

## Articles

# The Value of Civilian Handgun Possession as a Deterrent to Crime or a Defense Against Crime

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### I. INTRODUCTION

A central issue in the gun control controversy is the degree to which civilian ownership of firearms reduces crime. Sixty-five years of vehement debate have amply proven the wisdom of an early 20th Century opponent of gun ownership. Writing in 1921, New York City Chief Magistrate William McAdoo, a leading figure in the controversy, predicted that:

[w]e shall make no progress in removing this national menace until this basic fact as to the ineffectiveness of arming citizens is well and thoroughly understood by the people who foolishly buy pistols and arm themselves.<sup>1</sup>

The gun owner's almost talismanic faith in the protective efficacy of guns leads him to cling to them notwithstanding the manifest evils to which guns all too often lend themselves. The other side seeks to outlaw handguns, many would prefer outlawing all guns, dogmatically convinced not just that guns do more harm than good, but that "[i]n the hands of the general public handguns confer virtually no social (pg.114) benefit."<sup>2</sup> Since legislatures have been unwilling to ban handguns, disciples urge the courts to accomplish this goal, in effect, by imposing strict liability for the manufacture,

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<sup>1</sup> W. MCADOO, WHEN THE COURT TAKES A RECESS 131 (1921). In a subsequent article Magistrate McAdoo averred that he "would as soon place a full-venomed, cobra snake in my house as a loaded revolver." McAdoo, *Causes and Mechanisms of Prevalent Crimes*, 24 SCI. MONTHLY 415, 419 (1927).

<sup>2</sup> Fisher, *Are Handgun Manufacturers Strictly Liable in Tort*, 56 CAL. ST. B.J. 16, 18 (1981) (supporting imposition of strict manufacturers' liability as a mechanism for judicial abolition of the handgun). See also Riley, *Shooting to Kill the Handgun: Time to Martyr Another American "Hero,"* 51 J. URB. L. 491 (1974) (urging legislative prohibition of handgun ownership); Fields, *Handgun Prohibition and Social Necessity*, 23 ST. LOUIS U. L.J. 35 (1979) (same).

distribution, or ownership of a gun.<sup>3</sup> Given the fervor of each side in this debate, it is not surprising that neither seems fazed by the lack, until comparatively recently, of any substantial evidence regarding the supposed utility of civilian handgun ownership in reducing crime. The purpose of this article is to analyze the empirical evidence, most of which has become available only in the last decade.<sup>4</sup> Prior to such discussion it is necessary, however, to present some caveats and two definitions.

### A. Caveats

This article is emphatically not an attempt to resolve whether, and to what extent, public policy should circumscribe or allow gun ownership. (pg.115) To determine what level of gun control is desirable requires a much broader inquiry than is attempted here.<sup>5</sup> It requires a pragmatic and systematic inquiry: not just a balancing whether in the abstract guns do more harm than good, but consideration of whether, in fact, any particular control strategy will produce a favorable trade-off

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<sup>3</sup> See Fields, *Does Blame for Handgun Crime Lie at the Factory Gate?*, BUS. & SOC'Y REV., Spring 1983, at 51 (urges a strict liability approach to handguns); Baker, *Without Guns Do People Kill People?*, 75 AM. J. PUB. HEALTH 587, 588 (1985) (supporting either statutory or judicial abolition of all guns but recommending "restricting the sale and ownership of handguns" particularly "because of their very low benefit-risk ratio."). Other articles advocating the strict product liability approach include Horwitz, *Kelley v. R.G. Industries: A Cause of Action for Assault Weapons*, 15 U. DAYTON L. REV. 125 (1989); Note, *Common Law Strict Liability against the Manufacturers and Sellers of Saturday Night Specials*, 27 SANTA CLARA L. REV. 607 (1987); Note, *Do Victims of Unlawful Handgun Violence Have A Remedy Against Handgun Manufacturers: An Overview and Analysis*, 1985 U. ILL. L. REV. No. 4, at 967; Teret & Wintemute, *Handgun Injuries: The Epidemiologic Evidence for Assessing Legal Responsibility*, 6 HAMLIN L. REV. 341, 349-50 (1983); and Turley, *Manufacturers' and Suppliers' Liability to Handgun Victims*, 10 N. KY. L. REV. 41 (1982).

<sup>4</sup> Virtually every issue in this debate has been marked by contentions strongly advanced yet unsupported by strong evidence. Only a decade ago, a distinguished analyst writing in a leading journal of public policy scathingly dismissed the entire corpus of scholarly literature then extant: "[despite an enormous volume of writing,] it is startling to note that 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, at best, and tainted by obvious bias." Bruce-Briggs, *The Great American Gun War*, THE PUBLIC INTEREST, Fall 1976, at 37. Although anti-gun advocates saw this assessment as hostile to their position (see, e.g., Fields, *supra* note 2, at 40), Professor Philip Cook, a criminologist whose seminal contributions in the area have been partially underwritten by anti-gun organizations, was writing: "[w]hile the consistent failure of gun control proposals to pass Congress has often been blamed on lobbying efforts of the NRA, part of the problem may be that the case for more stringent gun control regulation has not been made in any scientific fashion." P. Cook, *A Policy Perspective on Handgun Control* 14 (1976) (available at Duke University).

Likewise, the authoritative review of pre-1979 gun control literature done for the National Institute of Justice provides an overwhelmingly negative assessment of virtually every aspect. J. WRIGHT, P. ROSSI & K. DALY, *UNDER THE GUN: WEAPONS, CRIME, AND VIOLENCE IN AMERICA* (1983) [hereinafter *UNDER THE GUN*].

<sup>5</sup> Resolution would require a broad assessment of at least the following: (1) crime reductive utility and every other supposed benefit of gun ownership to individuals or society generally, (2) constitutional barriers to particular gun restrictions or to the means needed for their enforcement, (3) comparison to those alleged benefits of all the costs (e.g., accidents, violence, and suicide) of gun ownership — in light of a hardheaded evaluation of (4) the likely extent to which non-compliance or other factors might frustrate the salutary purposes of a gun ban, and (5) the costs to the criminal justice system of trying to overcome such non-compliance. For discussion and relevant citations on factor (2) (1) and (5), see Kates, *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 203 (1983) (especially 270-72, and 204 n.5) [hereinafter MICH. L. REV.]; Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. No. 5 (forthcoming in 1991); Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989); Kessler, *Enforcement Problems of Gun Control: A Victimless Crimes Analysis*, 16 CRIM. L. BULL. 131 (1980); and Hardy & Chotiner, *The Potentiality for Civil Liberties Violation in the Enforcement of Handgun Prohibition*, in *RESTRICTING HANDGUNS* (D. Kates ed. 1979) [hereinafter *RESTRICTING HANDGUNS*]. On factors (1) and (3)-(5), see G. KLECK, *POINT BLANK: GUNS AND VIOLENCE IN AMERICA* (forthcoming in 1991) [hereinafter *POINT BLANK*]; *UNDER THE GUN*, *supra* note 4, chs. 7, 8, 14; Kates, *Handgun Banning in Light of the Prohibition Experience*, in *FIREARMS AND VIOLENCE* (D. Kates ed. 1984), McDowall & Loftin, *Collective Security and the Demand for legal Handguns*, 88 AM. J. SOC. 1146, 1158 (1983), and Benenson & Hardy, *Critiquing the Case for Handgun Prohibition*, in *RESTRICTING HANDGUNS* 85-90 (D. Kates ed. 1979).

by actually reducing the harms, or the more important ones, that involve guns more than it reduces the values.<sup>6</sup> In contrast, this article is limited to considering the crime reductive utility of gun ownership by individuals.

The second caveat is that the disproportionate attention here given to studies and analyses authored by opponents of gun ownership reflects necessity rather than a bias against gun ownership. The fact is that the gun lobby has, in effect, defaulted in the academic arena.<sup>7</sup> Thus, studies by gun control advocates constituted almost the whole corpus of academic literature available on gun issues until the last decade when more neutral scholars began addressing those issues. Significant of all too many aspects of the gun control controversy is that (pg.116) gun owners require no scholarship—nor even "sagecraft"—to maintain their talismanic faith in the protective efficacy of guns. There is, as a consequence, little academic literature from that side of the debate.<sup>8</sup>

### B. Definitions

The first definitional problem was to find apt shorthand labels for the respective positions of the gun lobby and its opponents. This article uses the terms "pro-gun" and "anti-gun" for the respective polar extremes in the American gun controversy. It bears emphasis that the "pro-gun" and "anti-gun" positions are extremes—extremes that have, tragically in my view, dominated and drowned out more moderate voices. In fact, polls over the past half century consistently show that most Americans, including a majority of gun owners, are neither pro-gun nor anti-gun but rather "pro-control."<sup>9</sup> On the one hand, most Americans reject the anti-gun disdain for self-defense and the basic anti-gun creed of the inherent depravity of guns. Yet, on the other hand, most Americans also reject the childish pro-gun shibboleth that it is enough to outlaw murder and other violent crime—and thus superfluous to reinforce such laws by sensible, prophylactic controls on weapons that may be used to commit violence. This article may be described as a self-conscious attempt to apply the moderate pro-control position embraced by most Americans to the claims about the crime reductive value of civilian gun ownership offered by the more extreme sides in the controversy.

The second definitional problem involves distinguishing actual use of a gun to thwart a crime in progress (hereinafter described as "defensive-use") from the deterrent effect of victim arms possession in dissuading criminals from attempting a crime at all (hereinafter described (pg.117) as

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<sup>6</sup> For a discussion of the role of cost-benefit analysis and other issues relevant to outlawing widely desired commodities, see H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* (1968), J. KAPLAN, *MARIJUANA — THE NEW PROHIBITION* (1975), and Kaplan, *A Primer on Heroin*, 27 *STAN. L. REV.* 801 (1975). Treatments of those principles in the gun context include Kessler, *supra* note 5, Lizotte, *The Costs of using Gun Control to Reduce Homicide*, 62 *BULL. N.Y. ACAD. MED.* 539 (1986), Kaplan, *The Wisdom of Gun Prohibition*, 455 *ANNALS* 11 (1981), and Kaplan, *Controlling Firearms*, 28 *CLEV. ST. L. REV.* 1 (1977).

<sup>7</sup> For discussion of the quality and content of analyses that typify gun lobby thinking, see *infra* note 56 and accompanying text.

<sup>8</sup> *But see infra* note 60. Cf. Tonso, *Social Science and Sagecraft in the Debate Over Gun Control*, 5 *LAW AND POL'Y Q.* 325 (1983) (using gun control as an example of Florian Znaniecki's construct of intellectuals as "sages" who, under the pretense of scholarship, invent or interpret data in the service of a preordained conclusion (F. ZNANIECKI, *THE SOCIAL ROLE OF THE MAN OF KNOWLEDGE* 72-74 (1968) (explaining his construct of intellectuals as "sages"))).

<sup>9</sup> These labels are taken from two pieces in which I have addressed the issue of public opinion: D. Kates, *Bigotry, Symbolism and Ideology in the Battle Over Gun Control* (1990) (paper presented at the Annual Meeting of the Law and Society Association), and Kates, *The Battle Over Gun Control*, *THE PUBLIC INTEREST*, Summer 1986, at 42-3. For analysis of the most modern and extensive polls, see Wright, *Public Opinion and Gun Control*, 455 *ANNALS* 24 (1981), and Bordua, *Adversary Polling and the Construction of Social Meaning: Implications in Gun Control Elections in Massachusetts and California*, 5 *LAW & POL'Y Q.* 345 (1983).

"deterrence"). Though basic, this distinction has only rarely been observed even by criminologists and anti-gun writers, and almost never by pro-gun writers. It is a crucial distinction because conceptual and practical difficulties make the evidence for deterrence more complex and more ambiguous than for defensive-use.

This article will first address defensive-use and then deterrence. But before either aspect of defensive gun ownership can be analyzed empirically, certain ethical or cultural concerns must be addressed—if only because they have so often intruded into, and more or less subtly obfuscated, purportedly empirical discussions of these issues.

## II. NON-EMPIRICAL MORAL AND PHILOSOPHICAL CONSIDERATIONS

In the notoriously extreme bitterness of the gun control debate, some analysts see a clash of cultural and ethical values disguised by the more or less pseudo-criminological terms. This is not to deny that there are real criminological disagreements in the gun debate. Rather, the proposition is that such disagreements are minor in comparison to the violent cultural and moral antagonism which "the Great American Gun War" cloaks.<sup>10</sup> Indicative of the depth of those antagonisms is the description of anti-gun attitudes offered in the encyclopedic review of American gun control literature prepared by the University of Massachusetts for the National Institute of Justice: that gun control advocates sincerely view gun owners as "demented and blood-thirsty psychopaths whose concept of fun is to rain death on innocent creatures, both human and otherwise."<sup>11</sup> Thus, anti-gun advocates (pg.118) denounce gun ownership as "simply beastly behavior"<sup>12</sup> and view the gun both as a real and a symbolic mechanism of a peculiar savagery lurking in an American soul that is "hard, isolate, stoic and a killer."<sup>13</sup>

As one would expect, the pro-gun view is utterly different. Colonel Jeff Cooper, perhaps its most eloquent spokesman, claims that:

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<sup>10</sup> It is not criminological disagreements that make this controversy so bitter that it cannot be resolved with mutual accommodation and rational compromise. What precludes resolution of the gun issue are cultural and moral antagonisms so savage that, as one neutral observer comments, "gun owners worry — 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 Hand: A Feasible Strategy for Gun Control*, 2 J. POL'Y AN. & MGMT. 185, 187-88 (1983). In other words, gun owners end up fanatically opposing controls many of which they may themselves deem reasonable and sensible in the abstract, see *supra* note 9, because the way in which gun control is debated convinces them that, at least, it is not a criminological program but an expression of culturally or ethically based hatred of them.

[Experience with this debate] convinces America's handgun owners that they are a hated minority whose days are numbered by mortal enemies—enemies who hate them more than crime. With the die cast so, gun owners are made to think that they have everything to lose if those who loath them have any success at all. [Knowing this, the gun lobby actually] disseminate[s] the nastier [anti-gun] cartoons and vituperative op-ed pieces in publications read by gun owners to fan the flames of incipient paranoia.

Stell, *Guns, Politics and Reason*, 9 J. AM. CULTURE 71, 73 (1986). See also Kates, *The Battle Over Gun Control*, THE PUBLIC INTEREST, Summer 1986; Bruce-Briggs, *supra* note 4, at 61; UNDER THE GUN, *supra* note 4, at 323-24; Kaplan, *Controlling Firearms*, *supra* note 5, at 5-7.

<sup>11</sup> UNDER THE GUN, *supra* note 4, at 4.

<sup>12</sup> *Gun Toting: A Fashion Needing Change*, 93 SCI. NEWS 613, 614 (1968).

<sup>13</sup> Hofstadter, *America As A Gun Culture*, AM. HERITAGE, Oct. 1970, at 82 (applying to gun ownership D. H. Lawrence's definition of "the essential American soul"). Compare the pronouncement of columnist Sydney Harris that "[t]he 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." Chicago Daily News, Apr. 11, 1967. See, e.g., Luedens, *Wretchedness Is A Warm Gun*, 48 PROGRESSIVE No. 11, at 50 (1984); Ellison, *Fear Not Your Enemies*, HEAVY METAL, Mar. 1981, at 34; and references cited *infra* notes 16, 18, 36-42.

[w]eapons compound man's power to achieve; they amplify the capabilities of both the good man and the bad, and to exactly the same degree, having no will of their own. Thus, we must regard them as servants, not masters—and good servants to good men. Without them, man is diminished, and his opportunities to fulfill his destiny are lessened. An unarmed man can only flee from evil, and evil is not overcome by fleeing from it.<sup>14</sup>

Some might argue that there can be no basis for rationally evaluating these violently contradictory points of view, at least insofar as they constitute professions of cultural, moral, or quasi-religious premises. But even fundamental premises are not necessarily immune from rational evaluation. A doubtless apocryphal tale holds that when James Joyce publicly repudiated his Catholicism he was approached by an English reporter who asked him if he would now become a Protestant. "Just because I've lost my faith," Joyce is said to have replied, "do you think I've lost my reason as well?" The point is that it is sometimes or to some extent possible to determine whether professions of moral faith are founded in reason. Thus, for instance, the anti-gun response to Cooper's profession of faith is that a gun is simply not an effective defense to criminal attack. It is best to flee if possible, and otherwise to submit. Such action constitutes the only viable form of opposition to robbery, rape, or other acts of violence.<sup>15</sup> This article (pg.119) explores the validity of this view. If it proves to be true, Colonel Cooper's faith that guns allow resistance to evil is exposed as contrary to reason.

#### *A. Examination of Some Non-Empirical Elements of Anti-gun Faith*

Some declarations of anti-gun morality may also be subject to refutation either as contra-factual or as internally inconsistent; a prime instance of internal inconsistency occurs in statements made by the nationally syndicated columnist and cultural historian Garry Wills who feels that "gun fetishists" are at once immoral and unpatriotic "traitors, enemies of their own patria," and "anti-citizens" arming "against their own neighbors."<sup>16</sup> Yet what Professor Wills and the many others who echo such statements advocate as the appropriate response to criminal attack is summoning a police officer.<sup>17</sup> There is an amusing, but none the less very real, impediment to analyzing this position: it is so inconsistent that one who does not start out accepting it is hard put to believe it. Thus, I emphasize that the anti-gun concern is not simply pragmatic, such as to deny that gun armed self-defense is effective or to laud the obvious advantages of police assistance when that option is open. Entirely independent of, though often accompanying, such pragmatic concerns is the moral view advanced by some anti-gun advocates that under no circumstances is it ever legitimate to use

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<sup>14</sup> J. COOPER & THE EDITORS OF GUNS AND AMMO, HANDGUNS 1 (1976).

<sup>15</sup> See, e.g., P. SHIELDS, GUNS DON'T DIE, PEOPLE DO 125 (1981) (the Chairman of Handgun Control Inc. advises "the best defense against injury is to put up no defense—give them what they want or run. This may not be macho, but it can keep you alive."). See also *Don't Resist Robbery Study Warns*, N.Y. Times, Dec. 11, 1984, at C11, col. 5 (an interview with Zimring and Zuehl, the authors of the study cited *infra* note 106).

<sup>16</sup> Wash. Star, Jan. 18, 1981, Chicago Sun Times, Dec. 12, 1980, and Philadelphia Inquirer, May 17, 1981 (each quoting Wills' statement that "[t]he gun nuts who write me say that their liberty may have to be preserved against their own government, their own fellow countrymen, someday ...").

