

June 1974

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Recommended Citation

David T. Hardy & John Stompoly, *Of Arms and the Law*, 51 Chi.-Kent L. Rev. 62 (1974).

Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol51/iss1/4>

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OF ARMS AND THE LAW

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RECENT POLITICAL ASSASSINATIONS and a sharp rise in violent crime during the past decade have led to a demand for measures aimed at reducing the incidence of illegal violence. Programs ranging from urban renewal to increases in police manpower have been advanced,¹ but no proposal has inspired as much controversy as that of additional federal controls on the possession of firearms. Proponents and opponents of controls have accused each other of seeking support from communist-front groups² and from organizations of the radical right.³ Individual adversaries have been labelled liars,⁴ perjurers,⁵ racists,⁶ members of the lunatic fringe,⁷ and "freaks with advanced psychotic personality defects."⁸ Arguments have been described as hysterical propaganda⁹ and racist assaults on common sense.¹⁰ The statement of one Senator that to "consider this question in a rational manner will be a significant challenge to . . . abilities and objectivity"¹¹ seems likely to prove a clear understatement.

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1. See generally THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, THE REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS ch. 17 (1968); NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE, TO ESTABLISH JUSTICE, TO INSURE DOMESTIC TRANQUILITY Appendix 1 (1970).

2. Hearing pursuant to S. Res. 35 before the Subcomm. to Investigate Juvenile Delinquency of the Senate Comm. on the Judiciary, 90th Cong., 1st Sess. 343 (1967) (testimony of E. Gomberg) [Hereinafter cited as 1967 Hearings]; Hearings pursuant to S. Res. 240 before the Subcomm. to Investigate Juvenile Delinquency of the Comm. on the Judiciary, 90th Cong., 2d Sess. 682-83 (1968) (testimony of L. Jackson) [Hereinafter cited as 1968 Hearings].

3. See C. BAKAL, THE RIGHT TO BEAR ARMS 136 (1966); J. Clark, *The Role of the Federal Government in Combatting Violence* in CRIME IN URBAN SOCIETY 89 (B. McLennan ed. 1970).

4. 1967 Hearings 874-75 (testimony of J. Tydings).

5. See C. BAKAL, THE RIGHT TO BEAR ARMS 200 (1966).

6. See Clark, *The Role of the Federal Government in Combatting Violence*, in CRIME IN AMERICA 89 (B. McLennan ed. 1970).

7. See C. BAKAL, THE RIGHT TO BEAR ARMS 200 (1966).

8. See Editorial, GUNS AND AMMO, March, 1973, at 6.

9. See 1968 Hearings 201 (statement of H. Glassen).

10. See 1967 Hearings 876 (statement of J. Tydings).

11. Hearings on S. 2507 before the Subcomm. to Investigate Juvenile Delinquency of the Senate Comm. on the Judiciary, 92d Cong., 1st Sess. 36 (1971) (statement of R. Hruska) [hereinafter cited as 1971 Hearings].

This article will examine whether, in view of the extent and nature of criminal homicide,¹² additional firearm controls at the federal level are warranted. The constitutionality of such measures will first be discussed by analysing interpretations given to the second amendment by courts and commentators. The efficacy of existing controls in restraining homicide rates will be evaluated and a prognosis for the success of additional federal controls in this area will then be offered. Finally, the most recent proposals for additional federal firearm regulation will be examined in light of constitutional and practical considerations.

THE CONSTITUTION AND FEDERAL FIREARMS LEGISLATION

In the second amendment to the United States Constitution, the framers enunciated the principle that "[a] well regulated Militia, being ing necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." The meaning of this sentence and its impact on federal regulation of firearms possession is a matter of considerable dispute. With the objective of ascertaining the proper interpretation of this amendment, this article will first discuss existing federal firearm controls and current interpretations of the second amendment. Then, after articulating the competing interpretations of the second amendment, those interpretations will be evaluated in light of the second amendment's wording, the meaning of the particular terms employed by the framers and extrinsic evidence as to the purpose behind the adoption of the second amendment.

Current Status of the Second Amendment

No federal restrictions on the possession or use of firearms existed prior to 1934. Since that date, however, Congress has enacted three statutes governing not only the possession and use of firearms but also their purchase and sale. The National Firearms Act of 1934¹³ was the first of these statutes. Predicated upon the taxing power of Congress, this statute simply imposed a transfer tax upon the sale of certain specialized firearms.¹⁴ Congress again entered the

12. For the purposes of this article, the terms "homicide" and "killing" will be employed as synonyms for "murder and non-negligent manslaughter".

13. Act of June 26, 1934, ch. 757, § 2, 48 Stat. 1237, as amended 26 U.S.C. §§ 5801-72 (1954).

14. A \$200 tax is imposed on each transfer of such weapons as fully automatic firearms, shotguns with barrels of less than eighteen inches, rifles with barrels of less than sixteen inches, and firearms equipped with silencers. 26 U.S.C. § 5811 (1954). A \$5 transfer tax is imposed on certain other weapons. *Id.*; 26 U.S.C. § 5845(e) (1971).

arena of firearms legislation in 1938 by passing the Federal Firearms Act.¹⁵ This Act required all dealers in firearms and ammunition to obtain a federal license, and prohibited interstate shipment of firearms into the hands of felons, persons under indictment for felonies, and persons lacking permits where such were required by state law. In the decades following the 1930's, the demand for further federal controls faded as homicide rates steadily declined.¹⁶ No additional federal controls were enacted until 1968 when Congress promulgated the Gun Control Act of 1968¹⁷ in response to an increase in violent crime.¹⁸ This Act prohibited the sale, purchase or possession of any firearms by specified classes of individuals.¹⁹

The recent origin of federal controls makes it inevitable that early decisions of the United States Supreme Court on second amendment issues would involve state, and not federal, legislation. In the three early cases which focused on second amendment issues, *United States v. Cruikshank*,²⁰ *Presser v. Illinois*,²¹ and *Miller v. Texas*,²² the Court found that the second amendment proscribes only federal and not state limitations on the keeping and bearing of arms.²³ Only in 1939 did

15. Act of June 30, 1938, ch. 850, § 1, 52 Stat. 1250 (repealed 1968).

16. See PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CRIME AND ITS IMPACT—AN ASSESSMENT 20 (1967).

17. Act of Oct. 22, 1968, Pub. L. No. 90-618 §§ 101-302, (codified at 18 U.S.C. §§ 901-28) (Supp. 1973). The 1968 Act superseded provisions of the Omnibus Crime Control and Safe Streets Act of 1968 which had been enacted only four months earlier and had not yet become effective. See *Hearings pursuant to S. Res. 48 before the Subcomm. to Investigate Juvenile Delinquency of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 38 (1969) (testimony of R. Thrower) [hereinafter cited as 1969 *Hearings*].

18. See THE NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE, TO ESTABLISH JUSTICE, TO INSURE DOMESTIC TRANQUILITY 17 (1970).

19. The groups under this proscription include convicted felons, persons adjudicated mentally defective or committed to mental institutions, and those who are "unlawful users of or addicted to marihuana or any depressant or stimulant drug" 18 U.S.C. § 922(d), (g), (h) (1970).

20. 92 U.S. 542 (1876).

21. 116 U.S. 252 (1886).

22. 153 U.S. 535 (1894).

23. In *Miller*, the Court stated that neither the second amendment nor the fourth amendment applied to the states, *Id.* at 538, just as the *Cruikshank* Court had refused to apply either the first or the second amendment to the states. 92 U.S. at 552. The continuing refusal of the Court to apply the second amendment to the states is illustrated by *Burton v. Sills*, 394 U.S. 812 (1969) (*mem.*), in which the Court dismissed for want of a substantive federal question an appeal on second amendment grounds from a state prosecution. Although a detailed discussion of the second amendment's impact on state firearm controls is beyond the scope of this article, for a discussion of this issue see Comment, *The Right to Keep and Bear Arms: A Necessary Constitutional Guarantee or an Outmoded Provision of the Bill of Rights?* 31 ALBANY L. REV. 74, 79-80 (1967).

the Court deal with the application of the second amendment to federal legislation. In *United States v. Miller*,²⁴ the Supreme Court upheld a conviction under the 1934 act for possession of a sawed-off shotgun. The Court disposed of the second amendment question by noting:

In the absense of any evidence tending to show that possession or use of a "shotgun having a barrel of less than eighteen inches in length" at this time has some reasonable relationship to the preservation or efficiency of a well-regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such a weapon. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.²⁵

The Court did not state that the weapon in question could have no connection with a militia, as certain commentators have assumed;²⁶ it merely found that the petitioner had failed to produce any evidence of such a connection. This failure is not surprising, however in light of the petitioner's failure either to appear for argument²⁷ or to file a formal brief.²⁸ In the three decades that have passed since the decision in *United States v. Miller*, the Supreme Court has remained silent on the application of the second amendment to federal firearms regulation.²⁹

The lower federal courts have been moderately active in construing the second amendment with reference to federal controls. These courts have not accepted the rationale of *United States v. Miller* without comment. The First Circuit, after noting that *Miller* would permit the possession of the highly dangerous weapons of modern war, and that the experience of commando units in the Second World War suggested that almost any weapon was capable of military application, upheld a conviction for illegal use of a pistol on the ground that the defendant had been using the weapon as part of a personal frolic, with no intent to prepare for a military career.³⁰ The emphasis was thus

24. 307 U.S. 174 (1939).

25. *Id.* at 178.

26. See Comment, *Federal Regulation of Firearms Sales*, 31 U. CHI. L. REV. 780, 782 (1964).

27. See *United States v. Miller*, 307 U.S. 174, 175 (1939).

28. The preliminary list of attorneys on brief and on argument makes no reference to appellee's brief. *Id.* An examination of the microfilm record of briefs filed discloses only briefs for the government.

29. The Court has not, however, remained silent on the application of other provisions of the Bill of Rights to federal firearms controls. See *Haynes v. United States*, 390 U.S. 85 (1967).

30. *Cases v. United States*, 131 F.2d 916 (1st Cir. 1942) cert. denied 319 U.S.

shifted from the nature of the weapon to the manner of its use. The Third Circuit in *United States v. Tot*³¹ upheld a conviction for possession of a pistol following conviction for a felony. Although noting that the petitioner's claim could be disposed of under *Miller* because the defendant had failed to show a reasonable relationship between his possession of the particular weapon and the preservation of a well regulated militia, the *Tot* court preferred to rest its decision on the position that the bearing of arms was not an absolute right, but was subject to reasonable regulations barring possession by individuals likely to commit a crime.³² The court further noted that the regulation in question did not interfere with the ability of the state to maintain an organized militia.³³ It thus appears that the prevailing interpretation of the second amendment views the right to bear arms as limited to matters essential to the preservation of an organized state militia, either in terms of protecting only possession of weapons suitable for militia use or in terms of protecting only persons discharging militia-related duties.

The Second Amendment: Individual or Collective Right?

The second amendment's simple statement of a need for a militia and the existence of a right to bear arms has engendered considerable controversy among courts and commentators. The major dispute in its interpretation concerns the question of whether this amendment creates an individual or a collective right. The United States Supreme Court in *United States v. Miller*, as well as a majority of the commentators,³⁴ have adopted the collective rights approach. This position

770 (1943). The *Cases* rationale involves *construing* the Constitution in order to avoid undesired practical consequences, and may contain an internal inconsistency. The *Cases* court criticized the emphasis in *United States v. Miller* upon the nature of the weapon on grounds that militia-related weapons might include almost any weapon. The *Cases* shift to militia-related activities as the test may not avoid this consequence. If, as the *Cases* court notes, almost any civilian weapon is of military value, then it seems likely that practice with a civilian weapon will create skills of military value, and hence the activity may be as militia-related as the weapon. See H. MCBRIDE, A RIFLEMAN WENT TO WAR 300, 302-03 (1935); 1967 *Hearings* at 301 (statement of R. Hruska); *id.* at 313 (report of Joseph Little Corp.).

31. 131 F.2d 261 (3d Cir. 1942).

32. *Id.* at 266-67. But cf. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 875 (1960); I. BRANT, *THE BILL OF RIGHTS: ITS ORIGIN AND MEANING* 43 (1965).

33. 131 F.2d at 267.

34. See, e.g., Levin, *The Right to Bear Arms: The Development of the American Experience*, 48 CHI-KENT L. REV. 148 (1971); Note, *The Right to Bar Arms*, 19 S.C. L. REV. 402 (1967); G. NEWTON & F. ZIMRING, *FIREARMS AND VIOLENCE IN AMERICAN LIFE* 113 (1969) (Staff Report to the National Commission on the Causes and Prevention of Violence) [hereinafter cited as NEWTON & ZIMRING]; 1968 *Hearings* 32 (testimony of J. Tydings).

views the second amendment as a guarantee only of the right of state governments to maintain organized militia units free from federal disarmament. The effect is to interpret the amendment as stating "the right of the state to arm organized militia formations shall not be infringed." Under this view, since the amendment protects the interests of the state alone, individuals cannot invoke its protections, and it confers no right to bear arms aside from uses necessary to the maintenance of the organized state military units. The basis for this interpretation rests upon the view that the amendment's initial clause "[A] well regulated Militia, being necessary" strictly limits the following phrase ". . . the right of the people to keep and bear arms shall not be infringed." It is argued that the framers used "the people" to signify "the states," and certain statements of the framers emphasizing the interest of the states in their militia³⁵ tend to validate this.

