.20
UNITED STATES	12.20 (1982)	<b>7.59</b>	19.79
CANADA	<b>13.94</b>	<b>2.60</b>	<b>16.54</b>
NORWAY	14.50 (1984)	<b>1.16</b>	15.66
N. IRELAND (Homicide rate may not include "political" homicides)	9.00	6.00	15.00
AUSTRALIA	<b>11.58</b>	<b>1.95</b>	<b>13.53</b>
NEW ZEALAND	9.70	1.60	24.50
ENGLAND/WALES (Homicide rate does not include "political" homicides)	<b>8.61</b>	<b>0.67</b>	<b>9.28</b>
ISRAEL	6.00	2.00	8.00

\* Killias, "Gun Ownership and Violent Crime: The Swiss Experience in International Perspective," a paper presented at the 1989 Annual Meeting of the American Society of Criminology.

(pg.43) The evidence from international comparisons is confirmed by various neutral attempts to determine whether gun ownership causes violence as footnoted earlier and by the most extensive and methodologically sophisticated study. This was Kleck's application of modern, computer-assisted statistical techniques to post-World War II American crime rates. The interactive cause-and-effect result he found contradicts that posited by anti-gun crusaders. Kleck concludes that from the 1960s on, fear of violent crime caused many more people to buy guns. Increased gun ownership did not itself increase crime (if anything, it dampened it). But an increase in gun ownership, or at least gun use, by criminals helped cause the post-1960 increases in violent crime, including murder.<sup>152</sup>

It may be of interest that Kleck simultaneously investigated the possible effect that the cessation of capital punishment in the 1960s and 1970s had in causing the crime wave. He concludes that increased violence was not attributable to the cessation of capital punishment. Note also that this criminological evidence does not support the gun lobby's myopic opposition to gun controls. On the contrary, Kleck endorses sweeping, strongly enforced laws against possession of any firearm by persons convicted of any kind of felony.<sup>153</sup>

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<sup>152</sup> Kleck, "Capital Punishment, Gun Ownership and Homicide," 84 *Am. J. of Soc.* 882 (1979); and Kleck, "The Relationship between Gun Ownership Levels and Rates of Violence in the United States," in D. Kates (ed.), *Firearms and Violence* (San Francisco: Pacific Research Institute, 1984).

<sup>153</sup> Policy Lessons above.

Guns are more lethal than some means of death, though less lethal than others such as hanging, certain poisons, and falls from great heights. Because of their lethality, guns may facilitate murder or suicide among people who are so inclined. On the other hand, guns are the most effective means by which a victim may resist violent attack.

## MASSACRES

**July 1984.** An unemployed and apparently deranged security guard with a shotgun killed 21 customers and employees at a MacDonald's hamburger restaurant in San Ysidro, California.

**August 1986.** A National Guard marksmanship instructor, who had been discharged from his job as a postal worker, killed 15 former co-workers in an Oklahoma Post Office.

**February 1988.** A disgruntled employee in Sunnyvale, California killed seven and wounded four fellow employees with a shotgun.<sup>(pg.44)</sup>

**January 1989.** A petty criminal and former mental patient used an assault rifle to kill five children and wound 30 others in a Stockton, California, schoolyard.

**September 1989.** A suicidal manic-depressive with an assault rifle killed eight people and wounded 12 in a Louisville, Kentucky, industrial plant.

In each of these incidents the perpetrator committed suicide or remained on the scene to be killed, eschewing any opportunity to escape before the police arrived.

It is deceptive for gun prohibition-confiscation advocates to use the pathos and horror induced by such tragedies—and by assassinations—to argue their case.<sup>154</sup> In more candid moments, they concede that it is impossible to take guns away from those who are determined to misuse them: "No amount of control will stop a determined assassin—or a determined street robber—from getting a gun."<sup>155</sup> The theory of gun prohibition rests on an entirely different claim. The claim (which is examined in the next section of this paper) is that guns cause domestic or acquaintance homicides to be committed, supposedly, by ordinary law-abiding citizens who would never have killed if they had not had access to a gun in a moment of wild anger.<sup>156</sup>

Thus, no confiscation effort (however broad or stringent) will disarm hardened criminals, much less political terrorists or killers, who are so highly motivated for personal reasons that they undertake massacres even though their actions will probably result in their own deaths. On the contrary, if massacre were a serious threat to life in the United States, the best policy response would

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<sup>154</sup> See for example, Schwerin, "Two Shootings, One Lesson: Gun Control," *New York Times* Op-Ed, Sept. 15, 1986; "The Gun Collector," *New York Times* editorial, July 22, 1984.

<sup>155</sup> From the editorial "Controlling Guns," *National Law J.*, April 13, 1981, p. 14. See also Zimring, "Is Gun Control Likely to Reduce Violent Killings," 35 *U. Chi. L. Rev.* 721 (1968) (professional criminals cannot be disarmed); Harding, "Firearms Ownership and Accidental Misuse in S. Australia," 6 *Adelaide L. Rev.* 271, 272 (1978) (political criminals cannot be disarmed).

<sup>156</sup> Zimring (*U. Chi. L. Rev.*) above, Alviani & Drake above, and references cited in the next section of this paper.

probably be that of Israel, which depends on the defensive value of widespread precautionary gun possession among the populace. Consider an incident in a Jerusalem cafe just four months before the California MacDonald's massacre: three terrorists who tried to machine-gun the crowd were able to kill only one victim before being shot down by handgun-armed Israelis. When presented to the press the next day, the surviving terrorist bitterly explained that his group had not realized that Israeli civilians were armed. The terrorists had planned to machine-gun a succession of crowded spots, believing that they would be able to escape before the police or army could arrive to deal with them.<sup>157</sup> (pg.45)

Therefore, anti-gun policies not only offer no solution for the massacre situation, but also are detrimental because they preclude whatever chance victims might have to protect themselves in the crucial time before police arrive.<sup>158</sup> **Please note that I am not necessarily suggesting this as a model for American policy.** Because terrorism is Israel's most pressing criminal justice problem, Israel maximizes its defense by giving firearms training to all citizens, by encouraging gun ownership, and by having almost the entire populace carry weapons (Jews of both sexes, the Druse, and other pro-Israeli Arabs). The advisability of such measures is quite different for the United States where military training is not universal, even for males.

Arguably, the issue does not merit examination because massacres represent a very small part of the American homicide problem. Melodramatic as the massacres were, if the death total for those I have listed is **combined**, it still constitutes less than 1 percent of the American murder total in any single year. But there is a tangential significance to the manner in which anti-gun advocates have exploited the massacre issue for which (in calmer moments) they admit their proposals have no value. By capitalizing on the emotions these tragedies arouse, anti-gun advocates display a cynical unscrupulousness that is wildly at variance with their pretensions of moral superiority over the gun lobby. Indeed, this attitude may help explain the finding of a recent Congressional poll that the two lobby groups which provide members of Congress with reliable information are the American Library Association and the National Rifle Association.

