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THE MYTH OF THE "VIRGIN KILLER": LAW-  
ABIDING PERSONS WHO KILL IN A FIT OF RAGE<sup>1</sup>

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<sup>1</sup> We take the phrase "virgin killer" from a comment by David Canter of the Center for Investigative Psychology at the University of Liverpool. When the journal HOMICIDE STUDIES asked members of its editorial board to suggest topics for the new millennium that remain largely unexplored in the homicide literature, Prof. Canter replied: "The issue that puzzles me most is what might be called the *virgin* killer ... the person who has absolutely no background indicators .... These people are very rare, but their existence challenges everything we know about homicide." Quoted in M. Dwayne Smith, "A New Era of Homicide Studies: Visions of a Research Agenda for the Next Decade," 4 HOMICIDE STUDIES 3, 8 (2000) (emphasis in original).

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## ABSTRACT

Current American federal, and state laws generally bar gun possession by persons who have been convicted of any felony, or certain misdemeanors, or who have been involuntarily committed to a mental institution. A recurrent issue in political debates over "gun control" is the extent to which such laws could reduce murder rates assuming they could be effectively enforced. Many advocates of banning and confiscating all guns, or all handguns, argue that even in theory "felon in possession" laws have little chance of reducing homicide, because most homicides are committed by ordinary people acting out of momentary and uncontrollable rage. From this premise it is argued that outlawing firearms to the citizenry at large might substantially reduce homicide rates, even if such laws prove impossible to enforce against terrorists, habitual criminals and the like.

Though this premise is widely held, it is mistaken. Murder is a very unusual behavior and perpetrators turn out on investigation to be extreme aberrants. Studies of homicide uniformly find almost all murderers differ markedly from ordinary people in having life histories of violence, felony, psychopathology, substance abuse, restraining orders and so forth. If there is an argument for banning guns to the entire populace, it must derive from some other basis than that ordinary citizens are likely to commit murder.

## INTRODUCTION

The gun lobby slogans "guns don't kill, people kill" and "when guns are outlawed, only outlaws will have guns" more or less originated with the father of criminology, the 18th Century philosopher Cesare Beccaria. Under the title "False Ideas of Utility" Beccaria derided the notion that generally disarming the population would have the effect of suppressing violence.

The laws that forbid the carrying of arms are laws of such a nature [false utility]. They disarm those only who are neither inclined nor determined to commit crimes. Can it be supposed that those who have the courage to violate the most sacred laws of humanity, the most important of the code, will respect the less important and arbitrary ones, which can be violated with ease and impunity, and which, if strictly obeyed, would put an end to personal liberty--so dear to men, so dear to the enlightened legislator--and subject innocent persons to all the vexations that the quality alone ought to suffer? Such laws make things worse for the assaulted and better for the assailants; they serve rather to encourage than to prevent homicides, for an unarmed man may be attacked with greater confidence than an armed man. They ought to be designated as laws not preventive but fearful of crimes, produced by the tumultuous impression of a few isolated facts, and not by thoughtful consideration of the inconveniences and advantages of a universal decree.<sup>4</sup>

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<sup>4</sup> C. Beccaria, **An Essay on Crimes and Punishments** 87-8 (1764). Compare the modern

Hence, the theoretical futility of gun control probably deserves recognition as one of the earliest propositions in criminology. From early in the 20th Century, however, a sub-set of the Beccarian idea has been intensely debated. Might one get all the public safety that gun controls could yield by forbidding gun possession by persons with a record of serious crime or mental instability? Or must laws disarm the whole population on the theory that anyone is likely to murder, given the right circumstances and possession of a

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evaluation in James D Wright, Peter Rossi and Kathleen Daly, UNDER THE GUN: WEAPONS, CRIME AND VIOLENCE IN THE UNITED STATES (N.Y., Aldine: 1983) at 137-38 "... there is no good reason to suppose that people intent on arming themselves for criminal purposes would not be able to do so even if the general availability of firearms to the larger population were seriously restricted. Here it may be appropriate to recall the First Law of Economics, a law whose operation has been sharply in evidence in the case of Prohibition, marijuana and other drugs, prostitution, pornography, and a host of other banned articles and substances, namely, that demand creates its own supply. There is no evidence anywhere to show that reducing the availability of firearms *in general* likewise reduces their availability to persons with criminal intent or that persons with criminal intent would not be able to arm themselves under any set of general restrictions on firearms." (Italics in original.)

The same points have been made even with regard to the illegal firearms market involving juvenile delinquents. Joseph F. Sheley & James D. Wright, IN THE LINE OF FIRE: YOUTH, GUNS AND VIOLENCE IN URBAN AMERICA 150-53 (1995).

firearm? To answer these questions requires reviewing what we know about the propensity to murder. Is it the case that there but for the grace of God, might go any of us? Or is it the case that those "at risk" for violent crime, or at least for the most extreme crime, murder, differ substantially from the general run of humanity?

### DIFFICULTIES OF TRYING TO DISARM CRIMINALS ONLY

It has long been generally agreed that certain discrete high risk groups should be denied access to firearms by what we shall call felon-in-possession laws.<sup>5</sup> The difficulty of achieving this goal is that persons who are inclined toward crime may have little compunction about violating laws forbidding them arms, and those laws may be difficult to enforce against them. Had 20th Century Americans not previously understood this, the point would have been made unmistakably clear by the Prohibition experience. As the SATURDAY EVENING POST editorialized in 1925: "If the Federal

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<sup>5</sup> We use that phrase to denominate the federal, and most state, laws that bar gun possession by persons who have been convicted of any felony, or certain misdemeanors, or who have been involuntarily committed to a mental institution. See, e.g. Title 18 USC § 922(g), Cal. Penal C. §§ 12021 ff. and W & I. C. §§ 8100-8105.

government cannot prevent the landing and distribution of shiploads of rum, how can it stop the criminal from getting the most easily concealed and vital tool of his trade."<sup>6</sup>

Eighty subsequent years of trying to enforce narcotics bans have further spotlighted the practical difficulties of enforcing disarmament on either the whole populace or discrete groups therein.<sup>7</sup> Among the major difficulties in a

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<sup>6</sup> "Firearms and the Gunman," Oct. 31, 1925, p. 28.

<sup>7</sup> See, e.g., Randy E. Barnett, "Bad Trip: Drug Prohibition and the Weakness of Public Policy", 103 YALE L. J. 2593, 2617-2618 (1994); Samuel Walker, SENSE AND NONSENSE ABOUT CRIME AND DRUGS: A POLICY GUIDE chs. 10 and 13 (Belmont, CA: Wadsworth, 1994); Steven B. Duke & Albert C. Gross, AMERICA'S LONGEST WAR: RETHINKING OUR TRAGIC CRUSADE AGAINST DRUGS 113 (N.Y. Putnam, 1993); James B. Jacobs, CAN GUN CONTROL WORK (Oxford, 2003); Alan J. Lizotte, "The Costs of Using Gun Control to Reduce Homicide," 62 BULL. N.Y. ACAD. MED. 539 (1986); Don B. Kates, "Handgun Banning in Light of the Prohibition Experience" in Don B. Kates (ed.) FIREARMS AND VIOLENCE: ISSUES OF PUBLIC POLICY (1984); John Kaplan, "The Wisdom of Gun Prohibition" 455 ANNALS OF THE AMER. ACAD. OF POL. & SOC. SCI. 11 (1981); Raymond Kessler, "Enforcement Problems of Gun Control: A Victimless Crimes Analysis", 16 CRIM. L. BULL. 131 (1980) David Hardy and Kenneth Chotiner, "The Potentiality for Civil Liberties Violation in the Enforcement of Handgun Prohibition" in D. Kates (ed.) RESTRICTING HANDGUNS (1979). See also James B. Jacobs, & Kimberly A. Potter,

society like ours, whose prisons are overflowing with felons serving sentences for serious criminal acts, available prison space will more likely be devoted to those so convicted than to those convicted of mere *mala prohibita* like the illegal possession or carrying of a gun. In order to incarcerate murderers and robbers, those convicted of nothing more serious than having or carrying a gun tend to get probation or minimal sentences -- even if they have prior felony convictions.<sup>8</sup> However inevitable that is, given the scarcity of our resources, it deprives felon-in-possession laws of their force. The point of these laws is to deter particularly dangerous people from having or carrying a particularly fearsome form of weaponry **before** they have a chance to use it against victims. That point largely disappears if it turns out that the law is only really enforced if they get caught actually using a gun against

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"Comprehensive Handgun Licensing & Registration: An Analysis & Critique of Brady II, Gun Control's Next (and Last?) Step," 89 J. CRIM. L. & CRIMINOL. 81-110 (1998) and "Keeping Guns Out of the 'Wrong' Hands: The Brady Law and the Limits of Regulation," 86 J. CRIM. L. & CRIMINOL. 93 (1995).

<sup>8</sup> See the discussion by career BATF agent-turned-criminologist William J. Vizzard, SHOTS IN THE DARK: THE POLICY, POLITICS, AND SYMBOLISM OF GUN CONTROL (N.Y.: Rowman & Littlefield, 2000) at 167-69.



victims.<sup>9</sup> As the premier study of gun control enforcement concluded over two decades ago:

It is very possible that, if gun laws do potentially reduce gun-related crime, the present laws are all that is needed if they are

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<sup>9</sup> Prof. Vizzard, a strong proponent of pro-active policing under felon-in-possession laws to deter or incarcerate felons **before** they misuse weapons, provides a poignant example from his years as a BATF supervising agent: Two long-time felons with prior murder and other felony convictions "were stopped by California highway patrol officers for speeding. The officers observed blood on the subjects' clothing...." A search of the trunk revealed "clothing soaked with human blood, an assault rifle, and a pistol. Imbedded in the frame of the pistol were bits of human flesh. Although subsequent investigation by homicide investigators and ATF agents working under my supervision, never located a victim, both subjects received sentences of approximately 20 years in federal prison for firearm possession." SHOTS IN THE DARK, supra, at 166.

Gratifying though this denouement is, it obviously came too late for at least one victim. If a policy of severe prosecution prevailed in all felon-in-possession cases regardless of whether evidence of some other, more serious, crime existed, the subjects might have been deterred from having guns, or they might have been incarcerated instead of being free to kill.

enforced. What good would stronger laws do when the courts have demonstrated that they will not enforce them?<sup>10</sup>

We shall resume discussion of the potentialities and costs of felon-in-possession laws in the penultimate section of this paper.

### "THE VIRGIN KILLER" THESIS

Sophisticated gun control advocates recognize that terrorists and habitual criminals will not voluntarily obey gun bans and that, as a practical matter, gun laws are difficult or impossible to enforce against them.<sup>11</sup> The

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<sup>10</sup> Paul Bendis & Steve Balkin, "A Look at Gun Control Enforcement," 7 J. POLICE SCI & ADMIN 438-48 (1979).

<sup>11</sup> See, e.g., Amitai Etzioni & Richard Remp, TECHNOLOGICAL SHORTCUTS TO SOCIAL CHANGE 107 (N.Y.: Sage, 1973) ("The 'premeditated and rational' murder by the so-called 'hardened' criminal would appear to be the least affected by gun control laws reducing the availability of guns. Clearly, this type of homicide is most susceptible to the argument that if guns were outlawed for all citizens, criminals would find some means of getting guns, or use other weapons instead."), Editorial "Controlling Guns" NATIONAL LAW JOURNAL, April 13, 1981, p. 14 ("No amount of control will stop a determined assassin -- or a determined street robber -- from getting a gun.") See also Franklin Zimring, "Is Gun Control Likely to Reduce Violent Killings", 35 U. CHI. L. REV. 721 (1968) (professional criminals cannot be disarmed),

argument for disarming the citizenry as a whole proceeds more or less from that very recognition. The failure of current laws, gun control advocates assert, comes from their too-narrowly focusing on criminals rather than on disarming the whole population. Laws so focused are almost tautologically futile: almost by definition, criminals will disobey them.