In contrast to the collective right theory, a minority of commentators have adopted an individual rights approach.³⁶ This view emphasizes the positive grant contained in the second clause of the amendment that "the right of the people to keep and bear Arms, shall not be infringed." The initial militia clause is viewed as a statement of the object that the framers hoped to achieve by guaranteeing an individual right to bear arms, the creation of an armed citizenry. By guaranteeing the existence of such an armed citizenry, which would itself constitute the militia (as the term was employed by the framers)³⁷ the framers are seen as intending to create a base, secure against federal control, from which the states might fashion organized units. Whatever end the framers desired to achieve, the right they created is viewed by individual-rights theorists as residing in individual citizens and it may be invoked by them as a protection of their right to keep and bear arms.

In attempting to determine the better view, resort may be had to both the literal content of the second amendment and to the extrinsic evidence as to the meaning attached to those words by the framers.

35. See authorities cited note 34 *supra*.

36. See Hays, *The Right To Bear Arms, A Study in Judicial Misinterpretation*, 2 WM. & MARY L. REV. 381 (1960); Levine & Saxe, *The Second Amendment: The Right to Bear Arms*, 7 HOUSTON L. REV. 1 (1969).

37. *United States v. Miller*, 307 U.S. 174, 179 (1939) (militia defined as "all males physically capable of acting in concert for the common defense"); *Presser v. Illinois*, 116 U.S. 252, 265 (1886) ("all citizens capable of bearing arms"). See ARIZ. CONST. art. 16, § 1 ("The militia of the State of Arizona shall consist of all able-bodied citizens of the State between the ages of eighteen and forty-five years . . ."). See also 4 J. ELLIOT, *DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 244-45 (2d ed. 1888) [hereinafter cited as ELLIOT, *DEBATES*].

An examination of the second amendment should focus upon three critical phrases: "the right of the people," "to keep and bear Arms," and "[a] well regulated Militia, being necessary to a free State".

Some commentators have suggested that the choice of the words "the right of the people" indicates that the right conferred was collective in nature.³⁸ These authorities argue that the framers employed the terms "citizens" or "persons" to describe rights intended as individual, and "the people" to describe rights intended as collective. This argument seems deficient for two reasons. First, it does not correspond with the interpretation given other constitutional provisions of similar wording. The fourth amendment refers to the "right of the people" to be free from unreasonable searches and seizures,³⁹ yet it has been construed as a right invocable by individual citizens.⁴⁰ The first amendment employs similar language in recognizing the right of association, a right which though collective in nature,⁴¹ has been construed as protective of individuals.⁴² The ninth amendment also refers to rights of the people⁴³ and on the few occasions when it has been applied it has been viewed as barring government intrusions upon individual rights.⁴⁴ In addition to conflicting with interpretations given similar phrases in other amendments, the view that "the people" connotes

38. See Comment, *Constitutional Limitations on Firearms Regulation*, 1969 DUKE L.J. 773, 796-97. But see Levine & Saxe, *The Second Amendment: The Right to Bear Arms*, 7 HOUST. L. REV. 1, 18 (1969).

39. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

40. See, e.g., *Chimel v. California*, 395 U.S. 752 (1969); *Katz v. United States*, 389 U.S. 347 (1967); *Mapp v. Ohio*, 367 U.S. 643 (1961); *Weeks v. United States*, 232 U.S. 383 (1914). See generally McKay, *Mapp v. Ohio, The Exclusionary Rule and the Right of Privacy*, 15 ARIZ. L. REV. 327 (1973).

41. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

By definition, no one can associate alone.

42. See *Elfrandt v. Russel*, 384 U.S. 11 (1966); *Shelton v. Tucker*, 364 U.S. 479 (1960).

43. "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.

44. In *Griswold v. Connecticut*, 381 U.S. 479 (1965), Justice Goldberg based his concurrence in part upon the unenumerated rights recognized in the ninth amendment. *Id.* at 487, 489-91 (Goldberg, J., concurring). In *Roe v. Wade*, 410 U.S. 113 (1973), the majority mentioned with approval the district court's use of the ninth amendment as the basis for its decision, but preferred to rest its own affirmance on the fourteenth amendment alone. *Id.* at 153.

"the states" fails to account for various indications that the framers distinguished between these two terms. In the tenth amendment, the framers reserved non-delegated powers either to the states "or to the people"⁴⁵ suggesting that they viewed the two as different entities. Moreover, major disputes in the ratifying conventions centered upon whether the phrase "[W]e, the people" in the preamble implied that the Constitution originated from the people rather than from the states,⁴⁶ which suggests that the framers did not consider the terms interchangeable. Thus the view that the right "of the people" to bear arms is really a right "of the states" must involve a dual standard of constitutional interpretation and also fails to consider evidence of a distinction made by the framers between these terms.

In contrast, the view that "the people" indicates the recognition of an individual right does not conflict with interpretations given other rights of similar wording and recognizes a distinction between the people and the states. The terms employed to describe those to whom the second amendment rights belong thus seem to support the individual and not the collective approach to the second amendment.

The framers' description of the right "to keep and bear Arms" also seems more favorable to the individual approach than to the collective rights view. Two specific rights were established, the right to keep arms and the right to bear arms. If the framers' intent was only to protect organized state militias, and insure against a professional army, this dichotomy would be neither necessary nor appropriate. It would not be necessary, since a right to bear arms in the field would have sufficed to enable the militia to carry out its duties, regardless of where the weapons were kept when the members were off-duty.

45. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST., amend. X. Justice Black, referring to the ninth and tenth amendments, has stated: "The use of the words, 'the people,' in both these Amendments strongly emphasizes the desire of the Framers to protect individual liberty." Black, *supra* note 32, at 871.

46. See 4 ELLIOT, DEBATES 15-16 (statements of Caldwell & McClaine, North Carolina convention). See also THE ANTIFEDERALIST PAPERS 63 (M. Borden ed. 1965). The dispute over whether the phrase "We, the People" in the Preamble denoted the people in a collective sense as citizens of the states, or as individuals to whom the Constitution was directly attributable, formed the basis of the Webster-Haynes and Webster-Calhoun debates in later years. See 4 ELLIOT, DEBATES 506, 510, 518. Haynes and Calhoun took the collectivist view. In 1861, certain southern states elected to appeal the issue by a procedure more frequently used in international law. In 1865, following protracted litigation, a decision at Appomattox Court House conclusively settled the issue in favor of Webster's individualist interpretation. See B. CATTON, THE ARMY OF THE POTOMAC: A STILLNESS AT APPOMATTOX (1953).

The provision of a right to keep arms is also more appropriate to an individual than to a collective right. It is possible to construe a right of the people to bear arms as a collective right to engage in military service, viewing the bearing of arms as a term of art relating to service in the military. But the keeping of an object is not often used in other than its most natural meaning, to retain or preserve that object.⁴⁷ It is much more difficult to conceptualize a collective right to keep firearms, residing at once in the entire people and yet in no individual. The individual rights approach, on the other hand, neither renders the right to keep arms superfluous nor inappropriate as each citizen has a right to possess and to utilize firearms. Since an interpretation which gives meaning to all terms is favored over one which renders some provisions meaningless,⁴⁸ it would appear that the individual rights approach is preferable to the collective approach in terms of giving meaning to the rights recognized in the second amendment.

The second amendment's initial phrase, "A well regulated Militia, being necessary to the security of a free State . . ." has been the source of considerable dispute. The collective approach views this phrase as a strict limitation on the right to keep and bear arms which is conferred in the following phrase,⁴⁹ while the individual rights view treats it as a statement of purpose, an explanation of the rationale behind the absolute right to keep and bear arms.⁵⁰ Here, too, the individual rights approach seems superior to the collective rights stand. First, as used by the framers, the term "Militia" referred to all citizens capable of bearing arms, and not merely to those persons enrolled in formal state military units.⁵¹ Thus, even should the second amendment be construed to protect only members of the "Militia" its protections would extend to all persons capable of bearing arms. To the extent that "Militia" refers to an armed citizenry rather than formal units, the collective approach has the same effect in practice as the individual approach. Any citizen physically able to use firearms may do so.

A second difficulty with the collective rights interpretation of this phrase is that it creates a conflict between constitutional provisions. Construing the second amendment to bar federal interference with the armament of formal militia units places that amendment in conflict with another constitutional provision that creates a federal power to

47. Cf. 4 ELLIOT, DEBATES 598 (statement of Senator Leigh, U.S. Senate, 1836).

48. *Wright v. United States*, 302 U.S. 583, 588 (1938).

49. See authorities cited note 34 *supra*.

50. See authorities cited note 36 *supra*.

51. See authorities cited note 37 *supra*.

regulate the armament of formal militia units.⁵² This conflict does not exist, however, if the individual rights interpretation is adopted. Under this approach, the second amendment is viewed as creating an informal militia, an armed citizenry, with which the federal government may not interfere. From this armed citizenry the states might create formal, organized militia units and these formal military units would then be subject to federal regulation. Thus, since an interpretation harmonizing constitutional provisions is favored over one that creates conflict or implies repeal,⁵³ the individual rights approach again seems superior to the view that the second amendment creates only a collective right.

A third reason for the superiority of the individual rights construction of the militia phrase is that this view gives meaning to the qualifier "well regulated." Under the collective rights view, the right to bear arms phrase is dependent upon the militia phrase. In effect, the second amendment is seen as stating that "[t]o the extent necessary to the existence of a well regulated militia, the right to keep and bear arms shall not be infringed." This interpretation renders the qualifier "well" both meaningless and superfluous. It renders this term meaningless, since it is obvious that prohibiting federal disarmament of militia units does not ensure that they will be well-regulated as armament and organization have at best a most tangential relationship. A guarantee against disarmament may ensure the existence of an armed militia, but not a well regulated one. The collective interpretation also renders the term "well regulated" superfluous; if the states sought protection of their militias, a simple reference to the necessity of a militia, whether regulated or unregulated, would have sufficed. The individual rights approach, in contrast, gives meaning to this qualifier and should therefore be favored.⁵⁴ This view construes the militia phrase

52. Compare U.S. CONST. art. I § 8 with U.S. CONST. amend. II. This conflict becomes more prominent if bearing arms is treated as a term of art connoting general military duties rather than the act of carrying a firearm. The guarantee of the right to bear arms would, if so construed, prohibit all federal regulation of militia activities, not merely the regulation of armament.

One commentator has argued that the assertion of control over the organized militia by the federal government has extinguished any second amendment rights possessed by the states. See Note, *The Right to Bear Arms*, 19 S.C. L. REV. 402, 409-10 (1967). The rationale for applying the principles of adverse possession to constitutional guarantees is unclear. It is clear, however, that courts should attempt to reconcile constitutional amendments with the text of the original constitution and that, where there is unavoidable conflict, the amendment will control. *Badger v. Hoidale*, 88 F.2d 208 (8th Cir. 1937).

53. *Badger v. Hoidale*, 88 F.2d 208 (8th Cir. 1937).

54. *Cf. Wright v. United States*, 302 U.S. 583, 587-88 (1938).

as a statement of the objective which the framers hoped might be accomplished by the creation of a general, individual, right to bear arms. The right would create an armed citizenry from which the states could fashion well-regulated units which would form the foundation of their security and freedom. Taken as an independent statement of fact, the claim that a well-regulated militia is necessary to a free state is not without reason. Taken as a provision of limitation, the statement that a right to be armed exists only to the extent it is necessary to a militia which is well-regulated, seems to have little meaning.

Finally, the fourth flaw in the collective rights interpretation of the militia phrase results from the contention that a statement of purpose together with a pronouncement of a right results in a right strictly limited to activities having a direct connection with the stated purpose. This position is inconsistent with the interpretation given a similar constitutional provision, the right of assembly. The first amendment right of assembly resembles the second amendment both in its pronouncement of a "right of the people" and also in its statement of the purpose for assembly: "to petition the Government for a redress of grievances."⁵⁵ Despite this structure, the right has been successfully invoked by private organizations as well as individual citizens,⁵⁶ and held to bar indirect hinderances to assembly as well as direct imposition of criminal penalties.⁵⁷ Despite the express purpose of permitting assembly "to petition the Government", courts have applied freedom of assembly to labor unions whose primary purpose was economic⁵⁸ and which are barred by statute from most political activities.⁵⁹ Free-

55. "Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I. In *United States v. Cruikshank*, 92 U.S. 542 (1876), a prosecution under the Reconstruction Civil Rights Act, the Court refused to apply the right of assembly where the government failed to allege that the meeting disrupted by defendants had been held to petition the government. *Id.* at 552-53. This narrow view of the right of assembly has since been repudiated. 2 B. SCHWARTZ, A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES: RIGHTS OF THE PERSON 780-81 (1968).