## **THE LAW-ABIDING GUN OWNER AS DOMESTIC AND ACQUAINTANCE MURDERER**

Conceding that banning handguns would not disarm terrorists, or assassins, the anti-gun argument portrays those people as exceptions to the generality, which is "*previously law-abiding citizens* committing impulsive gun-murders while engaged in (pg.46) arguments with family members

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<sup>157</sup> *The Economist*, Apr. 7, 1984, p. 34. Compare "Man with a Sword Kills 2 on Staten Island Ferry" (deranged Cuban refugee kills 2, wounds 9 before being stopped by bystander who was licensed to carry gun) *New York Times*, July 8, 1986; and "Tragedy Ends Love Triangle" (gunman, who apparently intended to kill his ex-girlfriend and her current boyfriend's family, entered their residence in early a.m. hours armed with silenced guns and explosives and wearing a bulletproof vest; gunman killed by 13-year-old boy who armed himself after the gunman had wounded his father and killed the girlfriend and the boy's older brother), *San Francisco Examiner*, July 15, 1986, p. 1.

<sup>158</sup> This was denied by anti-gun advocate Mike Royko in a facetious column that appeared shortly after the Post Office massacre. Royko derisively claimed that, given Oklahoma's "weak" gun laws, the gunman should have been shot down by his victims if gun-armed self-defense really works. But regardless of state law, the federal Gun Control Act of 1968 prohibits possession of a gun in a federal building. Perhaps this policy is cost-beneficial overall. But in the massacre situation its cost was that the only armed person in the Post Office was the killer, who was not deterred by the prospect of having to violate the law.



or acquaintances.<sup>159</sup> The anti-gun crusaders claim most murders result from gun ownership among ordinary citizens: "That gun in the closet to protect against burglars will most likely be used to shoot a spouse in a moment of rage ... *The problem is you and me—law-abiding folks.*"<sup>160</sup>

If this portrayal of murderers were true, a gun ban might drastically reduce murder because the primary perpetrators (law-abiding citizens) might give up guns even though hardened criminals, terrorists, and assassins would not. Unfortunately for this appealingly simple nostrum, every national and local study of homicide reveals that murderers are not ordinary citizens—nor are they people who are likely to comply with gun laws. Murderers (and fatal gun accident perpetrators) are atypical, highly aberrant individuals whose spectacular indifference to human life, including their own, is evidenced by life histories of substance abuse, automobile accident, felony, and attacks on relatives and acquaintances.<sup>161</sup>

## 1. Prior Felony Record of Murderers

The FBI's annual crime reports do not regularly compile data on the prior criminal records of murderers, and no such data are otherwise available on a national basis. But in a special data run for the Eisenhower Commission, the FBI found that 74.7 percent of murder arrestees nationally over a 4-year period had prior arrests for violent felony or burglary.<sup>162</sup> In another 1-year period 77.9 percent of murder arrestees had priors.<sup>163</sup> Over yet another 5-year period nationally, arrested murderers had **adult** criminal records showing an average prior criminal career of at least 6 years duration, including four major felony arrests; 57.1 percent of these murder arrestees had been convicted of at least one prior adult felony; and 64 percent of a national (pg.47) sample of convicted murderers who had been released were rearrested within 4 years.<sup>164</sup>

These data have been confirmed by numerous local studies over the past 40 years.<sup>165</sup> For instance, a profile showed that a typical murderer in Washington, D.C., had six prior arrests,

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<sup>159</sup> Lindsay, "The Case for Federal Firearms Control," p. 22 (1973) (emphasis added). Citing Lindsay, the National Coalition to Ban Handguns pamphlet, "A Shooting Gallery Called America," asserts that "each year" thousands of "gun murders [are] done by law-abiding citizens who might have *stayed* law-abiding if they had not possessed firearms" (emphasis in original); and "that most murders are committed by previously law-abiding citizens where the killer and the victim are related or acquainted." See also Edwards, "Murder and Gun Control," 18 *Wayne State U. Law Rev.* 1335 (1972).

<sup>160</sup> Kairys, "A Carnage in the Name of Freedom," *Philadelphia Inquirer*, Sept. 12, 1988 (emphasis added). Mr. Kairys is a lawyer and part-time teacher of sociology.

<sup>161</sup> See discussion below and Lane, "On the Social Meaning of Homicide Trends in America," in T. Gurr, *Violence in America*, v. 1, 59 (1989) ("... the psychological profile of the accident-prone suggests the same kind of aggressiveness shown by most murderers"). For discussion of gun accident fatality, see the next section of this paper.

<sup>162</sup> Set out in tabular form in D. Mulvihill et al., *Crimes of Violence: Report of the Task Force on Individual Acts of Violence* (Washington, D.C.: Govt. Print. Off., 1969) at 532.

<sup>163</sup> FBI, *Uniform Crime Report*, 1971, at 38.

<sup>164</sup> FBI, *Uniform Crime Report*, 1975, at 42ff.

<sup>165</sup> In addition to the studies reviewed in Kleck & Bordua, "The Factual Foundation for Certain Key Assumptions of Gun Control," 5 *Law & Pol. Q.* 271, 292ff. (1983); and Kleck, "Capital Punishment, Gun Ownership, and Homicide," 84 *Am. J. of Soc.* 882, 893 (1979). See for example, R. Narloch, *Criminal Homicide in California* 53-54 (Cal. Bur. of Crim. Stats., 1973); A. Swersey & E. Enloe, *Homicide in Harlem* (Rand, 1975) 17 ("We estimate that the great majority of both perpetrators and victims of assaults and murders had previous arrests, probably over 80 percent or more").

including two for felonies, one for a violent felony.<sup>166</sup> Note that these data do not begin to reflect the full extent of murderers' prior criminal careers—and thus cannot illustrate how different murderers are from the ordinary law-abiding person. Much serious crime goes unreported. Of those crimes that are reported, a large number are never cleared by arrest; of those so cleared, many are juvenile arrests that are not included in the data recounted above. At the same time we know that most juvenile, unsolved, or unreported serious crimes are concentrated in the relatively small number of people who have been arrested for other crimes.<sup>167</sup>

## 2. Prior Violence History of Wife Murderers

Intrafamily murderers are especially likely to have engaged in far more previous violent crimes than show up in their arrest records. But because these attacks were on spouses or other family members, they will rarely have resulted in an arrest.<sup>168</sup> So domestic murderers' official records tend not to show their full prior violence, but only their adult arrests for attacking people outside their families. Therefore, only about "70 to 75 percent of domestic homicide offenders have been previously arrested and about half previously convicted."<sup>169</sup> As to how many crimes they perpetrate **within the family**, even in a relatively short time, "review of police (pg.48) records in Detroit and Kansas City" shows that in

90 percent of the cases of domestic homicide, police had responded at least once to a disturbance call at the home during the two-year period prior to the fatal incident, and in over half (54 percent) of the cases, they had been called five or more times.<sup>170</sup>

A leading authority on domestic homicide notes: "The day-to-day reality is that most family murders are preceded by a long history of assaults ..." Studies (including those just cited) "indicate that intrafamily homicide is typically just one episode in a long-standing syndrome of violence."<sup>171</sup> Nor is "acquaintance homicide" accurately conceptualized as a phenomenon of previously law-abiding people killing each other in neighborhood arguments. The term "acquaintance homicide" covers, and far more typically is exemplified by, examples such as a drug addict killing

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<sup>166</sup> Data reported to the Senate Sub-committee to Investigate Juvenile Delinquency, 19th Congress; see *Hearings, Second Session 75-76*.

<sup>167</sup> *NIJ Felon survey* above, chap. 3; J. & M. Chaiken, *Varieties of Criminal Behavior* (1982); M. Wolfgang et al., *Delinquency in a Birth Cohort* (1972).