<sup>17</sup> Wash. Star, Jan. 18, 1981.

a gun in defense of self or family.<sup>18</sup> Thus Professor Wills holds that people (pg.120) who own guns to protect their families in the event that police assistance is unavailable exhibit a morally abhorrent attitude toward fellow Americans. Of course, if consistently adhered to, Professor Wills' view is as immune from rational dispute as is any other moral belief. But if one is willing to call on the police to defend one's family with a gun, it is patently inconsistent to condemn the morality of those who are willing to defend their families themselves if the police are unavailable when the need arises.<sup>19</sup>

Adherents of the anti-gun faith commonly characterize defensive gun ownership as "paranoid."<sup>20</sup> What paranoid means in this context (pg.121) is not entirely clear—at least today. It may

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<sup>18</sup> *Id.* To the same effect see, for example, the categorical assertion of University of Chicago Professor Robert Replege, testifying before Congress that "[t]he only legitimate use of a handgun that I can understand is for target shooting ... ." *Handgun Crime Control—1975-1976, Hearings pursuant to S. Res. 72, § 12 Before the Subcomm. to Investigate Juvenile Delinquency of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess. 1974 (1975) (oversight of the 1968 Gun Control Act).

Typically such assertions are based on purely secular morality. *E.g.*, *The Gun Under Fire*, TIME, June 21, 1968, at 17. But similar religiously based sentiments abound. A Methodist publication affirms the moral necessity of submission rather than using a gun to resist a rapist or other felon. Brockway, *But the Bible Doesn't Mention Pistols*, in *Engage-Social Action Forum*, HANDGUNS IN THE UNITED STATES (1977). Rhetorically posing the question "Is the Robber My Brother," Reverend Brockway answers in the affirmative: for though neither the robbery victim nor the

woman accosted in the park by a rapist is likely to consider the violator to be a neighbor whose safety is of immediate concern ... [c]riminals are members of the larger community no less than are others. As such they are our neighbors or, as Jesus put it, our brothers.

*Id.*

The Methodists, or at least Reverend Brockway, seem to concede that the victim may morally use a gun if she believes that the attacker will kill her after raping her. *Id.* The Presbyterian Church USA disagrees, since it holds that the rape victim is morally required to give up her life rather than use a gun to menace the life of her attacker. As its representative, Reverend Kathy Young, the director of its Criminal Justice Program, recently testified before Congress "[t]he General Assembly [of the Presbyterian Church USA] has declared in the context of handgun control and in many other contexts, that it is opposed to 'the killing of anyone, anywhere, for any reason.'" *Legislation to Modify the 1968 Gun Control Act: Hearings before the Subcomm. on Crime of the House Comm. on the Judiciary*, 99th Cong., 2nd Sess. 128 (1985-86).

As Reverend Young took care to emphasize, the Church does not object to long guns because it assumes that they are not to be used in self-defense but only "by sports people;" conversely, handguns must be prohibited because "[t]here is no other reason to own a handgun (that we have envisioned, at least) than to kill someone with it." *Id.* For the similar pronouncement of the Union of American Hebrew Congregations, see *id.* at 121-25.

<sup>19</sup> The moral equivalency of calling the police and of defending oneself was apparent to Thomas Hobbes. T. HOBBS, LEVIATHAN ch. 13 (1651). Of course he could not have offered this precise equation since he lived before the institution of police in England. But an alternative Professor Wills recommends, the use of locks, did exist in Hobbes' time and he had no difficulty recognizing its equivalency to arms in addressing arguments like Professor Wills'. Those who in theoretical discussions decry Hobbes' characterization of man as an insult to human nature, implicitly affirm the characterization when they safeguard themselves by keeping arms and by locking their homes and strong boxes "against their own neighbors." Washington Star, Jan. 18, 1981. Nor is gun ownership the only example of the distrust of, and hostility "against[,] their own neighbors" that so exercises Professor Wills. Such feelings are equally evident when people move from high- to low-crime areas, thereby choosing neighbors whom they feel they need not fear. That example, in turn, suggests a question about the relationship between morality, privilege, and obliviousness to the situation of the disadvantaged: does the good fortune that allows Professor Wills to live in a peaceful suburb like Evanston make him morally superior to those who, living on Chicago's South Side, must be prepared to defend their families from attack by "neighbors" they too would eschew if they could afford to do so? Cf. Silver & Kates, *Self Defense, Handgun Ownership and the Independence of Women in a Violent Sexist Society*, in RESTRICTING HANDGUNS 147-50 (D. Kates ed. 1979).

<sup>20</sup> See, for example, the statement of former California Governor Edmund G. "Pat" Brown, Sr., Chairman of the National Commission on Reform of federal Criminal Laws, appearing before a subcommittee of the Senate Judiciary Committee in 1971 to assail defensive gun ownership as a manifestation of exaggerated, unrealistic public fears of crime. (In addition, of course, he advanced lines of argument which retain greater credence today. See *infra* notes 41-43 and accompanying text.) "Saturday Night Special" *Handguns: Hearings on S. 2507 Before the Subcomm. to Investigate Juvenile Delinquency of the Senate Comm. on the Judiciary*, 92nd Cong., 1st Sess. 55-56 (1971). See also the assertion that "[s]tudies [show] ... that the likelihood of injury or death during the course of a burglary is minimal." M. YEAGER WITH J. ALVIANI & N. LOVING, HOW WELL DOES THE HANDGUN PROTECT YOU AND YOUR FAMILY? 3 (1976) [hereinafter YEAGER] (citing, *inter alia*, G. NEWTON & F. ZIMRING, FIREARMS AND VIOLENCE IN AMERICAN LIFE 62 (1970) [hereinafter NEWTON & ZIMRING]). While his opposition to handgun ownership remains no less fervent

now be no more than a psych-jargon dressed expression of abhorrence of defensive gun ownership. But what paranoid literally conveys is a view that was common among American intellectuals up to about a decade ago. In that view, the extent of crime had been vastly exaggerated as a result of public hysteria; crime was neither increasing nor dangerous nor pervasive enough to justify being armed. Such a precaution so far exceeded the real level of danger as to be an irrational overreaction.<sup>21</sup> Thus, it may be useful to compare defensive gun ownership to another kind of precaution that is generally deemed sensible. Conventional wisdom considers homeowners who buy earthquake insurance not paranoid but prudent, especially in California, even though such insurance runs at least \$2.00 per \$1,000.00 valuation, or \$300.00 annually (for a middle class dwelling costing about \$150,000.00 at California prices).<sup>22</sup> Over a ten year period the homeowner will pay \$3,000.00 in earthquake insurance premiums. In contrast, a used Smith & Wesson .38 special revolver, which will last forever with proper maintenance, costs perhaps \$150.00. Yet the likelihood of an average American household (much less one in a high crime area) suffering burglary or robbery over that period is roughly ten times greater than the chance of injury from all natural disasters (such as flood, earthquake, hurricane, or tornado) combined.<sup>23</sup>

Can defensive gun ownership be deemed an irrational overreaction if it is reasonable to pay twenty times as much to insure against a danger less than one tenth as likely? The gun owner might even argue that his weapon is a better investment in that it may actually avert the anticipated harm while insurance only recoups its costs. Some may object that insurance is not comparable to a gun since insurance always pays off, but whether gun ownership protects against crime is a matter of controversy. While this may be true, it does not suggest that gun (pg.122) owners are paranoid. If the empirical evidence discussed *infra* proves the gun owner's faith in the weapon's protective efficacy to be wrong, then wrong is what it is—not paranoid. That gun ownership does not represent so exaggerated a perception of the crime problem as to constitute irrational overreaction is made evident by the now well accepted view that crime makes life significantly more dangerous in the United States than it is in many other countries.<sup>24</sup> Moreover, if fear of crime equates to paranoia, why then does the mental health of gun owners actually appear to be superior to that of non-owners? Because gun owners feel more confident about their ability to deal with crime, studies find them less frightened of crime than are non-gun owners living in the same areas.<sup>25</sup>

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today, Professor Zimring's views on the dangers of home intrusion seem to have changed radically. *See, e.g.,* Zimring & Zuehl, *Victim Injury and Death in Urban Robbery: A Chicago Study*, 15 J. LEGAL STUD. 1, 8 (1986). *See also infra* note 147 and accompanying text.

<sup>21</sup> W. TUCKER, VIGILANTE: THE BACKLASH AGAINST CRIME IN AMERICA 39 (1985).

<sup>22</sup> Interview with Jack Martin, Insurance Agent (1986).

<sup>23</sup> Wright, *The Ownership of Firearms for Reasons of Self Defense*, in FIREARMS AND VIOLENCE 316 (D. Kates ed. 1984). A subsequent U.S. Department of Justice study concludes that over a 20 year period almost 75% of all American homes will be burglarized. *83% to be Victims of Crime Violence*, N.Y. Times, Mar. 9, 1987, at A13, col. 1.

<sup>24</sup> TUCKER, *supra* note 21, at 41 ("America now has the highest crime rate in the industrialized world."). *Cf.* D. SHIPLER, RUSSIA: BROKEN IDOLS, SOLEMN DREAMS 128-29, 231 (1983) (quoting an IZVESTIA journalist suggesting that if Russian crime statistics were sensationalized, or even published at all, "there would be as much fear [in Moscow] as there is in New York").

<sup>25</sup> *See generally* Thompson, Bankston, Thayer-Doyle & Jenkins, Single Female Headed Households, Handgun Possession and the Fear of Rape (1986) (paper presented at the Annual Meeting of the Southern Sociological Society) (available from the authors at the Department of Sociology, La. State U., Baton Rouge); DeFronzo, *Fear of Crime and Handgun Ownership*, 17 CRIMINOLOGY 331 (1979). UNDER THE GUN, *supra* note 4, at 120, describes lesser fear of crime as one of the few significant differences between the personalities of gun owners and non-owners.

One difficulty in evaluating findings of lesser fear of crime among gun owners is that these may not be entirely independent of the phenomenon that areas with large gun ownership tend to have less crime to fear. *See, e.g.,* Bordua, *Firearms Ownership and*

Despite the benefits of lessened fear to gun owners, for society in general what is unquestionably more important is the role guns play—some people believe it causative—in about 33,000 suicides, accidents, and murders annually.<sup>26</sup> Thus, regardless of any fear reductive effect, gun ownership may be contra-indicated, particularly for people (pg.123) in the high-risk groups for gun abuse.<sup>27</sup> Once again, though, the desirability of a universal gun ban, or of any other particular level of restriction, involves issues far beyond the scope of this article.

### *B. The Police as a Source of Personal Protection for Individual Citizens*

Another possible rationale for classifying defensive gun ownership as paranoid is because the existence of a professional police force renders personal self defense obsolete. Regrettably, this exaggerates the factual effects of policing and totally misstates its function in law and theory, as plaintiffs who attempt to sue for non-protection have found.<sup>28</sup> Doubtless the deterrent effect of

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*Violent Crime: A Comparison of Illinois Counties*, in *THE SOCIAL ECOLOGY OF CRIME* 156 (J. Byrne & R. Sampson ed. 1986); Eskridge, *Zero-Order Inverse Correlations between Crimes of Violence and Hunting Licenses in the United States*, 71 *SOC. & SOC. RES.* 55 (1986).

<sup>26</sup> For a particularly eloquent indictment of the gun in this respect, see former U.S. Attorney General Ramsey Clark's *CRIME IN AMERICA* 90 (1971). Current statistical breakdowns on handgun homicide, suicide, and fatal accidents are given *infra* note 78 and accompanying text.

At the insistence of two reviewers of this article, I hasten to add two caveats on the subject of suicide. First, some people deem suicide not an evil, but simply a matter of personal choice. It might even be deemed hubris for lesser mortals to presume to judge a course deemed appropriate in their own circumstances by, *inter alia*, Socrates, Demosthenes, Hannibal, Cleopatra, Clive, Castlereagh, Virginia Woolf, Robert LaFollette, Jr., and Ernest Hemingway. Second, common sense and cross cultural "data show that people will find a way to commit suicide regardless of the availability of firearms." Danto, *Firearms and their Role in Homicide and Suicide*, 1 *LIFE THREATENING BEHAVIOR* 10, 14 (1971) (noting that many countries where guns are effectively unavailable have far higher suicide rates than ours). Even strongly anti-gun analysts find little reason to quarrel with this. *Cf.* Newton & Zimring, *supra* note 20, ch. 6.

<sup>27</sup> See, e.g., Cook, *The Role of Firearms in Violent Crime: An Interpretative Review of the Literature*, in *CRIMINAL VIOLENCE* 269 (M. Wolfgang & N. Weiler eds. 1932) [hereinafter Cook, *CRIMINAL VIOLENCE*]. "A gun becomes involved in a fatal accident through misuse. [Unlike the general gun owning population, those] who cause such accidents are disproportionately involved in other accidents, violent crime and heavy drinking." *Id.*

As might be expected when such characteristics prevail in the high risk group for fatal gun accidents, they also prevail among those who intentionally misuse weapons. It has been observed that gun accident perpetrators strikingly resemble murderers: both groups exhibit singular irresponsibility and indifference to human life and welfare (even their own) as evidenced by life histories of serious felony, alcohol and drug abuse, automobile and other dangerous accidents, and often irrational assaults on acquaintances, relatives, and even strangers. Compare POINT BLANK *supra* note 5, at ch. 4, with FIREARMS AND VIOLENCE, *supra* note 5, at 145. Kleck suggests that the pertinent inquiry about one who displays such characteristics is not whether he will kill himself or someone else, but when he will eventually manage to do so. See also Kleck, *Policy Lessons from Recent Gun Control Research*, 49 *LAW & CONTEMP. PROBS.* 35, 40-41, 59-60 (1986) [hereinafter *Policy Lessons*] (recommending that gun laws focus on such high-risk owners, and seek to deprive them of all guns, not just handguns).

But gun accidents and murders differ "rather dramatically" from gun suicides whose circumstances and perpetrators closely parallel those characterizing the general population. Cook, *CRIMINAL VIOLENCE* 269, 270-71, *supra*; Danto, *Firearms and Violence*, 5 *INT'L. J. OFFENDER THER.* 135 (1979); Danto & Danto, *Jewish and Non-Jewish Suicide in Oakland County, Mich.* (1981) (paper delivered at the annual meeting of the American Association of Suicidology).

<sup>28</sup> See, e.g., *Calogrides v. City of Mobile*, 475 So.2d 560 (Ala. 1985) (quoting *Weutrich v. Delia*, 155 N.J. Super. 324, 326, 382 A.2d 929, 930 (1978) ("a public entity such as a municipality is not liable in tort for its failure to protect against the criminal propensity of third persons"); *Morris v. Musser*, 84 Pa. Commw. 170, 478 A.2d 937 (1984); *Morgan v. District of Columbia*, 468 A.2d 1306 (D.C. 1983); *Davidson v. City of Westminster*, 32 Cal.3d 197, 185 Cal. Rptr. 252, 649 P.2d 894 (1982); *Chapman v. City of Philadelphia*, 290 Pa. Super. 281, 434 A.2d 753 (1981); *Sapp v. City of Tallahassee*, 348 So.2d 363 (Fla. Dist. Ct. App. 1977); *Simpson's Food Fair v. City of Evansville*, 149 Ind. App. 387, 272 N.E. 2d 871 (Ct. App. 1971); *Silver v. City of Minneapolis*, 284 Minn. 266, 170 N.W.2d 206 (1969); *Riss v. City of New York*, 22 N.Y.2d 579, 293 N.Y.S.2d 897, 240 N.E.2d 860 (1968); *Keane*

professional policing helps assure that many will never require personal protection. But for those who do need such protection, the fact is that the police do not function as bodyguards for individuals.<sup>(pg.124)</sup>

Rather, the police function to deter crime in general by patrol activities and by apprehension after the crime has occurred. If circumstances permit, the police will protect a citizen in distress. But they are not legally duty bound to do even that, nor to provide any direct protection, no matter how urgent a distress call they may receive.<sup>29</sup> *A fortiori* the police have no responsibility to, and generally do not, provide personal protection to private citizens who have been threatened.

Typical of cases enunciating the non-responsibility of the police for protecting individual citizens is *Warren v. District of Columbia*<sup>30</sup> in which three rape victims sued the city and its police department. Two of the victims were upstairs when they heard men who had broken in downstairs attacking their roommate. After half an hour they assumed the police must have arrived in response to their repeated phone calls and went to check on their roommate. In fact, their calls had somehow been lost in the shuffle while the intruders beat their roommate into silent acquiescence. So when the roommates went downstairs, as the court's opinion graphically describes it, "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 for the next fourteen hours.<sup>31</sup>

The court exonerated the District of Columbia and its police, as was clearly required by 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>32</sup>

As the phrase "fundamental principle of American law" suggests, this holding is not some legal aberration unique to the District of Columbia. It is universal, being enunciated by formal statute as well as judicial decision in many states.<sup>33</sup> Nor is it simply a cynical ploy for government to avoid just liability. The proposition that individuals <sup>(pg.125)</sup> must be responsible for their own immediate safety, with police providing only a general deterrent, is inherent in any society. Consider the matter just in terms of the number of New York City women who seek police protection each year. 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, responding to emergency calls, and so on.<sup>34</sup> Given what New York courts have called

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v. City of Chicago, 98 Ill. App. 2d 460, 240 N.E.2d 321 (1968). *See also* Bowers v. DeVito, 686 F.2d 616 (7th Cir. 1982) (no federal constitutional requirement that state or local agencies provide sufficient police protection).

<sup>29</sup> *See Calogrides*, 475 So. 2d 560.

<sup>30</sup> 444 A.2d 1 (D.C. 1981).

<sup>31</sup> *Id.* at 2.

<sup>32</sup> *Id.* at 4. Compare *Chambers-Castanes v. King County*, 100 Wash.2d 275, 669 P.2d 451 (1983), holding that a special duty could arise as an exception to the non-liability principle where the plaintiffs alleged not just mere general reliance on the police, but that plaintiffs were dissuaded from taking steps to protect themselves because when they called for police assistance they were specifically assured that help was on its way.

<sup>33</sup> CAL. GOV'T CODE §§ 821, 845, 846 (West Supp. 1991) and 85 ILL. REV. STAT. para. 4-102 (1987) construed in *Stone v. State*, 165 Cal. Rptr. 339, 106 Cal. App. 3d 924 (Ct. App. 1980) and *Jamison v. City of Chicago*, 48 Ill. App. 567 (App. Ct. 1977) respectively. *See generally* 18 McQUILLIN ON MUNICIPAL CORPORATIONS § 53.80 (3d ed. 1989); *supra* notes 28-31; *infra* notes 34, 35; 46 ALR 3d 1084.

<sup>34</sup> Silver & Kates, *Handgun Ownership, Self-defense and the Independence of Women in a Violent, Sexist Society*, RESTRICTING HANDGUNS 144-47 (D. Kates ed. 1979). Riss, 293 N.Y.S.2d 897; Silver, 284 Minn. 266; Wong v. City of Miami, 237 So.2d 132 (Fla. 1970) (all emphasizing the need for judicial deference to administrators allocating scarce police resources as a reason for denying liability for failure to protect).

"the crushing nature of the burden,"<sup>35</sup> the police cannot be made responsible for protecting the individual citizen. Providing such protection is up to the threatened individual, not the police.