In emphasizing this futility, gun control advocates are not (in their own minds at least) conceding gun control is futile per se. As they see it, the solution to gun murder lies in disarming the law abiding population, not the criminal population. This position is summarized, though not endorsed, in the Academy of Criminal Justice Sciences' analysis of gun control:

An important aspect of the argument for [banning handguns to the general populace] ... runs along the following lines:  
"Homicide is largely a matter of domestic and acquaintance killings by ordinary citizens who happen to have a loaded handgun available to them in a moment of rage." These crime of passion and altercation killings ("non-felony-related" homicides) are isolated outbursts of violence by individuals who are

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Richard Harding, "Firearms Ownership and Accidental Misuse in S. Australia", 6 ADELAIDE L. REV. 271, 272 (1978) (political criminals cannot be disarmed).

otherwise law-abiding, not violence prone, and have clean records. Precisely because they are law-abiding and not assaultive criminals by nature, ordinary citizens will comply with handgun restrictions, unlike hardened criminals....<sup>12</sup>

The Academy's analysis goes on to label this

largely a media myth fostered by reporters who "play up" the dramatic contrast between extremely violent acts by persons with supposedly [non-violent backgrounds.]... [In fact, based on actual criminal records], *the average murderer turns out to be no less hardened a criminal than the average robber or burglar.* There is, therefore, *no more reason to think [the murderer] ... will cavil at violating a handgun ban than will [the robber.]*<sup>13</sup>

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<sup>12</sup> Gerald D. Robin, VIOLENT CRIME AND GUN CONTROL (Cincinnati, Academy of Criminal Justice Sciences: 1991) at p. 46, references omitted.

<sup>13</sup> Ibid. at pp. 47 and 48; emphasis ours.

With apologies to Prof. Canter, we describe this media myth as the "Virgin Killer" thesis.<sup>14</sup> Surprisingly, it has been emphatically endorsed by academics despite an absence of empirical evidence. In a recent article Professor Frank Vandall reiterates and endorses law professor/anti-gun activist David Kairys' assertion "That gun in the closet to protect against burglars will most likely be used to shoot a spouse in a moment of rage....The problem is you and me -- law-abiding folks." To the same effect he quotes the faith of leading medical anti-gun activist Katherine Kaufer Christoffel, that "most shootings are not committed by felons or mentally ill people, but are acts of passion that are committed using a handgun that is owned for home protection."<sup>15</sup> Likewise, the doyen of academic anti-gun activists,

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<sup>14</sup> As set out in fn. 1, above, Prof. Canter uses the phrase to describe what he calls the "very rare" phenomenon of a killer "who has absolutely no background indicators, e.g., a prior criminal or mental record.

<sup>15</sup> Frank J. Vandall A PRELIMINARY CONSIDERATION OF ISSUES RAISED IN THE FIREARMS SELLERS IMMUNITY BILL 38 Akron L. Rev. 113, 118-19 and footnote 28 (2005) quoting Prof. Kairys, from his article "A Carnage in the Name of Freedom", PHILADELPHIA INQUIRER, September 12, 1988 and Prof. Chgristoffel, from her article

Franklin Zimring assert: "most homicides result from non-criminal social relations" -- "the social processes that generate arguments that result in homicides are not distinctively criminal in most cases."<sup>16</sup> This characterization of murder is invoked to justify banning firearms by sociologist/Communitarian founder Amitai Etzioni writes "...most homicides are not committed by the 'hardened' criminal who would seek out a gun or

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respectively: Katherine Kaufer Christoffel, "Toward Reducing Pediatric Injuries from Firearms: Charting a Legislative and Regulatory Course", 88 PEDIATRICS 294, 300 (1991)

<sup>16</sup> Franklin E. Zimring & Gordon Hawkins, CRIME IS NOT THE PROBLEM: LETHAL VIOLENCE IN AMERICA (Oxford, 1997) at 16 and 61. We describe Professor Zimring as America's leading academic gun control advocate based on his distinguished near 40 year career of such publications as: "Is Gun Control Likely to Reduce Violent Killings", 35 U. CHI. L. REV. 721 (1968; "Fun and Games with Guns and Statistics", 4 WISCONSIN L. REV. 1113-26 (1968, the Eisenhower Commission's firearms report, FIREARMS AND VIOLENCE IN AMERICAN LIFE (U.S. Gov't. 1970) (with George Newton), "Victim Injury and Death in Urban Robbery", 15 J. LEG. STUD. 1 (1986), THE CITIZEN'S GUIDE TO GUN CONTROL (N.Y., Macmillan: 1987) (with Prof. Hawkins).

other lethal weapon whether or not it was legal, but rather by ordinary, 'law abiding' citizens who kill on impulse rather than by intent."<sup>17</sup>

Among the most extensive expositions of "the virgin killer" thesis is that in a 1995 book on gun control by SUNY political scientist Robert Spitzer.<sup>18</sup> He denounces the idea that "one can readily differentiate between 'good guys' and 'bad guys.'" -- "that guns in the hands of good guys are good, whereas guns in the hands of bad guys are bad" -- that "If [the bad guys] are controlled (through deterrence or imprisonment, for example), the problem is essentially solved." Prof. Spitzer admits this "'good guy-bad guy'" dichotomy is more or less valid as to crimes

such as robbery and theft ... since such crimes (especially when guns are involved) are infrequently attributable to impulse... [But it] bears little relation to reality for most gun-related homicides, in that many homicides are the result of impulsive actions taken

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<sup>17</sup> See, e.g., Etzioni & Remp, *supra* at 107.

<sup>18</sup> Robert Spitzer, *THE POLITICS OF GUN CONTROL* (Chatham, N.J., Chatham House 1995) 186 *ff.*

by individuals *who have little or no criminal background* and who are known to the victims.

[In] a *Time* magazine compilation of all 464 gun deaths that occurred nationwide... [t murders] typically involved people who loved, or hated, each other -- spouses relatives or close acquaintances. [Citing F.B.I. data] almost half of all murders ... were committed by an acquaintance or relative of the victim. More than a quarter of all women murdered were killed by boy friends or husbands. Arguments precipitated 32 percent of all murders. Only 21 percent resulted from the commission of felonies such as arson, robbery, and the like... The good guy-bad guy myth thus evaporates when *most murders* are examined....<sup>19</sup>

The "virgin killer" thesis is in fact the central tenet of arguments for banning guns to the general populace rather than just to high risk groups. That thesis is espoused by opinion leaders, anti-gun advocates and editorialists alike. The founder and head of the Violence Policy Center writes: "the majority of homicides in America result from confrontations

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<sup>19</sup> Quoting from *ibid.*, pp. 186-87 with emphasis added.



between people who know each other, and not from criminal attacks by strangers....”<sup>20</sup> Medical and public health philippics against firearms

commonly feature such assertions as that:

most shootings are not committed by felons or mentally ill people, but are acts of passion that are committed using a handgun that is owned for home protection[;]

most [murderers] would be considered law-abiding citizens prior to their pulling the trigger[;]

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<sup>20</sup> Josh Sugarmann, EVERY HANDGUN IS AIMED AT YOU: THE CASE FOR BANNING HANDGUNS (2001) p. 73. As of April 8, 2005 the Violence Policy Center website described itself as “the most aggressive group in the gun control movement”

<http://www.vpc.org/aboutvpc.htm> (as of April, 2005) As such, the VPC asserts that

each year the FBI's *Uniform Crime Reports* affirms that the majority of homicide victims die not as a result of criminal activity, but because of arguments between people who know each other. The reality of firearms violence is that it stems not from "guns in the wrong hands," but from the virtually unregulated distribution of an inherently dangerous consumer product....

More than half the homicides in this country involve people who are not criminals... These so-called "mom and pop" murders, the result of heated arguments or accidents, are rarely premeditated[;] [Murderers] are neither felons nor crazy, [but rather] people involved in family fights and fights over jobs and money, and people who are sad or depressed.<sup>21</sup>

Naturally, the "virgin killer" theme is central to groups like the National Coalition to Ban Handguns which claims "most murders are committed by previously law abiding citizens where the killer and the victim are related or acquainted" and describes thousands of "gun murders done

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<sup>21</sup> Quoting, respectively, Webster, et al., "Reducing Firearms Injuries", ISSUES IN SCIENCE AND TECHNOLOGY, Spring, 1991: 73-9, p. 73; Bruce R. Conklin & Richard H. Seiden, "Gun Deaths: Biting the Bullet on Effective Control" PUBLIC AFFAIRS REPORT: Bulletin of the Institute of Governmental Studies [U.C.- Berkeley] vol. 22 # 5, p. 1 (1981), at p. 4; and Deane Calhoun, "From Controversy to Prevention: Building Effective Firearm Policies", INJURY PREVENTION NETWORK NEWSLETTER, Winter, 1989-90, at p. 15. To the same effect see Karl P. Adler & J.A. Barondess, et al., Correspondence, 272 JAMA 1409 (1994); George Pickett & John J. Hanlon, PUBLIC HEALTH: ADMINISTRATION AND PRACTICE 496 (L.A., Times-Mirror: 1990); Frederick P. Rivara, & F. Bruder Stapleton, "Handguns and children: a dangerous mix." 3 DEVELOPMENTAL AND BEHAVIORAL PEDIATRICS 35, 37 (1982).

[annually] by law-abiding citizens who might have stayed law-abiding if they had not possessed firearms."<sup>22</sup>

## FALSITY OF "THE VIRGIN KILLER" THESIS

### *1. Summary of the Aberrance of Homicide Perpoetrators*

The claims just quoted represent an audacious contradiction of what is one of the best-settled criminological truths. In this country, the systematic study of murder and murderers dates from Marvin Wolfgang's 1958 PATTERNS IN CRIMINAL HOMICIDE. That study, "and later research reveal[] that [both] homicide victims and offenders often have extensive criminal histories and that most crime is committed by a relatively small number of serial offenders."<sup>23</sup>

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<sup>22</sup> National Coalition to Ban Handguns [now the Coalition to Stop Gun Violence], "A Shooting Gallery Called America", undated, unpaginated pamphlet, emphasis in original. See also the Violence Policy Center's views set out at footnote ??? supra.

<sup>23</sup> David Kennedy, et al., "Homicide in Minneapolis: Research for Problem Solving," 2 HOMICIDE STUDIES 263, 269 (1998); see also 267: "Marvin E. Wolfgang's pioneering 1958 classic, *Patterns in Criminal Homicide*, defined the shape of criminological research on homicide. ... Wolfgang documented basic characteristics of homicide which have now become

Nearly fifty years of further homicide studies confirm that murderers are **almost never** the "ordinary, 'law abiding' citizens" Prof. Etzioni (& Remp, supra), blame. The great majority are, in fact, extreme aberrants whose life histories are full of violence, psychopathology, crimes (some acquisitive, others completely irrational), substance abuse, and other hazardous behavior and dangerous accidents. The whole corpus of research shows murderers "*almost always* have a long history of involvement in criminal behavior."<sup>24</sup>

It will be noted that the data reviewed herein concern American homicide. We have made no attempt to collect non-American data. But insofar as we have happened across homicide data from other nations the patterns is the same. "Two-thirds of accused [Canadian murderers] and half of all \_\_\_\_\_ criminological axioms [including that] ... alcohol is often a factor in homicide events; a relatively high proportion of [both] offenders and victims have a prior criminal record ...."