<sup>168</sup> Police have traditionally been loathe to arrest in such situations; moreover, in upwards of 50 percent of relatively serious cases, the police have no opportunity to make an arrest because the victim fails to report the matter (out of belief that the matter is a private affair, or that the police will not take action, or out of fear of retaliation). See the U.S. Bureau of Justice Statistics releases, "Family Violence" (April 1984); "Preventing Domestic Violence Against Women" (Aug. 1986); and "Violent Crime by Strangers and Non-Strangers" (Jan. 1987), all based on survey responses rather than reports to police.

<sup>169</sup> "Policy Lessons" above, 49 *Law & Contemp. Probs.* at 40-41, emphasis added.

<sup>170</sup> Browne & Williams, "Resource Availability for Women at Risk: Its Relationship to Rates of Female Perpetrated Partner Homicide," a paper presented at the 1987 annual meeting of the American Society of Criminology (available from the authors at the Family Research Laboratory, U. of New Hampshire).

<sup>171</sup> Straus, "Domestic Violence and Homicide Antecedents," 62 *Bull. N.Y. Acad. Med.* 446, 454, 457 (1986); and Straus, "Medical Care Costs of Intrafamily Assault and Homicide," 62 *Bull. N.Y. Acad. of Med.* 556, 557 fn. (1986). For a detailed review of relevant studies, see Browne & Flewelling, "Women as Victims or Perpetrators of Homicide," a paper presented at the 1986 annual meeting of the American Society of Criminology (available from the authors at the Family Research Laboratory, U. of New Hampshire).

his dealer in the course of robbing him; a loan shark or bookie killing a nonpaying customer; or gang members, drug dealers, and members of organized crime "families" killing each other.<sup>172</sup>

### 3. Non Sequitur and Fabrication in Labeling Murderers as Ordinary Citizens

In contrast to these evaluations, neither of the data sets, which are cited as supporting claims that murderers "are good citizens who kill each other," is persuasive. The National Coalition to Ban Handguns' assertion that "most murders are committed by a relative or close acquaintance of the victim"<sup>173</sup> is conceptually unpersuasive because it is a *non sequitur*: it simply does not follow that because a murderer knows or is related to his victims, he must be an ordinary citizen rather than a long-time criminal. The conclusion would make sense only if ordinary citizens differed from criminals by neither knowing anyone nor being related to anyone.

The other data set that supposedly shows murderers as ordinary citizens is Lindsay's assertion that "most murderers (73 percent in 1972) are committed by previously law-abiding citizens committing impulsive gun-murders while engaged in (pg.49) arguments with family members or acquaintances."<sup>174</sup> While there is nothing **conceptually** wrong with this statement, it is **empirically** unpersuasive because it is simply a fabrication. Lindsay claims his figures are from the FBI 1972 *Uniform Crime Report*. But that report offers no such statistic; rather it and other FBI data diametrically contradict the statement. Far from showing that 73 percent of murderers nationally were "previously law-abiding citizens," the report shows that 74.7 percent of persons arrested for murder had prior arrests for a violent felony or burglary.<sup>175</sup>

As the abstract to the NIJ Evaluation concludes:

It is commonly hypothesized that much criminal violence, especially homicide, occurs simply because the means of lethal violence (firearms) are readily at hand and, thus, that much homicide would not occur were firearms generally less available. *There is no persuasive evidence that supports this view.*<sup>176</sup>

I emphasize that this statement does NOT refute the case for gun control, including rationally tailored gun bans. The fact that murderers are "real criminals" with life histories of violence, felony,

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<sup>172</sup> Current Research above at 203 (in T. Gurr, *Violence in America*, v. 1).

<sup>173</sup> Both this and the preceding quote are from the National Coalition to Ban Handguns, undated, unpaginated pamphlet, "A Shooting Gallery Called America."

<sup>174</sup> Lindsay, "The Case for Federal Firearms Control" p. 22 (1973).

<sup>175</sup> Cf. the FBI 4-year national homicide data set out in Mulvihill et al. above at 532. Lindsay's reference gives no specific page citation for the 1972 *Uniform Crime Report*. His 73 percent figure is directly contradicted by the special "Careers in Crime" data appearing at pp. 35-38 of that *Report* and the other FBI data discussed above. Please note, incidentally, that neither the 1972 *Report* nor any other FBI publication gives figures for the percentage of family and/or acquaintance murders that are committed with guns. The 1972 *Report* does contain a figure for the overall number of murders in which a gun was used, but it is 65 percent not Mayor Lindsay's 73 percent.

<sup>176</sup> Emphasis added. The language quoted is from the abstract to J. Wright, P. Rossi, & K. Daly, *Weapons, Crime and Violence in America: Executive Summary* (Washington, D.C.: Gov. Print. Off., 1981), published as a separate document accompanying the main NIJ Evaluation. It does not appear *in haec verba* in the revised commercially published version (*Under the Gun*), but see pp. 192-94 and 321-22 thereof.

substance abuse, and auto accident highlights the danger in such people having handguns—or guns of any kind!<sup>177</sup> But it is very misleading when homicide statistics that are idiosyncratic to gun misusers are presented as arguing for banning guns from the whole populace. Idiosyncratic statistics provide no basis for the claim that precautionary gun ownership by average citizens seriously endangers their friends or relatives.<sup>(pg.50)</sup>

## GUN ACCIDENTS

### 1. Fatalities among Children

To emphasize accidental handgun fatalities among children, Handgun Control Inc. runs a national advertisement that pictures an infant playing with a pistol. An academic-produced video for schools and libraries solemnly asserts that "a child is accidentally killed by a handgun every day" (i.e., 365 per year).<sup>178</sup> Two academic anti-gun crusaders put the accidental death toll at "almost 1,000 children" per year.<sup>179</sup>

Fortunately, these assertions are grotesque exaggerations. In fact, the National Safety Council's figures of identifiable accidental fatalities from handguns average only 246 people of **all ages** per year.<sup>180</sup> For children alone, the identifiable handgun average was 10-15 accidental fatalities per year for children under age five and 50-55 yearly for children under age fifteen.<sup>181</sup>

Obviously, it is a terrible tragedy when a child dies in an accident, whether from a handgun or otherwise. But that does not justify falsifying statistics to concoct an argument for banning handguns. As discussed in the next section of this paper, fatal gun accidents (including those involving children) are largely attributable to gun possession among the same kinds of irresponsible aberrant adults who commit murders. Some feasible proposals for controls to reduce child (and other) accidental deaths from firearms are offered in my conclusion. As to the advisability of going beyond controls to banning handguns, the 13 children under age five who died in handgun accidents may be compared to the 381 children who drowned in swimming pools in 1980. Yet nobody would demand a ban on new swimming pools—much less demand that all those who currently own pools be required to fill them in.

Anti-gun fanatics are wont to exclaim that even if a gun ban saves only one life, it is worth it. That statement has special appeal if the lives being saved are <sup>(pg.51)</sup> those of very young children.

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<sup>177</sup> See for example, "Policy Lessons," 49 *Law & Contemp. Prob.* at 40-41, 59-60 (gun policy should focus on such high-risk owners, outlawing their possession of all guns, not just handguns).

<sup>178</sup> "Violence: Kids with Guns," produced by Films for the Humanities and Sciences, Inc., Princeton, NJ., 1989.

<sup>179</sup> Teret & Wintemute above at 346.