### C. "Vigilantism" and Related Concepts

In tandem with anti-gun disdain for armed self-defense,<sup>36</sup> the common misunderstanding that the police exist to protect individuals has given rise to an elusive, but frequently expressed, attitude that equates gun use in defense of self or others to "vigilantism." A striking facet of this attitude is that it not only outweighs but even reverses the approval normally accorded Good Samaritans. In a study of those who rescued crime victims and/or arrested their attackers, *Psychology Today* disapprovingly characterizes eighty-one percent of these Good Samaritans as those who "own guns and ... 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>37</sup> Similarly, an anti-gun survey classifies gun owners as "violence prone" based on positive responses to questions about the legitimacy of using force in order to (pg.126) stop a crime in progress or rescue its helpless victim.<sup>38</sup> Further, the editor of a book on the legal status of Good Samaritans begins with the question:

[a]re we to encourage the ordinary citizen to take direct action in the prevention of crime or the apprehension of criminals, after centuries of social development clearly pointing toward the elimination of vigilante action and the concentration of responsibility in the hands of public officials?<sup>39</sup>

Implicit in the foregoing quotation is a rough definition of vigilantism: though Good Samaritanism is highly creditable in other contexts, it somehow becomes "vigilante action" if it involves "the ordinary citizen" in "the prevention of crime or the apprehension of criminals...."<sup>40</sup> As with Professor Wills' views,<sup>41</sup> the underlying concept seems to be that the defense of citizens is so exclusively the job of the police that it is a usurpation for ordinary citizens to defend themselves or each other. In his critically acclaimed book *CRIME IN AMERICA*, former Attorney General Ramsey Clark denounces gun ownership for self-defense on two apparently related grounds: first, that it is atavistic and uncivilized, creating "anarchy, not order under law—a jungle where each relies on

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<sup>35</sup> *Weiner v. Metropolitan Transit Authority*, 55 N.Y.2d 175, 182, 448 N.Y.S.2d 141, 144, 433 N.E.2d 124, 127 (App. Div. 1982).

<sup>36</sup> See *supra* note 18 and accompanying text. See also *infra* notes 37 and 46. But it bears emphasis by reiteration that the term "anti-gun" is not used here to describe mere support for gun control; rather it is used only in its most literal sense: cultural or moral revulsion against guns and their owners, and concomitantly against gun use in self-defense. It also bears emphasis that most Americans are not anti-gun in this sense, yet are "pro-control" in perceiving a need for rational control of deadly weaponry. See *supra* note 9 and accompanying text.

<sup>37</sup> Huston, Geis & Wright, *The Angry Samaritans*, *PSYCHOLOGY TODAY* 64, June 1976. This 81% figure was about 250% greater than the 33% of the population who then owned guns. See *POINT BLANK*, *supra* note 5 at ch. 2.

<sup>38</sup> Williams & McGrath, *Why people Own Guns*, 26 J. OF COMM. 22 (1976); Lizotte & Dixon, 93 AM. J. SOC. 383 (1987) (gunowners exhibit approval of defensive violence—protection for crime victims, not violence toward dissenters or police brutality). Cf. *UNDER THE GUN*, *supra* note 4, at 122 ("[t]here is no evidence suggesting" that gunowners are "an especially unstable or violent or maladapted lot; their 'personality profiles' are largely indistinct from the rest of the population.") But see *supra* note 25; *infra* note 129 and accompanying text.

<sup>39</sup> *THE GOOD SAMARITAN AND THE LAW* (J. Ratcliffe ed. 1966).

<sup>40</sup> *Id.*

<sup>41</sup> See *supra* note 16 and accompanying text.

himself for survival;" and second, that it both usurps a state prerogative and is a reproach to our polity for gun owners to appropriate the right to defend themselves because "[a] state in which a citizen needs a gun to protect himself from crime has failed to perform its first purpose."<sup>42</sup>

For all its appeal to refined and high-minded but uncritical readers, such an attitude lacks practicality in application. How does society benefit if, instead of shooting the ex-husband who breaks into her house, a woman allows herself to be strangled because the civilized thing to do is to wait for him to be arrested for her murder? Far from advancing the cause of rational gun control, such attitudes actually retard it by creating "straw men" which aid the gun lobby in diverting (pg.127) attention from serious arguments for control. Unfortunately, such extreme anti-gun attitudes seem to have played a major part in shaping the ideology and rhetoric of the gun control movement and have particularly influenced its analysis of defensive gun use.

Supposedly pragmatic works also appear subtly colored by the unstated but unshakable belief that even legal defensive gun use represents vigilantism or some other social wrong. Consider the failure to differentiate men from women in noting that over a fifteen year period "only 23 burglars, robbers, intruders ... were killed by guns in the hands of persons who were protecting their homes," and that "[d]uring the same interval, *six times* as many fatal accidents occurred in the home."<sup>43</sup> This admonition misportrays domestic homicide as if it were all murder, ignoring the fact that approximately fifty percent of interspousal homicides are committed by abused wives.<sup>44</sup> To understand domestic homicide, it is necessary to distinguish unprovoked murder from lawful self-defense against homicidal attack—a distinction which happens to correlate closely with the distinction between husband and wife.

Murderers generally have long prior histories of criminal and other dangerously aberrant behavior. This is particularly true in cases of domestic homicide where it is often not an isolated occurrence or outbreak, but rather is the culminating event in a pattern of interpersonal abuse, hatred, and violence that stretches back well into the histories of the parties involved. The day-to-day reality is that most family murders are prefaced by a long history of assaults.<sup>45</sup> Not surprisingly, (pg.128) when

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<sup>42</sup> CLARK, *supra* note 26, at 88. *See also* *Guns and the Civilizing Process*, Wash. Post, Sept. 26, 1972, at A16, col. 1; Duncan, *Gun Deaths*, Christian Century, Apr. 25, 1979, at 471, col. 2; the references cited *supra* notes 12, 16 and 18.

<sup>43</sup> YEAGER, *supra* note 20, at 4. *See also* J. ALVIANI & W. DRAKE, *HANDGUN CONTROL: ISSUES AND ALTERNATIVES* 8 (1975). Virtually identical formulations as to "domestic homicide" appear in other anti-gun discussions of self-defense. *E.g.*, Rushforth, Hirsch, Ford & Adelson, *Violent Death in a Metropolitan County*, 297 NEW ENG. J. MED. 531, 537 (1977); Drinan, *Gun Control: The Good Outweighs the Evil*, 3 CIV. LIBERTIES REV. Aug.-Sept. 1976, at 44, 49. *See also* Shields, *supra* note 15, at 49-53, 124-25.

<sup>44</sup> U.S. BUREAU OF JUSTICE STATISTICS, *FAMILY VIOLENCE*, table 1 (April 1984) [hereinafter *FAMILY VIOLENCE*]. *See generally* Straus, *Domestic Violence and Homicide Antecedents*, 62 BULL. N.Y. ACAD. MED. 446 (1986).

<sup>45</sup> UNDER THE GUN, *supra* note 4, at 193 n.3. *See generally* Howard, *Husband-Wife Homicide: An Essay from a Family Law Perspective*, 49 LAW & CONTEMP. PROB. 63, 69-74 (1986) (the discussion beginning at 74 notes that a wife who kills her husband is much more likely to be trying to avoid a beating than culminating her own pattern of previous physical abuse against him). *Compare* Bruce-Briggs, *supra* note 4, at 40, decrying "[t]he calculation of family homicides and accidents as costs of gun ownership" because "[t]he 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." *Id.*

*See also supra* note 27 and accompanying text. The difference between the perpetrators of lawful self-defense homicides and murderers is actually minimized by the statistic that two thirds of the latter have at least one prior felony arrest record. In addition, a Kansas City study found that in the two years preceding 85% of domestic homicides, the police had been called to the scene at least once to stop an altercation; in 50% of the cases, the police had to appear five or more times. But because the police generally treat such incidents as "family affairs," few of them result in a felony arrest before the culminating incident in which death actually occurs. FIREARMS AND VIOLENCE, *supra* note 5, at 145 n.24.

we look at criminal violence between spouses we find that "[ninety-one percent] were *victimizations of women* by their husbands or ex-husbands ...."<sup>46</sup> Thus, the fifty percent of interspousal homicides in which husbands kill wives are real murders, but in the overwhelming majority of cases where the wives kill husbands, they are defending themselves or their children.<sup>47</sup> In Detroit, for instance, husbands are killed by wives more often than wives by husbands, yet men are convicted far more often. In fact, three-quarters of wives who killed their husbands were not even charged, prosecutors having found their acts lawful and necessary to preserve their lives or their childrens'.<sup>48</sup>

Even in a violent society, the number of homicidally irrational aberrants is so small that few of us have such friends, acquaintances, or relatives. Some people do, however, have that misfortune. It is, of course, tragic when, for instance, an abused woman has to shoot to stop a current or former boyfriend or husband from beating her to death. Still, it is highly misleading to count such incidents as costs of gun ownership by misclassifying them with the very thing they prevent: murder between "family and friends." However atavistic or unpatriotic Ramsey Clark may deem such incidents, they are not vigilantism and (pg.129) they are not costs. Rather, they are palpable benefits of defensive gun ownership from society's and the victims' points of view.

Both Anglo-American and foreign law affirm what Professor Wechsler called "the universal judgment that there is no social interest in preserving the lives of the aggressors at the cost of those of their victims."<sup>49</sup> While medieval common law looked askance at the social value of what it called homicide *se defendendo*,<sup>50</sup> later thinkers from Grotius, Locke, Montesquieu, Beccaria, and the Founding Fathers on through Bishop, Pollock, Brandeis, Perkins, and beyond have deemed self defense unqualifiedly beneficial to society.<sup>51</sup> It is only the unnecessary or excessive use of force that

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<sup>46</sup> Figures reported for the period 1973-81 in FAMILY VIOLENCE, *supra* note 44, at 4.

<sup>47</sup> See, e.g., Saunders, *When Battered Women Use Violence: Husband Abuse or Self-Defense?*, 1 VIOLENCE AND VICTIMS 47, 49 (1986); Barnard, *Till Death Do Us Part: A Study of Spouse Murder*, 10 BULL. AM. ACAD. PSYCHIATRY & LAW 271 (1982); D. LUNDE, *MURDER AND MADNESS* 10 (1975) (in 85% 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* 278 (1988) ("[W]hen women kill, their victims are ... most typically men who have assaulted them."); E. Benedek, *Women and Homicide*, in B. DANTO, J. BRUHNS & A. KUTSCHER, *THE HUMAN SIDE OF HOMICIDE* 150 (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; absent imminent danger of death or great bodily harm, she must submit to beating rather than resist with deadly force. *People v. Jones*, 12 Cal. Rptr. 339, 191 Cal. App. 2d 478 (Ct. App. 1961). See generally Kates & Engberg, *Deadly Force Self Defense Against Rape*, 15 U.C. DAVIS L. REV. 873, 876-77 (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 beatings until the final one. Howard, *supra* note 45.

<sup>48</sup> DALY & WILSON, *supra* note 47, at 15, and table 9.1 at 200.

<sup>49</sup> Wechsler, *A Rationale of the Law of Homicide*, 37 COLUM. L. REV. 701, 736 (1937).

<sup>50</sup> *Se defendendo* referred only to homicide committed in defense against an attack growing out of a quarrel or feud. When a civilian (there were no police, but soldiers performed occasional police duties) had to kill a robber, rapist, or other felon the common law strongly approved. See Kates, *The Second Amendment: A Dialogue*, LAW & CONTEMP. PROBS., Winter 1986, at 143, 147-48 n.24.

<sup>51</sup> See, e.g., *supra* note 47; F. POLLOCK, *A TREATISE ON THE LAW OF TORTS* 201 (New Amer. ed. 1894); PERKINS, *CRIMINAL LAW* 1003-04 (2d ed. 1969) (citing Bishop). For an innovative modern application of game theory to justify the legal principles of deadly force self defense as a disincentive to criminal behavior, see Polsby, *Reflections on Violence, Guns and the Defensive Use of Lethal Force*, LAW & CONTEMP. PROBS., Winter 1986, at 89.

Brandeis went even further, following the founding Fathers view of self defense as basic to the character of a free man. Compare Shalhope, *The Ideological Origins of the Second Amendment*, 69 J. AM. HIS. 599 (1981) and MICH. L. REV., *supra* note 5, at 229-32 with L. BRANDEIS, *THE BRANDEIS GUIDE TO THE MODERN WORLD* 211, 212 para. 438 (A. Lief ed. 1941).

is harmful and illegal. Furthermore, the wrongfulness of such misuse of force is qualitatively the same whether committed by citizens or by the police.

Vigilantism must not apply to lawful defensive use of force by anyone, but, at the same time, it must condemn all excessive or unnecessary uses of force for the purpose of imposing summary punishment, whether the vigilantes be citizens or police. The equation of vigilantism with lawful use of defensive force by a civilian fundamentally misinterprets the concept. In fact, vigilantism is force illegally used by anyone, whether civilian or government official, in order to impose summary punishment without due process of law. The unstated correlate of defining vigilantism as civilian action is to trivialize police use of excessive or unnecessary force.

With the issue of the term vigilantism thus properly understood, concerns about victim misuse of force can be seen in proper perspective. While qualitatively the evil of vigilantism is the same whether committed by civilians or police, quantitatively only police vigilantism is a major social problem today. In contrast, civilian vigilantism appears (pg.130) to be quite rare—perhaps because officials are alert to the need for vigor in suppressing it. Civilians' claims to have used deadly force defensively receive very close examination, with prosecution likely in the event of wrongdoing. Unfortunately, comparable scrutiny is rare when police misuse of deadly force is suspected; several studies suggest that a high proportion of police homicides are unjustified,<sup>52</sup> yet officers are rarely prosecuted even for the clearly wrongful use of deadly force.<sup>53</sup> These findings are buttressed by the extensive evidence adduced in civil rights cases like *Webster v. City of Houston*,<sup>54</sup> in which it was held to be a de facto municipal policy for each officer to carry an untraceable "drop gun" to be planted on those he might shoot (in order to falsely validate the officer's later claim of self defense). It is perhaps also significant that a comparison of police to civilian shootings of alleged criminals shows police to be 5.5 times more likely to have shot an innocent person in the belief that he was a criminal.<sup>55</sup> This is not to deny that civilian gun misuse is a legitimate subject of concern. The point is only that current legal sanctions appear generally sufficient to deter civilian vigilantism. So, the principal problem in this area is effective oversight of police use of force.

### III. DEFENSIVE USE OF HANDGUNS

#### A. A Pro-gun Analysis

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<sup>52</sup> See Geller, *Deadly Force: What We Know*, 10 J. POLICE SCI. & AD. 151 (1982) (discussing studies of police homicides).

<sup>53</sup> Based only on the evidence gathered by the Chicago Police Department's own internal investigations, Professor Harding found 13% of killings by Chicago officers to be "apparent prima facie cases of manslaughter or murder" and "[s]everal other incidents presented factual anomalies sufficient to suggest that a thorough investigation might well have revealed such prima facie cases." Harding, *Killings by Chicago Police, 1969-70: An Empirical Study*, 46 S. CAL. L. REV. 284 (1973). Yet only one of these officers were prosecuted. Departmental reprimands were not given even where the shooting admittedly violated official policy (e.g., shooting through a door so that officer was unable to determine who he was targeting; shooting at or from moving vehicle so as to endanger innocent bystanders). See also Geller & Karales, *Shootings of and By Chicago Police: Uncommon Crises, Part I: Shootings by Chicago Police*, 72 J. CRIM. L. & CRIMINOLOGY 1813 (1981). Though Chicago has a long and unenviable reputation for such abuses, they are not unique to Chicago; a Police Foundation study found a pattern of whitewashing killings by police in such diverse cities as Birmingham, Detroit, Indianapolis, Kansas City, Missouri, Oakland, Portland, Oregon, and Washington, D.C. C. MILTON, POLICE USE OF DEADLY FORCE (1977).

<sup>54</sup> 689 F.2d 1220 (5th Cir. 1982). See also *Hampton v. Hanrahan*, 600 F.2d 600 (7th Cir. 1979); *Goode v. Rizzo*, 506 F.2d 542 (3rd Cir. 1974).

<sup>55</sup> Silver & Kates, *supra* note 34, at 154-55.

Earlier in this article, the disproportionate attention given to anti-gun analyses was attributed to their virtual monopoly of the scholarly (pg.131) literature until neutral criminologists began to discuss defensive firearms use in the last decade.<sup>56</sup> Yet at least pseudo-scientific analyses have sometimes appeared in material written for gun owners and their sympathizers. One example is the apparently self-published book MYTHS ABOUT GUNS by James E. Edwards,<sup>57</sup> whom the book's rear jacket describes as a lawyer and former mayor in Coral Gables, Florida. In bold red letters the front jacket proclaims, "Theme of the book: More Guns ... Less Crime," and describes the book as "[a] concise, indexed, documented, pro-gun book of ready reference which explodes the main dogmas and myths of the anti-gun fanatics. Useful for debates, legislative hearings, letters to the editor and fighting bad gun laws."

Mr. Edwards energetically pursues that theme, offering three tables and two graphs (all reflecting the same data base) to prove that "as shown by official studies firearms ownership and the commission of crime ... gun ownership by the average citizen does not promote crime but reduces crime."<sup>58</sup> Each analysis compares the percentage of households in the East, South, Mid-West, and West that in a single 1968 survey admitted owning either a handgun or a gun of any kind to the rates of violent crime, property crime, and all crime in those regions in the years 1968, 1972, and 1976.<sup>59</sup> Unfortunately such comparisons (pg.132) stumble on the following methodological obstacles: 1) radical changes in regional patterns of gun ownership indicated by mid-1970s survey data;<sup>60</sup> 2) use of survey

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<sup>56</sup> My derision for the gun lobby's intellectual philistinism is not intended to deny its devotees' occasional contributions to scholarly literature. Modern Second Amendment interpretation largely began with an article by NRA national board member David I. Caplan, *Restoring the Balance: The Second Amendment Revisited*, 5 FORDHAM URB. L.J. 31 (1976). Invaluable contributions have been made by another pro-gun activist, Professor Stephen Halbrook, whose research into the writings of the Founding Fathers and the philosophical tradition they represented have compelled the agreement even of historians who find his argumentation simplistic and transparently partisan. See Fussner, Book Review, 3 CONST. COMMENTARY 582 (1986), Malcolm, Book Review, 54 GEO. WASH. L. REV. 452 (1986) (both reviewing S. HALBROOK, "THAT EVERY MAN BE ARMED": THE EVOLUTION OF A CONSTITUTIONAL RIGHT (1984)). My own debate with Professor Halbrook appears in 49 LAW & CONTEMP. PROBS. No. 1, at 151 (1986).

In the area of criminology, the NRA's resident scholar Dr. Paul Blackman has presented papers at numerous scholarly meetings in the 1980s. One paper particularly helpful here is a paper co-authored with NRA Assistant General Counsel Richard Gardiner called *Flaws in the FBI Uniform Crime Reports Regarding Homicide and Weapons Use* (1986) (presented at the annual meeting of the American Society of Criminology). This paper is typical of Blackman's work in that it concentrates on flaws in the FBI Uniform Crime Reports relating to issues that disserve the gun lobby's interests; flaws that might distort the crime picture in ways that aid the gun lobby go unmentioned. See discussion *infra* note 72.

<sup>57</sup> J. EDWARDS, MYTHS ABOUT GUNS (1978).