<sup>24</sup> Delbert S. Elliott, "Life Threatening Violence is *Primarily* a Crime Problem: A Focus on Prevention," 69 COLO. L. REV. 1081-1098 at 1089 (1998), emphasis added.

victims had previous criminal [conviction] records.” Insofar as mental health data were available for these Canadian murderers “one in eight of the accused [were] reported to have a mental health problem” and “68% of the accused had consumed alcohol or drugs.”<sup>25</sup> Over two thirds of murderers in a Swedish study had prior criminal convictions, and large percentages were alcoholics or mentally disturbed or defective..<sup>26</sup>. Other studies from Canada and Europe, as well as the U.S., all show that persons suffering major mental disorder, persons with sub-par I.Q. and substance abusers are each several times more

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<sup>25</sup> These facts and quotation are from p. 10 of the JURISTAT: Canadian Centre for Justice Statistics report “Homicide in Canada, 2002” by Josee Savoie. The same points are set out at p. 15 in the previous year’s report, though the g statistics given do, of course, differ slightly between the two years.

<sup>26</sup> Per Lindkvist, “Criminal Homicide in Northern Sweden, 1970-1981: Alcohol Intoxication, Alcohol Abuse and Mental Disease,” 8 INT’L. J. LAW AND PSYCHI.19-37 (1986).

likely to engage in violent crime than are ordinary people.<sup>27</sup> Dutch data indicate that of murderers whose prior histories are known 69.4% have previous criminal convictions while 28% were known to have been either unemployed or employed in narcotics trading.<sup>28</sup>

## *2. American Criminal Records Data*

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<sup>27</sup> Sheilagh Hodgins, "Mental Disorder, Intellectual Deficiency, and Crime," 49 ARCH. GEN. PSYCHI. 476 (1992) collecting such studies. To the same effect see Pekka Santilla & Jaana Haapasalo, "Neurological and Psychological Risk Factors Among Young Homicidal, Violent, and Nonviolent Offenders in Finland," 1 HOMICIDE STUDIES 234 (1997) (summarizing American and foreign studies on the extensive psychiatric histories of murderers).

<sup>28</sup> Paul R. Smit, et al., "Homicide in the Netherlands: An Exploratory Study of the 1998 Cases," 5 HOMICIDE STUDIES 293-310 (2001). Note that the 69.4% prior criminal record is a minimum for criminal record information was unavailable as to 38% of the murderers.

Only 15% of Americans in general have a criminal record of any kind.<sup>29</sup> But the overwhelming majority of murderers do. The longest data-set is the murder analyses the Chicago Police Department has published annually from the mid-1960s to date. Those analyses, and various state and national data-sets from the same general period, show upwards of 75% or more of murderers have **adult** criminal records.<sup>30</sup> Moreover, murderers tend to be

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<sup>29</sup> Mark Cooney, "The Decline of Elite Homicide," 35 CRIMINOLOGY 381, 386 (1997).

<sup>30</sup> See Chicago Police Department (Detective Division), MURDER ANALYSIS volumes for 1965-1998. Typical percentages of murderers who had prior crime records are: 1991: 77.15%; 1990: 74.63; 1989: 74.22; 1988: 73.59; 1987: 73.81 (five year average: 74.68%). Compare John W. Dawson and Barbara Boland (federal Bureau of Justice Statistics: Special Report) "Murder in Large Urban Counties, 1988" (U.S. Department of Justice, 1993): of 3,119 "murder defendants [under indictment] in the Nation's 75 largest counties", 76.7% "had a criminal history", i.e., prior criminal record. See also next footnote discussing F.B.I. national data runs and state and local studies; and the various such studies reviewed in Elliott, supra, and Kleck & Bordua, "The Factual Foundation for Certain Key Assumptions of Gun Control", 5 LAW & POLICY Q. 271, 292ff. (1983).

career criminals, rather than having just one prior offense. For instance, exclusive of all **other** offenses they may have had, 80% of Atlanta murder arrestees in 1997 had at least one prior drug offense; fully 70% had 3-5 or more prior drug offenses.<sup>31</sup> Similarly, when the Kennedy School at Harvard studied gun murders occurring in Lowell, MA: in 2002 nearly 95 percent of the killers turned out to have been already known to the criminal justice

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<sup>31</sup> Dean G. Rojek, "The Homicide and Drug Connection", p. 135 in Paul H. Blackman, et al., THE VARIETIES OF HOMICIDE AND ITS RESEARCH (Quantico, VA, F.B.I. Academy, 2000). Compare: HEARINGS OF THE SENATE SUB-COMMITTEE TO INVESTIGATE JUVENILE DELINQUENCY, 94th CONGRESS, SECOND SESSION 75ff. (1960s Washington, D.C. profile showed the typical murderer there had six prior arrests, two for felonies, one violent.); FBI, UNIFORM CRIME REPORT-1975 at 42ff. (homicide arrestees nationally over five year period had adult records showing an average prior criminal career of at least six years duration including four major felony arrests); David Kennedy, et al., supra (In this study, "Of the 118 Minneapolis youth homicide arrestees and suspects, 75% had been arrested at least once in Minneapolis since 1990, and for those offenders with at least one prior arrest, the mean number of arrests per offender was 7.8...").



system as gang members or for some other crime; 89 percent had been accused of a prior armed violent crime.<sup>32</sup>

At this point we need to introduce some distinctions and/or caveats. First, the fact that only c. 75% of murderers have **adult** records does not mean the other 25% (or any large proportion) of murderers lack even official crime records. By definition, the 10-15% of murderers who are juveniles cannot have adult records. But all available data suggest they have extensive juvenile records, as well as psychiatric or other official records of violence or

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<sup>32</sup> BOSTON GLOBE, "Study: Small Group Crimes" July 10, 2003. Anthony A. Braga, Jack McDevitt, & Glenn L. Pierce, UNDERSTANDING AND PREVENTING GANG VIOLENCE: PROBLEM ANALYSIS AND RESPONSE DEVELOPMENT IN LOWELL, MASSACHUSETTS [to be published in Police Quarterly (2005, Volume 8, Number 3, specific page numbers unknown)]

of other grave deviance -- and so do the c. 75% of murderers who have adult records, and the small minority of adult murderers without an adult record.<sup>33</sup>

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<sup>33</sup> See, e.g., Linda Langford, Nancy Isaac & Sandra Adams, "Criminal and Restraining Order Histories of Intimate Partner-Related Homicide Offenders in Massachusetts, 1991-95" in Blackman, et al., *VARIETIES OF HOMICIDE*, supra ("According to preliminary analysis, at least 74.7% of perpetrators had a prior criminal history in Massachusetts.... Nearly a quarter of perpetrators (23.6%) were under an active restraining order at the time of the homicide. Forty percent of perpetrators had a history of having been under a restraining order at some time prior to the homicide, taken out by the victim or some other person."); David Kennedy, et al., supra (In this study, "Of the 118 Minneapolis youth homicide arrestees and suspects, 22.9% were on probation at the time they killed and 39%" had sometime been on probation. Emphasis added); Thomas B. Marvell & Carlisle E. Moody, "The Impact of High Out-of-State Prison Population on State Homicide Rates," 36 *CRIMINOLOGY* 513, 517 (1998) ("most murderers differ little from other major criminals." See p. 518, n. 5 equating "major criminal" to "what others call professional criminals, career criminals, or violent predators."); David Finkelhor, "The Homicides of Children and Youth" in G. Kaufman Kantor & J. Jasinski (eds.) *OUT OF THE DARKNESS: CONTEMPORARY PERSPECTIVES ON FAMILY VIOLENCE* (Sage, 1997) ("A tragic fact about child abuse fatalities is that a large minority, ranging from 24% to 45%

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occur in families that are already known to child protective services because of some family or child care problem they had been having."); Roger Lane, MURDER IN AMERICA: A HISTORY (Ohio U. Press, 1997) p. 259 (data on Philadelphia homicides from the 1950s through the early 1960s showed, "Victims as well as offenders, finally, tended to be people with prior police records, usually for violent crimes such as assault, and both had typically been drinking at the time of the fatal encounter."); David M. Kennedy, "Pulling Levers, Chronic Offenders, High Crime Settings, and A Theory of Prevention," 31 VALPARAISO L. REV. (1997) ("...domestic violence offenders, at least those who come to the attention of the criminal justice system, tend to have robust [prior] offending histories.") (collecting studies); U.S. Department of Justice, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS-1994 (Bureau of Justice Statistics, D.C.) at p. 360 (of 942 persons identified as having murdered a police officer over the period 1984-93, 72% had prior criminal record); M. Denise Dowd, et al. "Pediatric Firearm Injuries, Kansas City, 1992: A Population-Based Study," 94 PEDIATRICS 867, 872 (1994) (75% of juveniles who shot other juveniles "had a history of one or more arrests by the Kansas City police department...."); John DiIulio, "The Question of Black Crime", 117 THE PUBLIC INTEREST 3, 16, 17 (1994): ("About 11 percent of murder arrestees [nationally] ... [were] on pretrial release (for an earlier case) at the time of the offense."; "According to the [federal] B[ureau] of J[ustice] S[tatistics] National Pretrial Reporting Program, which is based on data from the nation's 75 most populous counties and encompasses most big cities, in 1990 14 percent of murder arrestees

Second, it must be acknowledged that many of these prior crime records are: for arrests rather than convictions (though conviction-based data for Canada are similar<sup>34</sup>); for non-violent as well as violent offenses; and for relatively trivial offenses. "Relatively few minor offenders go on to become involved in life-threatening violent crimes, but virtually all individuals who

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were on probation and 7 percent were on parole" when the murder occurred.); A. Swersey and E. Enloe, *HOMICIDE IN HARLEM* (N.Y., Rand, 1975) 17 ("the great majority of both perpetrators and victims of assaults and murders had previous arrests, probably over 80% or more"); R. Narloch, *CRIMINAL HOMICIDE IN CALIFORNIA* 53-54 (Sacramento, Cal. Bur. of Crim. Stats., 1973); FBI, *UNIFORM CRIME REPORT-1971* at 38 (77.9% of homicide arrestees nationally over a year period had prior criminal records); D. Mulvihill, et al. *CRIMES OF VIOLENCE: REPORT OF THE TASK FORCE ON INDIVIDUAL ACTS OF VIOLENCE* (Washington, D.C., Gov't. Printing Office, 1969) at 532 (table showing that 74.7% of murder arrestees nationally over a four year period in the early 1960s had priors for violent crime or burglary).

become involved in life-threatening violent crime have prior involvement in many types of minor (and not so minor) offenses."<sup>35</sup> "Homicide offenders are likely to commit their murders in the course of long criminal careers consisting primarily of nonviolent crimes but including larger than normal [for other criminals] proportions of violent crimes."<sup>36</sup> Comparisons among persons having any crime record show that "frequency, seriousness and variety of offending are all strongly predictive of life-threatening violent

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<sup>34</sup> Our American data are for prior arrests **or convictions** of murderers. Canadian data, which are for convictions only, reveal that "Two-thirds of accused [murderers] and half of all victims had previous criminal records." See Canadian Centre for Justice Statistics pamphlets cited supra.

<sup>35</sup> Elloitt, supra, 69 COLO. L. REV. at 1087-88.