<sup>180</sup> The National Safety Council began breaking handgun accidents out of the total number of accidental gun fatalities only in 1979. The 246 figure given in the text represents the average for identifiable handgun accidents for 1979 and succeeding years.

<sup>181</sup> Kleck-Aldine above, Table 7.5 (figures for 1980 derived from Prof. Kleck's review of the Public Health Service's computerized detail tapes). Compare the Center for Disease Control's figure that accidents with handguns and long guns **combined** killed 34 children under age 5 in 1984. "Mortality and Morbidity Weekly Report," March 11, 1988, p. 145. It should be noted that, while the number of accidental long gun fatalities is clearly substantially higher, the figures given for handgun deaths may understate the phenomenon since many figures of accidental gun fatalities do not determine whether the weapon was handgun or a long gun.

But if anti-gun advocates feel prohibiting or confiscating upward of 70 million handguns is justified to save 13 young children's lives (and confiscating upward of 200 million guns of all types to save 34 children), why does saving 381 annually not justify banning swimming pools, or at least prohibiting their proliferation? Is it possible that anti-gun fanatics are motivated more by hatred of guns and their owners than by saving lives? Of course, handguns and swimming pools are very different things that may merit very different policy responses. Among the relevant differences are that, unlike handguns, pools are not used to defend against approximately 645,000 crimes each year and do not save thousands of innocent lives.

The disparity is even more striking in regard to fatalities caused by cigarettes. Compare the 10-15 children under age five who die in handgun accidents annually to the 432 who die in residential fires caused by adults who fall asleep while smoking.<sup>182</sup> Not only do we not forbid smoking in the home, the federal government actually pays tobacco farmers subsidies to grow their crops. Yet cigarettes, which have absolutely no social utility (except perhaps for the subjective pleasure they give smokers), take hundreds of times more lives than do handguns in accidents, murders, and suicides combined. In that connection, note that we do not ban alcoholic beverages, though people under their influence commit more murders and suicides than occur with handguns—and alcohol causes hundreds of times more fatal accidents and non-fatal violent crimes than involve handguns.<sup>183</sup> (If it be suggested that we repealed Prohibition only because it proved unenforceable, the short answer is that a handgun ban is even less enforceable.<sup>184</sup>)

## 2. Aberrance of Gun Accident Perpetrators

My reason for limiting the preceding discussion primarily to children is because the issues that arise with adults who perpetrate serious accidents are much the same as with murderers. This kind of person is just as atypical as the murderer; indeed, he (pg.52) closely resembles the murderer in attitudes and life history of singular irresponsibility and indifference to human life and welfare.<sup>185</sup> This similarity is marked in perpetrators of fatal gun accidents. When compared to cars (which take

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<sup>182</sup> See the Centers for Disease Control, "Mortality and Morbidity Weekly Report," March 11, 1988, pp. 144-45.

<sup>183</sup> U.S. Public Health Service, *Alcohol and Health*, p. 4 (1978); see discussion and citations in Kates, "Handgun Banning and the Prohibition Experience," in *Firearms and Violence* above at 143-44.

<sup>184</sup> Analyzing enforceability requires considering two sub-issues: the likelihood of voluntary compliance, and the ease with which a handgun ban can be enforced against the noncompliant. As to the first sub-issue, massive resistance can be expected since people believe (whether rightly or not is irrelevant) that they urgently need a handgun for their family's defense and that a handgun ban would be illegal because it is against the constitutional right to arms. In contrast, no one but alcoholics "need" liquor and Prohibition was clearly legal, having been enacted as a constitutional amendment. As to enforcement against the noncompliant, liquor is consumed; therefore, continuing to use it required violators to take relatively high viability steps to buy more liquor. In contrast, to find and confiscate upwards of 70 million extant handguns would require unconstitutional house-to-house searches. For those who do not already own one, buying a handgun requires only one purchase—and if handguns were smuggled in at the rate marijuana is estimated to be, 20 million new handguns would be available for purchase each year. See discussion in "Handgun Banning and the Prohibition Experience," id at 144-66.

<sup>185</sup> "... the psychological profile of the accident-prone suggests the same kind of aggressiveness shown by most murderers." Lane, "On the Social Meaning of Homicide Trends in America," in T. Gurr, *Violence in America*, v. 1, p. 59 (1989). See also J. Wilson & R. Herrnstein, *Crime and Human Nature* (1985): "Young men who drive recklessly and have many accidents tend to be similar to those who commit crimes."

190 times as many lives<sup>186</sup>), handguns are simple mechanisms that are entirely safe for any owner who is responsible enough to observe elementary precautions. Empirical studies show that "a gun becomes involved in a fatal accident through misuse." Unlike the average gun owner, those "who cause such accidents are disproportionately involved in other accidents, violent crime, and heavy drinking."<sup>187</sup> If we examine their backgrounds of serious felonies, substance abuse, automobile and other dangerous accidents, frequently irrational assaults on families, and the like, the question about these reckless or irresponsible people is not **whether** they will kill themselves or others, but **when**.<sup>188</sup> Indeed, a large portion of child gun accidents may be attributable to these irresponsible people who leave loaded guns unsecured.

It is a category error to apply to the general citizenry gun accident fatality statistics that are actually accurate only for idiosyncratic gun misusers.<sup>189</sup> But, once again, this error highlights the imperative for gun controls to forbid such misusers from having access not only to the relatively accident-free handgun but from having any kind of firearm. Feasible gun control proposals that deal with the problem of accidental fatalities are offered below.<sup>(pg.53)</sup>

### CONTROL ALL GUNS, NOT JUST HANDGUNS

Now I wish to address a crucial problem that is invariably ignored by pro- and anti-gun extremists alike: controls over handguns **but not rifles and shotguns** may result in the counter-productive substitution of these weapons in accident and assault situations where long weapons are far more problematic. The gun lobby has understandably not made this point despite its being the single strongest argument against the National Coalition to Ban Handguns. Naturally, the National Rifle Association has no interest in explaining that long guns are much more deadly and easy to discharge accidentally because that point only defuses demands for banning handguns at the cost of justifying greater regulation for all guns.

Anti-gun advocates and academics have failed to address substituting long guns because these people are mostly too ignorant—proudly ignorant—of guns to even grasp the problem.<sup>190</sup> Their

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<sup>186</sup> "Motor vehicle crashes in 1986 resulted in 46,056 deaths." Center for Disease Control, *Mortality and Morbidity Weekly Report*, March 11, 1988.

<sup>187</sup> Cook, "The Role of Firearms in Violent Crime: An Interpretative Review of the Literature," in M. Wolfgang and N. Weiler (ed.), *Criminal Violence* 269 (1982).

<sup>188</sup> Kleck-Aldine above, chap. 7. For further evidence that fatal gun accident perpetrators and murders differ "rather dramatically" from the general population, see Cook above at 270-71 and Danto, "Firearms and Violence," *5 Int'l. J. Offender Ther.* 135 (1979).

<sup>189</sup> Cf. Bruce-Briggs, "The Great American Gun War," *45 The Public Interest* 37, 40 (1976):

The calculation of family homicides and accidents as costs of gun ownership is false. The great majority of these killings are among poor, restless, alcoholic, troubled people, usually with long criminal records. Applying the domestic homicide rate of these people to the presumably upstanding citizens whom they prey upon is seriously misleading.