56. See *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539 (1963); *NAACP v. Alabama*, 357 U.S. 449 (1958).

57. A denial of access to public employment was found a sufficient infringement in *Gilmore v. James*, 274 F. Supp. 75 (N.D. Tex. 1967), *aff'd* 389 U.S. 572 (1968). Disclosure of membership lists was held an invalid infringement in *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 538 (1963) and in *NAACP v. Alabama*, 357 U.S. 449 (1958). *Shelton v. Tucker*, 364 U.S. 479 (1960), invalidated a requirement that teachers reveal organizations to which they had previously belonged. The Court in *Elfbrandt v. Russel*, 384 U.S. 11 (1966) held unconstitutional on assembly and expression grounds a requirement that state employees take an overly broad loyalty oath.

58. See *Thomas v. Collins*, 323 U.S. 516, 531-32 (1945).

59. 18 U.S.C. § 610 (Supp. 1973) prohibits the giving by a union or corporation

dom of association has also been held to bar limitations on anti-union pamphleteering by Chambers of Commerce,⁶⁰ and to limit restrictions upon political groups not likely to petition the existing government structure.⁶¹ These decisions are consistent with the principle that constitutional restrictions on government power are to be construed liberally rather than strictly,⁶² but they seem difficult to reconcile with the collective rights position that a statement of a right is limited by a statement of purpose.⁶³ The individual rights approach, in contrast, would construe the second amendment in a manner consistent with the construction of the right of association. In both cases the framers would be seen as recognizing a broad right, not strictly limited by a purpose clause, and a right which, while it may as a practical matter be exercised on a collective level,⁶⁴ nevertheless protects any individual. It appears, therefore, that the choice of the phrase "A well regulated Militia," like the use of "the right of the people" and "to keep and bear Arms," lends greater support to an individual rights interpretation of the second amendment than to the collective rights approach.

Beyond analyzing the terms used to structure the second amendment, an examination of the meaning attached to these terms by the framers provides further insight into whether the second amendment creates individual or collective rights. The meaning of these terms to the framers may be gathered from evidence concerning usages of the terms when the amendment was drafted. In this respect, the wording chosen by the state conventions which, in ratifying the Constitution

of "any direct or indirect payment . . . or any services, or anything of value" to a candidate for federal office. *See United States v. U.A.W. International Union*, 352 U.S. 567 (1957).

60. *See NLRB v. American Pearl Button Co.*, 149 F.2d 311, 318 (8th Cir. 1945).

61. *See Aptheker v. Secretary of State*, 378 U.S. 500 (1964); *Wallace v. Brewer*, 315 F. Supp. 431, 443 (M.D. Ala. 1970). In those cases where the Court has upheld limitations on active membership in subversive groups, it has done so on the basis of a balancing of first amendment interests against societal interests, and not on the ground that the failure of the organization in question to petition the government for a redress of grievances left it beyond the protection of the first amendment. *See Communist Party of the U.S.A. v. Subversive Activities Control Board*, 367 U.S. 1, 97 (1961). *Compare Konigsberg v. State Bar*, 353 U.S. 252 (1957), *with Konigsberg v. State Bar*, 366 U.S. 36 (1961).

62. *Byars v. United States*, 273 U.S. 28, 32 (1927); *Fairbank v. United States*, 181 U.S. 283 (1901); *cf. Kansas v. Colorado*, 206 U.S. 46 (1907).

63. The position that a statement of purpose, not expressly made a condition to the operational part of an instrument, limits the operation of the instrument has been rejected in other contexts. *See Damon v. Damon*, 90 Mass. 192, 194 (1860).

64. In both cases, the benefit to democracy would accrue only if people in general took an active interest in petitioning the government or creating an armed citizenry. In either case, the guarantee of the right to individuals is a prerequisite to its collective exercise.

made the original proposals for a Bill of Rights, seems to be strong evidence of prevailing usages. If these proposals referred to other rights which are now accepted as individual in character in terms similar to those employed to express the right to bear arms, then it seems likely that the phrasing of the second amendment was not seen as creating a right of a nature distinct from other clearly individual rights. Proceeding from this premise, a survey of proposals for the Bill of Rights makes it clear that provisions protecting the right to bear arms employed language very similar to that used in provisions now accepted as creating individual rights. Ratifying conventions in Virginia,⁶⁵ New York,⁶⁶ North Carolina,⁶⁷ and Rhode Island⁶⁸ used the following terms to delineate the rights later embodied in the first amendment:

[T]he people have a right to freedom of speech and of writing and publishing their sentiments, that freedom of the press is one of the greatest bulwarks of liberty, and ought not to be violated.⁶⁹

The Virginia proposal for a right to bear arms,⁷⁰ which was virtually identical with those of New York,⁷¹ North Carolina,⁷² and Rhode Island,⁷³ utilized a similar format:

[T]he people have a right to keep and to bear arms, that a well regulated Militia composed of the body of the people trained to arms is the proper, natural and safe defence of a free State.

The similarity of phrasing suggests that the structure of the second amendment—a statement of a right of the people, together with a statement of the relation which that right bears to freedom and a democratic government—was not understood at the time of the framing to create a right different in character from the freedom of speech or of the press.

The meaning of the terms employed by the framers in expressing the right to keep and bear arms may also be clarified by examining the practical construction given those terms by state constitutions in existence during the ratification process. Provisions guaranteeing a

65. DEBATES IN THE FEDERAL CONVENTION OF 1787 AS REPORTED BY JAMES MADISON 662 (Hunt & Scott ed. 1920).

66. *Id.* at 667.

67. *Id.* at 676.

68. *Id.* at 682-83.

69. *Id.*

70. *Id.* at 662.

71. *Id.* at 666.

72. *Id.* at 676.

73. *Id.* at 683.

right of the people to keep and bear arms were present in the constitutions of Massachusetts,⁷⁴ Pennsylvania,⁷⁵ Rhode Island,⁷⁶ and North Carolina.⁷⁷ These provisions would be meaningless if it is assumed that the phrase "the right of the people to keep and bear Arms" refers only to the right of a state to form a militia. A state can hardly infringe its own rights; a guarantee in its constitution that it will not do so would border on the absurd. The propriety of protecting the right embodied in these words against both federal and state interference indicates that it is a right capable of infringement by both levels of government. Given the structure of the federal system, the process of elimination indicates that the "right of the people to keep and bear Arms" must inhere in the individual.⁷⁸ Consideration of the words employed in the second amendment, when viewed in light of evidence as to the meaning attached to those words when the amendment was drafted, suggests that the framers intended to create an individual right, and not one protecting the states alone.

Attempts have been made to interpret the second amendment by an examination of the writings of the more notable framers and their contemporaries. It is argued that the framers' motive in creating the second amendment was to prevent the formation of a professional standing army. Since under this view the motive was to replace the standing army with the militia, the second amendment should be construed to do more than protect the existence of an organized militia, the modern citizen-soldier organization.⁷⁹ This argument appears to overlook the distinction between motive and intent.⁸⁰ To interpret

74. MASS. CONST., art. xvii (1780); see 3 F. THORPE, *THE FEDERAL AND STATE CONSTITUTIONS* 1892 (1909).

75. PA. CONST., DECLARATION OF RIGHTS § 13 (1776); see 5 THORPE, *supra* note 74, at 3083. See also PA. CONST. art. I, § 21 (1969).

76. R.I. CONST. art. I, § 22 (1776); see 4 THORPE, *supra* note 74, at 3224.

77. N.C. CONST., DECLARATION OF RIGHTS § 17 (1776); see 5 THORPE, *supra* note 74 at 2788. Right to bear arms provisions were also adopted in the constitutions of several states admitted to the union soon after the adoption of the Bill of Rights. See ARK. CONST. art. II, § 21 (1836); ALA. CONST. art. I, § 23 (1819); 1 THORPE, *supra* note 74 at 98, 270.

78. Many state courts have, however, followed the collective rights approach, apparently feeling that the right belongs to some political entity located somewhere between the individual citizen and the government. See generally Comment, *The Impact of State Constitutional Right to Bear Arms Provisions on State Gun Control Legislation*, 38 U. CHI. L. REV. 185 (1970).

79. See, e.g., *United States v. Miller*, 307 U.S. 174 (1939); *United States v. Tot*, 131 F.2d 261 (3d Cir. 1942); Levin, *The Right to Bear Arms: The Development of the American Experience*, 48 CHI-KENT L. REV. 148 (1971).

80. See *People v. Weiss*, 252 App. Div. 463, 468, 300 N.Y.S. 249, 255 (1937) ("Motive is the moving power which impels to action for a definite result. Intent is the purpose to use a particular means to effect such a result."); cf. *United States v.*

a constitutional provision in terms not of intent, as gathered from the document, but in terms of the motive inspiring that intent, as gathered from the statements of a few of the drafters, is a most questionable procedure. This approach becomes a speculative attempt to apply not the measures the framers had resolved to implement, but instead the measures the commentator thinks they should have implemented in light of their goals.⁸¹ Whatever the motive, the intent of the framers, as nearly as can be discerned from statements in the state conventions,⁸² the writings of the more noted contemporary authorities,⁸³ and the early commentators,⁸⁴ was to ensure that the federal government would have no power to disarm the militia—the body of the citizenry capable of bearing arms.⁸⁵ The motive, whether or not it was to prevent a standing army, should not obscure nor control this intent.

Even should the motive be considered of importance, however, there is strong support for the view that a primary motive behind the guarantee of a well-armed citizenry was to enable the populace to arise

Sprague, 282 U.S. 716, 731-32 (1931) ("[W]here the intention is clear there is no room for construction and no excuse for interpolation or addition."); *Nardone v. United States*, 302 U.S. 379 (1937); *Hotz v. Equitable Life Assurance Soc'y*, 224 Iowa 552, 276 N.W. 413 (1937). *But see* *Maxwell v. Dow*, 176 U.S. 581 (1900); *cf.* *Vitty v. Eley*, 51 App. Div. 44, 64 N.Y.S. 397 (1900).

81. This risk is illustrated by *United States v. Tot*, 131 F.2d 261 (3d Cir. 1942). There the court based its conclusion that the second amendment creates a collective right which does not prevent federal authorities from outlawing possession of certain arms on citations from *Lenior* in the North Carolina convention and from James Madison. *Id.* at 266. Yet *Lenior*, in the passage cited, objects to the proposed constitution on the ground that "[w]hen we consider the great powers of Congress, there is great cause of alarm. They can disarm the militia. If they were armed, they would be a resource against great oppressions." 4 ELLIOT, DEBATES 203. Since "Militia" connotes the citizenry capable of bearing arms, as discussed in the text accompanying note 51 *supra*, this passage suggests that the framers' desire was specifically to prevent the action upheld in *Tot*. Madison, in the passage cited by the court, noted that "the advantage of being armed, which the Americans possess over the people of almost every other nation," together with the federal structure of our government, "forms a barrier against the enterprises of ambition . . ." Madison then went on to state that:

Notwithstanding the military establishments in the several kingdoms of Europe, which are carried as far as the public resources will bear, the governments are afraid to trust people with arms.

THE FEDERALIST NO. 46, at 321-22 (J. Cooke ed. 1961). The thrust of Madison's argument appears to be toward the maintenance of an armed citizenry as a protection against possible tyranny. This cannot easily be reconciled with a view that, since Madison used the term "militia" in referring to the citizenry, he would have no objection to federal disarmament of the citizenry.

82. *See* 1 ELLIOT, DEBATES 371-72 (Luther Martin); 4 ELLIOT, DEBATES 203 (*Lenior*). *See generally* Hays, *The Right to Bear Arms, A Study in Judicial Misinterpretation*, 2 WM. & MARY L. REV. 381, 392-94 (1960).

83. *See* THE FEDERALIST NO. 46 (J. Madison).

84. *See* 2 J. STORY, COMMENTARIES ON THE CONSTITUTION 677-78 (1858).

85. *See* note 37 and accompanying text *supra*.

in armed rebellion should the newly-formed government prove oppressive.⁸⁶ This motive would be inconsistent with any construction of the second amendment which would allow federal disarmament of the general population. There is also evidence that right to bear arms proposals were not viewed at the time of the framing of the amendment as being aimed at the prevention of standing armies. Alexander Hamilton in a contribution to *The Federalist* noted concerning the state constitutions that "two only of them contained an interdiction of standing armies in time of peace; that the other eleven had either observed a profound silence on the subject, or had in express terms admitted the right of the legislature to authorize their existence."⁸⁷ At the time of Hamilton's statement, four states possessed constitutional right to bear arms guarantees.⁸⁸ This can hardly be considered a "profound silence" unless the right to bear arms provisions were considered to have no necessary connection with the standing army limitations. Additional evidence supporting a motive to create an individual right to bear arms is found in proposals for a Bill of Rights made by several state ratification conventions. New Hampshire proposed that "Congress shall never disarm any Citizen unless such as are or have been in Actual Rebellion."⁸⁹ Members of the Pennsylvania convention proposed a bill of rights which failed to gain majority approval but inspired and greatly influenced suggestions for amendments made by other states.⁹⁰ The Pennsylvania proposals included a provision that "no law shall be enacted for disarming the people except for crimes committed or in a case of real danger of pub-

86. The necessity of an armed rebellion, should the fears of the anti-federalists prove correct, was often cited in the state conventions and in other contemporary sources as a rationale for the maintenance of an armed citizenry. See 4 ELLIOT, DEBATES 203 (Lenior); 2 J. STORY, COMMENTARIES ON THE CONSTITUTION 678 (1858). Cf. 1 ELLIOT, DEBATES 382 (Luther Martin). Virginia and North Carolina had proposed as a constitutional amendment the statement that

the doctrine of non-resistance against arbitrary power and oppression is absurd slavish, and destructive of the good and happiness of mankind.