<sup>58</sup> *Id.* at 7. For comparable assertions see B. DAVIDSON, TO KEEP AND BEAR ARMS 175 (2d ed. 1979) and W. MCBIRNIE, WHY GUN CONTROL LAWS CANNOT REDUCE CRIME BUT CAN REDUCE YOUR SECURITY! 13 (Community Churches of America pamphlet).

<sup>59</sup> EDWARDS, *supra* note 57.

<sup>60</sup> The following table contains the 1968 regional survey data on gun ownership (which Mr. Edwards uses in comparisons to regional crime figures for years as late as 1976) to regional gun ownership data in a July 6, 1975 Gallup survey release.

	1968		1975	
	Handguns	All guns	Handguns	All guns
EAST	15%	33%	11%	31%
WEST	29%	49%	19%	40%
MIDWEST	20%	51%	15%	46%

data from national regions resulting in "aggregated units too large and internally heterogeneous for useful analysis;"<sup>61</sup> and 3) the sleight of hand Mr. Edwards uses to massage the data into supporting his argument.<sup>62</sup>

Above and beyond these problems is an even more basic error which deserves extended discussion because of its almost universal appearance when gun issues of any kind are analyzed by partisans on either side. This lies in two assumptions, the error of which ought to be apparent to anyone who has had an introductory course in social science. The first assumption is that a correlation between two phenomena is sufficient to prove that one has caused the other. This may be illustrated by the fact that Mr. Edwards is quite right about his "more guns ... less crime" correlation; indeed, it is supported by far stronger evidence than he himself presents.<sup>63</sup> But by the same token, there could probably be established an equally strong correlation between (pg.133) "more cows ... less crime." Before breaking into a song of praise to Bessie the Great Protector, it might be wise to ask whether this correlation represents anything beyond a spurious artifact of rurality: cows tend to be found in rural areas and crime does not. Of course the low per capita crime rates in rural America may be attributable to its high rates of gun ownership. But for the rational and dispassionate observer, more is required than the bald correlation between "more guns ... less crime."

The second false assumption is that, even where some basis exists for deducing causation from a correlation between two factors, one cannot blithely presume which is the cause and which is the effect according to a preexisting perspective. This may be illustrated by another frequently encountered, but erroneous, pro-gun argument: states which severely restrict handgun ownership have higher crime rates than less restrictive states.<sup>64</sup> However, studies do not consistently show that more restrictive areas in fact have more crime. Some studies show them with no more crime than less restrictive areas.<sup>65</sup> Even if the more restrictive areas were found to have more crime, other explanations may be equally or more plausible than the deterrent or self-defense effects of gun ownership in reducing crime. Professor Polsby, referring to such a finding by a respected scholar who is markedly less convinced of the value of gun ownership, notes:

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SOUTH	18%	59%	28%	58%
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<sup>61</sup> Bordua, *supra* note 25. Illustrative of the difficulties with Mr. Edwards' broad regional comparisons is Cook's observation that "the western region includes both the Pacific states and the mountain states; the former tend to be low and the latter very high in density of handgun ownership." Cook, *CRIMINAL VIOLENCE*, *supra* note 27, at 269. Thus, it might turn out that it was only the comparatively low gun ownership Pacific States that were low in crime, thereby refuting the point Mr. Edwards' tries to support.

<sup>62</sup> Mr. Edwards correctly notes that in all three comparison years, the East, though lowest in both handgun ownership and all-gun ownership, had generally much higher rates of violent crime, property crime, and all crime than either the Mid-West, the South, or the nation as a whole. But in order to claim that gun ownership reduces crime, Mr. Edwards was forced to shirk another comparison which equally appears from this data set: the West, with nearly twice the handgun ownership and nearly 50% more gun ownership overall than the East, had much more property crime and overall crime than the East in each of the comparison years.

<sup>63</sup> Bordua, *supra* note 25; Eskridge, *Zero-Order Inverse Correlations Between Crimes of Violence and Hunting Licenses in the United States*, 71 *SOC. & SOC. RES.* 55 (1986).

<sup>64</sup> See, e.g., Krug, *The Relationship Between Firearms Licensing Laws and Crime Rates*, 113 *CONG. REC.* 20060 (1967); Snyder, *Crime Rises under Rigid Gun Control*, *AM. RIFLEMAN*, 1969, at 54.

<sup>65</sup> See Cook, *infra* note 66; Magaddino & Medoff, *An Empirical Analysis of Federal and State Firearm Control Laws*, in *FIREARMS AND VIOLENCE* 225 (D. Kates ed. 1984); DeZee, *Gun Control Legislation: Impact and Ideology*, 5 *LAW & POL'Y Q.* 367 (1983); Lester & Murrell, *The Relationship Between Gun Control Statutes and Homicide Rates: A Research Note*, 4 *J. CRIME & JUS.* 145 (1981); Murray, *Handguns, Gun Control Laws and Firearm Violence*, 23 *SOC. PROBS.* 81, 88 (1975).

Although a study of the nation's largest cities suggests that the jurisdictions most restrictive of private gun ownership have the highest robbery rates, explanations for this phenomenon other than deterrence by the prospect of victim self-defense are conceivable. For instance, it is reasonable to assume that many jurisdictions have adopted stringent gun control laws to combat existing high rates of violence. Conversely, jurisdictions with low violence rates will have felt much less pressure to ban guns. Many studies suggest, however, that—for whatever reason—gun control laws do not succeed in reducing violence. If these studies are correct, a correlation would naturally be expected to develop between high violence rates and gun prohibition laws, as well as between low violence rates and looser restrictions on firearms, (pg.134) both because people who are criminally inclined would not be deterred in the former case by the probability that their victims would be armed and because the behavior of such criminals is not much affected by gun prohibition.<sup>66</sup>

Evaluation of the defensive utility of firearms requires consideration of evidence more directly relevant than inference from comparisons of regional crime statistics. Obtaining relevant evidence requires turning from pro- to anti-gun authors.

### *B. An Anti-gun Analysis*

Anti-gun authors provided the earliest attempts to analyze more directly relevant forms of evidence. Because the anti-gun views will be found even less persuasive under close scrutiny than those of the gun lobby, it is important to reemphasize the definitions with which this article began. The term anti-gun is not used here as a synonym for "pro-control," but rather in its literal sense of antagonism toward gun ownership. The term carries with it a morally or culturally based antagonism and an associated disdain for the right of self-defense. That antagonism underlies much of the argument for banning handguns based on the purportedly empirical claim that guns are useless for self-defense. It does not follow, however, that we must accede to gun lobby arguments against the need for rational control. The fact that handguns are useful no more exempts them from reasonable regulation than the fact that automobiles and innumerable other commodities are useful precludes reasonable regulation to minimize the likelihood of their being misused.<sup>67</sup>

The standard arguments against the utility of defensive gun ownership date back to the early part of the century. Even their more modern formulations were written at least a decade ago. Because directly (pg.135) relevant empirical evidence has been largely unavailable until recently, such arguments have tended to be speculative rather than empirically based. For example, it was, and is, argued that resistance is useless and dangerous because criminals are more ruthless, are better shots, or will have

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<sup>66</sup> Polsby, *Reflections on Violence, Guns and the Defensive Use of Lethal Force*, LAW & CONTEMP. PROBS., Winter 1986, at 89, 97-98 (citations omitted) (discounting a finding from Cook, *The Effect of Gun Availability on Robbery and Robbery-Murder: A Cross Section Study of 50 Cities*, 3 POL'Y. STUD. REV. ANN. 743, 776-78 (1979)).

<sup>67</sup> See *supra* notes 9, 42-46 and accompanying text. As I have suggested in debating the Second Amendment with the gun lobby, the fact that it guarantees responsible adults a right to keep a handgun for home defense does not preclude the vast majority of gun controls (i.e. those designed to keep guns from the criminal and the irresponsible rather than to disarm the ordinary citizen), nor does it preclude even more stringent regulation of the carrying of arms outside the home. Compare Kates, *supra* note 50, with S. Halbrook, *What the Framers Intended: A Linguistic Analysis of the Right to 'Bear Arms,'* LAW & CONTEMP. PROBS., Winter 1986, at 151 (presenting the counter argument of the NRA).

the drop on victims.<sup>68</sup> Where empirical evidence has been cited, it consists in idiosyncratic local statistics of self defense homicide, suggesting that gun use in self defense is a very uncommon phenomenon.<sup>69</sup> From this it is argued that reduced gun availability would confer great benefit at little corresponding cost because "[g]uns purchased for protection are rarely used for that purpose."<sup>70</sup> The following two subsections consider more recent empirical evidence of the defensive value of handguns.

### *C. Lawful Self Defense Homicides as an Index to Defensive Gun Use*

Anti-gun debate based on lawful homicide statistics provides better evidence of the extent of defensive gun use than pro-gun attempts to infer it from differences in regional crime rates. Still, lawful homicide figures as an index to overall defensive gun uses raise not only conceptual problems<sup>71</sup> but, more importantly, factual problems. In the vast (pg.136) majority of cases of defensive gun use, the outcome is not that criminals die but only that they are wounded or injured or that they are apprehended or scared off without being injured at all.<sup>72</sup> Thus, even if more broad based long term, geographically diverse figures on lawful homicide had been available before the 1980s, homicides constituted too small a proportion of overall defensive gun use to be a reliable index to the frequency of such use. One would certainly not measure the value of guns in police work by simply totaling the number of violent felons police kill. By the same token, lawful defensive homicides are not a fair measure of the overall defense value of gun ownership.

The anti-gun justification for using the idiosyncratic lawful homicide statistics is that, until recently, those have been the only available data from which the extent of civilian defensive gun use

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<sup>68</sup> See, e.g., Riley, *supra* note 2, at 497-99; Drinan, *Gun Control: The Good Outweighs the Evil*, 3 CIV. LIBERTIES REV. 44, 49 (1976); Clark, *supra* note 26, at 88; Hoffman, *Homicide by Means of Firearms*, in *OUTLAWING THE PISTOL* 22 (H. Wilson ed. 1925); McAdoo, *supra* note 1; W. MCADOO, *WHEN THE COURT TAKES A RECESS* 131 (1921); McAdoo, *Causes and Mechanisms of Prevalent Crimes*, 24 SCI. MONTHLY 415, 419 (1927); M. KAVANAGH, *THE CRIMINAL AND HIS ALLIES* ch. 25 (1927).

The partisan deceptiveness of both pro and anti-gun advocates is epitomized by the NRA's Contrasting explanation. Blackman, *The Armed Criminal in America*, AM. RIFLEMAN, Aug. 1985, at 34, 35, 78, notes what anti-gun advocates misleadingly omit: the most ruthless criminals are unlikely to be good shots since their crimes are generally committed (as their lives are lived) under the influence of one or even several debilitating intoxicants. Of course Blackman neglects to note the correlative implication that these particularly reckless, dangerous criminals will be less deterred than less dangerous criminals by the prospect that a victim may be armed with a gun. See *infra* note 165.

<sup>69</sup> See, e.g., NEWTON & ZIMRING, *supra* note 20, at 62-68 (relying on mid-1960s estimates by police officers in Detroit and Los Angeles).

<sup>70</sup> Meredith, *The Murder Epidemic*, SCIENCE 84, Dec. 1984, at 46. See generally *supra* notes 2, 3, *infra* note 71.

<sup>71</sup> Compare to Bruce-Briggs, *supra* note 4, describing the anti-gun argument from justifiable homicide statistics as "ingeniously specious" because:

[p]eople do not have "house guns" to kill burglars but to prevent burglaries. The measure of the effectiveness of self defense is not the number of bodies piled up on doorsteps but in the property that is protected. We have no idea how many burglars are challenged and frightened off by armed householders. And, of course, there is no way to measure the deterrent effect on burglars who know that householders may be armed.

*Id.*

Since Bruce-Briggs wrote his article in 1976, a considerable amount of evidence has been gathered concerning the matters addressed in the last two sentences quoted above.

<sup>72</sup> Cook, *The Case of the Missing Victims: Gunshot Woundings in the National Crime Survey*, 1 J. QUAN. CRIM. 91, 94-96 (calculates from a variety of empirical studies that almost six times as many people recover as die from a handgun or small caliber rifle wound). Kleck, having reached the same result from other data, adds that "[t]he use of guns to shoot criminals, however, represents only a small minority of the defensive uses of guns. Most incidents involve a gun being used only to threaten, apprehend, or shoot at a criminal, or to fire a warning shot, without killing or wounding any one." *Policy Lessons*, *supra* note 27, at 35, 44.

could be inferred. This does not excuse the misleading selection and manipulation of such data. For instance, it is well known (the point having been made often in anti-gun studies)<sup>73</sup> that householders rarely have the opportunity to use guns against burglars since burglars take care to strike when no one is home to shoot them. It was therefore misleading to cite the rarity of intruders being killed by householders as evidence that defense guns are rarely used under any circumstances. Also misleading was the citation of such statistics without mention<sup>74</sup> of the much higher incidence of other kinds of lawful defense homicides, such as "woman kills homicidal ex-boyfriend," "shopkeeper kills robber," and the like.<sup>75</sup> Similarly, it was highly misleading to cite incomplete Detroit, Los Angeles, and New York City figures of the number of criminals civilians were killing in the mid-1960s without (pg.137) mentioning the availability from the Chicago Police Department of complete and official figures showing that, for decades, the numbers of lawful defensive homicides by civilians had equaled the numbers by police and lately tended to outnumber them by as much as three to one.<sup>76</sup>

The effect of these and other statistical manipulations was to artificially minimize the incidence of lawful defensive homicides (therefore of inferable overall defensive gun use) in the anti-gun studies. Consider the now-discredited—though still widely cited—comparison that handgun accidents kill six times as many householders as householders kill burglars.<sup>77</sup> Based on this finding of an anti-gun study of Cleveland gun deaths, it might be thought that gun accidents must account for a substantial part of the yearly handgun death toll. Yet even nationwide the National Safety Council can identify an average of less than 300 accidental handgun fatalities annually as compared to approximately 6,000 handgun suicides and 6,000 to 9,500 handgun murders.<sup>78</sup> The actual ratio of fatal handgun accidents to lawful defensive killings is not six to one in favor of the former, but more

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<sup>73</sup> See, e.g., NEWTON & ZIMRING, *supra* note 20, at 62; YEAGER, *supra* note 20, at 3.

<sup>74</sup> See, e.g., Rushforth, Hirsch, Ford & Adelson, *Accidental Firearm Fatalities in a Metropolitan County (1958-73)*, 100 AM. J. EPIDEM. 499, 502 (1975).

<sup>75</sup> See *infra* notes 72, 83. The problem is exacerbated by the anti-gun practice of not just ignoring statistics of lawful defensive homicide involving ex-husbands, for example, but misclassifying such incidents as "domestic and acquaintance homicide," i.e. murder. See *supra* note 46 and accompanying text.

<sup>76</sup> See NEWTON & ZIMRING, *supra* note 20 (criticized by Silver & Kates, *supra* note 34, at 156). Regardless of the situation in Detroit during the mid-1960s, in 1920 such homicides comprised 26.6% of all Detroit homicide. Robin, *Justifiable Homicide by Police Officers*, in STUDIES IN HOMICIDE 295 n.3 (M. Wolfgang ed. 1967). In the years 1975 to 1980, the number of felons killed by civilians in Detroit outnumbered those killed by police by more than two to one. *Policy Lessons*, *supra* note 27, at 43.

<sup>77</sup> Rushforth, Hirsch, Ford & Adelson, *supra* note 74. See also NEWTON & ZIMRING, *supra* note 20, at 62; YEAGER, *supra* note 20, at 3.

<sup>78</sup> See generally UNDER THE GUN, *supra* note 4, at ch. 8; authorities cited *supra* note 19. For the incidence of murder/manslaughter with handguns, see FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS 10 (1982) (placing the number for that year at 8,474). But see *Policy Lessons*, *supra* note 21 [errata: note 27] (indicating that as many as 3,000 of these were lawful self defense). Figures for the level of handgun involvement in accidental deaths are for the years 1979 (when they were first broken out of the general gun death figure by the National Safety Council) to present. Kates, *Guns, Murders and the Constitution* 50 (monograph, Pacific Research Foundation) (1990).

The use of handguns for suicide is even more difficult to determine. They can definitely be identified as the weapon in only about 2,200 suicides per year, but the great majority of gun suicides cannot be attributed to a particular kind of firearm. Based on their proportion of gun-identifiable suicides, the anti-gun National Alliance Against Violence estimates the actual handgun suicide total per year at 6,600. NATIONAL ALLIANCE AGAINST VIOLENCE MANUAL FOR PUBLIC EDUCATION CAMPAIGN ON HANDGUN VIOLENCE, June 1983, at 32. This is consistent with the results of state level studies, as seen in Marrow & Hudson, *Accidental Firearms Fatalities in North Carolina, 1976-80*, 76 AM. J. PUB. HEALTH. 1120, 1122 (1986) (46% of gun suicides involved shotgun or rifle).

like one to three in favor of the latter.<sup>79</sup> While something unique about Cleveland might explain this 1800% deviation from the norm, a more (pg.138) plausible suggestion that has been made is that the number of accidents in Cleveland was inflated by the inclusion through misclassification of large numbers of handgun suicides.<sup>80</sup> In sum, the anti-gun attempts to minimize the extent of defensive gun use could not have been sustained by full and accurate description of even the sparse city-level lawful homicide data available when the various anti-gun studies were written.<sup>81</sup>

Subsequently, as such data have become available for other cities, and on state and national bases, the anti-gun argument has suffered further.<sup>82</sup> Though it does not publish them in its yearly Uniform Crime Reports, the FBI now collects national "justifiable homicide" figures which show that armed citizens annually lawfully kill more violent felons than do the police.<sup>83</sup> Yet even these figures underrepresent the full extent of lawful defensive homicide by fifty percent or more. The FBI statistics count as criminal any intentional killing whose legality was initially questioned, even those later ruled lawful.<sup>84</sup> Also, based (pg.139) on the obsolete distinction between "excusable" and "justifiable" homicide, the FBI excludes from the latter category any killing that occurred in defense of the defender's life. In other words, if a woman shoots an ex-boyfriend who is strangling her, or a contract killer hired by her husband, the FBI counts that as a criminal homicide (for statistical purposes only) because the attacker's immediate purpose was only to kill her. If, however, a merchant kills a robber or a woman kills a rapist, the FBI counts that as a justifiable homicide because the attacker's purpose was some crime other than homicide.<sup>85</sup> It is estimated that if all lawful

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<sup>79</sup> *Policy Lessons*, *supra* note 27, at 44.

<sup>80</sup> It is suggested in POINT BLANK, *supra* note 5, at ch. 4, that gun suicides are routinely misclassified as accidents (perhaps to spare the feelings of the deceased's family); for instance, an experienced medical examiner comments that he has never seen or heard of a death occurring "by accident" in cleaning a gun that did not turn out, on examination, to be either a suicide or a murder. As to the possible misclassification of suicides as accidents in Rushforth, Hirsch, Ford & Adelson, *supra* note 74, specifically, see the critique in MICH. L. REV., *supra* note 5, at n.277 and the references there cited. Compare the later article in which the same authors (without emphasis or making the obvious comparison) generate from the same sample statistics from which it may be calculated that civilians lawfully kill three times as many violent felons as do police. Rushforth, Hirsch, Ford & Adelson, *Violent Death in a Metropolitan County*, 297 NEW ENG. J. MED. 531, 533 (1977).