<sup>190</sup> For handgun prohibition arguments based on the belief that handguns are as lethal as long guns, see Christoffel & Christoffel, "Handguns: Risks versus Benefits," *77 Pediatrics* 781, 872 (1986); and Baker, "Without Guns Do People Kill People?" *75 Am. J. Pub. Health* 587 (1985). For handgun prohibition arguments based on the belief that handguns are even more lethal than long guns ("uniquely lethal"), see Wintemute, "Firearms as a Cause of Death in the United States," *27 J. of Trauma* 532, 536 (1987); and Teret & Wintemute, "Handgun Injuries: The Epidemiologic Evidence for Assessing Legal Responsibility," *6 Hamline L. Rev.* 341, 349-50 (1983).

pride in ignorance validates their moral superiority over the barbaric gun lovers whom they despise. But whatever the moral value of their ignorance, it precludes their anti-gun proposals from being taken seriously. Indeed, it renders their proposals not just useless but actually life-threatening because such proposals might cause more serious accidents and assaults from long guns.

## 1. Handguns vs. Long Guns as Accident Vectors

Anti-handgun advocates recognize that an effective handgun ban would induce many people to substitute long guns for the purposes handguns now serve. In a 1979 article Samuel Fields Jr., chief spokesman for National Coalition to Ban Handguns argued that a ban would greatly reduce the "2,500 handgun deaths" he asserted were annually "associated with handgun accidents" in that

A strict permit system and/or a ban on private possession of handguns would significantly alter the firearms habits of law-abiding citizens, who would then turn to *safer* long guns for self-protection. [Emphasis added.]<sup>191</sup> (pg.54)

Academic proponents of these views include Dr. Diane H. Shetky in two different issues of the *American Journal of Diseases of Children*.<sup>192</sup> Asserting that she wants handguns banned, not "taking away all firearms," she follows Fields in alleging, as examples of the terrible cost of handgun ownership, that "handguns account for only 20 percent of the nation's firearms yet account for 90 percent of all firearms use, both criminal and accidental."<sup>193</sup>

What is remarkable about such assertions is not just that their **every single** assertion is wrong, but that their implicit (and in Fields' case explicit) recommendation that long guns are "safer" defensive weapons than handguns is tragically contrary to the truth. The fact is that, for a host of technical reasons, long guns are both far more susceptible to accidental discharge than handguns and far more deadly when so discharged—particularly for small children. Toddlers cannot operate a handgun but can easily discharge a long gun that irresponsible parents keep loaded and readily available in the home.<sup>194</sup>

The crucial safety difference between handguns and long guns clearly appears from an accurate statement of the accidental gun death statistics that Mr. Fields and Dr. Shetky have so garbled (to put the matter most charitably). Fields' claim of an annual rate of 2,500 fatal handgun accidents exaggerates by a factor of more than ten the number of such fatalities that can be identified by the National Safety Council (246 annually); indeed, Fields' claim of 2,500 accidental deaths

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<sup>191</sup> Fields, 23 *St. Louis U. L. J.* above at 51.

<sup>192</sup> "Children and Handguns: A Public Health Concern," 139 *Am. J. of Diseases of Children* 229 (March 1985) and a reply to a letter to the editor printed in *The Pediatric Forum* section of the Jan. 1986 issue. Significantly, the first article repeatedly supports its assertions by references to publications by anti-gun lobbyists or propaganda organizations. Significantly, at least three of these assertions are either demonstrably false or highly misleading.

<sup>193</sup> *Id.* at 5-6; compare Fields offering the same statistic at p. 38. See also Baker, "Without Guns Do People Kill People?" 75 *Am. J. Pub. Health* 587 (1985); Teret & Wintemute, "Handgun Injuries: The Epidemiologic Evidence for Assessing Legal Responsibility," 6 *Hamline L. Rev.* 341, 349-50 (1983).

<sup>194</sup> See discussion in 82 *Mich. L. Rev.* above at 261-64.

grossly overstates the average yearly total for handguns and long guns **combined** (around 1,850). The comparative safety advantage of a handgun is demonstrated by the fact that although it represents 90 percent or more of the guns kept loaded at any one time, it can be identified as the weapon in less than 13.5 percent of fatal gun accidents.<sup>195</sup> (pg.55)

Fields may be forgiven his failure to offer such comparisons (but not his misrepresentation that the gun accident statistics are to the contrary), since when he wrote there were no national data dividing fatal gun accidents into handgun vs. long gun. But such data had become available well before 1986 when Shetky wrote. Regrettably, she chose instead to cite something she calls "Federal Bureau of Investigation, Uniform Crime Reports, **Annual Crime Surveys, 1963-73**" (emphasis in original) as the source for her dual claim that handguns (a) make up only 20 percent of the American gunstock, but (b) cause 90 percent of the fatal gun accidents. It is not surprising that (a) is 100 percent low and (b) is 660 percent high.<sup>196</sup> After all, not only does her alleged source not give those figures, the FBI does not provide data on those subjects at all!<sup>197</sup>

## 2. Handguns vs. Long Guns as Criminal Homicide Vectors

Academic anti-gun crusaders have pointed out that, since gun wounds **in general** are much deadlier than knife wounds, banning **all** guns would reduce murder because homicidal attackers would be forced to substitute the less-deadly knife for guns.<sup>198</sup> True enough, if banning all guns were feasible politically (which it concededly is not) and if a ban would disarm the kind of persons who use them feloniously (an issue the anti-gun sagecraft literature has sedulously avoided treating).<sup>(pg.56)</sup>

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<sup>195</sup> Writing in 1979, Field had access to the National Safety Council's annual *Accident Facts* publications, which listed firearm accident fatalities for 1976-78 as (respectively) 2,059, 1,982, and 1,806. This averages out to 1,950. (The lower average I give in the text reflects about 1,825 accidental gun fatalities per year in the years since.)

The estimate that handguns compose about 90 percent of the loaded guns at any time comes from raw data in Bordua's survey research among Illinois gun owners; see also 82 *Mich. L. Rev.* above at 263. As to the number of fatal handgun accidents annually, the National Safety Council began breaking out a separate figure only in 1979. In that year and the successive years, there were an average of 246 identifiable accidental handgun deaths out of an average 1,825 fatal gun accidents overall. Although the number of long gun fatalities is clearly substantially higher, this 246 figure may understate the phenomenon since in many accidental gun fatalities it is undetermined whether the weapon was a handgun or a long gun. See Kleck-Aldine above, "Firearms Accidents," chap. 7.

<sup>196</sup> As to (b) the correct figure is 13.5 percent not 90 percent (see last footnote) and as to (a) it is around 40 percent not 20 percent. See NIJ Evaluation, Table 2-5, at p. 42, and preceding comment (p. 41) that "although there is much disagreement in the literature over the total number of [guns], there is a fair consensus over the relative proportions" of handguns vs. long guns.

<sup>197</sup> As suggested by my quotation marks, the purported FBI publication she cites does not appear to exist. Giving her the benefit of the doubt, I assume what she is citing, as if they were one document, are the annual Uniform Crime Reports issued by the FBI for each of the years 1963-73. But these reports give data on law enforcement and crime only. They do not—nor does the FBI at all—compile figures for accidents (with guns or otherwise) or for gun ownership in general, nor does the FBI provide comparative breakdowns for handgun vs. long gun accidents nor for handgun vs. long gun ownership.