DEBATES IN THE FEDERAL CONVENTION OF 1787, AS REPORTED BY JAMES MADISON 660, 676 (Hunt & Scott ed. 1920). The framers apparently recognized as an ultimate political reality that all power grows out of the barrel of a gun, and proceeded on the principle that democracies should keep the sources of power in the hands of individual citizens. It should be remembered that the framers had just completed one of the most successful armed rebellions in modern history. The prospect of an overthrow of the government did not worry them so much as the possibility that the government they were creating might prove tyrannical.

87. THE FEDERALIST No. 24, at 153-54 (J. Cooke ed. 1961) (A. Hamilton) (emphasis in original).

88. See notes 73-76, *supra*.

89. DEBATES IN THE FEDERAL CONVENTION OF 1787 AS REPORTED BY JAMES MADISON 658 (Hunt & Scott ed. 1920).

90. E. DUMBAULD, THE BILL OF RIGHTS AND WHAT IT MEANS TODAY 11 (1957).

lic injury from individuals"⁹¹ A motive aimed at creating an individual right to bear arms is also suggested by the very wording of the second amendment. That amendment does not prevent or even limit the use of standing armies. Nor does it establish the militia as the sole or primary defense of the United States. If the framers meant to avoid the dangers of standing armies by this amendment, it can only be observed that they chose a remarkably inefficient way of doing it, when more direct and positive measures had been proposed.⁹²

In summary, the framers seem to have intended to create a right which would protect individual citizens against disarmament by the federal government. Since this right is an express exception to the enumerated powers of Congress, it is not limited by any federal "police power."⁹³ The individual rights approach has the virtues of consistency with interpretations given other amendments, avoidance of conflict with

91. *Id.* at 12. That the right proposed was seen as individual in nature is further supported by the inclusion of a proposal for a constitutional right to hunt game. *Id.* at 13.

92. *E.g.*, the Pennsylvania proposal that "standing armies shall not be kept up in time of peace, and the military shall be subordinate to the civil power" or the New Hampshire suggestion that "no standing Army shall be Kept up in time of Peace unless with the consent of three fourths of the Members of each branch of Congress" E. DUMBAULD, *supra* note 90, at 12; DEBATES IN THE FEDERAL CONVENTION, *supra* note 89, at 658.

93. See *Mandel v. Mitchell*, 325 F. Supp. 620, 629 (E.D.N.Y. 1971), where the court stated that:

New York Times Co. v. Sullivan marks the emergence in clarity of the view . . . that the people, not the government, possess the sovereignty, and that by the First Amendment they emphasized the withholding from the federal government of the power to make laws affecting (in *Sullivan*) the freedom of the press (citations omitted).

See also *Black*, *supra* note 32, at 867; *McCulloch v. State of Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819); *THE FEDERALIST* No. 41 (J. Madison). Those of the framers who opposed the Bill of Rights often did so on the ground that its protections were unnecessary, since the federal government possessed only the enumerated powers and none of those included the power to abridge any of the rights sought to be guaranteed. The framers who supported the Bill of Rights argued that the protections should be inserted as a special guarantee of those rights, and to ensure that the general powers would never be construed to permit the infringement of the rights so emphasized. See J. MADISON, *NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787*, 640 (Koch ed. 1966); F. McDONALD & E. McDONALD, *CONFEDERATION AND CONSTITUTION 1781-1789*, 190 (1968). Neither the view of the proponents nor of the opponents of the Bill of Rights is consistent with the position that the national government could, under a manner of police power, limit the rights set forth in the amendments. The Virginia resolutions expressly rejected any such approach:

[N]o right of any denomination can be cancelled, abridged, restrained or modified, by the Congress . . . by the President, or any department or officer of the United States

I. BRANT, *THE BILL OF RIGHTS: ITS ORIGIN AND MEANING* 41 (1965). For a government of limited powers to assume power on the basis that such power is beneficial to the public would resemble a court of limited jurisdiction determining a question beyond its jurisdiction on the justification that the cause of action was compelling.

other provisions, and appears to be in accord with the intent of the framers of the amendment.

THE ADVISABILITY OF ADDITIONAL FIREARM LEGISLATION

The generic term "firearm controls" includes a multitude of different proposals, ranging in complexity and strictness from simple registration unaccompanied by restrictions on purchase to restrictive permit systems severely limiting firearm ownership. It is impossible to examine in depth all possible forms of firearm restrictions within the limits of this article. Emphasis will therefore be placed on the development of concepts having a general application to the more frequently proposed forms of firearm controls, with limited discussions of particular features of certain control proposals. The advisability of controls will be evaluated by exploring two issues; first, whether there is reason to believe that controls currently in existence have acted to reduce homicide rates and, second, whether it appears likely that additional federal controls would prove capable of reducing future levels of homicide.

Existing Controls And Homicide Rates

Comparisons of homicide rates prevailing in areas with and without firearm controls are frequently employed in attempts to ascertain whether existing controls have lowered homicide rates. Far too many comparisons have been made to be dealt with individually. Instead, this article will initially analyze the three major shortcomings often found in these simple comparisons: a failure to utilize the relevant criterion; a failure to demonstrate that relations between homicide rates and controls is causal in nature; and a failure to show a uniform relation between controls and lower homicide rates. Recent statistical studies will then be examined in order to determine to what degree statistical tools can improve upon the simple comparison.

Simple Comparisons

Studies which employ the percentage of homicides committed with firearms as a basis for comparing control and non-control areas⁹⁴ utilize a criterion which has no relevance to the proper objective of controls. The proper basis for assessing the effectiveness of controls

94. See, e.g., C. BAKAL, *THE RIGHT TO BEAR ARMS* 270 (1966); R. CLARK, *CRIME IN AMERICA* 104 (1970); 1967 *Hearings*, *supra* note 2, at 873 (statement of J. Tydings); 1971 *Hearings*, *supra* note 11, at 377-78 (statement of B. Bayh).

is the *overall* homicide rate. A lower percentage use of firearms in areas with controls does not prove that controls thwart homicides. The difference may result from the use of other weapons, such as knives,⁹⁵ the use of which may be necessitated by controls or brought about by cultural influences.⁹⁶ The lack of a consistent relationship between the percentage of firearms used in homicide and the overall homicide rates⁹⁷ suggests that lower percentages of firearm homicides do not reflect frustrated gun homicides, but instead successful non-gun homicides. It would therefore appear that comparisons based upon the percentages of firearms used in homicides are based upon a standard which has no relevancy to the desirability of firearm controls.

A second flaw present in most comparisons consists of a failure to demonstrate that the variations observed in homicide rates are due to the presence or absence of firearm controls. These comparisons frequently fail to account for many of the factors influencing homicide rates⁹⁸ and often display serious cultural and economic biases. Three

95. See notes 221-223 and accompanying text, *infra*.

96. The effect of factors other than controls on the choice of weapons in homicide can be illustrated by a few examples. In New York in 1966 the percentage of rifles and shotguns was half the nationwide rate, yet that state imposed no controls on such long weapons at that time. Benenson, *A Controlled Look at Gun Controls*, 14 N.Y.L.F. 718, 734 (1968). England's low percentage of gun use in homicides has been ascribed to that nation's strict gun controls. See R. CLARK, *supra* note 94, at 105. England does not control knife ownership, however, and yet only 5% of English homicides involve knives, a rate less than one-third the American rate. Compare N. WALKER, *CRIME AND PUNISHMENT IN BRITAIN* 20 (Edinburgh University Press 1968), with FEDERAL BUREAU OF INVESTIGATION, *UNIFORM CRIME REPORTS 1968* at 108 [hereinafter cited as UCR]. During the 1967 hearings, when questioned concerning states without controls which had lower percentages of gun homicides than certain controlling states, Ramsey Clark stated: "I think you are comparing unlikes You have to compare the conduct of people and the methods of reporting The statistical quality varies tremendously with different jurisdictions." 1967 *Hearings* 945. Clark is, however, fond of citing favorable comparisons of this type as proof of the desirability of controls. See R. CLARK, *supra* note 94, at 104.

97. See chart I, *infra*, at note 177 and accompanying text. See also M. WOLFGANG, *PATTERNS IN CRIMINAL HOMICIDE* 81-82 (1958). Wolfgang found that while homicide rates in Philadelphia were approximately equal to overall Pennsylvania rates, firearms were used in 33% of Philadelphia murders, compared to 68% statewide. Much the same difficulty is found in comparisons based on the number of firearm killings, rather than overall homicide rates. For example, Clark cites Japan as having but 68 gun suicides in 1968, compared to 10,407 in the U.S. R. CLARK, *supra* note 94, at 103. The overall suicide rate for Japan in that year was, however, approximately 50% higher than the U.S. rate. National Commission on the Causes and Prevention of Violence, *International Comparisons*, in *THE CRIMINAL IN SOCIETY* 230 (1971).

98. See NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE, *supra* note 1, at 24-32. Comparisons intended to demonstrate control ineffectiveness were criticized during Senate hearings by Senators Dodd and Tydings for failure to account for factors ranging from population density to social considerations. The senators concluded that "unless states are compared in a highly controlled manner with respect to each and every one of these and perhaps other crime factors, no meaningful esti-

recent comparisons made by Ramsey Clark,⁹⁹ *The New York Times*,¹⁰⁰ and a *Harvard Law Review* commentary¹⁰¹ are typical. These comparisons refer to a total of four control states—New York, Massachusetts, New Jersey and Rhode Island—and a total of five non-control states—Florida, Texas, Arizona, Georgia and Mississippi. A regional bias is immediately evident; every state chosen to represent control states is located in the Northeast, while all states chosen to represent non-controlling states are in the Southeast or Southwest. The effect is to introduce a strong cultural bias in that societal factors incline the Southeast and Southwest to a higher homicide rate than prevails in the Northeast.¹⁰² An economic bias is also present. The states chosen to represent control areas have much higher per-capita incomes than those picked to represent areas without controls.¹⁰³ In view of the strong positive relationship between poverty and levels of violent crime,¹⁰⁴ this economic bias has a significant effect on the validity of these comparisons. The neutrality of the comparisons, thus is compromised by cultural and economic biases. To the extent that

mate can be made of the net effect of any firearms licensing law. . . ." 1968 *Hearings* 555. Despite this valid criticism of simple comparisons, both senators employed such comparisons extensively to support their positions during the hearings. See 1968 *Hearings* 21, 49, 514. See also R. CLARK, *supra* note 94, at 104-105:

While our information is far from complete and comparisons fail to account for such differences as urbanization, industrialization, economic status, climate, ethnic composition and regional history that affect murder rates, it is perfectly clear that lots of guns and little control mean murder.

99. R. CLARK, *supra* note 94, at 104.

100. N.Y. Times, June 17, 1968, § 1 at 38.

101. Note, *Firearms: Problems of Controls*, 80 HARV. L. REV. 1328, 1345 (1967).

102. A. SUTHERLAND & D. CRESSEY, *PRINCIPLES OF CRIMINOLOGY* 140 (6th ed. 1970); TASK FORCE REPORT, *supra* note 16, at 31; Pettigrew & Spier, *The Ecological Structure of Negro Homicide in CRIME IN AMERICA* 69 (B. Cohen ed. 1970). Similar cultural biases occur in attempts to compare U.S. homicide rates with those of other nations. See NEWTON & ZIMRING 124; 1968 *Hearings* 204-05 (statement of H. Glassen).

103. The following table illustrates this:

State	per capita income	rank
New York	\$4,797	2
New Jersey	\$4,539	5
Massachusetts	\$4,294	9
Rhode Island	\$3,920	15
Arizona	\$3,542	29
Texas	\$3,515	30
Georgia	\$3,277	34
Mississippi	\$2,561	50

DEP'T OF COMMERCE, *STATISTICAL ABSTRACT OF THE U.S.* 1971, 314. Comparisons which weigh crime rates in the second most wealthy state in the nation against those in the least wealthy state cannot be considered neutral with regard to economic status.

104. See generally NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE, *supra* note 1, at 24-25; NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, *supra* note 1, at 134; R. CLARK, *supra* note 94, at 50.

these factors may account for the rate variations observed, no causal relationship between controls and lower homicide rates is established.

Another reason why variations in homicide rates cannot prove that controls cause homicide rate reductions lies in the possibility of common causation. The "frontier ethic" present in the South and West tends to promote higher homicide rates in those regions.¹⁰⁵ That same cultural factor tends to create an aversion to firearm controls in those areas.¹⁰⁶ Thus it is possible that states without controls would tend to have higher homicide rates, not because the absence of controls results in higher rates, but because both the absence of controls and the higher rates result from the same cultural factors.¹⁰⁷ An externally imposed change in firearms regulations would not necessarily reduce homicide rates in noncontrolling areas if this analysis is correct, since the real determinant of the higher rates would remain unaffected. Thus, even if controls and lower rates often coincide, the coincidence does not prove a causal link between the two, for both may be effects of a common cultural cause.