<sup>36</sup> David M. Kennedy, et al., "Homicide in Minneapolis: Research for Problem Solving," 2 HOMICIDE STUDIES 263, 269 (1998). See also David M. Kennedy, et al., "Youth Violence in Boston: Gun Markets, Serious Youth Offenders and A Use Reduction Strategy," 59 LAW & CONTEMP PROBS 147, 159-60 (1997) (Boston juvenile murderers' prior criminal record averaged 9.7 prior arraignments).

offending. Even in the case of life-threatening domestic violence, most of those violent offenders have a history of prior involvement in criminal behavior and serious violent crimes."<sup>37</sup> By the same token, comparison of youth with criminal backgrounds to those who have not committed crimes show a very high "correlation between the frequency of any criminal act and the frequency of life-threatening violent acts at ages eighteen to twenty-four."<sup>38</sup>

### *3. Data from Other Sources than Explicit Criminal Records*

Data reflecting only official crime records greatly underrepresent murderers' true histories of prior serious crimes. For instance, such data

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<sup>37</sup> Elliott, *supra*, 69 COLO. L. REV. at 1085-86.

<sup>38</sup> Elliott, *supra* at 1085-86. He adds other evidence indicates that "These correlations actually underestimate the relationship between crime generally and life-threatening crime."

"substantially underestimate" the incidence among those who murder relatives or acquaintances of

[a] real history of assaultive behavior because their [prior] victims [we]re less like to press charges and the police [we]re loathe to interfere in a family matter. A study of police responding to domestic disturbance calls in Kansas City (Missouri) found that 90 percent of all the family homicides were preceded by previous disturbances at the same address, with a median of 5 calls per address. Thus homicide -- [whether] of a stranger or [of] someone known to the offender -- is "usually part of a pattern of violence, engaged in by people who are known ... as violence prone."<sup>39</sup>

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<sup>39</sup> Academy of Criminal Justice Sciences analysis supra, note ??? at 47-48 quoting Prof. Kleck; other references omitted.

Perpetrator studies that delve beyond official records find that, whether murderers **also** have official records of deviance, virtually all have lives studded with violence and other crimes that for some reason did not lead to their arrest or civil commitment.<sup>40</sup> Moreover many may have "official" records of a type that do not explicitly reveal the fact of their prior violence.<sup>41</sup>

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<sup>40</sup> See, e.g., R. Holmes & S. Holmes, *MURDER IN AMERICA* 8-9, 28 (London, Sage: 1994) (animal torture and other prior aberrance of juveniles who murder, and of spouse murderers, respectively). In an unpublished study done by the FBI, one third of multiple murderers interviewed in prisons stated they had tortured animals as children and one half had done so as adolescents. *MARIN INDEPENDENT JOURNAL*, September 10, 1997 p. A5 "Animal Abusers More Likely to Hurt People, Study Says." Compare Piers Beirne, "For A Nonspeciesist Criminology: Animal Abuse As An Object of Study," 37 *CRIMINOLOGY* 117, 123 (1999) (anecdotal evidence of animal abuse as a childhood activity of multiple or serial murderers).

As the Academy of Criminal Justice Sciences analysis quoted above notes, one problem with evaluating murderers based just on their official records is that (at least until quite recently) police were often unwilling to arrest perpetrators of domestic violence. "The day-to-day reality is that most family murders are preceded by a long history of assaults" says a leading authority on



Two interview studies by Brownstein et al. of different sub-groups of incarcerated New York State murderers are illustrative. A 1995-96 sample of

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such violence. Murray A. Straus, "Domestic Violence and Homicide Antecedents", 62 BULLETIN OF THE N.Y. ACADEMY OF MEDICINE 446, 454, 457 (1986) and "Medical Care Costs of Intrafamily Assault and Homicide", 62 N.Y. ACAD. OF MED. 556, 557 fn. (1986), summarizing studies through the mid-1980s as "indicat[ing] that intrafamily homicide is typically just one episode in a long standing syndrome of violence." More recent data confirm this. Typical are the four articles included in the November, 1998 ("Femicide") issue of HOMICIDE STUDIES, the following quote from one of them being representative of all: "The overriding theme to emerge from these cases was that partner homicide is most often the final outcome of chronic women battering." Paige Hall-Smith, Kathryn E. Moracco & John D. Butts, "Partner Homicide in Context," 2 HOMICIDE STUDIES 400-421 at 411 (1998).

<sup>41</sup> Peter Reinharz, chief juvenile prosecutor for the City of New York, was kind enough to read a copy of this ms. in draft form. His comment (August 15, 2001) was that, based on his experience the virgin killer thesis is mythical. One thing that may tend to obscure murderers' prior violent conduct against other family members is that instead of having been formally arrested and/or prosecuted they were just referred to counseling or "family court" or some similar non-criminal institution.

83 young murderers (aged 12-21) self-reported the following misconduct committed in the years before they murdered: 60% had dealt in illegal drugs; 76% had engaged in property destruction; 65% had committed grand theft; 73% had committed misdemeanor or felony assault; 63% had committed robbery.<sup>42</sup> Equally illustrative of how deviant killers are from "ordinary 'law abiding' citizens" are the life histories of the 215 female murderers interviewed by Brownstein, et al.: 65% of them admitted to at least one prior violent crime (assault or robbery) "and 64% said they had seriously harmed someone else" in at least one of those prior incidents.

As further exemplified *infra*, these killers, like most others, generally resemble their victims in being immersed in an aberrant, highly dangerous life style. "In discussing their own violent victimizations, 58 percent [of these female murderers] said they had been victims of serious physical harm as a

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<sup>42</sup> Henry H. Brownstein, et al., "Prior Involvement with Drugs, Illegal Activities, Groups, and Guns Among a Sample of Young Homicide Offenders," in Blackman, et al., VARIETIES OF

child", as had 79% of them during their adult lives; "49 percent said they had been the victims" of rape or molestation as children; "43 percent said they had experienced such harm as an adult." On the day they killed, 64% used one (or more) drugs: 47% alcohol, 18% crack, 12% non-crack cocaine, 11% marijuana and 10% heroin. Ninety-five percent had prior experience with such intoxicants ; 39% were previously involved in drug distribution.<sup>43</sup>

Neither the 83 juvenile murderers nor the 215 female murderers interviewed accord with characterization of murderers as "neither felons nor crazy," just ordinary people "who would [have] be[en] considered law-abiding citizens prior to their pulling the trigger" -- "The problem is you and me -- law abiding folks."<sup>44</sup> Rather Brownstein's intererviewees fit the pattern

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HOMICIDE, supra (see tables 1-5).

<sup>43</sup> Henry H. Brownstein, et al., "Women Who Kill in Drug Market Situations," 12 JUSTICE Q. 473, 476-77 (1995).

<sup>44</sup> See footnotes ??? above and accompanying text.

of murderers in general. They are atypical only in that 215 are female, and 83 are below age 21, whereas the average murderer is a man in his mid-twenties. Yet in their extreme deviance from the ordinary law abiding citizenry Brownstein's interviewees epitomize the extreme aberrance of murderers in general. The "rather mundane general rule [is that p]eople who are seriously violent in the present almost invariably have been seriously violent in the past."<sup>45</sup>

#### *4. What Victim Data Show About Murder Characteristics and Circumstances*

What murderers do resemble is their victims – because, generally, both come from the same criminal milieu. Data on murder victims are fuller than are data on murderers because some murders are never solved. But the victim data are just as inconsistent with the "virgin killer" thesis as are the

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<sup>45</sup> Gary Kleck, "Policy Lessons from Recent Gun Control Research", 49 LAW & CONTEMPORARY PROBLEMS 35, 40 (1986).

perpetrator data. Contrast Zimring & Hawkins' misleading assertions that "most homicides result from non-criminal social relations" and that "the social processes that generate arguments that result in homicides are not distinctively criminal in most cases"<sup>46</sup> to the accurate assessment that: "The victims of gun violence are far from a cross section of the American public. Particularly in the case of homicide ... [victims] with criminal records are greatly overrepresented."<sup>47</sup> Likewise, contrast Conklin & Seiden's falsehood, most murders "involve people who are not criminals... 'mom and pop murders'," to an analysis of national data on "acquaintance" gun murders that occurred in homes. Note that if any data set should show lots of "mom and

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<sup>46</sup> CRIME IS NOT THE PROBLEM supra at 16 and 61. For similar false characterizations of homicide circumstances see those quoted above from Spitzer, Conklin & Seiden, and the Violence Policy Center, respectively.

<sup>47</sup> Philip J. Cook & Jens Ludwig, GUN VIOLENCE: THE REAL COSTS 21 (Oxford, Oxford University Press, 2000).

pop” murders, it would be a sample of gun murders of acquaintances in homes .Yet, in fact,

the most common victim-offender relationship among "acquaintance" cases was that between persons involved in drug dealing, where *both parties were criminals who knew one another because of prior illegal transactions.*<sup>48</sup>

These national data are confirmed by the showing in local studies that killers and victims resemble each other in having life histories of violence, crime, substance abuse and/or psychopathology. For instance, NEW YORK: A New York Times study of the 1,662 murders committed in that city in the years 2003 through 2005 found that "More than 90 percent of the killers had

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<sup>48</sup> Gary Kleck, TARGETING GUNS: FIREARMS AND THEIR CONTROL 236 (1997) (emphasis added) based on U.S. Bureau of Justice Statistics data run on murder defendants being prosecuted in the 33 largest urban counties in 1988.

criminal records; ...." <sup>49</sup> BALTIMORE (2006): Police data show that 92% of those arrested for murder in 2006 had criminal records.<sup>50</sup>

ST. LOUIS: Between Jan. 1, 2001 and July 1, 2003 police there recorded 300 killings. Of the suspects arrested in these killings: 88 percent had prior felony criminal histories. 65% had a history of using illegal narcotics. Of the victims, 78 percent had a felony criminal history and 73% had a criminal history involving illegal drugs. Sixty-eight percent of the victims had illegal drugs or alcohol in their systems at time of autopsy.<sup>51</sup> LOS ANGELES: 71% of minors injured in drive-by shootings "were documented members of

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<sup>49</sup> Jo Craven McGinty, "New York Killers, and those killed, by the numbers," N.Y. TIMES, April 28, 2006.

<sup>50</sup> Gus G. Sentementes, "Patterns persist in city killings: Victims, suspects usually black men with long criminal histories", BALTIMORE SUN, January 1, 2007 t  
[http://www.baltimoresun.com/news/local/baltimore\\_city/balte.ci.homicide01jan01,0,4002621.story?track=mostemailedlink](http://www.baltimoresun.com/news/local/baltimore_city/balte.ci.homicide01jan01,0,4002621.story?track=mostemailedlink)

<sup>51</sup> ???

violent street gangs."<sup>52</sup> WASHINGTON, D.C.: "The Metropolitan Police Department classifies most homicides by motive: the fraction classified as drug-related increased from 21 percent to 80 percent [of all homicides there] between 1985 and 1988;"<sup>53</sup> PHILADELPHIA: "84% of victims in 1990 [and 93% as of 1996] had antemortem drug use or criminal history."<sup>54</sup>

RICHMOND: Virginia Department of Justice data on adolescents in Richmond showed that "the risk of gunshot injury is 22 times higher for

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<sup>52</sup> H. Range Hutson, et al., "Adolescents and Children Injured or Killed in Drive-By Shootings in Los Angeles," 330 *New England Journal of Medicine* 324, 325 (1994).

<sup>53</sup> Philip J. Cook, "The Technology of Personal Violence", in M. Tonry (ed.) 14 *CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH* (1991).

<sup>54</sup> Quoting Michael D. McGonigal, et al. "Urban Firearm Deaths: A Five-Year Perspective," 35 *Journal of Trauma* 532-536 (1993). The 93% figure for 1993 is reported in Cook & Ludwig, *supra*, at p. 23, citing unpublished study from University of Pennsylvania Medical School.



males who are involved in crime than [for] those who are not."<sup>55</sup>

CHARLOTTE, NC: Of 545 adult gunshot victims over the period July 1, 1992 to June 30, 1993, 71% had criminal records.<sup>56</sup> ATLANTA: exclusive of whatever **other** offenses they may have committed, "60% of homicide victims had a criminal record of drug violation."<sup>57</sup>; CHICAGO: The Police Department's murder analyses from the mid-1960s to date consistently show upwards of two-thirds of homicide victims with criminal records and/or other indicia of criminal behavior. NEW ORLEANS: 85% of autopsied murder

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<sup>55</sup> Id. citing unpublished Virginia Department of Justice study.