Readers should not be misled by the fact that the Uniform Crime Reports deal with crime and should not credit Dr. Shetky's claim that these reports show handguns account for "90 percent of *all* firearms misuse, both *criminal* and accidental" (my emphasis). No such figure is given in the Uniform Crime Reports cited; in fact those reports did not regularly break down any category of gun crime into long guns vs. handguns. Some (but not all) of those reports did break down gun homicides, and the 1967 report gave figures for gun robbery and aggravated assault as well. But neither altogether nor separately do the figures in any of the cited reports correspond to those given by Dr. Shetky. The facts are both that available data on this subject are insufficient to support the kind of estimate she is making—and that they clearly do not support her figure. See discussion in NIJ Evaluation, chap. 9.

<sup>198</sup> See for example, Baker, "Without Guns, Do People Kill People?" 75 *Am. J. Pub. Health* 587 (1985); Zimring, "Is Gun Control Likely to Reduce Violent Killings," 35 *U. Chi. L. Rev.* 721 (1968).



But the same reasoning shows that banning handguns **only** is likely to actually and grievously increase the death toll from homicidal attack. Handguns are deadlier than large knives (which kill only about 2.4 percent of those they wound), but rifles are between 5 and 11.4 times deadlier than handguns and about 15 times deadlier than knives.<sup>199</sup> Shotguns are so much deadlier than handguns that for medical purposes the wounds they make are not to be "compared with other bullet wounds ... [A]t close range they are as deadly as a cannon."<sup>200</sup>

Of course, unless sawed off, rifles and shotguns are less concealable than handguns. So it would not be reasonable to assume that, if handguns disappeared, long guns would be used in 100 percent of the homicidal assaults now carried out with handguns. Some homicidal attackers would substitute knives instead, with presumably fewer lethal results. But using medical studies and gross ballistic comparisons, I have estimated that if long guns were substituted in only 50 percent of today's handgun assaults, the number of victims actually killed would double. Note that this catastrophe would result even if not one victim died in the other 50 percent of the cases in which (hypothetically) knives would be substituted!<sup>201</sup>

One cannot seriously doubt that long guns (either sawed off or unaltered) could easily substitute for 50 percent of the handguns assaults. Criminological studies show "that anywhere from 54 percent to about 80 percent of homicides occur in circumstances that would easily permit the use of a long gun."<sup>202</sup> This conclusion is more than confirmed by the NIJ (National Institute of Justice) felon survey: 82 percent of felons concurred that "if a criminal wants a handgun but can't get one, he can always saw off a long gun." Of the felons who had often used handguns in crime, 87 percent felt that sawing off a long gun to make it concealable for carrying would be "easy"—a view with which 89 percent of those who had often used shotguns concurred.<sup>203</sup>

Using these responses, Lizotte calculates that, far from saving lives, the current handgun death toll might more than triple if a handgun ban led to long gun substitution at the rates indicated!<sup>204</sup> Perhaps the foregoing calculations are somehow (pg.57) fundamentally wrong. But no such error has been exposed by anti-gun academic crusaders. The sagecraft literature deals with the possibility of long guns being substituted for banned handguns by just not mentioning it.

I emphasize that the danger of such substitution does not preclude the possibility of intelligently tailored gun controls. Those controls simply must be limited to ones that are politically viable for long guns and handguns **equally**—a possibility that, for obvious reasons, is never mentioned by the National Rifle Association. But it is even more irresponsible (and intellectually

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<sup>199</sup> Baker above. See generally Fackler, "Physics of Missile Injuries," in N. McSwain Jr. & M. Kerstein (eds.), *Evaluation and Management of Trauma* (Norwalk, Conn.: Appleton-Century-Crofts, 1987).

<sup>200</sup> Taylor, "Gunshot Wounds of the Abdomen," 177 *Annals of Surgery* 174-75 (1973); see also Fackler above.

<sup>201</sup> Kates, *Restricting Handguns* above at 108-11.

<sup>202</sup> Kleck, "Handgun-Only Gun Control: A Policy Disaster in the Making," in *Firearms and Violence* above at 186-94.

<sup>203</sup> J. Wright & P. Rossi, NIJ Felon Survey, 221, Table 11.3.

<sup>204</sup> Lizotte, "The Costs of Using Gun Control to Reduce Homicide," 62 *Bull. N.Y. Acad. Med.* 539, 541 (1986) (using Kleck's figures for long gun vs. handgun lethality, which differ from mine in being based on a range of more exhaustive and sophisticated ballistic comparisons that do not include medical study data).

dishonest) for anti-gun sages to solemnly proclaim that banning handguns would save lives without addressing the danger that a ban could result in far more lives being lost. As the NIJ Evaluation facetiously remarks,

If someone intends to open fire on the authors of this study, our *strong* preference is that they open fire with a handgun, and the junkier the handgun, the better. The possibility that even a fraction of the predators who now walk the streets armed with handguns would, in the face of a handgun ban, prowl with sawed-off shotguns instead causes one to tremble.<sup>205</sup>

## BASIC PRINCIPLES OF GUN CONTROL

The basic regulatory principles may be grouped under these concepts: Realism, Favorable Trade-Offs, Parity, Accommodation, Avoiding Unfavorable Trade-Offs, and Affirmative Benefits.

**Realism.** English analyst Colin Greenwood points out that no matter how stringent the controls, there will always be enough guns in any society that anyone determined to have a gun will be able to do so, whether for crime or self-defense. Thus, after nearly 80 years of an increasingly stringent state ban of handguns, New York City police estimate the number of illegally owned guns there at 2-3 million. Anti-gun crusaders attribute this number to handguns being legally obtained in most other states. Yet, even in peaceful England where few people think they need a gun for self-defense, Greenwood has shown that the number of guns illegally smuggled in off-sets the number confiscated yearly. In other words, 70 years of an ever more strictly administered ban has not diminished the illegal gunstock.

Moreover, the more closely one looks, the more absurd it is to blame the lack of a ban in other states for the failure of New York's handgun ban. The rate at which handguns are (illegally) owned for defense in New York City is more than double the rate of defensive ownership in states where it is legal. If people really (pg.58) want a gun for family defense, they will get one, regardless of any law. With upwards of 200 million guns in the United States (70 million of which are handguns), there is no hope of reducing crime by banning and confiscating guns. Such a policy would actually reduce the cost of new guns. Any machinist can manufacture basic revolvers and automatic pistols out of pot metal and organized crime could sell them more cheaply than commercially made guns are now—just as rotgut sold for less during Prohibition than good liquor had before it. Of course, pot metal guns would not safely fire more than 100 to 200 shots. But that lower quality would far more than suffice to meet the demand for new and additional guns for crimes or self-defense.

Gun policies ought not be designed or adopted according to unrealistic expectations. The inevitable failure only creates gun lobby propaganda. The basic determinants of violent crime are fundamental socio-cultural, institutional, and economic factors that no gun law can overcome. So long as perhaps 1 of every 300 persons who grow up in the United States is inclined toward violent

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<sup>205</sup> Above at 322-23 (emphasis in original).

crime, our society will be far more violent than either gun-banning England or gun-loving Switzerland, where only 1 of 30,000 inhabitants is so inclined.

**Favorable Trade-Offs.** Yet, these statistics do not justify the gun lobby's myopic rejection of all new controls. Gun controls can have a net marginal value if carefully tailored to produce **value that exceeds the costs** they involve. For instance, burglars rarely carry guns. Doubtless the primary reason is that burglars expect to avoid confrontation by striking only when they think the premises are unoccupied. But their eschewal of gun carrying is reinforced by the knowledge that in most states they will face much stiffer punishment if caught with a gun during a burglary.