A third weakness frequently found in simple comparison studies consists of evidence suggesting that controls are not the only, nor even the major, determinant of the homicide rate. Pennsylvania, New Jersey and Hawaii are often mentioned as examples of controlling states with homicide rates well below the national average, the inference being that controls have lowered their rates relative to nationwide levels.¹⁰⁸ Pennsylvania's law was adopted in 1939.¹⁰⁹ An examination of 1938 homicide figures reveals that the Pennsylvania homicide rate was 3.5 per 100,000 population, well below the 5.3 national average.¹¹⁰ The New Jersey controls were imposed in 1966,¹¹¹ while its

105. See note 102 *supra*.

106. See Pettigrew & Spier, *supra* note 102, at 72. It has been argued that states with higher homicide rates are more likely to adopt controls. This misstates the proper premise; states that *perceive* their homicide rates as being excessive are more likely to institute firearm regulations. A population with little propensity for violence is more apt to consider high homicide rates as unnatural, and less likely to regard firearms as having legitimate uses, and thus is more likely to adopt a system of firearms controls.

107. An analogy may be found in studies which note a strong correlation between homicide rates and membership in certain religions. It has been argued that a given religion is itself unlikely to cause high or low murder rates. Instead, it is probable that certain religions tend to find adherents in regions and social groups with high murder rates, while others are more often adopted by persons in groups with lower propensities to violence. See H. BLOCH & G. GEIS, *MAN, CRIME AND SOCIETY* 265 (1962).

108. See N.Y. Times, July 28, 1968, § IV at 6; 1967 *Hearings* 109 (statement of F. Ludwig); 1968 *Hearings* 177 (statement of A. Sills); *id.* at 45 (statement of H. Fong); *id.* at 601 (statement of R. Clark).

109. See PA. STAT. ANN. tit. 18, §§ 6101-6119 (1973).

110. 1938 UCR at 128, 136.

111. See 1968 *Hearings* 177 (statement of A. Sills).

rates are low relative to the nation as a whole, they were even lower prior to the gun law's adoption.¹¹² Likewise, Hawaii's homicide rate was but half the national average even before the Hawaiian controls were enacted, and its rate has rapidly escalated since.¹¹³ In each case, the relatively low homicide rates existed prior to the enactment of the controls, strongly suggesting that the cause of the relatively low rates is to be found in factors other than the firearm regulations.¹¹⁴ A close examination of the homicide rates of New York City, often cited as an example of an area with strict controls and few homicides,¹¹⁵ also supports the conclusion that homicide rates are determined by factors other than controls. In 1966, when the city's overall homicide rate was 8.4, the rates in various boroughs ranged from 3.26 in Queens to 15.13 in Manhattan.¹¹⁶ It appears that the same degree of controls may be consistent with either very low or very high homicide rates, depending upon other factors such as the cultural or economic structure of the area. In view of the bias commonly found in comparisons, the possibility of a common cultural causation, and evidence that controls are not the major determinant of homicide rates, simple comparisons seem unable to establish the effectiveness of controls.

Even if it is assumed that simple comparisons are a valid method of assessing control effectiveness, there is still reason to doubt that such comparisons prove that controls depress homicide rates. If state and regional comparisons are valid assessments of effectiveness, and

112. The New Jersey rate for homicides was 2.5 in 1961 and had risen to 3.2 to 1965. Between 1966 and 1968, rates rose from 3.5 to 5.1. See 1961 UCR at 46; 1965 UCR at 64; 1966 UCR at 73; 1968 UCR at 71.

113. The controls referred to are Hawaiian law as enacted in 1967. 1968 *Hearings* 45 (statement of H. Fong); see HAWAII REV. STAT. §§ 134-2 to -7, as amended (Supp. 1973). In 1962, five years before the enactment, the Hawaiian homicide rate was 2.9, compared to a 4.5 national average; its rate in 1966, just before the imposition of controls, was also 2.9, as against a national average of 5.6. 1962 UCR at 35, 43; 1966 UCR at 58, 68. By 1972, five years after the law's passage, the Hawaiian rates had climbed to 6.8 per 100,000, equal to approximately two-thirds of the 8.9 nationwide rate. 1972 UCR at 61, 70.

114. A similar tendency of low homicide rates to precede rather than follow the adoption of firearm controls is found when international comparisons are employed. Britain's extremely low homicide rate has been attributed to the strict British controls. See R. CLARK, *supra* note 94, at 105. The British controls, in their present scope and strictness, date from 1937. 1971 *Hearings* 251 (statement of C. Greenwood). Comparisons made considerably before 1937 nonetheless found the British homicide rate to be but a fraction of the American rate. H. BREARLY, *HOMICIDE IN THE U.S.* 27-28 (1932). See also Morris & Blom-Cooper, *Homicide in England*, in *STUDIES IN HOMICIDE* 30 (Wolfgang ed. 1967).

115. See 1968 *Hearings* 91 (statement of J. Lindsay); Note, *Firearms: Problems of Controls*, 80 HARV. L. REV. 1328, 1345 (1967).

116. 1967 *Hearings* 707 (statement of A. Krug).

if firearm controls substantially lower homicide rates, a strong and consistent relation between controls and lower rates, and a lack of controls and higher rates, should be found.

At present, no consistent relationship exists between the presence of controls and low homicide rates. On the regional level, the north-central states, with few controls¹¹⁷ have the lowest regional homicide rate in the nation.¹¹⁸ On the state level, many non-controlling states have rates comparable to or lower than the most frequently cited controlling states, as the following comparison illustrates:¹¹⁹

CONTROLLING STATES		NONCONTROLLING STATES	
<i>State</i>	<i>1972 Homicide Rate</i>	<i>State</i>	<i>1972 Homicide Rate</i>
New York	11.0	Idaho	3.8
New Jersey	6.5	Kansas	4.0
Massachusetts	3.7	Minnesota	2.4
Rhode Island	1.3	Montana	2.5
		N. Dakota	1.2
		Utah	2.9
		Vermont	1.7
		W. Virginia	6.1
		Wyoming	4.1

It should also be noted that there are a few states outside the Northeast which have control systems and whose rates should be taken into consideration along with the Northeastern control states. California's firearm controls have been praised by advocates of controls,¹²⁰ yet that state has a 8.8 homicide rate.¹²¹ This is well over the 7.3 rate of neighboring Arizona,¹²² which has been mentioned as an example of a noncontrolling state with high homicide rates.¹²³ North Carolina requires permits for handgun purchases¹²⁴ and annual handgun registration.¹²⁵ Yet North Carolina's 1972 rate was 12.8, almost 50% higher than the national average.¹²⁶ Mississippi registers all pis-

117. See generally Benenson, *A Controlled Look at Gun Controls*, 14 N.Y.L.F. 718, 724 (1968). The Northcentral states also have a rate of firearm ownership 50% higher than that of the Northeast. NEWTON & ZIMRING 10.

118. See 1972 UCR, table 3; TASK FORCE REPORT, *supra* note 16, at 30.

119. Data taken from 1972 UCR, table 5.

120. 1968 Hearings 603 (statement of R. Hruska); see *id.* at 655 (exhibit).

121. 1972 UCR, table 4.

122. *Id.*

123. See R. CLARK, *supra* note 94, at 104.

124. N.C. GEN. STAT. 14-402 (1969), as amended N.C. GEN. STAT. 14-402 (Supp. 1973).

125. N.C. GEN. STAT. 14-407 (1969), as amended N.C. GEN. STAT. 14-407 (Supp. 1973).

126. 1972 UCR, table 4.

tols and most rifles,¹²⁷ yet its homicide rate was an even higher 15.4.¹²⁸ It would seem from this that no strong and consistent relationship exists between stricter controls and lower homicide rates at a given point in time.

Such a relationship is also absent when comparisons are made between rates in a given area before and after the adoption of a control ordinance. Firearm controls are often adopted as part of a general anticrime program, and it is impossible to determine from comparisons alone what retardation of homicide rates was due to controls and what part was due to other anticrime provisions. For example, a temporary decline in Philadelphia's homicide rate has been cited as proof of the effectiveness of that city's controls.¹²⁹ Yet in the same year that controls were imposed, the Philadelphia police force was augmented by over a thousand men.¹³⁰ There is good reason to believe that the controls did not cause the reduction in the homicide rate. The proportion of Philadelphia murders committed with firearms remained the same before and after the adoption of controls.¹³¹ Whatever was responsible for the homicide decline therefore reduced both gun and non-gun homicides to the same degree. Firearm controls, however, cannot depress non-gun homicide rates; only some factor which influences all homicides, regardless of weapon employed, could create such a proportionate reduction. As a result, the contention that the temporary decline in Philadelphia's homicide rate was due to controls seem highly dubious. Toledo, Ohio has also been cited as an area where controls have proven beneficial.¹³² There gun and non-gun homicides both went into a steep decline during the period in question.¹³³ It seems likely that these temporary declines cannot of themselves demonstrate that firearm controls create a lower homicide rate.

Even if it is assumed that comparisons over a period of time are a valid method of determining the impact of controls, an analysis of areas which have adopted firearm controls in recent years discloses

127. MISS. CODE ANN. § 45-9-1 (1972); see 1968 *Hearings* 364 (report of Stanford Research Institute).

128. 1972 UCR, table 4.

129. See Bakal, *The Failure of Federal Gun Control*, SATURDAY REVIEW, July 3, 1971, at 14.

130. Compare 1964 UCR 155, with 1965 UCR 160. See generally 1967 *Hearings* 714 (statement of M. Benenson).

131. Bakal, *The Failure of Federal Gun Control*, SATURDAY REVIEW, July 3, 1971, at 14.

132. *Id.*

133. 1969 *Hearings* 59 (statement of J. Burkhart).

no consistent relationship between controls and long-term declines in homicide rates. Between 1969 and 1970, Philadelphia rates jumped from 7.5 to 9.3, and Toledo rates went from 3.2 to 5.9,¹³⁴ increases respectively of 28% and 65% over a year. In 1966 New Jersey adopted the strictest statewide controls in the nation.¹³⁵ The following two years saw a 45% increase in the homicide rate,¹³⁶ a rise greater than had occurred in the five years preceding adoption.¹³⁷ The experience of Hawaii since the adoption of a strict law in 1967¹³⁸ is hardly more encouraging; the homicide rate has more than doubled in the intervening five years.¹³⁹ In the seven years which have passed since Las Vegas and Clark County, Nevada, adopted handgun registration,¹⁴⁰ homicide rates there have risen from 8.0 to 18.3.¹⁴¹ In 1968, new controls were adopted or existing controls augmented in Chicago,¹⁴² the District of Columbia,¹⁴³ Miami,¹⁴⁴ San Francisco,¹⁴⁵ and New York City.¹⁴⁶ The intervening years have seen increases in homicide rates in each of these cities.¹⁴⁷ Comparisons over a period of time at the regional level also suggest that there is no strong relationship between controls and declining homicide rates. Between

134. Compare 1969 UCR 83, with 1970 UCR 92, 95. See generally 1967 *Hearings* 688 (statement of M. Benenson). By 1972, rates had risen to 10.7 in Philadelphia and 5.9 in Toledo. 1972 UCR, table 5.

135. See 1968 *Hearings* 143-44 (statement of A. Sills).

136. Between 1966 and 1968 the rate jumped from 3.5 to 5.1 murders per 100,000 population. Compare 1966 UCR 73, with 1968 UCR 71. Nationwide rates increased by about 21% over the same period. Compare 1966 UCR 5, with 1968 UCR 7.

137. During this period, rates went from 2.5 to 3.5 per 100,000. Compare 1966 UCR 73, with 1968 UCR 71.

138. See HAWAII REV. STAT. §§ 134-2 to -7, as amended (Supp. 1973) and authorities cited note 113 *supra*.

139. The rate increased from 2.4 in 1967 to 6.8 in 1972. Compare 1967 UCR 70, with 1972 UCR 70; cf. HAWAII REV. STAT. §§ 134-2 to -7, as amended (Supp. 1973), and authorities cited note 113 and accompanying text *supra*.

140. NEWTON & ZIMRING 91 n.22.

141. Compare 1965 UCR 79, with 1972 UCR 85.

142. See CHICAGO, ILL., MUNICIPAL CODE §§ 11.1-.2 (1968).

143. See DISTRICT OF COLUMBIA, POLICE REGULATIONS art. 51, 54 (1968).

144. See MIAMI, FLA., CODE §§ 25.104-.119 (1968).

145. See SAN FRANCISCO, CAL., MUNICIPAL CODE ch. VIII, § 1(610) (1968).

146. See NEW YORK, N.Y., ADMINISTRATIVE CODE §§ 436-6.0 to -6.16 (1968).

147. The following table sets out homicide rates prevailing when controls were adopted in 1968, as well as the rates for years before and four years after the adoption:

City	Homicide rates		
	1964	1968	1972
Chicago	7.2	10.7	11.5
Miami	6.2	12.5	14.3
New York City	6.1	8.5	19.1
San Francisco	4.3	7.7	8.6
Toledo	2.3	4.0	5.9
Washington, D.C.	8.4	9.5	12.4

See 1964, 1968, 1972 UCR.