<sup>56</sup> Unpublished study by University of North Carolina-Charlotte professors Richard C. Lumb and Paul C. Friday, cited in Don B. Kates, Henry E. Schaffer, et al., "Guns and Public Health: Epidemic of Violence or Pandemic of Propaganda", 62 TENN. L. REV. 513, ???, fn. ??? (1995).

<sup>57</sup> Rojek in Blackman, *supra*.

victims in the years 1992-1993 were positive for metabolites of cocaine.<sup>58</sup>

BALTIMORE: Of 211 patients who came to a major urban trauma center for treatment of gunshot or knife wounds or other violent trauma, 61.9% tested positive for narcotics with another 8.6% testing positive for alcohol; 11.7% had had both alcohol and narcotics.<sup>59</sup>

The most intensive local study of which we are aware is from San Francisco where, of gun shot victims in 1999, 87% either tested positive for illegal drugs or had a prior criminal history. (The 67% figure for prior criminal history is a minimum figure because it is limited to their prior criminal records in San Francisco and does not include arrests or convictions in other jurisdictions in California or other states.) Three further findings of

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<sup>58</sup> Personal communication from Tulane University sociologist James D. Wright, Jan. 9, 1998, based on his conversation with the chief medical examiner.

<sup>59</sup> Carl. A. Soderstrom, et al., "Psychoactive Substance Use Disorders Among Seriously Injured Trauma Patients," 277 J.AM.MED. ASSOC. 1769 (1997).

this 1999 study are indicative: By 2001 sixty-three percent of the gunshot victims who recovered had been re-arrested in San Francisco for some other crime. And, among all the gunshot victims, those with prior criminal histories were twice as likely to have suffered multiple gunshot wounds as those without such a history – and were seven times more likely to have been wounded in connection with a drug transaction.<sup>60</sup>

Likewise, studies in major trauma care centers report the same people (i.e., criminals) come in time after time with successive bullet or knife wounds or other intentional trauma. So frequently is this the case that some studies describe such trauma as a **disease**: "a chronic recurrent disease peculiar to unemployed, uninsured law breakers."<sup>61</sup>

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<sup>60</sup> 2001 study by the San Francisco Health Department from its Firearm Injury Reporting System reported at <http://www.dph.sf.ca.us/Reports/Firearms/Part7Criminal.pdf>.

<sup>61</sup> R. Stephen Smith, et al. "Recidivism in an Urban Trauma Center," 127 ARCHIVES OF SURG. 668, 670 (1992) -- describing the conclusions in D. W. Sims, et al., "Urban Trauma: A Chronic, Recurrent Disease," 29 J. TRAUMA 940 (1989) and M.C. Morrissey, et al., "The

These facts provide indispensable perspective for the misuse by proponents of "the virgin killer" thesis of FBI figures on non-felony related homicide and the concept of acquaintance homicide. References like Spitzer's to FBI figures showing that "almost half of all murders ... were committed by an acquaintance or relative of the victim"<sup>62</sup> are *literally* correct and representative of homicide nationally for decades. But they are also highly misleading unless one realizes that the concepts involved are used only in the most literal sense without the implication the uninitiated reader may assume - - and which anti-gun advocates do assume, or at least assert. "Nonfelony-related homicide" and "acquaintance homicide" do not mean killings by and among ordinary neighbors, friends or co-workers. Rather they involve:

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Incidence of Recurrent Penetrating Wound Trauma in an Urban Trauma Center," 31 J. TRAUMA 1536 (1991). See also G. V. Poole, et al., "Trauma is A Recurrent 'Disease'," 113 SURGERY 608 (1993), W. A. Goins, et al., "Recurrent Intentional Injury," 84 J. NAT'L. MED. ASSOC. 431 (1992) and D.S. Reiner, et al., "Trauma Recidivism," 65 AM. SURG. 556 (1990).

<sup>62</sup> Quoting Spitzer, fn. ??? supra.

vicious assaults by street gang members against rivals [in their own or other gangs], contract murder taken out by competitors, and, increasingly drug disputes between acquaintances or business associates. Although such killings are officially listed [in the UCRs] as nonfelony-related because the offender "knew" the victim beforehand, for all intents and purposes they are felony-related and probably cannot be prevented through the expediency of gun controls.<sup>63</sup>

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<sup>63</sup> Academy of Criminal Justice Sciences analysis *supra* at 47. It should be noted that this analysis is itself misleading in one respect: Whether the FBI classifies a homicide as "felony-related" does not turn on whether the offender knew the victim. A murder is only so classified if the circumstances clearly indicate that it occurred in the course of another felony, e.g., robbery or rape. Thus if the circumstances clearly indicate that a drug dealer was killed by a customer to acquire his drugs it will be classified as "felony related" whereas the killing of one dealer by another for the purpose of eliminating a competitor is "nonfelony-related."

Another troublesome distinction is that between "gang-related" and "nongang-related" murders. For several years a study of Boston homicides by and of youth has been conducted by a

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group consisting of academics and police and probation officers and youth workers. "At the outset of the project the practitioners felt strongly that the youth homicide problem was almost entirely a gang problem, that essentially all youth homicide offenders were gang members" as were all youth victims, "excluding innocent bystanders." Closer analysis modified this by using a restrictive definition of "gang-related." Yes, virtually all youth murders in Boston are committed by gang members. But many of these murders are unrelated to gang activity as such, e.g., a robbery-murder committed by a gang member acting purely on his own behalf. Thus only a majority of murders were "gang-related" if that term is restrictively defined as murders committed on behalf of the gang. Anthony Braga, Anne M. Piehl & David M. Kennedy, "Youth Homicide in Boston: An Assessment of the Supplementary Homicide Report Data," 3 HOMICIDE STUDIES 277, 283-84 (1999).

For the multiple relationships between drugs and murder and drugs, gangs and murder, see, e.g. Patrick J. Meehan and Patrick W. O'Carroll, "Gangs, Drugs and Homicide in Los Angeles," 146 AM. J. DIS. CHILD. 683, 686 (from study of murders over a 25 month period: 30% of "homicide victims died from violence between rival gang factions or from violence associated with narcotics trafficking." -- although the authors did not find that the gangs necessarily were involved in the narcotics trafficking as is often asserted), P. Goldstein, "Homicide Related to Drug Traffic", 62 BULL. N.Y. ACAD. MED. 509 (1986); Zimring and Zuehl, "Victim Injury and Death in Urban Robbery", 15 J. LEG. STUD. 1, 9-12 (1986); Tardiff,

Likewise, killings between "relatives" cannot be understood as something that occurs in ordinary families. What "relative" denotes in the context of murder is a killing perpetrated by a violent man who has brutalized his mate, children and/or other family members on numerous prior occasions before eventually killing one or more of them.<sup>64</sup> This is typified by the

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Marzuk, et al. [I], "Homicide In New York City: Cocaine Use and Firearms" 272 JAMA 43, 46 (1994); Tardiff, Marzuk, et al. [II], "A Profile of Homicides on the Streets and in the Homes of New York City", 110 PUBLIC HEALTH REPORTS 13 (1995).

<sup>64</sup> Compare Langford, Isaac & Adams, note ??? above, to the multiple studies cited in note ??? above and to Kathryn E. Moracco, Carol W. Runyan, & John D. Butts, "Femicide in North Carolina," 2 HOMICIDE STUDIES 422, 441 (1998): "This study reemphasizes the central role of domestic violence as an antecedent to partner femicide. [Of the femicide victims who] were killed by their partners [2/3rds] were known to have been victims of domestic violence. As great as these figures are, they most likely underrepresent both the number of battered women and the types of violence they experienced as we suspect the police and medical examiner may have been unaware of a history of domestic violence in some cases."

following Nov. 1, 2002 news item:<sup>65</sup> Eric Christopher Kiefer was shot to death by his former wife's current boyfriend after Kiefer broke into to the wife's parents' home and attacked the boyfriend, the parents, and his own daughter with a hatchet. Kiefer was under a restraining order based on his having (in separate incidents): stabbed his former wife; beaten her up; and beaten up the boyfriend. Police had been called to the residence 10 times in the preceding two years to deal with Kiefer's attacks or attempts to break into the home.

As is more fully discussed below, the fact that many killings involve "relatives" or "acquaintances" does not gainsay the killers being habitual criminals, psychopaths or sociopaths."It is not surprising that research has documented a substantial relationship between violent victimization and

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<sup>65</sup> LOS ANGELES TIMES, Nov. 1, 2002: "Shotgun Blast Kills Intruder as He Terrorizes Former Wife, In-Laws," <http://www.latimes.com/news/local/la-me-hatchet1nov01.story>



violent offending. Many victims of life-threatening violence are themselves violent offenders."<sup>66</sup>

## THE FALSE EMPIRICAL BASIS OF "THE VIRGIN KILLER" THESIS

Given its lack of any support in criminological literature, one must wonder whence the "virgin killer" thesis comes and what causes its continued perpetration. The sole attempt we have found to support it with direct statistical evidence appeared in 1973 in what we shall call "the Lindsay pamphlet" because it was issued by the Criminal Justice Coordinating Council of the City of New York under the aegis of then-Mayor John Lindsay. According to this pamphlet, "most murders (73% in 1972) are committed by previously law abiding citizens committing impulsive gun-murders while engaged in arguments with family members or acquaintances",

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<sup>66</sup> Elliott, *supra*, 69 COLO. L. REV. at 1089.

a figure which it attributed to the F.B.I.<sup>67</sup> -- without, however, citing any specific reference.

The citation was fraudulent. Indeed the F.B.I., UNIFORM CRIME REPORT (UCR) covering 1972 was not even available when the Lindsay pamphlet was being written. Nor could the claimed figure have come from the F.B.I. since its data do not address the impulsiveness of homicides or count the number of gun homicides involving families and acquaintances.<sup>68</sup> Some F.B.I. data in the 1960s and 1970s did address the criminal background of murderers in general. But these data almost diametrically contradicted the

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<sup>67</sup> Quoting from p. 22 of John V. Lindsay, "The Case for Federal Firearms Control" (1973), p. 22; reprinted at pp. 1549 et. seq. in HEARINGS BEFORE THE SUB-COMMITTEE TO INVESTIGATE JUVENILE DELINQUENCY OF COMMITTEE OF THE JUDICIARY, U.S. SENATE, 94th CONGRESS, FIRST SESSION, v. II (1975).

<sup>68</sup> Contemporary UCRs gave no figure for family or acquaintance (or both) murders committed with guns. The 1972 REPORT does contain a figure for the overall number of murders in which a gun was used. It was 65%, not the pamphlet's 73%.