<sup>81</sup> In addition to the various statistics set out *supra* at notes 74, 76, and 80, see Robin, *supra* note 76 at 47, which cites the classic early Twentieth Century study of American homicide (H. BREARLEY, HOMICIDE IN THE UNITED STATES 63 (1932)) as showing that lawful civilian homicides made up 32% of total homicide in Washington, D.C. in the period 1914 to 1918, and 31.5% and 26.6% of total homicide in Chicago and Detroit, respectively, in 1920. A further caveat must be noted about these figures and those set out *infra* in notes 83-86 and accompanying text: it was not the case in all of these lawful homicides that the victims killed the criminal with a gun; in at least a small proportion, the killing was done with some other weapon or without a weapon.

<sup>82</sup> MICH. L. REV., *supra* note 5, at 269-70 (citing both recent national statistics and local ones for California, Chicago, Cleveland, and Houston for the proposition that armed citizens justifiably kill up to three times more violent felons than do police). See also *Policy Lessons*, *supra* note 27, at 44 (citing a study estimating that citizens performed 1266 excusable homicides as compared to 388 felon homicides by police).

<sup>83</sup> See MICH. L. REV., *supra* note 5, at 269-70 n.278 (cites both recent national statistics and local ones for California, Chicago, Cleveland, and Houston for the proposition that armed citizens justifiably kill up to three times more violent felons than do police); *Policy Lessons*, *supra* note 27, at 44.

<sup>84</sup> *Policy Lessons*, *supra* note 27, at 43. See also Kleck, *Crime Control Through the Use of Force in the Private Sector*, 35 SOC. PROBS. 1 (1987) [hereinafter *Crime Control*].

<sup>85</sup> *Policy Lessons*, *supra* note 27 (discussing the FBI classification scheme). See also *Crime Control*, *supra* note 84; Kates, *supra* note 50, at 147-48 n.24 (showing the common law distinctions between justifiable and excusable homicide).

civilian self defense killings were counted, the actual number of violent criminals killed by citizens might exceed the number killed by police each year by as much as five times.<sup>86</sup>

#### D. Survey Data as an Index to Defensive Gun Use

Until fairly recently, survey evidence on gun issues was limited to the results of whatever general inquiries the Gallup or Harris polls had haphazardly asked in the four or five question polls devoted to gun matters. During the past decade, however, both pro- and anti-gun groups have sponsored intensive and sophisticated multi-question private national surveys on various issues in the gun control debate. The question of whether guns had been used defensively in the (pg.140) respondents' homes was common to several of these private surveys. The surveys were not conducted directly by the partisan groups sponsoring them but by independent private polls including Peter Hart and Patrick Caddell for the anti-gun groups, and the Decision Making Information ("DMI") organization for the NRA.<sup>87</sup> Although less well known than Gallup or Harris, these are respected polls: the firms regularly poll both Democratic and Republican Presidential candidates including Presidents Carter, Ford, and Reagan.

As with any poll, these polls are subject to the objection that they generalize about a population of over 250 million people on the basis of information obtained from a sample of only about 1,500 supposedly representative individuals.<sup>88</sup> But excepting objections to surveys in general, there is no reason for discounting the results of these gun polls in particular; while these polls were paid for by partisans, the reputations of the independent organizations actually conducting them precludes any question of falsification, and academic studies have favorably cited and relied upon their results.<sup>89</sup> To preclude even unreasonable doubts as to validity, however, the discussion here will

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<sup>86</sup> Kates, *supra* note 50, at 147-48, n.24. Problems both of misclassification and of comparability to killings by police cause even this comparison to understate the import of lawful homicide by civilians. The misclassification problem has already been alluded to. See *supra* notes 52-55 and accompanying text. While killings by civilians are held lawful only after at least ordinarily rigorous scrutiny, killings by police enjoy an extraordinary bias toward exonerating the officer even in the most egregious cases. Available data do not allow estimation of how many police killings routinely classified as justifiable should have instead been classified as unlawful. But the one comparative study finds that while innocent civilians had been misidentified as criminals in two percent of cases where they used guns defensively, eleven percent of a sample of police officers were misidentified. Though mistaken identification is not necessarily criminal, it can result in a manslaughter charge if the gun user is negligent. The problem of comparability derives from the fact that, until recently, the police were lawfully entitled to shoot in a major sub-set of cases in which civilians could not shoot. Until 1985, most jurisdictions allowed police to shoot even non-violent felony suspects if necessary to prevent their escape, but civilians were not given the same privilege. (In the early 1970s, for instance, while working for California Rural Legal Assistance, I represented the family of a confused and troubled Chicano youth who had been killed by police while fleeing a charge of cultivating marijuana.) *Tennessee v. Garner*, 470 U.S. 901 (1985), holds that due process allows shooting fleeing suspects only where there is probable cause to believe they have committed a felony involving threat of deadly force. Since *Garner* postdates the statistics used in this article, a current comparison of lawful killings by police and civilians presumably would show even fewer police homicides.

<sup>87</sup> See discussion and analyses of these polls in *Policy Lessons*, *supra* note 27, at 44-45; *Crime Control*, *supra* note 84; Bordua, *supra* note 9; and Wright, *supra* note 9.

<sup>88</sup> See Edwards, *On Errors in Surveys*, 9 AM. SOC. REV. 359 (1944).

<sup>89</sup> See Wright, *Public Opinion and Gun Control: A Comparison of Results from Two Recent National Surveys*, 455 ANNALS 24 (1981). Both the private polling organizations and the pro- or anti-gun organizations that sponsored these particular surveys had every reason to avoid any kind of fabrication of the results. Clients employ these private polling organizations to survey public opinion or marketing behavior primarily for the client's internal use in formulating marketing or political strategies. To fabricate results would thus be counter-productive for the client and a reputation for doing so would be ruinous for the polling organization. Of course it must be doubted that, for instance, the NRA would have made the results of these internal polls public—much less arranged for their publication in the CONGRESSIONAL RECORD—unless it deemed that those results serve the

be based only on the evidence from neutral and anti-gun sponsored polling.<sup>90</sup> (pg.141) It is possible to simply discard the results of the NRA sponsored polls since the data on defensive gun use from all the surveys are mutually consistent.<sup>91</sup> Based on surveys sponsored by anti-gun groups, handguns are used to defend against approximately 645,000 crimes per year.<sup>92</sup> The accuracy of the magnitude of

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pro-gun cause. *See also* Bordua, *Adversary Polling and the Construction of Social Meaning*, 5 LAW & POLICY Q. 345 (1983) (on the implications of polls for the political strategies of pro- and anti-gun groups respectively—polls originally commissioned for their internal use but later released).

The primary internal use purpose of the gun polls involved here is suggested by the fact that both the NRA and, in the case of the poll principally relied on herein, the anti-gun organization opted to sample not the population in general but only registered voters within it. Of course such a choice itself produces statistical bias: a representative sample of registered voters may differ materially in ethnicity, race, education, income, and other demographic factors from the general populace. Insofar as such differences are relevant to the issue of defensive gun use, they would be most likely to minimize its full incidence; minorities and the poor, while they are underrepresented in a sample of registered voters, are disproportionately subjected to criminal attempts against which a gun would be used. *See infra* notes 111-113 and accompanying text.

<sup>90</sup> Principal reliance is placed on the Peter Hart and Cambridge polls; other polls relied on for the years 1975 to 1980 include the Field and Ohio State polls. *See, Crime Control, supra* note 84, (identifies the referenced polls). In addition, consistent results are found in an unpublished poll conducted by the Center for Social and Urban Research at the University of Pittsburgh for the years 1986-90. *See POINT BLANK, supra* note 5, at ch. 4.

<sup>91</sup> The polls are only mutually supportive in a general sense; for the reasons set out *infra*, this data cannot support Kleck's precise estimate of annual defensive uses, *see infra* note 92, where the estimate of defensive gun use is calculated from the Peter Hart survey alone.

The generalizations which the surveys mutually support are (a) that defensive gun uses are enormously more frequent than have previously been recognized, and (b) that as to handguns at least, such uses approximate in frequency, and even slightly exceed, the number of criminal misuses annually. *See UNDER THE GUN, supra* note 4, for the same finding based on comparison of the earlier Caddell and DMI polls. Neither those nor the other polls can support an estimate of annual defense uses because their questions were framed in terms of whether the respondent or members of his household had "ever" used a gun or handgun defensively. Other than the Hart poll, the only survey to ask about defense uses during a single year or span of years was the survey of Californians, whose results are compared to the Hart results *infra* note 92.

<sup>92</sup> The calculation is Kleck's, based on responses to the 1981 Peter Hart survey question: "[w]ithin the past five years, have you yourself or another member of your household used a handgun, even if it was not fired, for self-protection or for the protection of property at home, work, or elsewhere, excluding military service or police work?" Hart Research Associates (1981).

Although six percent of the sample answered "yes", a subsequent question determined that two percent of these self-defense instances involved use against animals rather than criminals. Multiplying the resulting four percent figure by the number of American households reflected in the 1980 census report and dividing by five (years), Kleck calculates that there are "644,976 defense uses of handguns against persons per year, excluding police or military uses." *POINT BLANK, supra* note 5, at ch. 4. *See also Crime Control, supra* note 84, at 2.

This roughly 645,000 figure may artificially exaggerate lawful defense gun uses in one way and minimize them in five others. The possible exaggeration arises because the survey question refers to protecting property. Although a criminal who is only stealing property that is not on anyone's person can lawfully be threatened with a gun, he cannot be shot to prevent the theft. Thus, a respondent whose answer of "yes" refers to an incident in which he only threatened a car thief with a handgun, was describing a lawful defensive use; but if he actually shot the thief, that would be an unlawful use, absent some additional circumstance, such as the thief advancing on the respondent.

Following are the five ways in which the survey may underrepresent the number of lawful defense uses: (1) respondents who actually acted legally may nevertheless give a negative answer out of fear that they may have broken the law; (2) the question's reference to self-protection may have elicited a negative answer where the respondent was acting to protect another; (3) as discussed *supra* note 89, a sample of registered voters will disproportionately exclude the groups most likely to have occasion to use a defense gun; (4) Kleck's calculation, like the question from which it derives, allows for only one defensive use, whereas some households' members may have had more than one defensive use over the five year period; and (5) the five year period is overly long, since survey evaluation literature shows crime victims tend to forget even quite serious victimizations occurring more than a year or two years previously. *See, e.g., Skogan, Sample Surveys of the Victims of Crime*, 4 PUBLIC DATA USE 23, 26-27 (1976). It is suggestive that in a 1976 survey, the percentage of gun-owning California respondents who stated that they personally and not just one of the members of their household, had used a handgun defensively within the previous two years was only slightly lower than the Hart survey number for five years. FIELD INSTITUTE, TABULATIONS OF THE FINDING OF A SURVEY OF HANDGUN OWNERSHIP AND ACCESS AMONG A CROSS SECTION OF THE CALIFORNIA ADULT PUBLIC (1976).

this figure may be assessed (pg.142) by noting that it slightly exceeds the estimated 581,500 crimes committed or attempted by handgun armed felons each year.<sup>93</sup>

Thus, the empirical evidence fails to sustain the claim that handguns are often used in crime, but rarely to defeat it. Since that claim is the foundation of the legal theory for judicial abolition of handgun manufacture via the doctrine of strict liability, the fact that defensive uses approximate or actually exceed criminal uses might seem to apply the coup de grace to that legal theory. But factual refutation seems superfluous since the courts have not, in any event, found that theory a legally sound basis for intruding into what they deem purely legislative or political matters.<sup>94</sup> Yet the fact that defense uses approximate or exceed criminal misuses emphatically does not refute the need for legislatively imposed gun control. Controls carefully tailored to disarm felons but not good citizens would reduce the incidence of gun misuse, but not of lawful defensive use.<sup>95</sup> Moreover, even a complete ban might still be advocated on the theory that the possible benefit of reducing (pg.143) suicide or homicide outweighs the certain cost of not reducing the overall number of crimes thwarted by defensive firearms use.<sup>96</sup>

Two other problems with the comparison given above should be noted. First, it is impossible to tell how many of the approximately 645,000 crimes that handguns defended against overlap with the roughly 581,000 criminal attempts by handgun armed felons. Doubtless in some cases, handgun armed felon meets handgun armed defender; but many cases involve either felon or defender confronting an opponent who is unarmed or armed with a knife, club, long gun, or other weapon.<sup>97</sup>

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<sup>93</sup> POINT BLANK, *supra* note 5, at ch. 4; *Crime Control*, *supra* note 84, at 4. I offer this comparison of defense uses to criminal attempts only because of its relevance to the strict liability issue discussed *infra* note 94. It should be understood that there are important comparability problems with the comparison: defense uses are calculated from survey data for the periods 1976 to 1980 and 1986-1990, while criminal attempts by handgun armed felons are calculated from national victim survey data, *see infra* note 116, for the year 1980; and the samples differ substantially in size, with criminal attempts being calculated from a much larger sample than defense uses.

<sup>94</sup> The references cited *supra* note 3 advocate the strict liability approach. *Cf.* Robertson v. Grogan Investment, 710 S.W.2d 678 (Tex. App.—Dallas 1986, no writ).

The proposition that the manufacture or sale of a handgun is an ultrahazardous activity giving rise to strict liability has been rejected in every case in which it has been considered. *See, e.g.,* Perkins v. F.I.E. Corp., 762 F.2d 1250, 1268 (5th Cir. 1985) (Louisiana law); Martin v. Harrington & Richardson, Inc., 743 F.2d 1200, 1203-04 (7th Cir. 1984) (Illinois law); Kelley v. R.G. Industries, Inc., 304 Md. 124, 497 A.2d 1143, 1147 (1985); Burkett v. Freedom Arms, Inc., 299 Or. 551, 704 P.2d 118, 122 (1985); Riordan v. International Armament Corp., 132 Ill. App. 3d 642, 87 Ill. Dec. 765, 769, 477 N.E.2d 1293, 1297 (App. Ct. 1985).

*Id.* at 680.

The closest any case has come to accepting the strict liability argument is *Kelley*. In *Kelley*, Maryland's highest court held that makers of "Saturday Night Specials" could be strictly liable, but nevertheless rejected the theory espoused by Fisher and the other articles cited *supra* note 3. The *Kelley* holding is based not on denial of the value of gun armed self defense or of handguns for that purpose, but on a technical finding that cheaply made short barreled handguns are too ineffective and unreliable as weapons to be useful for self defense. This aspect of *Kelley* has not been followed in subsequent caselaw. Moore v. R.G. Industries, 789 F.2d 1326, 1327 (9th Cir. 1986). Other cases rejecting strict liability include *Moore*; Patterson v. Roehm Gesellschaft, 608 F.Supp. 1206 (N.D. Tex. 1985); Rhodes v. R.G. Industries, 173 Ga. App. 51, 325 S.E. 2d 465 (Ct. App. 1985); and cases cited therein. For adverse comment on the theory, *see, e.g.,* Note, *Handguns and Products Liability*, 97 HARV. L. REV. 1912 (1984), and Halbrook, *Tort Liability for the Manufacture, Sale and Ownership of Handguns?*, 6 HAMLINE L. REV. 351 (1983).

<sup>95</sup> *See infra* note 167 and accompanying text.

<sup>96</sup> *See supra* notes 8, 26; *infra* note 166 and accompanying text.

<sup>97</sup> Unfortunately, none of the surveys discussed herein asked either victims or felons about confronting gun armed opponents when they themselves were so armed. From the prison survey discussed in the text *infra* accompanying notes 103 and 104, it appears that the felons most likely to have confronted a handgun armed victim were felons who had themselves used guns in some crimes. But this is not to say that such confrontations necessarily occurred when both felon and defender were armed with guns. Because felons who sometimes used guns tended to have been both more active criminals than those who never used any weapon

Second, it is important to understand that the comparison is not of success in either case, but only of the number of handgun crimes attempted annually versus the number of defense uses. Evidence suggests that handgun armed defenders succeed in repelling criminals, however armed, in eighty-three to eighty-four percent of the cases.<sup>98</sup> But comparable evidence is lacking as to the rate at which handgun armed criminals succeed in crimes they attempt.<sup>99</sup> (pg.144)

An independent body of data confirms the survey evidence on the incidence of defensive gun use. This second data source consists of formal and informal surveys taken among inmates of various federal and state prisons over the past two decades. Some of these surveys are methodologically crude and/or involve inadequate samples.<sup>100</sup> Given that the results of all of these surveys are consistent and supportive, it will suffice to refer to the latest, which was conducted under the auspices of the National Institute of Justice in state prisons across the country.<sup>101</sup> While most of its questions on victim arms possession focused on the question of deterrent effect,<sup>102</sup> several did address self defense. Thirty-four percent of the convicts responding "said they had been 'scared off,

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beyond a knife and more likely to have engaged in crimes involving confrontation—robbery as opposed to forgery—they would naturally have been more likely at some time in their criminal careers to have met a gun armed defender. J. WRIGHT & P. ROSSI, *ARMED AND DANGEROUS: A SURVEY OF FELONS AND THEIR FIREARMS* 156-57 (1986) [hereinafter National Institute of Justice Felon Survey]. The best available evidence, though it is by no means very good, of the proportion of gun armed defenders who meet gun armed criminals derives from a monthly column in the NRA magazine *AMERICAN RIFLEMAN* called *The Armed Citizen*. This column recounts civilian defense use incidents which are taken from current newspaper clippings sent in by NRA members. A review of these columns from January 1983 through October 1986 finds 37.5% of the incidents involved confrontation of a gun armed criminal by a gun armed defender. But this 37.5% figure represents, at best, a minimum for gun versus gun encounters. For obvious reasons, the NRA only publishes incidents in which the defender succeeded. Since a gun is the most powerful weapon for criminal as well as defender, it must be assumed that the 37.5% figure, derived from the defender successful cases, under represents the universe of gun versus gun confrontations. For discussion of the problems involved in making inferences from the NRA column, see Silver & Kates, *supra* note 34, at 154.

<sup>98</sup> *Crime Control*, *supra* note 84 (the Table in the text accompanying note 118 *infra* summarizes Kleck's comparison).

<sup>99</sup> For robbers, it is clear that a gun greatly increases the likelihood of success in robbing not just the ordinary pedestrian but "hardened" targets, such as retail stores whose owners may themselves be armed with guns, or banks and other establishments where the robber may have to overawe a larger number of people. By the same token, a gun robber is less likely to actually injure his victims because the mere display of his gun is more likely to elicit compliance from them, and perhaps also because he is reluctant to risk the noise that actually shooting would produce. Cook, *CRIMINAL VIOLENCE*, *supra* note 27, at 261; Hardy & Kates, *Handgun Availability and the Social Harm of Robbery: Recent Data and Some Projections*, in *RESTRICTING HANDGUNS* 121-22 (D. Kates ed. 1979).