1933 and 1965, homicide rates in the Southern and Rocky Mountain states fell by 33% to 50%, while rates in the New England states, where most control programs had been instituted, increased.¹⁴⁸ To consider a more recent time period, 1971 saw significant rate declines in no major control state and in three noncontrol states, and minor decreases in one control as against three noncontrol states.¹⁴⁹ In 1972, one control state had a major decline, as against three noncontrol states, and minor declines were noted in one control state in comparison to eight noncontrol states.¹⁵⁰ In view of the tendency for homicide rates to continue to increase following the imposition of controls, and the tendency of rate declines to affect impartially both control and noncontrol states, no consistent relationship appears to exist between imposition of controls and homicide rate declines.¹⁵¹

Statistical Studies

In an effort to refine the simple comparison, several writers have employed statistical methods to evaluate the effectiveness of existing control systems.¹⁵² Perhaps the most elaborate application of statistical methods to an assessment of existing controls was undertaken by

148. TASK FORCE REPORT, *supra* note 16, at 31 n.1 (1967).

149. States with significant declines (over 30%) were Arizona, Utah and South Dakota; lesser declines occurred in Rhode Island, Oregon, Virginia and Wyoming. 1971 UCR, table 3.

150. Significant decreases occurred in Rhode Island, Kansas, Montana and Wyoming; lesser declines were noted in Massachusetts, West Virginia, Iowa, Florida, Alabama, Kentucky, Tennessee, Arkansas and New Mexico; rates remained stable in North and South Dakota. 1972 UCR, table 3.

151. It has been argued that the absence of this relationship is due to the evasion of state and local controls by purchase of firearms in nearby areas which lack controls. See, e.g., NEWTON & ZIMRING 91, 94; R. CLARK, *supra* note 94, at 113; 1967 *Hearings* 395-401 (exhibits). This seems to employ a double standard; homicide declines are credited to the controls, homicide increases are blamed on the lack of nearby controls. For example, during the most recent hearings Mayor Lindsay of New York City estimated that there were presently eight million illegal guns in his city, or about one for every man, woman and child residing there. See 1971 *Hearings* 190. Yet later he suggested that the New York City controls were restraining homicides: "New York City, on homicide, which is what all those handguns are about, still is no. 16 out of the 25 largest cities in the country. Atlanta has more than three times the per capita murder rate as New York City." 1971 *Hearings* 195. One advocate of controls has authored a book devoting an entire chapter to "The Futility of State Laws" and has also published an article attributing temporary retardation of homicide rates in certain cities to the adoption of local controls. See C. BAKAL, *THE RIGHT TO BEAR ARMS* ch. 8, at 149 (1966); Bakal, *The Failure of Federal Gun Control*, SATURDAY REVIEW, July 3, 1971, at 14. See also text accompanying note 227 *infra*.

152. Certain applications of statistics to assessing the likelihood that future controls would prove effective will be dealt with under the assessment of future controls. This section will deal exclusively with studies based upon the experience of states with existing control systems.

Geisel, Roll, and Wettick.¹⁵³ The Geisel study centers upon the finding of a relationship between homicide levels as measured by murder rates and the degree of firearms controls imposed in various states and cities. The study begins by assigning numerical values to various forms of firearm controls employed in different areas.¹⁵⁴ The authors then attempt to compensate for factors other than controls which might explain variations in homicide rates. On the basis of the relationship reported between firearm controls and death rates, the authors reach the conclusion that nationwide imposition of controls equal in effectiveness to those in New Jersey might save several thousand lives annually.

The Geisel study brings to bear an impressive array of statistical tools. It should be recognized, however, that it fails to answer the central question in the debate over firearm controls: whether firearm controls have caused lower homicide rates. The existence of a relationship does not establish that the relationship is due to causation.¹⁵⁵ Two alternate explanations exist which are equally reasonable. The first is the possibility of common causation, the possibility that societal factors determine both the proclivity toward violence and the aversion to adopting firearm controls.¹⁵⁶ The tendency of relatively low homicide rates to antedate controls lends support to this explanation.¹⁵⁷ A second explanation lies in the failure of the Geisel study to take into account the effect of regional variations in homicidal proclivities.¹⁵⁸ Very few states have truly strict firearm controls.¹⁵⁹ Those that do

153. Geisel, Roll, Wettick, *The Effectiveness of State and Local Regulation of Handguns: A Statistical Analysis*, 1969 DUKE L.J. 647.

154. For example, prohibitions against possession by minors, felons, addicts, alcoholics and the mentally ill are each assigned a weight of 1 unit. A licensing requirement is assigned 8 units. *Id.*

155. The authors of the study seem somewhat equivocal on the issue of causation. On the one hand, they caution that "[t]he coefficients of certain demographic variables may not indicate a causal relation. The ecology of crime is more complex than this study's simple equations portray." Geisel, *supra* note 153, at 669 (emphasis in original). On the other hand, they state as their conclusion that "many lives would be saved if all states increased their level of control to that of New Jersey". *Id.* at 647.

156. See text accompanying notes 106-107 *supra*.

157. See text accompanying notes 108-113 *supra*; cf. text accompanying notes 134-150 *supra*. A very early study of homicide, conducted in 1880, concluded that the southern states had extremely high homicide rates relative to New England even prior to the Civil War. Gastil, *Homicide and a Regional Culture of Violence*, 36 AM. SOCIOLOGICAL REV. 412, 417 (1971). This would antedate even New York's Sullivan Law by half a century.

158. Geisel, *supra* note 153, at 669.

159. NEWTON & ZIMRING 181. Indeed, Geisel acknowledges that, since such a large proportion of homicides are committed by persons never convicted of crime or adjudged mentally defective or alcoholic, the most likely explanation for a reduction

are clustered in the northeastern portion of the nation, and possess many common cultural features which tend to depress homicide rates.¹⁶⁰ Several studies have found that persons raised in the southeastern United States have a significantly higher homicide propensity than those raised in the northeastern United States, even where both groups have migrated to a new region, share the same access to firearms and are subject to the same controls.¹⁶¹ Even if this relationship between controls and lower cultural proclivities to violence is pure coincidence, the relatively low homicide rates in control states may nevertheless be explained by location of states with strict controls solely in regions with low tendencies toward violence. The Geisel study therefore should not be interpreted, as the author admits, as conclusively establishing that firearm controls have caused a reduction in the homicide rate.¹⁶²

A more recent study by Seitz¹⁶³ approaches the assessment of controls in a different way. Seitz assigns a value of 1.0 to states that have both carrying and purchasing restrictions, and 0.0 to those states lacking either or both of these restrictions.¹⁶⁴ Acknowledging that controls would have differing impacts on the "violent subculture" and on the larger society, Seitz seeks to take this into account by separating white and non-white homicide rates and treating each separately.¹⁶⁵

in homicides by controls is that the controls achieved a significant across-the-board reduction in firearms possession. Geisel, *supra* note 153, at 267, 269. Clearly, a significant reduction in general ownership of firearms requires a comparatively strict law and not merely registration or permissive licensing. NEWTON & ZIMRING 83.

160. See NEWTON & ZIMRING 181:

Only two American jurisdictions, New York and Massachusetts, have attempted restrictive pistol licensing on a statewide basis. Because the number of restrictive licensing jurisdictions is so small, and because both of them are located in the Northeast, comparing the crime statistics of these states to other states through the use of multi-variate correlation is inappropriate. *Id.*

See also authorities cited note 102 *supra*.

161. See Gastil, *Homicide and a Regional Culture of Violence*, 36 AM. SOCIOLOGICAL REV. 412 (1971); cf. Pettigrew & Spier, *The Ecological Structure of Negro Homicide*, in CRIME IN AMERICA 69 (B. Cohen ed. 1970). See also M. WOLFGANG, PATTERNS IN CRIMINAL HOMICIDE 331 (1958).

162. A significant part of the saving in lives projected by the Geisel study consisted not of reductions in homicide, but in suicide and firearm accidents; indeed, the study found that the correlation between controls and homicide were weaker than that between controls and suicide. Geisel, *supra* note 153, at 672. The question of whether it is proper for government to render criminal the ownership of a firearm by an individual, on the ground that ownership might prove harmful to himself, is beyond the scope of this article. For a general discussion of the difficulties involved in attempting to lower suicides by firearm controls see NEWTON & ZIMRING at xii, 35.

163. Seitz, *Firearms, Homicides and Gun Control Effectiveness*, 6 LAW & SOC. REV. 595 (1972).

164. *Id.* at 605.

165. *Id.* at 604.

He then ascertains the relationship between controls and white and non-white murder rates in each state by means of multiple regression techniques. On the basis of the relationships thus found, Seitz concludes that the adoption of carrying and purchasing restrictions nationwide would reduce homicide rates within the violent subculture by 2%, and would reduce rates by 56% in the majority population.¹⁶⁶

Several weaknesses present in the Seitz study tend to undermine its conclusions. Like the Geisel approach, this study cannot be taken to prove causation; an explanation based upon common causation or cultural differences is equally plausible.¹⁶⁷ In addition, the factors employed by Seitz to represent the degree of firearms control in each state and the impact of a "violent subculture" on homicide rates pose problems not found in the Geisel study.

In assessing the effectiveness of controls in each state, Seitz imposes a simple all-or-nothing test; no value is assigned if the state lacks either carrying or purchasing restrictions, and a unitary value is assigned if a state has both.¹⁶⁸ This seems a rather crude manner of assessing the strength of controls. As Seitz himself admits, "[t]here is a wide variety of carrying and purchasing restrictions."¹⁶⁹ The effect is to treat the least stringent restrictions as if they had the same impact as the most stringent, a result which Seitz does not justify.¹⁷⁰ His assessment of state firearm controls thus seems of questionable validity.

A second failing of the Seitz approach is his attempt to compensate for the effects of a violent subculture. Realizing the necessity of compensating for cultural differences and their impact on homicide rates, Seitz divides American society into two parts, white and non-white:

Since for our purposes the subculture of violence is tolerably coterminous with the nonwhite population, it is relatively simple to control for the differences in cultural context by simply separating white and non-white homicide rates.¹⁷¹

166. *Id.* at 609.

167. See text accompanying notes 156-161 *supra*.

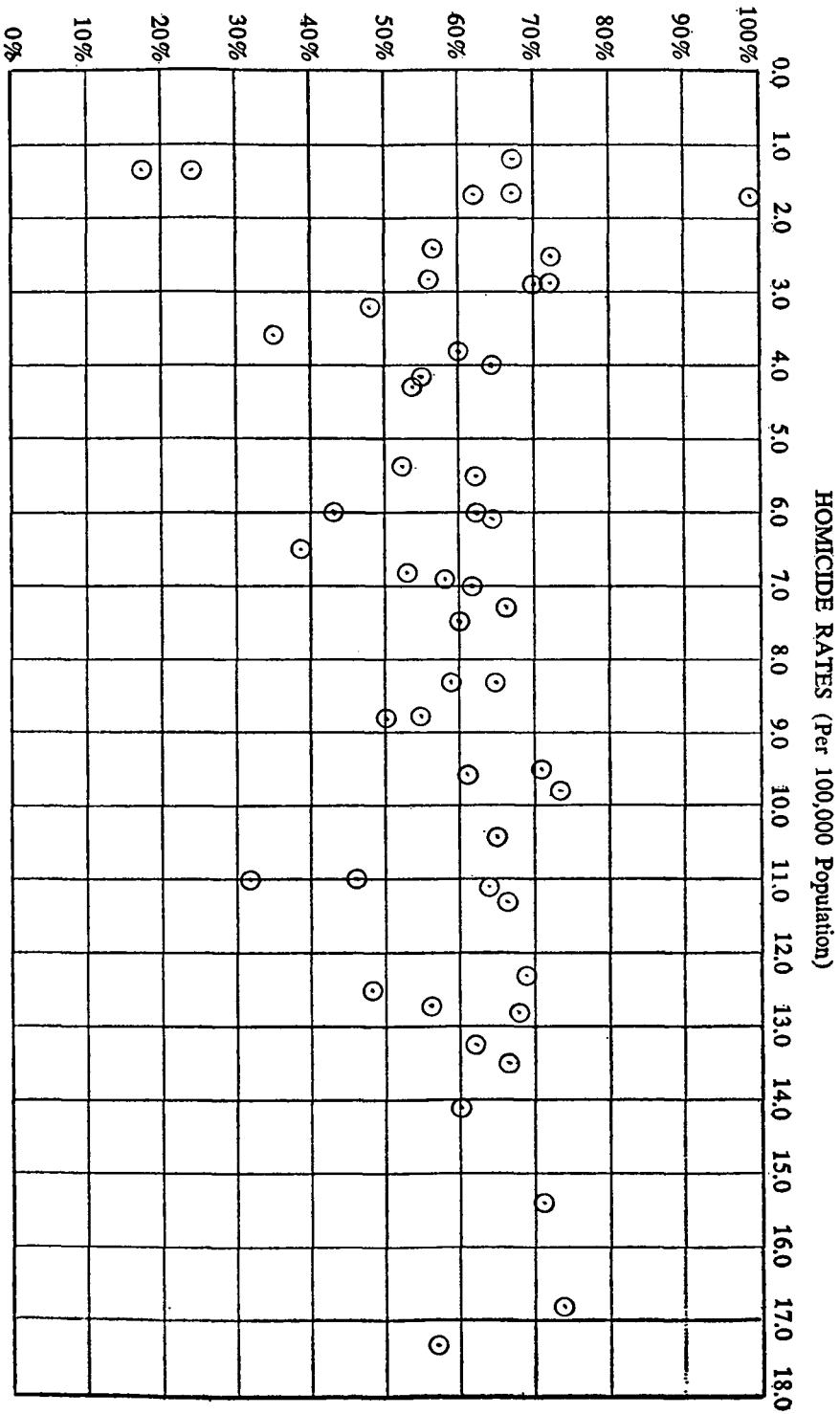
168. Seitz, *supra* note 163, at 605.