Lindsay pamphlet's claim that 73% had no record. What the F.B.I data actually showed was that 70-75% of murderers **did** have prior adult criminal records (as also did 1960s murderers).<sup>69</sup>

To reiterate, these 1960s and '70s FBI figures are part of a half-century of data. From the beginning of the systematic study of homicidal violence to date, studies have consistently shown that

the use of life-threatening violence in this country is, in fact, largely restricted to a criminal class and embedded in a general pattern of criminal behavior. Evidence for this is found in many self-reported studies of delinquency and crime... Research also reveals that once initiated, high levels of aggression and violence

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<sup>69</sup> See publications cited at fn. ??? above. For instance, when the 1972 UCR eventually did appear what its section titled "Careers in Crime" showed was that 74.7% of murder arrestees that year had prior arrest(s) for a violent felony or burglary: 1972 UCR at pp. 35-38. The early 1960s figures (Mulvihill, fn. ??? supra) were from a special data run the FBI did for the Eisenhower Commission and did not appear in the UCRs.

in childhood, which rarely involve weapons or injury, are very stable patterns of behavior that persist into late adolescence and adulthood, where they do come to involve both weapons and serious injury.<sup>70</sup>

In sum, "A history of violence is the best predictor of violence. It overshadows all others in the area of prediction."<sup>71</sup>

#### A DEARTH OF RELEVANT CITATIONS

Significantly, the Lindsay pamphlet's false assertion that 73% of murderers in 1972 had no criminal record is unique: So far as we can determine, this falsehood is the only criminal record statistic proponents of the "virgin killer" thesis have offered to support their claim that most

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<sup>70</sup> Elliott, 69 COLO. L. REV. supra at 1085 and 1090 (footnotes and citations omitted).

<sup>71</sup> Eugene D. Wheeler & S. Anthony Baron, VIOLENCE IN OUR SCHOOLS, HOSPITALS AND PUBLIC PLACES: A PREVENTION AND MANAGEMENT GUIDE (Ventura, CA: Pathfinder, 1993)

murderers are without prior criminal records. (Immediately after the Lindsay pamphlet appeared its false 73% statistic began showing up in other publications championing "the virgin killer" thesis, with the pamphlet often being given as an authenticating reference.<sup>72</sup>)

This 73% canard was reiterated in a 2005 law review article.<sup>73</sup> Other than that, so far as we can find, the canard has not been cited for many years. Perhaps this is because its antiquity would inevitably prompt inquiry into what later statistics might reveal; for, of course, such inquiry would expose the falsity of the "virgin killer" thesis. It is nevertheless quite remarkable that

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<sup>72</sup> See "A Shooting Gallery Called America", *supra*; also the congressional testimony of Dee Helfgott, Coordinator, Coalition for Handgun Control of Southern California, Inc. "Most murders (73%) are committed impulsively by previously law abiding citizens during arguments with family members or acquaintances." Handgun Crime Control Hearings, 1975-6 Senate Judiciary Committee [Subcommittee re Juvenile Delinquency] Oversight of the 1968 Gun Control Act, v. II at 2096.

<sup>73</sup> Vandall, *supra*, 38 Akron L. Rev. at n. 28 recycling the Helfgott quote; see last footnote.

Prof. Spitzer and other proponents of that thesis apparently feel no need to inquire into criminal record statistics or homicide studies to verify their assertions that murderers are "not bad guys" in any meaningful sense, but just ordinary people. No less remarkable is the absence of any reference or citation validating the "virgin killer" thesis even when its proponents are writing in publications where references are supplied for **other** points. The authors just baldly announce that "most homicides are not committed by the 'hardened' criminal ... but rather by ordinary, 'law abiding' citizens"; "most homicides are committed by family members without prior criminal convictions"; "most would be considered law-abiding citizens prior to their pulling the trigger"; "more than half the homicides in this country involve people who are not criminals."<sup>74</sup>

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<sup>74</sup> Quoting, respectively, Etzioni & Remp, *supra* at 107, and the following sources cited in fn. ??? above: Rivara & Stapleton at 37; Calhoun, at p. 15; Conklin & Seiden, *supra*, 22 PUBLIC AFFAIRS REPORT (U.C.- Berkeley) at p. 4. All these publications are studded with footnotes or endnotes, as also are Webster, et al., "Reducing Firearms Injuries", at p. 73 and Christoffel, 88

In lieu of citations or data, what is offered are ambiguous, if not meaningless, observations such as that: most killers "are neither felons nor crazy", but rather "people who are sad or depressed";<sup>75</sup> "murder is almost always an act of blind rage or illogical passion;"<sup>76</sup> "most shootings are not committed by felons or mentally ill people, but are acts of passion",<sup>77</sup> "typically involv[ing] people who loved, or hated, each other."<sup>78</sup> Assuming these vague characterizations of the mental state of killers are even meaningful, they are complete *non sequiturs*. They could only prove that killers are ordinary people if such mental states were unique to the law-

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PEDIATRICS at 300, *supra*. Yet when it comes to the "virgin killer" thesis, each of these publications assert it without any supporting citation.

<sup>75</sup> Calhoun, *supra*, at p. 15.

<sup>76</sup> Picket & Hanlon, *supra* at 496.

<sup>77</sup> Christoffel, *supra*, 88 PEDIATRICS at 300.

<sup>78</sup> Spitzer, as quoted above.

abiding, i.e., if hatred and rage, sadness and depression were mental states that felons and violent psychopaths do not experience.

What differentiates criminals and violent psychopaths from ordinary people is not their experiencing hatred or rage, but the ease with which those emotions are prompted and the acts to which they give rise. Killers exhibit an absence of impulse control and a seemingly inexplicable (to ordinary people) propensity to explode into extreme violence over the most trifling matters. On the one hand, ordinary people virtually never kill; on the other hand, the kind of person who murders often does so over things so trivial that we are left aghast not only at the fact of killing but at the inconsequential grievance that engendered it.<sup>79</sup> The triviality of motive further confirms the extreme

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<sup>79</sup> This was noted as long ago as Wolfgang's classic study of Philadelphia homicide in the 1940s and '50s. He "was able to classify 560 cases into one or another of 12 motive categories. By far the most frequent, accounting for 37% of the cases, was a sort of dispute that Wolfgang labelled an '*Altercation of relatively trivial origin; insult, curse, jostling, etc.*' Subsequent studies in other American cities have regularly replicated this... Such altercations constitute the most



deviance of murderers. However preposterously or insufficiently motivated a killing may seem to ordinary people with ordinary compunctions, it may make perfect sense to a psychopath, sociopath, and/or substance abuser with a life long record of law breaking and no compunction against extreme violence.<sup>80</sup>

Of course it is also the case that many murders occur over matters that are not trifling: Drug dealers killing or being killed by competitors or customers; robbery or rape victims being killed by their attackers to eliminate witnesses. As even Prof. Spitzer acknowledges, such "rational" killings are nevertheless wholly foreign to ordinary, law abiding people.

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prevalent variety of urban homicide in the United States." Martin Daly & Margo Wilson, *HOMICIDE* (1988) (emphasis in original).

<sup>80</sup> Prof. Lane notes that this triviality has struck "Observers of homicide in any era" -- but, nevertheless, the reasons made sense, and killing seemed a proportionate response, to the murderers themselves. *MURDER IN AMERICA: A HISTORY*, supra, pp. 351-52.

Many killings fit within the words with which proponents of the "virgin killer" thesis describe murder: Whether "rational" or not, murders committed by and among drug dealers, their customers and other long-time criminals are doubtless often "acts of passion" or "of blind rage" that are precipitated by "arguments over money or property", and occur "between people who know each other", "people who loved or hated each other", etc., etc.<sup>81</sup> Yet, insofar as they involved guns, such killings do indeed stem "from 'guns in the wrong hands,'" rather than being the work of "ordinary, 'law abiding' citizens" -- people "who might have stayed law-abiding if they had not possessed firearms."<sup>82</sup>

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<sup>81</sup> Quoting, respectively: Adler, Barondess, et al.; Violence Policy Center blurb; Spitzer; Pickett & Hanlon; and Christoffel, all supra.

<sup>82</sup> Quoting, respectively: Violence Policy Center blurb; Etzioni & Remp; and "A Shooting Gallery Called America", all supra.

## WORKPLACE AND OTHER MASS PUBLIC KILLINGS

Before closing it may be appropriate to consider a rare, but highly publicized, variety of American homicide whose perpetrators are often misconceived as being something like "virgin killers." These are the perpetrators of massacres (or attempted massacres) in a workplace or other public place. Sometimes these massacres are jocularly described as "going postal" because many have involved disgruntled current or former Post Office employees shooting down supervisors, fellow employees, and perhaps even customers.<sup>83</sup>

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<sup>83</sup> See, e.g., MARIN INDEPENDENT JOURNAL, Dec. 20, 1997, p. A3, "Postal Worker Sought Transfer," describing postal worker shooting of a supervisor and two other employees the day before, and accompanying column "'Going Postal': A Deadly History", listing nine prior such incidents between 1986 and 1997.

Though gun control is often touted as a remedy for massacre,<sup>84</sup> neither the perpetrators nor their killings fit the "virgin killer" model gun control advocates postulate. A dramatic inconsistency is revealed by a study of American massacres over the period 1965-95: "By far the most substantial category" involved killings by robbers or other felons of store employees and customers who were witnesses to an acquisitive felony.<sup>85</sup> Thus, even if the

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<sup>84</sup> See, e.g.: LOS ANGELES TIMES editorial on Empire State Building Massacre, "Lessons of Gun Violence: A Need for Tough Controls," March 10, 1997; NEW YORK TIMES OpEd "Two Shootings, One Lesson: Gun Control (by Ursula Schwerin), September 15, 1986; NEW YORK DAILY NEWS editorial, Aug. 22, 1986 "The Oklahoma Massacre"; LOS ANGELES TIMES editorial, July 27, 1984, "Our Daily Massacre"; NEW YORK TIMES editorial, July 22, 1984, "The Gun Collector.

<sup>85</sup> Thomas A. Petee, et al., "Debunking the Stereotype: An Examination of Mass Murder in Public Places," 1 HOM. STUD. 317, 327 (1997). The study was limited to cases in which three or more victims had been killed in a public place.

Addressing workplace homicides overall i.e., not necessarily involving more than one victim, studies indicate that "In the United States.... [a]bout 73% to 82% of all on-the-job

focus is on massacres, the evidence contradicts assertions like "...most homicides are not committed by the 'hardened' criminal who would seek out a gun or other lethal weapon whether or not it was legal, but rather by ordinary, 'law abiding' citizens who kill on impulse rather than by intent."<sup>86</sup>

In fact, the overwhelming majority of massacres are committed by people whom Prof. Spitzer himself classifies as "'bad guys'" (robbers), rather than being "impulsive actions taken by individuals who have little or no criminal background...."<sup>87</sup> Neither is that true even as to the small minority of massacres that are perpetrated for non-acquisitive reasons. Far from being

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homicides were attributed to robbery. Only 4% to 6% involved co-workers or former employees." Donald B. Walker & Malcolm Richards, "An Exploratory Study of Workplace Homicide in England and Wales," 4 HOM. STUD. 341, 344 (2000).

<sup>86</sup> Quoting, once again, Etzioni & Remp, *supra* at 107.

<sup>87</sup> Spitzer, *supra*, 186-87.

"impulsive" and "rarely premeditated,"<sup>88</sup> **all** these mass murders were premeditated. The killers premeditated sufficiently to have armed themselves in advance, sometimes with explosives as well as firearms, and ample supplies of ammunition, and to have clandestinely transported these things to the murder site. Some mass murders had been plotted for as much as a year before their occurrence. In some the massacre was the culmination of prior individual killings; and in others the killers had premeditated to the extent of actually revealing their intent in advance of the killings.<sup>89</sup>

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<sup>88</sup> Quoting Conklin & Seiden *supra*.