Based on the national victim surveys, Professor Kleck estimates that gun armed robbers succeed in obtaining their victim's property in 83% of robbery incidents. Interview with Gary Kleck (1987), which accords well with the success figure of gun armed defenders, see *infra* note 118. But there is no way to extrapolate this success percentage to other gun crimes. The following examples illustrate the difficulty of computing success in the case of aggravated assault. Case A: One of two competitors for the favors of the same woman points a gun at the other in an effort to dissuade him from pressing his suit. The felon — this constitutes aggravated assault in most American jurisdictions — succeeds in frightening his victim into promising not to see the woman again. Thereafter, the victim calls the police and, reneging on his promise, successfully pursues the woman during his competitor's absence in prison. The criminal is unlikely to call this success. Should we? Case B: A criminal, intending to break his victim's nose, strikes him in the face with a gun that goes off, killing the victim. Does the criminal regard this as success? Should we? While possessing a gun may aid a criminal — as would any other weapon — the comparative advantage of a gun over other weapons is that it allows the weak to overcome the strong. Cook, *CRIMINAL VIOLENCE*, *supra* note 27, at 247-48; *Policy Lessons*, *supra* note 27, at 37; Howard, *Husband-Wife Homicide: An Essay from a Family Law Perspective*, *LAW & CONTEMP. PROBS.*, Winter 1986, at 63. Since criminals generally tend to be younger, stronger, and in better condition than victims, it is fair to assume that guns are more essential to victims success against criminals than criminal success against victims.

<sup>100</sup> *Policy Lessons*, *supra* note 27, at n.50; *MICH. L. REV.*, *supra* note 5, at n.276.

<sup>101</sup> National Institute of Justice Felon Survey, *supra* note 97, at 154.

<sup>102</sup> See text accompanying *infra* notes 155-165.

shot at, wounded or captured by an armed victim,' and about two-thirds (69%) had at least one acquaintance who had this experience."<sup>103</sup>

Also suggestive of the effectiveness and frequency of defensive gun use were responses on two other points: thirty-four percent of the felons said that in contemplating a crime they either "often" or "regularly" worried that they "[m]ight get shot at by the victim;" and fifty-seven percent agreed that "[m]ost criminals are more worried (pg.145) about meeting an armed victim than they are about running into the police."<sup>104</sup>

### *E. Costs of Defensive Gun Use*

The success of defensive handgun use cannot be evaluated independent of the most obvious and immediate problem caused by any kind of resistance: victims may suffer additional physical injury or death. Because of the paucity of evidence until very recently, anti-gun arguments emphasizing this danger have, once again, had to proceed from speculation or anecdotal evidence.<sup>105</sup>

Based on national crime victim survey data, a number of anti-gun scholars recommend that victims eschew forcible resistance of any kind; if an attacker cannot be talked out of his crime, the victim should submit in order to avoid injury.<sup>106</sup> Doubtless this submission position would excite paroxysms of scorn from defense advocates like Colonel Cooper.<sup>107</sup> But, in fact, its scholarly critics have not been pro-gun nor have they urged gun armed resistance specifically.<sup>108</sup> Their criticisms involve issues of policy (advising victims to submit may encourage crime)<sup>109</sup> and issues of methodological error (since the data do not show time sequence, it is not clear how often victims are injured only after they resisted). The latest, and probably the most definitive, analysis concludes that the "data, when interpreted carefully, do not support (pg.146) any strong [general] assertions concerning the victim's safest course of action when confronted by a robber."<sup>110</sup>

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<sup>103</sup> National Institute of Justice Felon Survey, *supra* note 97, at 154. *Crime Control*, *supra* note 84, feels that this 34% figure should be viewed as a minimum, because some respondents may have falsely denied, or at least underreported, in answering the survey "[g]iven that being 'scared off' by a victim is not the sort of thing a violent criminal is likely to want to admit ...."

<sup>104</sup> National Institute of Justice Felon Survey, *supra* note 97, at 145 and Table 7.2.

<sup>105</sup> *See, e.g.*, NEWTON & ZIMRING, *supra* note 20, at 62-68.

<sup>106</sup> For a summary description of the national crime victim surveys, see *infra* note 118. 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 Non-Fatal Assaultive Violence*, 8 VICTIMOLOGY 215, 225 (1983) (advising that "it is better to do something than nothing" but that victims should "adopt only non-threatening countermeasures"); and M. Wolfgang, *Victim Intimidation, Resistance and Injury: A Study of Robbery* (1982) (paper presented at the Fourth International Symposium on Victimology, Tokyo). Professor 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 Professor Zimring's pragmatically based anti-gun views—which professor Block shares—see NEWTON & ZIMRING, *supra* note 20, as well as Zimring & Zuehl, *supra*, at 37-38.

<sup>107</sup> *See supra* quotation in text accompanying note 14. *See also* Ronald Reagan and Neal Knox quoted *infra* in text accompanying notes 132-136.

<sup>108</sup> Professor Cook, some of whose work has been underwritten by the anti-gun Center for Study & Prevention of Handgun Violence, supports outlawing at least all small handguns (*i.e.* those with short barrels that are easy to conceal). Cook, *Making Handguns Harder to Hide*, *Christian Science Monitor*, May 29, 1981, at 23, col. 1. In their critique of the submission position, Professors Ziegenhagen and Brosnan make their support for gun controls clear. Ziegenhagen & Brosnan, *Victim Responses to Robbery and Crime Control Policy*, 23 CRIMINOLOGY 675, 677-78 (1985).

<sup>109</sup> Ziegenhagen & Brosnan, *supra* note 108.

<sup>110</sup> Cook, *The Relationship Between Victim Resistance and Injury in Non-Commercial Robbery*, 15 J. LEGAL STUD. 405, 407 (1986). For further discussion of some sequencing problems in the data, see *infra* note 118.

One criticism which has curiously been overlooked is that the submission position is a parochial reflection of its expositors' own sexual, racial, and economic circumstances. In general, the submission position literature has avoided any discussion of rape and invariably it treats robbery and assault as the once-in-a-lifetime dangers which they may be for salaried white academics. It does not seem to have occurred to any submission advocate to question whether the calculus of costs and benefits of resisting might be different for others, for example:

[A]n 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] welfare recipients whom robbers target, knowing when their checks come and where they cash them [or] the elderly trapped in deteriorating neighborhoods (like the Manhattan couple who in 1976 hanged themselves in despair over repeatedly losing their pension checks and furnishings to robbers).<sup>111</sup>

Regrettably, for most victims, crime is not the isolated happenstance it is for white male academics.<sup>112</sup> Imagine the situation of a black shopkeeper, a retired Marine master sergeant who has invested the life savings from "20-years-and out" in the only store he can afford. Not coincidentally, it is located 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 which finds no place in the submission position literature; to survive they may have to establish a reputation for (pg.147) not being easily victimized.<sup>113</sup> The submission position literature is equally oblivious to the special factors that may have importance for rape victims. Even one rape, much less several, may cause catastrophic psychological injury that may be worsened by submission, avoided by successful resistance, and mitigated by even unsuccessful resistance.<sup>114</sup>

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<sup>111</sup> Kates, *supra* note 10, at 45-46.

<sup>112</sup> A recent U.S. Department of Justice study concludes that, over their lifetimes, 83% of American children now aged twelve will be victims of some kind of violent felony, and 52% of them will suffer two or more such offenses, while 87% will have property stolen on three or more occasions. In all these crime categories, Blacks will be much more frequently victimized than Whites. N.Y. Times, *supra* note 23. Cf. Sherman, *Free Police from the Shackles of 911*, Wall St. J., Mar. 20, 1987, at 10, col. 3 (Minneapolis police records show that in 1986 "23% of all the robberies, 15% of all the rapes and 19% of all the assaults and disturbances" occurred repetitively at only .3% of the city's commercial and residential addresses; a mere 5% of all the addresses ... produced 64% 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 repetitive victimization addresses are white male academics.

<sup>113</sup> Cf. *There Is This Store in Queens That's Not The Best Place to Rob*, Wall St. J., Oct. 29, 1971, at 1, col. 4 (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); Kleck & Bordua, *The Factual Foundation for Certain Key Assumptions of Gun Control*, 5 LAW & POL'Y Q. 271, 281-82 (1983) (the authors speculate that criminals may avoid neighborhoods that are known to be well armed as they do confrontation crimes in cities that have that reputation). See *infra* notes 131-137 and accompanying text.

<sup>114</sup> Kates & Engberg, *Deadly Force Self-Defense Against Rape*, 15 U.C. DAVIS L. REV. 873, 879-80 n.20, 898 (1982). Avoiding the rape issue has made it unnecessary for submission exponents to address this consideration specifically. But rape is specifically treated in the one sustained anti-gun attempt to apply the submission position to the gun issue. YEAGER, *supra* note 20. Curiously, having argued at pages 17 to 19 that physical resistance to robbers is of little avail and unreasonably dangerous, they later claim women do not need handguns against rapists because of "the effectiveness of other means of resistance, such as verbal and physical resistance." *Id.* at 33 (notwithstanding that robbers and rapists are often the same people). Yeager also argues that the circumstances in which most rapes occur rule out gun armed self-defense. *Id.* at 32-33 (citing evidence which leads more neutral evaluators to the opposite conclusion). Kleck & Bordua, *supra* note 113, at 290. Yeager does, however, deserve credit for devoting two pages to women and their concerns. Unlike Yeager's, a more reliable anti-gun treatment summarily dismisses the entire subject of women with the contemptuous observation that they are "less capable of self-defense and less knowledgeable about firearms" than men. NEWTON & ZIMRING, *supra* note 20, at 64. This is contradicted by police firearms instructors and other experts who conclude

By no means am I arguing that forcible resistance with or without guns is optimum for crime victims in any or all circumstances. I am only presenting additional factors that should be considered before a well-salaried white, male intellectual suggests to people who are most often crime victims what is best for them.

### *F. Effectiveness of Defensive Gun Use*

Notwithstanding the coincidence that the submission position has been largely championed by anti-gun advocates, it must be recognized that the considerations underlying that position are irrelevant to the defensive value of guns. The evidence cited does not focus on guns nor do the lessons drawn from less effective weapons seem to apply to resistance with guns. The only extant study specific to gun-armed (pg.148) civilian resisters found they suffered slightly lower rates of death or injury at the hands of criminals (17.8%) than did police (21%).<sup>115</sup> These results are open to question because the study involved only a very small sample. But confirming evidence from an enormously larger data base is available in the national crime victim surveys. (These, however, provide information only as to victim injury, not death, since victims who died resisting robbers are not available to answer survey questions.)

In fact, earlier versions of the national victim surveys were cited by the one specifically anti-gun presentation which has tried to empirically validate the dangers of resistance argument.<sup>116</sup> However, the survey questions in those early versions of the surveys lumped all resistance together without differentiating the injury and success rates of gun-armed resisters from those of resisters who were unarmed or armed only with less effective weapons. The more recent national victim surveys which do so differentiate have already been cited as showing that victims who resisted with guns were much less likely to lose their possessions to robbers than those who resisted with any other kind of weapon.<sup>117</sup> As the Table below shows, this recent data finds gun armed resisters approximately fifty percent less likely to be injured than victims who submitted to the criminal.<sup>118</sup> In contrast,

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that trained women are not only fully capable of armed self-defense but much easier to properly train: they lack the masculine ego problems which make men resistant to instruction. *See, e.g., Hicks, Point Gun, Pull Trigger, POLICE CHIEF*, May 1975 (after an hour on the range and two hours of classroom instruction in a Chattanooga Police Academy combat pistol course for civilian women, "most of [whom] had never held a revolver, much less fired one," the women were consistently outshooting police cadets who had just received eight times as much formal instruction and practice); AYOOB, *IN THE GRAVEST EXTREME* 38 (1980).

<sup>115</sup> See MICH. L. REV., *supra* note 5; *Policy Lessons*, *supra* note 27, at 45.

<sup>116</sup> YEAGER, *supra* note 20 at 15-16. The national victim surveys are conducted under the auspices of the Justice Department "utilizing census Bureau interviewers who contact a nationally representative sample of about 60,000 households every six months and record information from personal interviews concerning the crime victimization experience of all household members aged twelve or older." Cook, *supra* note 110 at 407. *See also* Skogan, *supra* note 92. The resulting data are believed to allow a more accurate estimation of the actual extent of victimization than the FBI's yearly UNIFORM CRIME REPORTS, which include only crimes that were actually reported to the police and, in turn, by the police to the FBI.

<sup>117</sup> *See supra* note 98 and accompanying text.

<sup>118</sup> *Crime Control*, *supra* note 84 (from which the table is taken). The fact that 22% of unresisting victims nevertheless suffered injury, while only 7.5% of victims who resisted with a gun did, points out that these surveys may artificially exaggerate the dangers of resistance. As Yeager mentions but then ignores, one cannot infer that resisting victims were injured because they resisted. YEAGER, *supra* note 20. The victim surveys generally do not explore the issue of sequence: did the injury come as a result of the resistance, or was it suffered before any resistance? Often, victims are injured before or regardless of resistance, as in a pure assault situation where the perpetrator's original intent is to injure or kill regardless of any question of resistance. For instance, 22% of victims in the national victim survey who said they did not resist were injured nevertheless. While the questions generally used in the victim surveys do not provide information on this sequencing issue, such information is available from a special Victim Risk Supplement questionnaire, administered as part of the regular survey in February 1984. The results indicate that "few incidents"

knife-armed (pg.149) resisters were more likely to suffer injury than non-resisters and much more likely to be injured than gun armed resisters. Comparisons to other forms of resistance are also favorable to the effectiveness of gun armed self-defense.<sup>119</sup>

Care must be taken to avoid exaggerating the importance of these findings as support for the utility of defensive gun use. Ironically, a major factor which might lead to exaggerating their import is a basic conceptual error in anti-gun analyses of the utility of gun armed self-defense. Implicit in many such anti-gun analyses has been the unexamined assumption that having a gun somehow compels the victim to resist with it even in circumstances that make it senseless and dangerous to do so.<sup>120</sup> But the whole point of a gun, or any other precaution against emergency, is to provide an option for use if, but only if, that is wise under the circumstances.

With this point in mind it becomes evident that the survey data on victim injury do not support any suggestion that victims who have guns can safely resist no matter what the circumstances. On the contrary, though guns do maximize successful resistance, of at least equal importance in minimizing injury is that gun owners seem to eschew resistance when submission is the wiser choice. Although the number of victims in the surveys who say they resisted with a gun is not statistically insignificant, it is dwarfed by the number who tried to flee or scream or resisted forcibly without a gun.<sup>121</sup> The much higher rates of injury among victims who resisted in such ways do not at all prove that resistance with a gun would have been safer in their particular circumstances. Rather, the much smaller number of gun armed victims who resisted suggests that gun owners may be disproportionately less likely to resist when the circumstances for that course of action are inauspicious. Gun owners may be more likely than other victims to have considered the dangers attendant upon resisting a criminal and are therefore more hesitant to do so.

However absurd the concept of a thoughtful gun owner will seem to anti-gun activists,<sup>122</sup> analogy may be found in the mid-1970s debate over the advisability of having patrol officers wear bullet proof vests under their uniforms. Some observers feared this might actually increase officer risk by producing a sense of invulnerability that would (pg.150) lead officers to throw caution to the winds. The actual result has been the reverse. Wearing the vest seems to remind officers of how vulnerable they really are, thereby inclining them to increased caution.<sup>123</sup> By the same token, when civilians take the momentous step of buying and keeping a gun for self-protection it may provoke them to a more sober consideration of the risks of incautious resistance. The low rate of injury to gun armed crime victims suggests they may be more capable of evaluating the opportunities and risks of resistance than a non-owner who, having never seriously contemplated the matter, is suddenly confronted by a robber.

Gun ownership and the option to resist crime which it confers carries with it risks and opportunities. These may be illustrated by considering some alternative circumstances involving a woman menaced by a rapist in her home. If she becomes aware of the rapist as he breaks in, the gun

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occurred in a sequence which would indicate the victim's resistance caused the attacker to inflict injury. *Crime Control*, *supra* note 84. Cook, *supra* note 110, provides a detailed treatment of the issues and concludes that it is impossible to resolve them based on presently available data.

<sup>119</sup> *Crime Control*, *supra* note 84.

<sup>120</sup> See Silver & Kates, *supra* note 34, at 165.

<sup>121</sup> See *supra* note 118.

<sup>122</sup> See *supra* notes 12, 16, 42, and accompanying quotations in the text.

<sup>123</sup> Interview with M. Ayoob, Veteran police training officer and nationally recognized lecturer on officer survival (1987).

allows her to frighten him off or capture and hold him for police.<sup>124</sup> But if her first knowledge is being awakened by the pressure of a weapon against her throat, nothing compels her to reach for a gun. Properly secreted it remains available for use if, for instance, the rapist becomes distracted in disrobing or by a police or fire siren or some other external event<sup>125</sup> or it becomes clear that he intends to mutilate or kill her regardless, so that it is rational to resist no matter how slim her chances of success.<sup>126</sup> In short, a gun simply offers victims an option; a dangerous option to be used only with discretion and/or because throwing oneself on the mercy of a violent attacker may be more dangerous. Fortunately those people who have (pg.151) the foresight to equip themselves with guns as a means of resistance seem also to have the good judgment not to try to use those weapons when that would only serve to endanger them further.

Another benefit of handgun ownership which must be conceded by even the most ardent anti-gun advocates is that possession of a handgun may be conducive to at least a delusive peace of mind. Anti-gun claims that "those who own handguns for self-defense are engaging in dangerous self-deception"<sup>127</sup> imply that at least delusive peace of mind may be a benefit of the opposing faith. In fairness, even ardent anti-gun advocates ought to admit the value of this in a society so crime ridden that they themselves proclaim that crime, and the fear it creates, palpably diminishes the quality of life.<sup>128</sup> More neutral observers forthrightly acknowledge that "[i]f people feel safer because they own a gun and in turn lead happier lives because they feel safer and more secure, then their guns make a direct and nontrivial contribution to their overall quality of life."<sup>129</sup>

Although increased peace of mind due to gun ownership may be dismissed as a benefit only to the owners themselves and not to society as a whole, it may have wider ramifications. Two fear related problems that have received increasing attention in recent years are the reluctance of bystanders to come to the aid of victims or to bear witness against their attackers. There has been no study of any relationship that may or may not exist between witnesses' or victims' gun ownership and their likelihood of cooperating with law enforcement authorities. But studies have linked gun ownership to Good Samaritanship. Gun owners are apparently more likely than non-owners both to feel a duty to come to the aid of others in distress and to actually do so.<sup>130</sup>

Of course, defensive gun ownership is a dangerous self-deception if it causes gun owners to be injured or killed through involvement in otherwise avoidable situations. But the evidence reviewed in this section does not suggest that gun ownership produces feelings of invulnerability that

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<sup>124</sup> See, e.g., Dufy, *The Dog Barked and Suddenly She Was Glad She Had Her Gun*, L.A. Times, May 29, 1981, §2, at 7, col. 1 (editorial by gun armed woman whose dog alerted her to an ice pick armed intruder concealed in her bathroom).

<sup>125</sup> See Silver & Kates, *supra* note 34, at 165-66.