If gun crimes are more to be feared overall, this law does some good and is virtually cost-free. If burglars obey it, we are all better off; insofar as they are caught disobeying, the law focuses imprisonment on those who are most dangerous and, therefore, most desirable to incapacitate. The same point underlies laws severely punishing convicted felons who own any kind of gun. Of course, the most violent felons (robbers, rapists, hit men) will be the least likely to obey. But when they disobey, the law allows long imprisonment for just owning a gun—without waiting until they actually hurt someone with it.

**Parity.** It is trite, but necessary, to emphasize that negative as well as positive effects must be considered when evaluating gun law strategies. The ineluctable fact is that control strategies that produce long gun substitution for handguns in any substantial proportion will greatly aggravate the dangers of gun misuse. Thus, any good control strategy involves parity of regulation between long guns and handguns to avoid the danger of promoting substitution of the former for the latter. Furthermore, if controls broad enough to provide such parity are not now politically feasible, adoption of the strategy must wait until parity becomes feasible.<sup>(pg.59)</sup>

**Accommodation.** Only with strong cooperation from owners can broader federal gun controls be established. Without such cooperation, requiring a license to own guns, for instance, would be (at best) a dead letter or (at worst) a source of enforcement costs that would vastly exceed any possible benefit. Whether cooperation can be achieved, given the decades of scorn, contempt, and hatred that anti-gun extremists have heaped on gun owners, is very doubtful.

At a minimum, gun owners would need the reassurance of a U.S. Supreme Court decision squarely recognizing that the Bill of Rights gives every law-abiding, responsible adult the freedom to choose to own guns for the protection of home and family. Also, gun owners would have to be convinced of the following. First, that the proposed gun laws are formulated in recognition of their legitimate interests and represent an honest attempt to accommodate those interests within the social necessity of rational control over deadly instruments. Second, the law's administration would not be so hostile or arbitrary as to deny law-abiding, responsible adults the freedom to choose to own guns for home and family defense.

**Avoid Unfavorable Trade-Offs.** Some anti-gun crusaders have their own, predictably onerous proposal for avoiding the need for any accommodation. Their plan is for Congress to ban handguns and command their confiscation by a law imposing a **mandatory** minimum prison sentence of a year on every violator. Much the same proposal was made to the New York State Legislature in 1980. It was tabled when the Prison Commissioner testified that the state prison

system would collapse if just 1 percent of the illegal handgun owners in New York City (where ordinary citizens cannot get a permit) were caught, tried, and imprisoned.

Likewise, the federal prison system would collapse if it tried to house even a hundredth of one percent of the tens of millions who would not obey a federal handgun ban. Fortunately, violators would not get to prison because the federal court system would collapse under the burden of trying them.

**Affirmative Benefit.** Widespread ownership of handguns for defense of self, home, or family is only natural in a nation beset with endemic crime. The empirical evidence establishes that such victim gun ownership results in the interruption and frustration of about 645,000 crimes each year. Civilian handgun ownership averts thousands of victim injuries, and even deaths, that would not otherwise have been avoidable, given the manifest physical and tactical advantages that criminals have over unarmed victims.

Against these palpable benefits there are no substantial costs of gun ownership by law-abiding, responsible adults. Such ownership may marginally increase the number of gun accidents, the majority of which stem from gun misuse by the same aberrant, reckless, and violent people who perpetrate most murders. Applying these irresponsible gun misusers' accident and murder rates to gun possession by the average citizen makes no more sense than estimating that citizen's chance of dying from a cut by using death rates among hemophiliacs.<sup>(pg.60)</sup>

## **CONCLUSION: SEVEN RATIONAL GUN CONTROL PROPOSALS**

The following are seven ways of fine-tuning current gun laws. First, current federal law (and a potpourri of state laws) forbid gun ownership by convicted felons and persons adjudged of unsound mind. This law could be extended to embrace anyone convicted of driving while intoxicated or of multiple convictions of selected violent misdemeanors. Such laws should be leavened by allowing police to give special permits to own a gun to such people if they have not been in trouble for several years.

Second, the ban on felons owning guns is undercut because millions of sales are between private persons where sellers have no way of checking whether the buyer is a felon. The obvious way to deal with this problem would be to require everyone who owns or wants to buy a gun to acquire a federal permit that would be available if the buyer is an adult without a felony record. But that requirement is both politically and practically impossible. Gun owners, who are convinced that anti-gun crusaders will eventually use permit records to confiscate all guns, would hysterically fight the law and, if it were enacted, would flout it *en masse*. More promising would be to check for a criminal record by using the driver's license. Every license issued could bear the notation "eligible to own firearms" (except, of course, for juveniles, felons, and those with insanity records). Selling a gun to a person without a driver's license bearing this notation would be a felony and would make the seller financially liable for any wrong done by the buyer.

Third, guns commonly enter the underworld when stolen from lawful owners by burglars who profit from guns being so easy to fence. One way to severely discourage such theft would be a dual law that (a) imposes a mandatory three-year prison sentence on anyone knowingly possessing

a stolen gun, and (b) rebuttably presumes knowing possession if the defendant is found to have possessed two or more stolen guns. Faced with this, fences may stop buying stolen guns, thereby discouraging burglars from stealing them.

Fourth, the array of state laws governing gun ownership by minors should be strengthened by a uniform provision against possession of any kind of gun by any person under 18 years of age, except under the supervision of a parent or other responsible adult.

Fifth, it should be a felony for a parent to negligently allow a gun of any kind to fall into the hands of an unsupervised minor. Where the parent owns the gun illegally (e.g., is a convicted felon), there should be mandatory imprisonment for at least 5 years. The gun lobby has objected that a parent whose child has been killed in a gun accident should not be subjected to the additional penalty of a prison sentence. But people who are unwilling to obey current gun laws and are too irresponsible to protect children against the consequences are too dangerous to be allowed at liberty, independent of any issue of punishment.<sup>(pg.61)</sup>

Sixth, current state laws on carrying a gun are so inconsistent, so irrational, and so maladministered that permits to carry guns are granted to unqualified persons with special influence and are arbitrarily denied to uninfluential persons, however well qualified.<sup>206</sup> These laws should be replaced by a comprehensive prohibition against carrying a loaded gun of any kind (either concealed or openly) without a permit. As a matter of right, the permit would be issued only to persons demonstrating firearms skill and a legal knowledge about gun use that is comparable to the training required of a police officer in the jurisdiction.

Seventh, it should be illegal to carry a loaded gun (a) on the person, (b) if inebriated (a prohibition that would apply even in one's own home), or (c) while drinking in a bar.