169. *Id.* at 611 n.13.

170. Seitz attempts to justify this treatment on two grounds: first, to employ separate variables would unduly complicate the equations and perhaps render them invalid; second, most policy makers will wish to adopt both carrying and purchasing restrictions together. *Id.* at 611, n.13. Neither of these arguments forms a valid reason for lumping all types of carrying and purchasing restrictions under a single heading and assuming that their impact is equal.

171. *Id.* at 604.

PERCENTAGE OF HOMICIDES
ACCOMPLISHED WITH FIREARMS



Seitz's assumption of a neat racial demarcation, which coincides nicely with cultural demarcations, is unjustified.¹⁷² Moreover, it ignores a substantial portion of the white murders who belong to social groups emphasizing violence.¹⁷³ For example, the social structure of the Southeast, where 44% of total U.S. homicides occur,¹⁷⁴ is strongly inclined toward violence among all races.¹⁷⁵ Seitz's assumptions ignore the impact of a "violent subculture" upon white homicides and thus lead him to understate the impact of the "violent subculture" upon total homicide rates. Since he concludes that controls would reduce homicides by 56% in the non-violent culture, as opposed to only 2% in the "violent culture,"¹⁷⁶ to the extent that the role of the "violent subculture" is understated, Seitz's conclusion overstates the total nationwide effect of controls by a factor of 28. The Seitz approach is therefore of doubtful value in determining control effectiveness; the techniques employed to assess the effect of controls and the extent of cultural inclinations toward violence are arbitrary and unjustified and any relationships found cannot be proven to be causal in nature.

The lack of an ascertainable causal relationship between homicide rates and access to firearms is further illustrated by Chart I. Percentages of homicides accomplished with firearms in each state, as determined in a study spanning the period 1962 - 1966,¹⁷⁷ is employed as an indicator of firearms availability. Since this measure indicates how often murders in each state actually obtain and use firearms, it is a reasonably accurate gauge of the availability of firearms to potential murderers.¹⁷⁸ Against this measure is plotted each state's

172. See G. Vold, *ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCES*, Nov. 1952, at 5; H. BLOCH & G. GEIS, *MAN CRIME AND SOCIETY* 262 (1962). Vold notes that

Lest anyone conclude . . . that regional differences in homicide are equivalent to, or due only to differences in the proportions of total population classified as other than white, attention is invited to the similar consistent and large differences in the rates as between regions for the white group alone.

G. Vold, *supra*, at 5.

173. See authorities cited note 102 *supra*.

174. 1972 UCR 6.

175. See authorities cited note 102 *supra*.

176. Seitz, *supra* note 163, at 609.

177. See 1967 *Hearings* 102 (exhibit).

178. Indeed, the percentage of murders accomplished with firearms in control and noncontrol states is often cited by advocates of controls, who argue that a low percentage indicates to a successful control system. See, e.g., C. BAKAL, *THE RIGHT TO BEAR ARMS* 270 (1966); R. CLARK, *supra* note 94, at 104; 1967 *Hearings* 21 (statement of J. Tydings); 1971 *Hearings* 377-78 (statement of B. Bayh). The construction of this graph is intended to determine whether lower homicide rates are actually created by lower percentage use of firearms.

homicide rate for 1972, the most recent year available.¹⁷⁹ The result should indicate if there is any strong relationship between access to firearms and the homicide rate.

On the face of the chart no significant relationship is apparent. The state of Vermont has the highest percentage of firearm use in homicide (100%) and yet is tied for the fourth lowest homicide rate of the fifty states (1.7). The states in the lowest homicide rate bracket, 1.0-1.9, have percentages of firearms use ranging from 17% to 100%, indicating that very low homicide rates may coincide with both very high and very low uses of firearms in homicide. If we examine the figures on the basis of percentage use of firearms, three states are tied at 67% use of firearms in homicide, indicating an approximately equal access to guns. Yet the homicide rates range from 1.7 to 13.5 to 16.0, differing by a factor of eleven. No less than five states are tied at 62% use: Indiana, Iowa, Louisiana, Oklahoma and Oregon. Homicide rates in these states stand at 1.7, 5.5, 6.0, 7.0 and 13.2, the extremes differing by a factor of eight. There does not seem to be any strong or consistent relationship between firearms availability as indicated by percentage use in homicides and the overall homicide rate of a state. Low accessibility is compatible with both high and low murder rates, and low homicide rates may occur in the presence of either great or minor access to firearms.

It appears, after an examination of assessments of existing controls, that neither simple comparisons nor statistical correlations can be taken to show a causal relation between the existence of controls and lower homicide rates. Too many factors, aside from controls, can influence rates and cause the presence of controls and lower homicide rates to coincide. The determination of whether additional federal firearm controls should be imposed in the future must be made upon a careful examination of the features and weaknesses of the particular controls proposed, instead of comparisons involving controls presently existing at the state and local level.

Additional Federal Firearm Controls

The primary objective of additional firearm regulations is the reduction of the homicide rate.¹⁸⁰ To achieve this, controls must do

179. See 1972 UCR, table 4.

180. One supporter of controls has stated: "It would be fairly easy to reduce the number of murders. Rational and effective gun laws would cut homicide sharply." Norval Morris, quoted in *Star*, *Shocking Rise of Murder*, *Look*, Sept. 19, 1967, at 32.

more than merely register firearms or record their owners.¹⁸¹ The controls would have to employ some form of restrictions limiting the classes of persons who may own firearms. Before these restrictions could be effective, however, certain practical impediments must be overcome. These impediments may be divided into four categories; the mass of firearms to be controlled, the difficulty of predicting future murderers, the availability of illegal firearms, and the use of substitute weapons.

The sheer mass of firearms currently in private hands poses a serious problem for the enforcement of a nationwide control program. It is estimated that there are as many as fifty million firearm owners and two hundred million firearms privately owned within the United States.¹⁸² It seems unlikely that this number would be materially reduced by the imposition of a system of firearm controls. The long useful life of a firearm makes it unlikely that the passage of time would materially reduce ownership.¹⁸³ Since many firearms are kept secretly in the owner's house for protection purposes,¹⁸⁴ the search and

181. Mere registration or licensing would not deter a professional criminal, for he could be traced through his weapon only in the unlikely event that they left the firearm behind. 1967 *Hearings* 971 (statement of J. Schooley). Presently, a criminal who leaves his weapon behind runs the risk of being traced by fingerprints or dealer's records, not to mention being shot in the back by his intended victim. Mere registration would not deter those who kill in a fit of rage, for those individuals usually kill without consideration of the probability of detection. See Star, *Shocking Rise of Murder*, *Look*, Sept. 19, 1967, at 33; cf. 1971 UCR 32 (84% of murders are presently cleared by arrest). A system which would file test bullets from each firearm and attempt to match rifling striations on crime bullets with those from registered guns is not workable considering the present state of ballistics science. No system of classification capable of filing the millions of test bullets which would be required, in a way that would enable practical matching of a given bullet with test bullets, has yet been devised. Moreover, since bullets fired from the same gun may differ greatly under any but the most detailed examinations, individual matching under a microscope is necessary, and several test bullets must be available. Finally, the striations on the test bullet would not necessarily match those of the firearm at a later date. The markings on test bullets can change over time, and the markings of the barrel change with the effects of wear, rust and fouling from fired bullets. See NEWTON & ZIMRING 135; G. BURRARD, *THE IDENTIFICATION OF FIREARMS AND FORENSIC BALLISTICS* 144-45, 148-51, 161-66 (1962); J. DAVIS, *AN INTRODUCTION TO TOOL MARKS, FIREARMS AND THE STRIAGRAPH* 107-08, 141-42 (1958); A. SVENSSON & O. WENDELL, *TECHNIQUES OF CRIME SCENE INVESTIGATION* 244, 249 (1965). Some of the cheaper pistols are manufactured from low-grade metals which change striations completely after each shot, rendering identification impossible. 1971 *Hearings* 121 (statement of J. Wilson).

182. 1968 *Hearings* 542 (statement of T. Kimball); see *id.* at 204 (statement of H. Glassen); 1969 *Hearings* 21 (statement of J. Tydings); *id.* at 45-46 (statement of R. Thrower); Benenson, *supra* note 96, at 719. To the extent that these estimates are based on surveys, ownership is probably underestimated. NEWTON & ZIMRING 6.

183. The useful life of a firearm is between ten and one hundred thousand shots fired. NEWTON & ZIMRING 5 n.9. One-quarter of the American-made guns confiscated by police in New York City are over a half-century old. *Id.* at 50.

184. Benenson, *supra* note 96, at 743.

seizure requirements of the fourth amendment¹⁸⁵ operate to restrict the ability of the authorities to discover these weapons.¹⁸⁶ Thus the sheer mass of firearms now owned would substantially burden enforcement and administration of any firearms regulations.¹⁸⁷

Unless controls are aimed at the complete abolition of private firearm ownership,¹⁸⁸ a reasonably accurate method of determining who may and may not obtain firearms must be employed. Since the primary problem consists of denying firearms to persons who will commit murder in the future, the administrators of the controls must be able to identify potential murderers. An inability to predict which persons will commit murder would result in failure of the control system to reduce homicides, since it would be impossible to determine who should and should not be allowed to own firearms.

The ability to distinguish future murderers depends upon the existence of an accurate and practical indicator of homicidal proclivities. Prior convictions are often used as such an indicator.¹⁸⁹ Studies have shown, however, that in excess of 70% of murderers were first-time offenders.¹⁹⁰ Thus, it appears that prior convictions do not necessarily

185. See *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *Sibron v. New York*, 392 U.S. 41 (1967); *Mapp v. Ohio*, 367 U.S. 643 (1961). See generally McKay, *Mapp v. Ohio, The Exclusionary Rule and the Right of Privacy*, 15 ARIZ. L. REV. 327 (1973).

186. NEWTON & ZIMRING 81 n.1; see 1967 *Hearings* at 114 (statement of F. Ludwig). Mr. Ludwig, a New York prosecutor, complained to the committee that "We have been somewhat handicapped in the seizure of guns since *Mapp v. Ohio* came down from the Supreme Court. . . ." *Id.*

187. See generally 1969 *Hearings* 45-46 (statement of R. Thrower).

188. This seems unlikely. See 1968 *Hearings* 47 (statement of E. Brooke) ("I know of no member of Congress who wants to impair the legitimate uses of firearms"); J. Clark, *The Role of the Federal Government in Combatting Violence in Crime in URBAN SOCIETY* 85 (1970) ("It should be stressed that nobody, least of all Senator Tydings and his colleagues, has ever suggested that any law abiding person should be denied ownership of a gun.") The advocates of controls often stress that such controls would prove no great burden to the average gun owner. See, e.g., 1967 *Hearings* 344 (statement of A. Gomberg); 1968 *Hearings* 23 (statement of J. Tydings); 1969 *Hearings* 25 (statement of J. Tydings); C. BAKAL, *supra* note 178, at 327-28; R. CLARK, *supra* note 94, at 110.

189. See, e.g., 18 U.S.C. § 922 (1970); HAWAII REV. STAT. § 134-7 (Supp. 1973); ILL. REV. STAT. ch. 38, §§ 24-3(d), 24-3.1(a)(3) (1973); MICH. ANN. STAT. tit. 28, § 28.92 (Supp. 1973).