<sup>126</sup> Cf. Kates & Engberg, *supra* note 114, at 886-88 (showing the tendency of rapists to kill or mutilate victims regardless of their submission); Cook, CRIMINAL VIOLENCE, *supra* note 27, at 263 ("20 out of 30 victims killed in gun robberies in Dade County [Miami] between 1974 and 1976 [had] not resist[ed] the robber"); Hardy & Kates, *supra* note 99, at 136 (describing an incident in which a shopkeeper, after initially submitting, killed a robber who made evident his intention to dispose of all witnesses by executing the customer who had lain face down on the floor at his command); *Clerk Kills Bandit, Is Fired by Store Chain*, L.A. Times, Aug. 30, 1981, at 1, col. 5 (clerk who, after initially submitting, killed robber who was going to execute him, is fired because 7-Eleven policy forbids clerks to have guns); Taylor v. Superior Court, 91 Cal. Rptr. 275, 3 Cal.3d 578, 477 P.2d 131 (1970) (robber/accomplice may be held for recklessness homicide where his compatriots are killed by victims who reasonably concluded from their actions that the robbers intended to kill them even if they handed over their money).

<sup>127</sup> Drinan, *supra* note 68, at 50-51.

<sup>128</sup> *Id.*

<sup>129</sup> Wright, *supra* note 23, at 327.

<sup>130</sup> See *supra* notes 37, 38.

encourage owners to recklessly court danger. If anything, non-owners appear less able to evaluate the danger and the opportunities of opposing criminals, and thus more inclined to face unwise opposition, than are gun owners.(pg.152)

#### IV. DETERRENCE

To reiterate, as used herein deterrence refers not to the actual use of a gun in repelling an attempted crime (defense use) but to the phenomenon of crime not being attempted because of the potential criminal's fear of confronting an armed civilian. There are several kinds of such deterrence as Professor Gary Green has noted in emphasizing the need to distinguish among "displacement," "total deterrence," and "confrontation deterrence." "Displacement" is the effect when some victims (or neighborhoods or communities) are perceived as well defended, so the same crime is merely directed against others. "Total deterrence" occurs when criminals are deterred from crime altogether. Finally, in "confrontation deterrence," criminals are deterred altogether from crimes like rape or robbery which involve confronting a victim.<sup>131</sup>

Ignoring the vital distinction between displacement and total or confrontation deterrence has allowed pro-gun advocates to present the evidence on deterrence as less ambiguous and equivocal than it really is. By assuming that deterring crimes against victims perceived to be well armed reduces the total quantum of crime, rather than just transferring it to other victims, extreme pro-gun advocates support arming the populace as a deterrent to crime. Thus, when Ford Administration Attorney General Edward H. Levi proposed forbidding guns in high crime areas, Ronald Reagan (then a private citizen) commented in an article published in a gun journal:

[m]ightn't it be better in those areas of high crime to arm the homeowner and the shopkeeper, teach him how to use his weapons and put the word out to the underworld that it is no longer totally safe to rob and murder? ... One wonders indeed if the rising crime rate isn't due as much as anything to the criminal's instinctive knowledge that the average victim no longer has any means of self-protection.... No one knows how many crimes are committed because the criminal knows he has a soft touch. No one knows how many stores have been let alone because the criminals knew it was [sic] guarded by a man with a gun or manned by a proprietor who knew how to use a gun.<sup>132</sup> (pg.153)

##### *A. Deterrence Through Publicizing Gun Ownership*

As pro-gun advocates like former NRA chief lobbyist Neal Knox are quick to note, experiments involving the deterrent effect of an armed victim population seem to have been very successful:

[I]n 1966 there were a series of brutal rapes in Orlando, Florida which panicked the women of the city into buying firearms for defense. Fearing a rash of accidental shootings, the local newspaper co-sponsored a firearms training class conducted by the police department; in the next few months some 6,000 [sic — the actual number was about 3,000] women were

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<sup>131</sup> This distinction, the basis for which apparently was first suggested in Silver & Kates, *supra* note 34, at 167-68, and MICH. L. REV., *supra* note 5, at 268 n.276, is more systematically treated in Green, *Citizen Gun Ownership and Criminal Deterrence: Theory, Research and Policy*, 25 CRIMINOLOGY 63 (1987). The terms "confrontation deterrence" and "total deterrence" are mine.

<sup>132</sup> Reagan, *Ronald Reagan Champions Gun Ownership*, GUNS AND AMMO (1975).

trained in firearms safety and through the extensively publicized program. The results were remarkable.... [In 1967] Orlando was the only city in the U.S. of more than 100,000 population to show a decrease in crime.<sup>133</sup>

Based on the FBI Uniform Crime Report for 1967, rape attacks in the city itself were reduced 88.2%, while aggravated assault and burglary declined by approximately 25%.<sup>134</sup> No explanation other than the firearms program credibly accounts for this phenomenon. The rest of the surrounding Standard Metropolitan Area experienced only an 8.7% decline in rape which may itself have represented a spill-over from the Orlando city program; rape actually increased by 5% in Florida overall that year and by 7% in the United States overall. Nor was the effect in Orlando limited to that year. Though rape gradually increased again after the program ended, five years later the rate was (pg.154) still 13% below the pre-program level. In contrast, during that five year period the national rape rate increased 64% and the Florida rate increased 96.1%. Most significant of all at least in terms of displacement, over the same five year period, rape increased by 308% in the surrounding Standard Metropolitan Area.<sup>135</sup>

An equally startling example of the crime-deterrent value of well-publicized gun ownership occurred in 1967 in Highland Park, Michigan, a Detroit suburb. Having read of the Orlando and similar firearms training programs, Police Chief Bill Stephens conducted a firearms training program for retail merchants who were being plagued by an unprecedented number of armed robberies .... [This was denounced by the anti-gun Detroit Police Commissioner] resulting in headlines in Detroit newspapers. Four months after the program began [Chief Stephens reported] that armed robbery of retail stores had been averaging two every three days immediately prior to the announcement of the training program; but from the day the newspapers carried the story, there had been not a single retail store robbery in the city—for a third of a year! ... [In Detroit itself a grocers' association sponsored such classes which were publicized both because of the Police Commissioner's criticism and because] in the following few months seven armed robbers were killed by store owners—and Detroit grocery store robberies dropped by almost 90%.<sup>136</sup>

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<sup>133</sup> Knox, *Should You Have a Home Defense Gun?*, in GUNS AND AMMO GUIDE TO GUNS FOR HOME DEFENSE 108 (G. James ed. 1975). When Knox wrote this article, he was editor of RIFLE and HANDLOADER magazines; his subsequent employment as NRA lobbying chief began several years later; having been discharged in a subsequent political shake-up within the NRA, he is currently president and lobbyist for the rival organization he founded, "Firearm Coalition", and editor of its HARD CORPS REPORT.

<sup>134</sup> Without at all implying inaccuracy in Mr. Knox's figures (which come from unpublished communications with the Orlando Police), I have elected to omit them in favor of my own calculations based on FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS 85, 172 (1966); 11, 64, 179 (1967); 13, 64-68, 88, 199 (1971) [hereinafter UNIFORM CRIME REPORTS]. See also *Policy Lessons*, *supra* note 27, at 47. Note that in making these comparisons, care must be exercised in several respects. First, it must be realized that the figure for Orlando is not that in the FBI UNIFORM CRIME REPORTS table entitled *Orlando Standard Metropolitan Statistical Area* (which covers the surrounding area as well as the city), but rather the figure for the city alone, which the FBI lists in the later table *Number of Offenses Known to the Police [in] Cities and Towns over 25,000 Population*. A second problem is that the latter table, unlike the former table, does not list both the raw number of rapes and the rate per 100,000 population, but only the raw number. To determine the rate for the city, it is necessary to compute it from the raw number. The figures given *supra* in the text represent the comparison of the rate thus computed to the rates that are given in the different tables for the state of Florida and the United States, respectively, and also for the Standard Metropolitan Area.

<sup>135</sup> UNIFORM CRIME REPORTS, *supra* note 134.

<sup>136</sup> Knox, *supra* note 133. See also Tucker, *supra* note 21, at 46 (stating that "recently" when Jacksonville, Florida, police, reacting to "a series of brutal rapes," offered a program similar to Orlando's, "[r]apes immediately plummeted to only 5% of their former rate.") Since Mr. Tucker offers no reference for this, and gives neither pre- and post-program figures nor dates, it is impossible to verify.

The similar experience in the Atlanta suburb of Kennesaw, Ga., has been described by Professors Kleck and Bordua.

In March of 1982, the Kennesaw city council passed a city ordinance *requiring* householders to keep a firearm in the home, with the exception of households with physically or mentally infirm persons, criminals or persons who conscientiously objected to gun possession. The ordinance was nationally publicized and widely perceived as a reaction to the passage in Morton Grove, Illinois, of an ordinance effectively prohibiting handgun ownership within the city limits. In the seven months immediately following passage of the Kennesaw law (March 15, 1982 to October 31, 1982) there were just five residential burglaries reported, compared to 45 in the same period of the previous year. An 89% decrease in burglaries in so short a period is hard to explain away; something was clearly happening in Kennesaw that was not happening in the rest of the country. (pg.155)

Again, it is debatable exactly why this ordinance had such an effect. There is no evidence indicating any significant actual increases in household gun ownership; the majority of southern households have guns without being prodded by an ordinance requiring it, and undoubtedly the same was true of Kennesaw. However, once again the publicized passage of the ordinance may have served to remind potential burglars in the area of the fact of widespread gun ownership, thereby heightening their perception of the risks of burglary.<sup>137</sup>

#### *B. Does Deterrence Benefit Society in General or Only Gun Owners?*

In the abstract, these results provide impressive support for the crime deterrent effect of civilian gun ownership.<sup>138</sup> But abstract effects do not automatically translate into concrete crime reductive benefits as pro-gun writers so blithely assume. They overlook the crucial distinction in social value between deterrence and the actual defense-use of guns: all incidents of the latter serve society at large, but only the non-displacement forms of deterrence do so. When a victim actually uses a gun to repel a crime which would otherwise have been successfully completed, everyone benefits: in the short run, the victim and society benefit by forestalling this particular crime; in the long run, both the victim and society benefit because successful completion of the crime would presumably have encouraged more crimes both by the perpetrator himself and by other criminals who learned of the successful crime. In contrast, society only benefits from deterrence if criminals react by totally eschewing crime, or at least confrontation crime. If the effect when particular individuals or neighborhoods or communities are perceived as well armed is only to displace the

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<sup>137</sup> Kleck & Bordua, *The Factual Foundations for Certain Key Assumptions of Gun Control*, 5 LAW & POL'Y Q. 271, 284-88 (1983) (citations omitted).

<sup>138</sup> Further abstract evidentiary support may be found in laboratory experiments showing that persons were more restrained in expressing hostility toward persons associated with weapons than toward others who were not so associated. These experiments involved subjects (most of them college students) tested under laboratory conditions to determine their levels of hostility in the course of being deliberately irritated or annoyed. Some of the subjects were associated with guns in some way, while others were not. See Toch & Lizotte, *Research & Policy: The Case of Gun Control*, in PSYCHOLOGY AND SOC. ADVOC. (P. Suedfeld & P. Tetlock eds. 1990).

same crime elsewhere, the benefit to one set of potential victims comes at the expense of others who are, or are perceived as being, less capable of self-protection.<sup>(pg.156)</sup>

In fairness, pro-gun advocates have some excuse for missing this point since their opponents have generally, though unintentionally, diverted attention from it. Anti-gun works like HOW WELL DOES THE HANDGUN PROTECT YOU AND YOUR FAMILY?<sup>139</sup> invariably frame the issue as whether gun ownership actually protects the individual family. By focusing on individual families, pro-gun advocates have been able to overlook the inconvenient reality that, though it clearly does serve the interest of the individual gun owning family to displace criminal attackers onto the unarmed, no larger social utility accrues if such attacks are not thereby decreased overall.

Indeed, if displacement were the only effect, it could be argued that deterrence is actually socially deleterious. Assume for the sake of discussion that programs that dramatize that women in a particular area are well armed only displace rape to some other area where it is less likely that the rapist will confront an armed victim. Of course, those who appraise probabilities more realistically than the gun lobby will conclude that many times even armed victims will not be able to defeat a criminal.<sup>140</sup> But from the perspective of overall social benefit, the important point is that the likelihood of rape being repelled is enormously greater if the victim is armed than if she is helpless. An armed victim also increases the chances that the rapist will be apprehended, killed, or frightened into eschewing rape in the future.<sup>141</sup> So deterrence would be socially counterproductive if all it caused were displacement, thereby actually diminishing the defense-use benefits that would otherwise accrue to society from civilian gun ownership.

Fortunately, the deterrent effect of civilian arms possession is not limited to displacement. As Professor Green recognizes, the great majority of rapists are not, when deterred from striking at one place, going to commit at least as many rapes elsewhere. Even as to rapists who pre-plan their crimes, the reduction in incidence would still be <sup>(pg.157)</sup> fairly substantial since planning for a new area, an area with which the criminal is less familiar, creates both real and psychological problems.<sup>142</sup> Of course, the incidence of rapes or other crimes committed opportunistically may especially be reduced when a criminal becomes frightened of the victims likely to be found in his regular haunts.

At the same time, it must be recognized that displacement effects are not unique to the deterrent value of civilian gun possession; they apply, and must be taken into account in appraising, any kind of crime deterrence program. For instance, a drastic increase in numbers of uniformed police assigned to ride the New York subways at night was followed by robbery reduction during those hours—but robbery then increased during daytime subway operations. Nevertheless since the daytime increase was far less than the nighttime decrease the program must be accounted a net

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<sup>139</sup> YEAGER, *supra* note 20.

<sup>140</sup> See text accompanying *supra* notes 118-126.

<sup>141</sup> Compare the results summarized in the National Institute of Justice Felon Survey, *supra* note 97, at 149: felons who had confronted an armed victim at some prior time were most likely to think about being shot by their victim in the course of a subsequent crime. When those who had this experience prepared to commit subsequent crimes, 45% of them regularly or often worried that a victim might shoot them. In contrast, only 28% of those who had not had the same experience worried about being shot. Indeed, 48% of those who had never had the experience had also never even thought about it. However, this group probably contains a disproportionate number of felons who specialize in non-confrontation crime, and so would neither have had occasion to confront a victim nor reason to fear doing so in the future.

<sup>142</sup> Robbers and, by parity of reasoning, other violent criminals "typically operate close to home." P. COOK, ROBBERY IN THE UNITED STATES: AN ANALYSIS OF RECENT TRENDS AND PATTERNS 12 (Nat'l Inst. of Just. Pamphlet, 1983).

success.<sup>143</sup> Thus the possibility of displacement does not refute the value of programs designed to deter crime, including publicizing victim armament. The point is only that careful study, with displacement being taken into consideration, is what is needed if the existence and extent of such net gain is to be accurately appraised.

### *C. Shifting Criminals from Confrontation to Non-Confrontation Crime*

As suggested above, even as to rape, it may reasonably be assumed the deterrent effect of a highly publicized firearms training program for potential victims may produce significant net reduction overall. As to other kinds of crimes, the deterrent effect may be much greater. The difference is that because for rape there is no non-confrontation alternative, the deterrent on a rapist must be total. In contrast, to reduce the incidence of a crime like robbery, the deterrent need only frighten robbers into non-confrontation alternatives such as dealing drugs, stealing cars, burglarizing unoccupied premises, or forgery. Since these are also serious felonies, such deterrence is not an unalloyed benefit as Professor Green has pointed out.<sup>144</sup> But since deterring confrontation crime into non-confrontation crime radically (pg.158) decreases likelihood of victim death or injury, its social benefit is very great. The benefit will be limited in areas where there are few opportunities for non-confrontation crime. In those areas, the incentive to rob might well outweigh the deterrent effect of known armed victim resistance to crime. Perhaps hearing of two or three such deaths each year of one's life would produce a greater deterrent effect on the prospective criminal's psyche over the long run. But, speculation is not evidence; or, rather, is only evidence of the numerous questions that remain after existing evidence is evaluated. Doubtless widely publicized firearms training for victims (or a series of shootings of criminals by victims) might dramatically reduce the number of robberies for some period of time. It would not be surprising, though, if this result reflected only an immediate shock effect without lasting impact on robbery rates.

Those who have made the one anti-gun argument that remains viable in light of present evidence about the defensive value of arms possession have unaccountably missed the social benefit of shifting criminals from confrontation to non-confrontation crimes. A common theme throughout their analyses has been that victims rarely use guns against burglars because burglars take care to strike only unoccupied premises.<sup>145</sup> It appears that a major reason for that care is fear of meeting an armed householder.<sup>146</sup> If so, civilian arms possession palpably and substantially benefits burglary victims by minimizing their risk of injury or death in confrontations with burglars. It is only because few burglaries occur at occupied premises that physical injury to victims is comparatively rare in

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<sup>143</sup> See J. WILSON, THINKING ABOUT CRIME 65-66 (1983).

<sup>144</sup> Green, *supra* note 131, at 70-71.

<sup>145</sup> See references cited *supra* note 73. Based on interviews with a sample of Pennsylvania felons, it is reported that, of the almost two hours these men averaged on each suburban burglary, time inside the house averaged five minutes or less; the rest of the time was spent targeting a particular house and making sure it would be unoccupied. G. RENGERT & J. WASILCHICK, SUBURBAN BURGLARY: A TIME AND A PLACE FOR EVERYTHING (1985).

<sup>146</sup> Compare RENGERT & WASILCHICK, *supra* note 145, at 30 (noting that burglars eschew late night burglaries because it is too difficult to tell if the premises are occupied, '[t]hat's the way you get yourself shot') and J. CONKLIN, ROBBERY AND THE CRIMINAL JUSTICE SYSTEM 85 (1972) (an earlier survey of criminal opinion) (former burglars he talked to had discontinued such offenses because of the "risk of being trapped in a house by the police or an armed occupant"), with the National Institute of Justice Felon Survey, *supra* note 97 (57% of the felons agreed that "[m]ost criminals are more worried about running into an armed victim than they are about running into the police" and where 74% of them agreed with the burglary-specific statement that "[o]ne reason burglars avoid houses when people are home is that they fear being shot during the crime."). See *supra* note 103; *infra* note 155.

burglary. Victim surveys show frequent injury in the 12.7% of burglaries that involve occupied (pg.159) premises.<sup>147</sup> The deterrent effect of civilian arms possession can be largely credited for the far lower rate of victim injury or death in burglaries than in robberies which are, by definition, confrontation offenses.<sup>148</sup>

Thus, programs that promote civilian arms possession palpably serve the public good if the publicity they generate deters robbers into non-confrontational burglary. It is worth noting that such non-confrontation deterrence constitutes a reversal of Professor Green's observation that displacement deterrence benefits only gun owners and not society. In this instance, civilian arms possession aids society but not gun owners in particular for rarely do burglars know the gun owners' homes from those of non-owners (nor, if the burglar is really careful to strike when no one is home to shoot, would the distinction matter to him). Consequently, any reduction in victim injury or death benefits potential victims in general, not just gun owners.<sup>149</sup>

#### *D. Aspects of Deterrence Requiring Further Study*

The reviewed evidence provides relatively strong support for the deterrent effect of civilian arms possession in the abstract. However, it does not provide a basis for formulating a new policy. Dramatic decreases in confrontation crime have followed in the wake of local programs dramatizing victim arms possession.<sup>150</sup> But even leaving aside the issue of displacement, two questions remain: would such programs be legal and practicable if tried on a regional or state level; and even if such programs did work in broader application, does their deterrent effect continue over time or is it merely transitory? Moreover, in evaluating these and other questions, it must be remembered that a deterrent does not forever prevent crime but only serves as a transitory disincentive. The legal and practical problems to implementing (pg.160) victim arms possession programs on a regional or state level are generally beyond the scope of this article. However, a few issues raised indirectly in other parts of the article bear further comment.