<sup>89</sup> See, e.g., MARIN INDEPENDENT JOURNAL, Aug. 1, 1999, p. A1, "Haunting Question in Atlanta Massacre" (Mark O. Barton who killed nine and wounded 13 people in an Atlanta brokerage office, and then killed himself, had earlier that day murdered his second wife and her two children); MARIN INDEPENDENT JOURNAL, April 24, 1999, p. A1, "Gunmen Planned Attack for a Year" (Columbine High School massacre was minutely planned by perpetrators who illegally secured four guns and large quantity of ammunition and manufactured 50 bombs, including one that would have killed upwards of 500 people had it not misfired.); MARIN

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INDEPENDENT JOURNAL, May 23, 1998, "Shooting Suspect Appears in Court" (15 year old killed his parents at home before killings at school. Search of his home found five bombs.); MARIN INDEPENDENT JOURNAL, March 25, 1998, p. A1, "13 Year Old Held in School Ambush Had Warned Friends"; MARIN INDEPENDENT JOURNAL, Oct. 8, 1997, p. A3: "Man Kills Two Women, Himself in San Antonio" (killer had threatened to kill his wife the day before he shot her, two co-workers and himself at her workplace.); MARIN INDEPENDENT JOURNAL, Oct. 2, 1997, A5, "Teen Accused of Killing 3, Injuring 7 in Rampage" (Philadelphia, MI teenager stabbed mother to death and then drove to school and opened fire.); MARIN INDEPENDENT JOURNAL, Dec. 13, 1994, "Maker of Prozac Found Not Liable in Shooting Rampage" (perpetrator of 1989 Louisville, KY massacre took several firearms and over 1,000 rounds of ammunition to the site); WALL STREET JOURNAL, Oct. 30, 1987, p. 21: "Losing It All: Complex Tale of Man Who Shot Stockbroker in Miami" (insolvent investor deliberately purchased handgun; upon receiving it after the three day waiting period elapsed, he drove to Merrill, Lynch office and shot his broker, the office manager and himself); SAN FRANCISCO CHRONICLE, Dec. 9, 1987: "Revenge Suspected in Crash" (former airline employee secured handgun, boarded a plane on which his former boss was flying and apparently shot it down killing all 42 on board, including himself); SAN FRANCISCO CHRONICLE, July 8, 1986, p. A1, "Two Die In Sword Attack Near Statue of Liberty" (having been involuntarily committed for psychiatric observation after proclaiming Jesus had ordered him to kill people,

Thus massacre perpetrators are extreme aberrants who are as different from the ordinary law abiding population as murderers in general are. Indeed, though we have no comprehensive statistics on the criminal and psychiatric backgrounds of massacre perpetrators, newspaper reports suggest that they actually exhibit more or less the same aberrant qualities as do murderers in general.<sup>90</sup>

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upon release perpetrator purchased a sword and ran amok on Staten Island Ferry killing 2 and wounding many others.); SAN FRANCISCO CHRONICLE, Oct. 31, 1985: "Woman Fires on Crowd -- 2 Slain, 8 Injured" (perpetrator drove to shopping mall in combat fatigues carrying a rifle and what police called "a considerable amount of ammunition.").

<sup>90</sup> See, e.g.: Feb. 5, 2001 AP release "Gunman Among 5 Dead in Shooting" (66 year old killer, who had also been convicted of child molestation, had worked at the plant where the killings occurred and been fired in 1994 upon discovery that he was involved in c. \$200,000 in thefts from the company); MARIN INDEPENDENT JOURNAL, Aug. 1, 1999 supra (Mark O. Barton who killed nine and wounded 13 people in an Atlanta brokerage office, and then killed himself, was the only suspect in the 1993 murder of his then wife and her mother which followed shortly after his taking out a \$600,000.00 life insurance policy on the wife); MARIN



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INDEPENDENT JOURNAL, May 23, 1998, supra (juvenile who killed two and wounded 22 others had background of torturing animals.); MARIN INDEPENDENT JOURNAL, Dec. 20, 1997, B7, "Gunman Thought He Had Been Set Up" (maintenance worker who killed his former supervisor and three other workers, and wounded two other workers and a police officer before being shot to death by police, had been fired for theft of property); SAN FRANCISCO CHRONICLE, Jan. 18, 1989, p. A1, "Profile of the Stockton Killer" (Patrick Purdy, who killed 5 children, wounded 30, before killing himself, had previously been involved in at least one robbery and multiple other crimes all of which were charged as misdemeanors.); SAN FRANCISCO CHRONICLE, Sept. 28, 1990, "Gunman Said He Heard Voices of Demons" (Iranian immigrant who held college students hostage in barroom, and died in shoot out with police after he had begun shooting the hostages, had been classified as a paranoid schizophrenic by county public health officials who investigated him in wake of multiple prior police contacts for minor crimes); SAN FRANCISCO CHRONICLE, Aug. 21, 1986, p. A1, "Hatred Spilled Over - Post Office Rampage" (Postal worker who killed 14 co-employees and himself and wounded six had long history of rage incidents including attempted murder of 11 year old child); SAN FRANCISCO CHRONICLE, Dec. 9, 1987 supra (former airline employee who opened fire in a passenger plane which crashed killing all 42 people aboard, had been fired for embezzlement.); WALL STREET JOURNAL, Oct. 30, 1987, supra (Investor who killed Merrill Lynch office manager and seriously wounded broker before shooting himself, was disbarred

## A CAVEAT ON THE VALUE OF FELON-IN-POSSESSION

### ENFORCEMENT

As promised we return to the enforceability and potential if enforced, of felon-in-possession laws. One reviewer of this paper criticized it as having an overly pessimistic view of that potential. We therefore wish to clearly state that, under certain conditions, gun laws aimed selectively at felons can help reduce some kinds of gun violence. At an absolute minimum, assuming that they are seriously enforced, such laws allow incapacitation by

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lawyer enrolled in federal witness protection program, having testified in organized crime case in which he had been one of the perpetrators.); SAN FRANCISCO CHRONICLE, July 8, 1986, *supra* (man who ran amok killing two people with a sword on Staten Island Ferry had a record of 11 prior arrests for minor crimes. He had just been released from involuntary psychiatric commitment based on his threats to kill for Jesus. He claimed both that he was on a mission from God and that he was under a voodoo curse.).

incarceration of felons who might otherwise be out committing very dangerous crimes.<sup>91</sup>

Moreover, there may be a substantial deterrent potential for such laws as suggested by the results claimed for two experimental programs. Dramatic reduction in illegal gun carrying has been claimed for "Project Exile," a program of concentrated, highly publicized prosecutions for felons-in-possession.<sup>92</sup> Project Exile is strongly supported by the NRA. As it is one area in which the federal government can actively participate in gun prosecutions, it has been promoted as the Bush Administration's primary approach to gun issues.<sup>93</sup>

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<sup>91</sup> SHOTS IN THE DARK, *supra*, at 165ff.

<sup>92</sup> SHOTS IN THE DARK, *supra*, at 165ff.

<sup>93</sup> For information on federal funding of Project Exile programs in various areas, and the U.S. Attorneys offices which have been participating in Project Exile prosecution schemes see [http://www.ncsconline.org/WC/Publications/KIS\\_SpeProGunStatesPub.pdf](http://www.ncsconline.org/WC/Publications/KIS_SpeProGunStatesPub.pdf)

Project Exile's value might be maximized by combining it with another program for which similar dramatic deterrent effects are claimed. This other reputedly successful program involves emphasis on, and concentrated targeting of, violations of public disorder and other minor laws, rather than ignoring such violations. We call this the Kansas City Program because that was the locus of the best known trial of it.<sup>94</sup> The Kansas City Program should not be confused with the "Broken Windows" theory which argues for enforcement of public disorder laws claiming their non-enforcement disheartens and terrorizes residents and causes criminals to view the neighborhood as ripe for more serious crimes.<sup>95</sup> The Kansas City Program uses the enforcement of laws against littering, loitering, urinating on a public

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<sup>94</sup> See, e.g., Lawrence W. Sherman, et al., *THE KANSAS CITY GUN EXPERIMENT*, National Institute of Justice (NIJ) Research in Brief (Washington, D.C., NIJ: 1995).

<sup>95</sup> See generally, James Q. Wilson & George Kelling, "Broken Windows: The Police and Neighborhood Safety," *ATLANTIC MONTHLY*, March 1982, pp. 29-38.

street, public drunkenness, jaywalking, or jumping a subway turnstile to avoid paying the fare, etc. to give police an excuse to stop, arrest and search violators. The Program's reported success in Kansas City supports the inherent plausibility that if criminals find that police are using such violations as an excuse to stop search and arrest those found with guns, illegal weapons carrying may drop off substantially.<sup>96</sup> (NOTE: we use the term "claims" in relation to these programs not because we doubt the evaluators' veracity, but because the programs have occurred in only a few locations and been of relatively short duration.<sup>97</sup>)

In evaluating the Kansas City Program and Project Exile for wider use, however, their limitations and their costs must be taken into account. The

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<sup>96</sup> Sherman, et al., supra, J. Wilford Shaw, "Community Policing to Take Guns Off the Street," 11 BEHAV. SCI. & L. 361-374 (1993).

<sup>97</sup> Kansas City experiments have been tried also in New York City, San Diego, Pittsburgh, Jersey City, Indianapolis and Boston.

chief limitation lies in the kinds of crimes they will deter. The worth of reducing **habitual** gun carrying lies in reducing "crimes of opportunity", i.e., crimes that were not pre-planned but occurred because a felon had a gun available when an opportunity arose. Neither the Kansas City Program nor Project Exile will have much effect in reducing the **idiosyncratic** gun carrying involved in pre-planned violent felonies like contract killings or robbery of a store or bank. For these crimes the chance of being caught with the gun is minimal because the perpetrator carries it only to and from the crime rather than loitering on the streets waiting for some opportunity to use it.

We do not deny the value of deterring habitual gun carrying, and, therefore, gun crimes of opportunity; or the value of felon-in-possession convictions in incapacitating dangerous criminals by prolonged incarceration. But it is fundamental that success here depends on two things: The use of creative excuses to search for illegal gun carrying has to mature from an experiment in Kansas City into a routine police policy. Second, the resulting

detection of felons-in-possession must result in serious prosecution and the imposition of serious penalties, a la Project Exile.<sup>98</sup>

This brings us to the issue of costs that our society has not previously been willing to incur. One such cost is financial: To detect the large numbers of felons carrying guns, **and** seriously punish them, means seriously increased costs for prosecution and imprisonment. (See last footnote.) Insofar as those costs are not fully funded by increases in expenditure, what serious penalties for felons caught with a gun mean is less resources available for

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<sup>98</sup> A federal evaluation of a variety of city level programs encapsulates the difficulties involved in both these things: "Although the initial evaluation of the Kansas City program shows it to be promising, its long term impact is not clear, the ability to replicate the program on a larger scale has not been established, and the program's high operating costs may be a barrier for other communities." Pamela K. Lattimore, et al., a NIJ Research Report, HOMICIDE IN EIGHT U.S. CITIES: TRENDS, CONTEXT, AND POLICY IMPLICATIONS 99 (Washington, D.C., NIJ: 1997).

On the very next page the evaluation reports that in most or all the cities studied "Authorities tried to make use of tougher sentences for gun felons, but the prospects for being able to do so depended on a wide variety of factors that may not have been controllable."

prosecution of criminals for more serious crimes, and the release of serious criminals to free up cell space to house felons caught in gun possession.

A second type of cost is in the area of civil liberties. Using minor crime as an excuse for search is a strategy of pretextual evasion of the Fourth Amendment. Moreover it raises much the same specter of discriminatory enforcement as does racial profiling. Police will not be cruising low-crime middle and upper-class areas looking for the opportunity to stop, search and arrest jay-walking white housewives. The burden of these pretextual searches will fall only on the disadvantaged and minority populations in high crime areas.<sup>99</sup>

The question perhaps is not so much whether certain gun crimes can be substantially reduced by such initiatives as whether the reduction is worth the

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<sup>99</sup> See, e.g., Anthony C. Thompson, "Stopping the Usual Suspects: Race and the Fourth Amendment," 74 N.Y.U. L. REV. 956 (1999), David A. Harris, "Driving While Black and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops," 87 J. CRIM. L. & CRIMINOLOGY 544 (1997).



costs. Arguably, gun crimes of opportunity might be substantially reduced by the concentrated enforcement of present laws. But civil libertarians would find some of those costs unacceptable. Many people might also regard the financial costs as unacceptable. Inter alia, the inevitable effect of so committing those resources would be reduced resource availability for other criminal justice priorities, and for social programs which perhaps offer a chance to alleviate the root causes of crime.