## **EPILOGUE: FUTILITY OF GUN CONTROLS IN AN OVERLOADED SYSTEM**

Please do not misconstrue the foregoing law reform proposals to suggest that fine-tuning gun laws is the key to curbing gun crime, much less violence in general. The United States already has some 20,000 federal, state, and local gun laws that cover almost every approach to achieving even the inherently limited benefits that gun controls offer as a way of reducing crime. Though I have offered suggestions for fine-tuning those laws, the real problem lies not in the scope or precise provisions of current controls, but in the lack of consistent enforcement and resources for enforcement. The premier study of gun law enforcement concludes

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<sup>206</sup> Over the past two decades, while New York City has made it virtually impossible for ordinary merchants and citizens to have guns in their stores or homes, it secretly granted permits for the following people to carry a concealed handgun anywhere at any time: Arthur Sulzberger (publisher of the *New York Times* whose public position is that no civilian needs or can use a gun for defense), Dr. Milton Brothers (husband of Dr. Joyce Brothers whose public position is that gun ownership is motivated by male sexual dysfunction), Donald Trump, Arthur Godfrey, Henry Cabot Lodge, William Buckley, Lyman Bloomingdale, Joan Rivers, a host of local union leaders, politicians, media figures, and other celebrities, and various DuPonts and Rockefellers. **There is no testing for competence with firearms or for knowledge of when they can and cannot legally be used.** Kates, "The Battle over Gun Control," 84 *The Public Interest* 42, 44-47 (1986).

It is very possible that, if gun laws do potentially reduce gun-related crime, the present laws are all that is needed if they are enforced. What good would stronger laws do when the courts have demonstrated that they will not enforce them?<sup>207</sup>

Though depressingly accurate as to the lack of enforcement, this quote actually understates the problem, and it is also unjust in blaming the courts exclusively. In (pg.62) areas plagued by violence, prosecutors and courts are overloaded with cases of heinous crime, and many state prisons are literally overflowing with perpetrators. A system overburdened with heinously violent cases is not going to give proper attention to felons who did nothing more than carry a gun. Yet this inability to suitably incarcerate negates the whole purpose of the gun law, which is to help prevent dangerous crimes **before** they occur. The lack of resources needed to prosecute and incapacitate (by long incarceration) felons who are caught with guns before they commit heinous crimes can destroy gun controls' potential for preventing those crimes.

The justice system's near-terminal overload makes irrelevant any merits that might exist in gun law proposals offered by both pro- and anti-gun extremists. For instance, the gun lobby proposes to stop gun crime by highly publicized **mandatory** penalty laws. When a crime involves a gun, judges would be required by the Legislature to impose a minimum 5-year sentence. Gun crime fell in some states that so legislated—until it became clear that courts were systematically sabotaging the law by imposing the 5-year mandatory sentence concurrently with, rather than consecutively from, the 5 years an armed robber would already receive.

It is easy to simplistically join Professors Bendis and Balkin in castigating the courts for this. But prosecutors are no less at fault when they cooperate with the judges in plea bargains whereby the sentence would be concurrent rather than consecutive. The blame really belongs on legislatures for credulously accepting a "quick fix" approach of burdening an already terminally overburdened system without adding resources. Any mandatory sentencing requires massive infusion of additional resources. If a long sentence is certain and no plea bargain possible, felons have every reason to add another protracted jury trial to those already inundating the prosecutor and court. Moreover, judges and prosecutors know that, when prisons are already overflowing, mandated sentences for offenders who rob at gunpoint result in less time served by more dangerous and malignant offenders (for instance, the rapists who gratuitously mutilated victims with a knife). When reason and institutional pressures unite against sentencing offenders severely just because they used a gun, a sentence by legislative fiat is unlikely without vastly expanded prosecutorial, judicial, and prison resources.

The problems of terminal systemic overload equally doom the anti-gun program. As noted earlier, the most specific proposal for banning and confiscating all guns (or even just handguns) also depends on mandatory sentencing: a mandatory 1-year term for anyone found with a gun, whether good citizen or felon. Forget about felons, either for gun crimes or crimes of any kind. To seriously enforce this law against the often-fanatic owners of 70 million handguns would far exceed the combined capacity of all courts in the United States, even if they stopped processing all other criminal and civil cases to try only gun cases.

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<sup>207</sup> Bendis & Balkin, "A Look at Gun Control Enforcement," 7 *J. Police Sci. & Admin.* 439, 478 (1979).

Less extreme anti-gun proposals are only less unrealistic. Consider the anti-gun claim that a waiting period, during which criminal records were checked, would have prevented John Hinckley from buying the gun with which he shot President Reagan, and would have prevented Patrick Purdy from buying the gun with which he <sup>(pg.63)</sup> massacred the children in Stockton. Regrettably, that claim is simply false—though it ought to be true!

During the 1980 campaign, Hinckley, who was then stalking President Carter, was caught committing the state felony of carrying a concealed handgun and the federal one of trying to take it on an airliner. Neither charge was pressed "in the interest of justice" (i.e., the interest of prosecutors in focusing on their current overload of serious violent crime cases rather than on people who have not-yet-committed such a crime). The promise of gun laws is epitomized by the fact that, if he had been convicted and sentenced under those laws, Hinckley would not have been at liberty to shoot Reagan a year later. The frustration of that promise by systemic overload is epitomized by the fact that, even if a law existed to require a waiting period or a felony conviction check, it would not have prevented Hinckley from buying his new gun. He had no felony conviction record to be checked! The same is true of Purdy: he had been arrested for a succession of felonies over several years, but all had been plea bargained down to misdemeanors.

The affirmative social benefit of widespread gun ownership is that handguns alone are used by good citizens to repel about 645,000 crimes annually. (Another approximately 215,000 defensive handgun uses annually involve dangerous animals, such as rabid skunks. If long guns are included, guns are used to repel about a million crimes per year.) The downside of widespread gun availability among the law-abiding is that there will always be some leakage to criminals when guns are stolen in burglaries. Realistically, however, we must recognize that there will always be enough guns in society to supply the needs of criminals or terrorists.

Moreover, we could substantially reduce gun crime by simply enforcing our present laws. If the resources were committed to convict and incarcerate every felon caught illegally possessing a gun, many dangerous felons would be incapacitated and others would learn to eschew guns. But we as a society are not willing to commit the billions of dollars that would be required.

It is trite and, more importantly, untrue to characterize gun crimes (and violent crimes in general) as problems to which there are merely "no easy solutions." These are problems to which there are no good solutions at all—only painful compromises. Much of the support for banning guns comes from people who cannot accept this. But, to paraphrase Bendis and Balkin, if we are not willing to mobilize the resources necessary to enforce current gun laws, what is the point of discussing the herculean effort that would be required to confiscate 200 million guns (or 70 million handguns) and incarcerate their 98 percent non-criminal owners?

Samuel Johnson bleakly expressed the matter more than 200 years ago:

How small of all that human hearts endure,  
The part which laws or kings can cure.<sup>(pg.64)</sup>

## **ABOUT THE AUTHOR**

Don B. Kates, Jr., attended Reed College and Yale Law School. During the Civil Rights Movement, he worked in the South for civil rights lawyers including William Kunstler. Thereafter, he specialized in civil rights and police misconduct litigation for the federal War on Poverty program. After three years of teaching constitutional law, criminal law, and criminal procedure at St. Louis University Law School, he returned to San Francisco where he currently practices law, teaches, and writes on criminology. He is editor of *Firearms and Violence: Issues of Public Policy* (San Francisco: 1984, Pacific Research Institute) and the Winter 1986 issue of *Law & Contemporary Problems*. He is author of the entry on the Second Amendment in M. Levy & K. Karst, *The Encyclopedia of the American Constitution*; "Firearms and Violence: Old Premises, Current Evidence," in T. Gurr (ed.), *Violence in America* (1989); and "Precautionary Handgun Ownership: Reasonable Choice or Dangerous Delusion," B. Danto (ed.), *Gun Control and Criminal Homicide*, forthcoming (1990).