The Kennesaw mandatory firearms ownership ordinance, which has been adopted by several other small towns, exempts conscientious objectors, thereby avoiding not only possible constitutional problems, but even the possibility of challenge at least in the federal courts since no opponent would have standing.<sup>151</sup> But even a mandatory ownership law that did not exempt objectors would probably pass constitutional muster. From the earliest period of American settlement, colonial and, subsequently, federal and state statutes imposed a duty to possess arms on virtually every

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<sup>147</sup> U.S. Bureau of Justice Statistics Bulletin reports that in 30.2% of occupied premises burglaries, amounting to 2.8 million cases over a ten year period from 1973 to 1982, the fact that victims were at home when burglary occurred resulted in a violent crime being directed against them. BUREAU OF JUSTICE STATISTICS, BULLETIN, HOUSEHOLD BURGLARY 4 (Jan. 1985). In a majority of this sub-set, 1,071,000 cases, the crime was a simple assault; the remainder involved serious violent felonies including 623,000 aggravated assaults, 281,000 rapes, and 786,000 robberies.

<sup>148</sup> Based on figures given in *Crime Control*, *supra* note 84, for the total numbers of robberies and burglaries and of robbery-murders and burglary-murders in 1980, it appears that the rate at which robbers murder their victims is more than 40 times greater than the rate at which burglars murder theirs. This difference can be attributed almost exclusively to the difference between a crime which, by definition, involves confrontation and one which almost 90% of the time does not.

<sup>149</sup> MICH. L. REV., *supra* note 9 [errata: note 5], at n.276.

<sup>150</sup> See *supra* notes 133-37 and accompanying text.

<sup>151</sup> See *supra* note 135 and accompanying text.

household—and on every military age male in each such household—as both a defense against and a deterrent to attack by Indians, foreign powers, and criminals.<sup>152</sup>

The decisive issue for a local or state program of deterring criminals through dramatizing victim gun ownership is publicity, not whether the victims actually have guns or even whether the criminals actually get shot. In neither Orlando nor Kennesaw were any criminals actually shot; and the effect in Detroit was not caused by the criminals actually being shot, but by the publicity this generated in light of the police chief's denunciations of the grocers' association firearms training program. Obviously, no state or local agency could compel the media to carry stories dramatizing gun ownership.<sup>153</sup> But common sense and actual experience join in suggesting that public compulsion or sponsorship of programs designed to maximize civilian gun ownership is likely to generate controversy and consequent media attention. While that publicity might quickly abate, public officials would probably be able to revive it *ad infinitum* by tactics such as speeches praising the program, releases describing reported incidents of criminals being routed by victims, or any reduction in violent crime that might be attributed to the program. This would require consistent allegiance to the concept by one or more law enforcement agencies over a prolonged period, although strong opposition by other agencies and/or prominent persons or organizations might actually generate additional publicity.

An equally important question when considering a new policy is the long-term effectiveness of the policy. The gun lobby cites the (pg.161) apparently dramatic effects of the Orlando and other local programs as proving that widespread gun ownership must reduce violent crime. It is intuitively evident that growing up in an area where criminals are frequently shot by victims would tend to deter confrontational offenses. However, this intuition is only remotely supported by local program results such as the ninety percent reduction in Detroit grocery robberies when gun training for grocers led to the well publicized shootings of seven armed robbers.<sup>154</sup>

#### *E. Applicability of Studies Based on Burglary to Deterrence of Other Crimes*

The evidence based on studies of burglary cannot be heedlessly generalized to suggest that civilian arms possession will have comparable deterrent effects on more dangerous crimes and criminals. The fact that almost ninety percent of home burglaries occur at unoccupied premises suggests that burglars generally want to avoid confronting armed householders. This is confirmed from statements by criminals themselves, including the responses to the National Institute of Justice Felon Survey.<sup>155</sup> But, again, the deterrent can not be evaluated independent of the incentive. Compare the two in relation to robbing liquor stores versus burglarizing occupied homes. In each case the deterrent (being shot by the victim) is the same yet the robber has an immensely greater

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<sup>152</sup> MICH. L. REV., *supra* note 5, at 214-18.

<sup>153</sup> *Cf.* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 254-58 (1974).

<sup>154</sup> *See supra* note 136 and accompanying text.

<sup>155</sup> *See supra* notes 145-46 and accompanying text. Also note in this connection the comparison of two figures reported by YEAGER, *supra* note 20, at 6-7: a sample of 1988 Boston home burglaries finds that only 8% were committed against occupied residences, whereas 44% of the 1665 home burglaries studied in Toronto, Canada, where protective gun ownership is notoriously much lower, were committed against occupied residences.

Kleck & Bordua, *supra* note 137, calculate that a burglar's chance of meeting an armed householder actually exceeds his chance of being otherwise caught, prosecuted, convicted, and made to serve time in jail. One may well ask which is the greater deterrent: is it the small chance of being shot, or is it the even smaller chance of going to jail?

incentive for confrontation. To offset the robber's risk of getting shot there is the incentive of a substantial cash take. But to offset the burglar's risk at occupied premises, there is only the prospect of adding to the goods he steals from the home the marginal amount of cash he may get from the person he confronts at home.<sup>156</sup> This very (pg.162) real difference in the incentives to confrontations in the two crimes clearly appears in the responses to different questions in the National Institute of Justice Felon Survey: 74% of the inmates agreed "[o]ne reason burglars avoid houses when people are home is that they fear being shot during the crime," but only 58% agreed that "[a] store owner who is known to keep a gun on the premises is not going to get robbed very often."<sup>157</sup>

These and other results of the Felon Survey significantly support (albeit with substantial reservations) the intuition that the phenomenon of criminals being repelled by armed victims does deter confrontation crime. In addition to the results just noted, 56% of the felons agreed that "[a] criminal is not going to mess around with a victim he knows is armed with a gun" and 57% admitted that "[m]ost criminals are more worried about meeting an armed victim than they are about running into the police." Over 80% of the felons felt that a criminal should always try to determine whether his victim was armed, while 39% said they personally had aborted at least one crime because of belief that the intended victim was armed and 8% said they had done so "many" times.<sup>158</sup> The summary given by the National Institute of Justice analysts is that "[b]eyond all doubt, criminals clearly worry about confronting an armed victim."<sup>159</sup> Admittedly, however, to worry is not the same as to be deterred from the activity which causes the worry—although worry may deter even a violent criminal into committing markedly fewer confrontation crimes than he would if he were without concern. Even hard core violent criminals whose courage is often fortified by potent combinations of alcohol and illegal drugs worry about armed victims. Similar concerns may completely deter the less violently inclined, less experienced, or less reckless criminal. Overall the results of the felon survey suggest the deterrent effect of victim armament is a substantial reason why some felons specialize in non-confrontation crime only and eschew the greater immediate rewards of confrontation crime altogether.

Yet the results are both more mixed and more complex than the gun lobby would like to admit.<sup>160</sup> About forty percent of the felons claimed that in planning a crime, they never even considered the possibility of being shot by a victim, and almost one-quarter of them said they actually found victim armament an incentive, "an exciting challenge."<sup>161</sup> (pg.163) Some of this can be dismissed as macho posturing; felons may be able to be more candid in describing the fears of criminals in the abstract than in describing their own. But it must also be considered that a subset of the criminal population which is disproportionately significant because murders and accidental fatalities are so heavily concentrated among them, are characterized by an indifference toward

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<sup>156</sup> *Crime Control*, *supra* note 84, disagrees, noting that the "fenceable" value of the good taken in the average burglary is less than \$70.00, so that realizing as little as \$35.00 in cash from the wallet of a robbery victim would yield the perpetrator over 50% more. I believe this quantitative fact ignores a qualitative truth: the armed predator, *see infra* note 123 and accompanying text, robs stores because he feels the chance of a \$400.00 cash take justifies the danger of meeting an armed proprietor; yet most burglars assiduously avoid occupied premises, because the chance of increasing the take by \$35.00 does not justify that danger.

<sup>157</sup> National Institute of Justice Felon Survey, *supra* note 97, at 145 and Table 7.1.

<sup>158</sup> *Id.* and at 154.

<sup>159</sup> *Id.* at 150.

<sup>160</sup> *See* discussion of Blackman, *supra* note 68.

<sup>161</sup> National Institute of Justice Felon Survey, *supra* note 97, at Table 7.1. *But see supra* note 103.

human life, including their own.<sup>162</sup> There is no necessary inconsistency between the attitudes of this subset and indifference—or even attraction—to armed victims.

Another and larger subset, the "violent predators,"<sup>163</sup> are characterized by very high rates of substance abuse (which is true of the most murderous subset as well).<sup>164</sup> With their spirits fortified with liquor, cocaine, PCP, or other substances, singly or in combination, the violent predators may be relatively indifferent to the danger of confronting an armed victim.<sup>165</sup> But even if they are not, addicts' desperation to finance their drug habits may make them willing to court that danger.

Clearly, worry about being shot by an armed victim did not deter many of the felons in this sample from a life of confrontation crime. Such worries may deter other criminals into non-confrontation crime and it may reduce the rate at which even violent predators engage in confrontation crimes. But the number of violent offenses which are nevertheless attempted prove that many criminals on many occasions can overcome their fears of the deterrent presented both by an armed citizenry and by the police and the prospect of punishment by the courts.

## V. CONCLUSION

This article began with the proposition that both pro- and anti-gun positions on the utility of guns against crime had been determined by faith in the period before the existence of credible empirical evidence (pg.164) on the issues. Having examined the evidence that has become available in the last decade it must be concluded that parts of each faith have been sustained.

The evidence from surveys both of civilians and of felons is that actual defensive handgun uses are enormously more frequent than has previously been realized. It may tentatively be concluded that handguns are used more often to prevent the commission of crimes than by felons attempting them. This should not be understood as suggesting that the decision to resist a felon can be made lightly or that their handguns automatically insulate resisters from injury. The unique defensive value of a handgun is not the only cause for comparatively low rates of injury among gun armed resisters; of equal or more important value is the wisdom not to resist in circumstances in which resistance is unlikely to succeed. The evidence on the gun lobby's vaunted deterrent effect of gun ownership is even more equivocal. In general, it does support the common sense intuition that the average criminal has no more desire to face an armed citizen than the average citizen has to face an armed criminal. Widespread defensive gun ownership benefits society as a whole by deterring burglars from entering occupied premises and by deterring from confrontation offenses altogether an unknown proportion of criminals, who might otherwise be attracted by the immediate profitability of robbery. Even when criminals are not so deterred, widespread gun ownership may frighten them sufficiently to reduce the overall number of such offenses they commit. And, it does frighten them into abandoning some specific offenses, particularly in areas where special local programs have

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<sup>162</sup> See *supra* note 27.

<sup>163</sup> This term appeared originally in the pioneering RAND California prison survey. The authors of the subsequent National Institute of Justice Felon Survey adapt it to their own focus on gun offenders by using "handgun predator" and "shotgun predator" to differentiate two sub-types of prolifically criminal violent offenders.

<sup>164</sup> National Institute of Justice Felon Survey, *supra* note 97, at 76-7.

<sup>165</sup> *Id.* at 50-54, 71. See also U.S. BUREAU OF JUSTICE STATISTICS, BULLETIN, PRISONERS AND ALCOHOL 2-3 (Jan. 1983) (almost one-half of the offenders had been drinking at the time of the offense for which they are presently incarcerated); BUREAU OF JUSTICE STATISTICS, BULLETIN, PRISONERS AND DRUGS 1 (Mar. 1983) (one-third of prisoners surveyed were under the influence of drugs at the time of the offense for which they are presently incarcerated). See *supra* note 68.

dramatized the likelihood of victim arms possession and training. Yet it must also be noted that the possibility that gun ownership reduces the activity level of confrontation offenders is only an unsubstantiated speculation; gun lobby propaganda has exaggerated the deterrent effect of gun ownership by not discounting for displacement effects that represent no net gain in overall crime reduction.

Finally some caveats may be offered on the limited import of the evidence I have reviewed for issues of firearms regulation. Clearly this evidence disposes of the claim that handguns are so lacking in social utility that courts should, in effect, eliminate their sale to the general public under the doctrine of strict liability. This evidence likewise cuts strongly against severe statutory restrictions based on the belief that handgun ownership offers few social benefits to offset the harms associated with it. Moreover, even if handguns offered no (pg.165) benefits whatsoever, neither does banning them—except as part of a policy of outlawing and confiscating guns of all kinds.<sup>166</sup> (pg.166)

What the evidence on crime reductive utility of firearms most definitely does not do is undercut the case for controls tailored to denying firearms of all kinds to felons, juveniles and the

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<sup>166</sup> Legislating against the handgun alone is futile—indeed counter-productive—since handguns are less deadly than long guns. Further, those misusing handguns can substitute long guns in enough situations in which handguns are presently misused to greatly increase the number of gun deaths. Lizotte, *supra* note 6. Long guns outnumber handguns by about two to one and there is good reason to believe that handgun ownership is most common among households where long guns are already present. UNDER THE GUN, *supra* note 4, ch. 3. Moreover, people who are strongly motivated to have a gun, whether for self-protection, sport, crime, or some other reason are likely to opt for a long gun if a handgun is not available. If a handgun ban resulted in the substitution of long guns for handguns among substantial numbers of people who keep a gun loaded and immediately at hand the most likely effect would be sharp increases in death from gun assaults and accidents with no decrease in gun suicide. *Policy Lessons, supra* note 27, at 48-50.

A ban on handguns alone would not prevent anyone who was peculiarly determined to commit suicide only with a firearm to use a long gun, as did some hundreds of thousands of Japanese soldiers during World War II to avoid the shame of surrender. Indeed, though handguns are readily available today, they do not predominate over long guns in firearms suicide at present. *See supra* note 78. *See also supra* note 26 (expressing the non-utility of gun laws as a means of reducing suicide).

As to criminal violence, the substitution of long guns which, even when sawed off are more difficult to carry, would presumably reduce the number of crimes of opportunity committed with guns. This would not greatly reduce felony homicide since unplanned street muggings and rapes rarely involve guns and even more rarely end in death. Nor would gun use in planned robberies and rapes be much reduced since virtually any crime can be planned so as to allow the use even of unaltered long guns, much less sawed offs. *A fortiori* there would be little or no reduction in deliberate or planned murder with guns. Gun use in crimes of passion would also be little reduced since a long gun kept loaded for home defense is not materially less accessible than a handgun. *Compare* Kleck, *Handgun-Only Control: A Policy Disaster in the Making*, in FIREARMS AND VIOLENCE 195 (D. Kates ed. 1984) (estimating that long guns could be substituted in 54-80% of crimes now committed with handguns) with the National Institute of Justice Felon Survey, *supra* note 84 (85% of handgun criminals responded that, if unable to acquire a handgun, they would carry a sawed off shotgun or rifle).

More important, any such reductions in the base number of gun assaults if long guns had to be substituted for handguns would be off-set disastrously by the great increase in the proportion of assaults that result in actual death. A handgun wound is only marginally more lethal than a stab wound from an ice pick or long bladed knife, with only one or two out of twenty victims dying on the average; but long guns are eight to fifteen times more lethal. *Compare* Baker, *supra* note 3, at 587 with RESTRICTING HANDGUNS, *supra* note 5, at 107-11. These considerations are even more applicable to the problem of gun accidents, since long guns are not only enormously deadlier but much more susceptible to accidental discharge. MICH. L. REV., *supra* note 5, at 261-64. The predictable result of a handgun ban that left those who feel they need a defensive gun the option of keeping a loaded long gun in home or office would be large increases in both the number of gun accidents and the number of deaths.

In sum, since the deleterious effects of gun ownership are at present actually minimized by the predominance of handguns in both crime and self defense, sensible public policy requires that any new restriction of handgun ownership be accompanied by equivalent (or greater) restriction of long guns. As remarked somewhat jocularly by the authors of the encyclopedic and authoritative modern evaluation of American gun control literature:

[I]f someone intends to open fire on the authors of this study, our strong preference is that they open fire with a handgun.... 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.

UNDER THE GUN, *supra* note 4, at 322-23.

mentally impaired. Indeed, Professors Kleck and Bordua, the criminologists principally responsible for documenting that utility, remain strongly supportive of such controls if carefully tailored not to prevent handgun ownership among the responsible adult population.<sup>167</sup> Moreover, it is still possible to argue for going beyond control to the prohibition and confiscation of all types of firearms if it can realistically be posited that the net gain in reducing suicide, gun accident, and certain kinds of homicide might outweigh the reductive effect of civilian firearms ownership on crime.

TABLE

*Attack Injury and Crime Completion Rates in Robbery  
and Assault Incidents, by Self-Protection Method—U.S. 1979-1985*

Column Number	Robbery				Assault		
	(1)	(2)	(3)	(4)	(5)	(6)	(7)
Self-Protection Method	% Completed	% Attacked	% Injured	Estimated Times Used	% Attacked	% Injured	Estimated Times Used
Used Gun	30.9	25.2	17.4	89,009	23.2	12.1	386,083
Used Knife	35.2	55.6	40.3	59,813	46.4	29.5	123,062
Used other weapon	28.9	41.5	22.0	104,700	41.4	25.1	454,570
Used physical force	50.1	75.6	50.8	1,653,880	82.8	52.1	6,638,823
Tried to get help or frighten offender	63.9	73.5	48.9	1,516,141	55.2	40.1	4,383,117
Threatened or reasoned with offender	53.7	48.1	30.7	955,398	40.0	24.7	5,743,008
Nonviolent resistance including evasion	50.8	54.7	34.9	1,539,895	40.0	25.5	8,935,738
Other measures	48.5	47.3	26.5	284,423	36.1	20.7	1,451,103
Any protection	52.1	60.8	38.2	4,603,671	49.5	30.7	21,801,957
No protection	88.5	41.5	24.7	2,686,960	39.9	27.3	6,154,763
Total	65.4	53.7	33.2	7,290,631	47.3	29.9	27,956,719

(pg.167) Notes: Separate frequencies in columns (4) and (7) do add to totals in "Any Self-Protection: row, since a single crime incident can involve more than one self protection method. See U.S. Bureau of Justice Statistics (1982) for exact question wordings, definitions, and other details of the surveys.

<sup>167</sup> See, e.g., *Policy Lessons*, *supra* note 27, at 59-62; Kleck & Bordua, *supra* note 137, at 293-94.

Source: Analysis of incident files of 1979-1985 National Crime Survey public use computer tapes (ICOSR, 1987b).