It remains to be seen whether Project Exile and/or the Kansas City Program will be widely adopted or become just another of the endless succession of anti-crime programs that are briefly bally-hoed, but eventually dropped.<sup>100</sup>

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<sup>100</sup> Though the Kansas City program's advocates have hailed the results others have found them ambiguous, ambivalent and downright puzzling. See Robert Weisberg, "The Utilitarian and Deontological Entanglement of Debating Guns, Crime and Punishment in America," 71 CHI L. REV. 333, 356-57 citing Bernard E. Harcourt, GUNS, CRIME AND PUNISHMENT IN AMERICA 192-209 (NYU 2003)

## CONCLUSION

Though it is the central tenet of the argument for banning handguns, or firearms in general, the Virgin Killer thesis is arrantly false. If there is an argument for banning guns to the law abiding populace, it must derive from some sound basis, not the fiction that ordinary citizens are likely to murder if they have access to firearms. In fact, a 160%+ increase in the number of civilian handguns over the last quarter of the 20th Century was accompanied by dramatic **decreases** in the murder rate.<sup>101</sup> Comparisons along the longest available time frame do not suggest that widespread firearm availability to

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For a skeptical evaluation of the positive results claimed for Project Exile-type programs see Sterven Raphael and Jens Ludwig "Do Prison Sentence Enhancements Reduce Gun Crime?: The Case of Project Exile," in Jens Ludwig and Philip J. Cook, (eds.) EVALUATING GUN POLICY: EFFECTS ON CRIME AND VIOLENCE (2003).

<sup>101</sup> Don B. Kates & Daniel D. Polsby, "Long Term Non-Relationship of Firearm Availability to Homicide" 4 HOMICIDE STUDIES 185-201 (2000).

the generally law abiding populace results in their killing, The earliest time for which reliable figures exist on both murder and gunstock rates is 1946. That year those rates were, per 100,000 population 34,430 guns, and six murders respectively. As of year 2000 the gunstock rate had almost tripled (95,500 per 100,000 population) but the murder rate was only 6.1 per 100,000<sup>102</sup>

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<sup>102</sup> See calculations and references in Don B. Kates. “The Limits of Gun Control: A Criminological Perspective” in Timothy Lytton (ed.), *Suing the Gun Industry: A Battle at the Crossroads of Gun Control and Mass Torts* (U of Mich. Press, c. 5/2005). (hereinafter cited as Kates in Lytton)

[For 1946 figures see Kleck, TARGETTING GUNS supra at 96-97 and 262-63. The 2000 firearms density figures were provided me by Prof Kleck. The murder rate figures for 2000 are from Arialdi M. Minino, et al, *Deaths: Final Data for 2000*. National Vital Statistics Reports 50 (CDC, 2002) # 15. Incidentally, the 2001 murder rate was slightly lower (6.06) not counting the 9/11 terrorist-caused deaths.]

Whether this handgun increase, and/or laws liberalizing victim access to firearms, have helped to reduce the homicide rate is a bitterly controversial matter even among scholars.<sup>103</sup> What is not fairly debatable is that the costs

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<sup>103</sup> From his studies Prof. Kleck concludes that handguns are used by civilians defending against 2.5 million or more crimes annually. Gary Kleck, *TARGETING GUNS: FIREARMS AND THEIR CONTROL* (N.Y., Aldine 1997), ch. 5. Comparing Kleck's results to those reached by several of his critics Prof. Jacobs concludes Prof. Jacobs concludes that "there is a great deal of self-defensive use of firearms, *in fact more defensive gun uses than crimes committed with firearms.*" James B. Jacobs, *CAN GUN CONTROL WORK* 14 (Oxford, 2003).

Based on his studies Prof. Lott concludes that the enactment of laws allowing responsible, law abiding, trained adults permits to carry concealed handguns has deterred many thousands of crimes across the states (now a majority of states) enacting such laws. John R. Lott, Jr., *MORE GUNS, LESS CRIME: UNDERSTANDING CRIME AND GUN CONTROL LAW* (Chicago, U. Chi. Press, 2nd ed. 2000). Lott's work has many critics, ideological and otherwise. But critics have undertaken their own studies with statistical models, data, and/or controls they deemed superior they reached the virtually the same results; some even conclude that Lott's error consisted in understating the deterrent effect. Lott's latest book on the subject is endorsed by three Nobel laureates. See discussion in Kates in Lytton supra. 878

of attempting to confiscate guns from the American public would greatly exceed the costs, discussed above, of seriously enforcing felon-in-possession laws. Confiscation of just handguns, much less all guns, would be met with non-compliance by tens of millions of otherwise law abiding people who believe (whether rightly or not is irrelevant) that they have both a constitutional right and an urgent need to possess guns for family defense.

Obviously, the extent of non-compliance cannot be precisely calculated. But available figures suggest the magnitude of the problem. If new gun sales continue at the levels seen in the last few decades, by year end 2005 the civilian gunstock will exceed 280 million, roughly 105 million being handguns.<sup>104</sup> One indication of the gravity of the resistance/enforcement problems was an Illinois poll in which respondents were asked whether they would turn in their firearms if federal law so required; of those identifying themselves as gun owners, 73% said they

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<sup>104</sup> See calculations given and referenced in Kates in Lytton supra.

would not.<sup>105</sup> In 2003 Oxford University Press published a book entitled CAN GUN CONTROL WORK? By law professor James B. Jacobs, director of NYU's Center for Research in crime and Justice. Chapter 10 is devoted to the feasibility of confiscating all guns or just handguns. Jacobs predicts that vast numbers of people would not comply with the law just as millions of Americans did not comply with National Prohibition and millions today continue to use illicit drugs, despite the threat of draconian punishment. Among those who currently possess handguns legally, many (rightly or wrongly) believe that they have a constitutional right to do so. Even a Supreme Court decision to the contrary would not shake millions of handgun owners' belief that such a right exists. Indeed, one of the major costs of a national prohibition on handgun possession would be the embitterment and alienation of a huge segment of the population.

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<sup>105</sup> Gary Kleck, POINT BLANK: GUNS AND VIOLENCE IN AMERICA 344 (1991).

We can get a sense of the magnitude of the compliance problem by looking at the success [read failure] of our current prohibition on possession that applies to persons with a felony record. Hundreds of thousands, perhaps millions, of ex-felons possess handguns illegally, despite the federal felon-in-possession law's threat of a 10-year maximum federal prison sentence. We can also obtain a perspective on compliance by looking at what happened when in 1995 several states prohibited possession, or simply require *registration* of assault rifles. In California only 10% of about 300,000 assault weapons owners registered their weapons.<sup>106</sup> Cleveland and Boston achieved an

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<sup>106</sup> The authors of this article believe the following further comments deserve notice: the actual date of the laws in question varies from 1989 (California) through 1995. The 10% compliance estimate for California derives from a Feb. 11, 1991 analysis by California Senate Committee on Judiciary of SB 263 (proposed registration extension amendment to Act), p. 3: "At best, only 10% of the state's total assault [weapon] arsenal was registered in compliance with this Act[s

estimated 1% compliance rate. Denver [owners] registered 1% of 10,000 assault rifles. The estimated 100,000-300,000 New Jersey assault rifle owners registered 947 assault rifles, rendered 888 inoperable, and turned over 4 to law enforcement personnel. It should be emphasized that these assault rifle laws were implemented in states that had produced legislative majorities for such gun controls. A federal registration requirement would have

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January 1, 1991 registration cut-off.]" This analysis was based on a California Attorney General estimate of 200,000-300,000 registerable firearms, of which about 18,250 were actually registered by the deadline. As a result of a subsequent deadline extension, by mid-1992 the number of firearms registered had swelled to 55,284. Had the registrations been accurate that would have amounted to more than 25% of the low estimate of 200,000 registerable weapons. However, it appears that over 60% of the firearms registered were incorrect, i.e., they were not covered by the Act, but were registered by owners who were confused as to which firearms it covered. Dec. 3, 1992 personal communication from Eugene J. Wolberg, Chairman of the California Attorney General's "Assault Weapon" Identification Committee. He estimated the



to be enforced in states where handgun prohibition could not command a legislative majority. In those states, non-compliance would be an even greater problem, and police and prosecutors charged with enforcing prohibition would have to confront jurors' hostility.<sup>107</sup>

Prof. Jacobs' chapter-end summary is: "Prohibiting possession would require disarming the citizenry; whether done quickly or over a long period it would be a monumental challenge fraught with danger. Millions of citizens would not surrender their handguns." From our experience with attempting to enforce drug laws, "a decades long 'war on handguns' might resemble a low-grade civil war more than a law enforcement initiative."<sup>108</sup>

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valid registrations under the Act at only 21,820, i.e. slightly over 10% of the low estimate of 200,000 registerable weapons.

<sup>107</sup> CAN GUN CONTROL WORK? *supra* at 162-63 references deleted.

<sup>108</sup> *Ibid* at 169.

Much of the argument for stringent gun control has been based on references to other nations. An ironic aspect of this is that for decades foreign advocates of banning guns in their own lands have made almost diametrically opposite arguments – the urgency of immediate action before gun ownership in their land grows so as to make gun control unenforceable as it is in the United States.<sup>109</sup>

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<sup>109</sup> See, e.g. M.L. Friedland, "Gun Control: The Options," 18 CRIMINAL LAW Q. 29, 34-35 (1975-76). Twenty years later England's chief law enforcement officer contrasted the low level of legal English handgun ownership to the United States where a handgun ban would be simply unenforceable. Reuters North America Wire Service, Aug. 1, 1994, "Britain's Police Chief Calls for Gun Crackdown." See also the slightly different version of the same statement in the AP, US&World Wire Service release of the same date entitled "Britain-London Crime."

A further irony is that, though in 1997 England banned and confiscated all legally owned handguns by 2000 it had become a world leader in violent crime of which it had twice the American rate. English police officials have subsequently lamented that, though "Britain has some of the strictest gun laws in the world[, i]t appears that anyone who wishes to obtain a[n illegal] firearm will have little difficulty in doing so." Kates in Lytton, *supra*.

Even to begin to try to confiscate 100 million handguns from otherwise law abiding, responsible, adult gun owners would require a waste of gargantuan resources -- especially when compared to the smaller resource commitment that would be required to seriously enforce current laws against felons as discussed in the preceding section of this paper. Indeed, the resource commitment needed to enforce a comprehensive handgun ban would be worse than a waste. Even if the studies suggesting that civilian gun ownership deters crime and help suppress it are wrong,<sup>110</sup> wasting gargantuan resources on the attempt to ban handguns would actually promote crime in two other respects. First, all the resources the criminal justice system now devotes to the already impossible task of trying to control violent criminals would have to be diverted to harassing good citizens who represent no meaningful danger. Second, it would eat up additional resources that might

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<sup>110</sup> See fn. ??? supra.

otherwise be devoted to social programs that may actually alleviate the root causes of crime.

The conclusion from the 1979 Bendis & Balkin study of gun law enforcement remains equally valid today: To the extent that gun laws can reduce violent crime, we already have the necessary laws, if we would seriously enforce them. What good would broader laws do when we are unwilling to commit the resources necessary to enforce those we already have?