190. See W. RECKLESS, *THE CRIME PROBLEM* 258-59 (4th ed. 1967). NEWTON & ZIMRING 77 n.10; H. BLOCH & G. GEIS, *MAN CRIME AND SOCIETY* 272 (1962); S. PALMER, *A STUDY OF MURDER* 21 (1960); M. WOLFGANG, *PATTERNS IN CRIMINAL HOMICIDE* 168-69 (1958); H. BREARLY, *HOMICIDE IN THE U.S.* 85 (1932); cf. Stanton, *Murders on Parole*, 15 CRIME & DEL. 149 (1969). Wolfgang's own survey found a high proportion of arrest records among murders; data on convictions was not given. The sample may have been atypical, since Wolfgang also found 47% of the victims of murder to have such records. M. WOLFGANG, *supra*, at 175.

indicate homicidal proclivities, and, as a result, denial of firearms permits on such a basis would not materially reduce the homicide rate.¹⁹¹

Another frequently employed indicator of potential murderers is a record of prior commitment to a mental institution.¹⁹² Several studies have found no significant difference in violent criminal activity between former mental patients and the general public;¹⁹³ one study found former patients to have a crime rate of less than one-twelfth that of the general population.¹⁹⁴ This becomes less surprising when it is understood that commitments are more often based on passivity than on violence¹⁹⁵ and that most murderers display no outward signs of mental disorder.¹⁹⁶ In addition to being ineffective, the use of prior commitment records may create serious inequities. Approximately 10% of all Americans will be committed at some time during

191. Nor does the use of arrest, rather than conviction, records seem to improve matters. Approximately 40% of all American males will be arrested at some time during their lives. Hess, *Abuse of the Record of Arrest Not Leading to Conviction*, 13 CRIME & DEL. 494 (1967). Such a criterion would seem to contravene the presumption of innocence and to open the way for abuses of the arrest power. *Id.*; cf. *Hearings on Preventative Detention before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. (1970). In addition, the use of arrest records as an employment criterion has been found to effectively create unjustified racial discrimination. See *Gregory v. Litton Systems*, 316 F. Supp. 401 (C.D. Cal. 1970), *aff'd* 472 F.2d 631 (9th Cir. 1972), reviewed in 6 HARVARD CIV. RIGHTS-CIV. LIB. L. REV. 166 (1970). See also National Commission on the Causes and Prevention of Violence, *National Violence Commission Report in THE CRIMINAL IN SOCIETY* 258-59 (1971).

192. See, e.g., 18 U.S.C. § 922 (1970); ILL. REV. STAT. ch. 38, §§ 24-3(e) to 24-3.1(a)(5) (1973); MICH. STAT. ANN. tit. 28, § 28.92 (Supp. 1973).

193. *Hearings on the Constitutional Rights of the Mentally Ill before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 91st Cong., 1st & 2d Sess. 277 (1970) (statement of B. Ennis); see B. ENNIS, PRISONERS OF PSYCHIATRY vii, 225 (1972); G. MORRIS, *Criminality and the Right to Treatment in THE MENTALLY ILL AND THE RIGHT TO TREATMENT* 121-24 (1970); Livermore, Malmquist & Meehl, *On the Justifications for Civil Commitment*, 117 U. PA. L. REV. 75, 83 n.22 (1969); Benenson, *supra* note 96, at 745 n.89; Rappaport, *Dangerousness and the Mentally Ill Criminal*, 21 S.C.L. REV. 23 (1968); Dershowitz, *Psychiatry in the Legal Process: a Knife that Cuts Both Ways*, 4 TRIAL, Feb.-Mar. 1968, at 32-34; cf. Schreiber, *Indeterminate Therapeutic Incarceration of Dangerous Criminals: Perspectives and Problems*, 56 VAL. L. REV. 602, 619 (1970).

194. See B. ENNIS, PRISONERS OF PSYCHIATRY 225 (1972).

195. *Hearings on the Rights of the Mentally Ill Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 87th Cong., 1st Sess., pt. 1, at 43 (1961) (statement of A. Deutsch) [hereinafter cited as *Rights of the Mentally Ill*]. See also B. ENNIS, *supra* note 194, at 217.

196. Gutmacher, *The Normal Murderer in READINGS IN CRIMINOLOGY AND PENOLOGY* 100 (1972); see Glasser, Kenefich & O'Leary, *The Violent Offender in CRITICAL ISSUES IN THE STUDY OF CRIME* 110-11 (1968); cf. 1967 *Hearings* 883 (statement of P. Dominick). But see Tupin, *Causes of Violence by Individuals*, 21 DEPAUL L. REV. 156 (1971).

their lives.¹⁹⁷ Studies in several states have shown that the decision to commit is often arbitrary and unjust.¹⁹⁸ There is also reason to believe that commitments show strong economic and racial bias.¹⁹⁹ It therefore appears that restricting firearm ownership on the basis of prior commitment would not materially reduce the homicide rate and would operate on an arbitrary basis.

The use of psychiatric testing has been occasionally suggested as a device for predicting future homicide offenders under a firearm control system.²⁰⁰ It is unlikely, however, that psychiatric testing can accurately discern in advance the few citizens who will commit murders. Most murderers do not show signs of marked psychosis,²⁰¹ and present techniques are unable to predict violence.²⁰² In addition to ineffectiveness, a program of mandatory psychiatric testing for fifty million firearm owners²⁰³ would permit certain abuses. The criteria for mental illness is arbitrary,²⁰⁴ and most tests overpredict, stigmatizing harmless persons as potentially dangerous.²⁰⁵ Experience with such tests suggests that they are susceptible to misuse²⁰⁶ and they are invasive of privacy.²⁰⁷ Such a program of testing may also be faulted

197. *Rights of the Mentally Ill* 11 (statement of A. Wiley); B. ENNIS, *supra* note 193, at vii.

198. For a comprehensive study of commitment procedures in Arizona see *Special Project, The Administration of Psychiatric Justice: Theory and Practice in Arizona*, 13 ARIZ. L. REV. 1 (1971). It has been estimated that up to two-thirds of the patients presently confined in mental institutions are being held without proper legal grounds. See *Rights of the Mentally Ill* 12 (statement of A. Wiley). Studies in several states have shown that the commitment hearings often occupy less than five minutes and that the person involved is in practice presumed insane and given the burden of establishing his sanity in that short period. See, e.g., *Special Project, supra*, at 38-39; Kutner, *Commitments Proceedings—Due Process*, 57 NW. U.L. REV. 383-85 (1962); Scheff, *supra* note 193, at 400, 403-04, 409; *Rights of the Mentally Ill* 25 (Statement of W. Creech); cf. Bacon, *Incompetency to Stand Trial: Commitment to an Inclusive Test*, 42 S. CAL. L. REV. 444, 452 (1969).

199. B. ENNIS, *supra* note 194, at 220-21.

200. See *Adams v. Williams*, 407 U.S. 143, 150 (1972) (Douglas, J., dissenting); 1968 *Hearings* 59 (statement of R. Clark). See also 1968 *Hearings* 16 (exhibit five).

201. See note 196 *supra*.

202. An inquiry by a California state legislative committee came to the conclusion that "the evidence indicates that there are no tests that can predict an individual's capacity for dangerous behavior." *Special Project, supra* note 198, at 97. See also Schreiber, *Indefinite Therapeutic Incarceration of Dangerous Criminals: Perspectives and Problems*, 56 VA. L. REV. 602, 619-20 (1970); N. WALKER, *CRIME AND PUNISHMENT IN BRITAIN*, ch. 7 (1968).

203. See note 182 *supra*.

204. See B. ENNIS, *supra* note 194, at 217; Scheff, *supra* note 193, at 409; *Special Project, supra* note 198, at 64-65. See generally T. SZASZ, *IDEOLOGY AND INSANITY* (1969).

205. Schreiber, *supra* note 202, at 619-20; Creech, *Psychological Testing and Constitutional Rights*, 1966 DUKE L.J. 332, 356-57.

206. Creech, *supra* note 205, at 347.

207. *Id.* Compare *Davis v. Mississippi*, 394 U.S. 721, 727 (1969) ("fingerprinting

on practical grounds. The fifty million firearms owners²⁰⁸ outnumber the 23,000 certified psychiatrists²⁰⁹ by over two thousand to one. Assuming a forty-four week work year, and a one-hour interview per person, each psychiatrist would have to assume an additional 38 hours of work weekly.²¹⁰ In light of their present workweek of 50 hours,²¹¹ such a burden is utter absurdity.

It would appear, therefore, that prediction of future murderers by criminal records, mental commitments, or psychiatric testing is exceedingly difficult. To the extent that such predictions cannot be made, firearms regulations cannot deny firearms to potential murderers and thus can hardly be expected to significantly reduce the homicide rate.

Assuming that a practical, accurate, and fair predictor of homicidal proclivities is found, and that prospective murderers are denied legal access to firearms, the effectiveness of gun controls in reducing the homicide rate may, nevertheless, be circumscribed by the possibility of "black market" firearm acquisitions. This source of firearms can be kept well supplied by thefts or other illegal means.²¹² Obtaining

involves none of the probing into an individual's private life or thoughts that marks an interrogation or search. . . ."), with *Adams v. Williams*, 407 U.S. 143, 150 (1972) (Douglas, J., dissenting). Justice Douglas took the position that the stop-and-frisk power was unnecessary to protect police, arguing that firearm control statute, which included mandatory psychiatric examinations, would be as effective and, unlike stop and frisk, would not violate the right of privacy. But such a program would seem far more invasive of the privacy and dignity of the individual than is the stop-and-frisk power. A government mandated probing of the mental processes of individuals would seem more invasive of privacy than would be a pat-down of the outer clothing. Since the examination would encompass approximately fifty million persons, it would seem a quantitatively greater invasion as well. Finally, the government interest in invading the privacy of a member of a large group, chosen at random, would seem far less than that involved in invading the privacy of a particular individual, where there was at least some cause to conclude the individual was armed and dangerous to the officer.

208. See authorities cited note 182 *supra*.

209. See *Rights of the Mentally Ill* 504. The general shortage is exacerbated by regional concentration. Half the nation's psychiatrists reside in five states; Wyoming, in contrast, has but twelve in residence. *Id.*

210. This may well be an understatement. This estimate assumes that every psychiatrist is capable of undertaking the prediction of violence, that one hour is sufficient time for that prediction, and that all psychiatrists would be free to work for the program. In reality, less than half of all psychiatrists are self-employed. *Id.* It seems unlikely that paraprofessionals would be of much assistance; given the immense difficulty of violence prediction even by an experienced professional, the use of paraprofessionals would likely result in serious mistakes.

211. *Id.*

212. See Note, *Firearms: Problems of Controls*, 80 HARV. L. REV. 1328, 1337 (1967); 1967 *Hearings* 702-03 (statement of Alan Krug); *id.* at 1099 (statement of G. McGovern). During one month in 1968, the number of firearms reported to federal authorities as stolen rose by over 5,400. 1968 *Hearings* 766 (statement of B. Casey).

It has been estimated that there are up to a half-million owners of firearms in

firearms from this source is neither unduly difficult nor costly. A former Scotland Yard superintendant has stated that pistols can be purchased illegally for the equivalent of twelve dollars in London despite the strict British controls.²¹³ Here in the United States, New York City police recently uncovered a case in which stolen firearms were sold in a drug store "over the counter like bottles of aspirin."²¹⁴ It therefore is likely that such illegal markets could be used to circumvent the effect of firearm controls.

In addition to illegal purchase of firearms, the construction of improvised firearms may pose serious problems for controls. Such weapons, often known as "zip guns", are quickly and easily made.²¹⁵ These improvised firearms are both powerful and deadly.²¹⁶ In 1966 they were responsible for nearly one-tenth of New York City firearm homicides.²¹⁷ In areas with strict controls, mass production of zip guns has become a profitable trade for those with special skills and

New York City, only 40,000 of which have applied for permits under its strict law. Benenson, *supra* note 96, at 743. See also 1972 *Hearings* 181 (testimony of chief of detectives Seedman). This, however, is not due solely to interstate evasion. Britain has strict nationwide controls, and is isolated geographically from other nations, yet in the three amnesty periods declared by British authorities since World War II, a total of 186,000 illegally-owned firearms were turned into the government. 1967 *Hearings* 348 (testimony of Alexander Gomberg).

213. R. FABIAN, LONDON AFTER DARK 116 (1954). See also 1971 *Hearings* at 250-251 (exhibit 31) ("[a] confirmed criminal . . . can and does buy whatever weapon he wants with the greatest ease.")

214. N.Y. Times, July 26, 1968, § 1, at 1. It has been reported that it is possible to lease illegal weapons from the Chicago underworld, in return either for a fixed fee or a contingent fee arrangement. See 1967 *Hearings* 630 (statement of L. Jackson).

215. The construction of these weapons is often quite ingenious. Some persons simply use sections of automobile radio antennae as barrels on frames made from cap guns, filing the hammer so that it will operate as a firing pin; the result is a functioning, if crude, .22 caliber pistol. Others ream chambers in the larger airguns to accommodate rimfire cartridges, or modify blank-firing pistols. Those who seek weapons with greater power often use firecrackers to drive loads of buckshot, fishing sinkers, or metal scrap from barrels made of steel pipe. See Koffler, *Zip Guns and Crude Conversions—Identifying Characteristics and Problems* (pts. 1-2), 60 J. CRIM. L.C. & P.S. 520 (1969), 61 J. CRIM. L.C. & P.S. 115 (1970); Smith, *Zip Guns*, POLICE, Jan.-Feb. 1963, at 10; DiMaio & Spitz, *Variations in Wounding Due to Unusual Firearms and Recently Available Ammunition*, 17 J. FOR. SCI. 377 (1972); 1968 *Hearings* 471 (statement of J. Dingell); 1967 *Hearings* 593 (statement of B. Stanczyk).

216. Zip gun projectiles are fired from short, unfired barrels and are often expanded by the muzzle blast; their instability causes them to tumble upon impact, inflicting serious tissue destruction. Koffler, *Zip Guns and Crude Conversions—Identifying Characteristics and Problems*, 61 J. CRIM. L.C. & P.S. 115, 124 (1970). The larger firecracker models have been found capable of penetrating two inch planks and 45 gallon steel drums. *Id.* Canadian authorities have found such weapons to be able to fire ball bearings through a 3/16 inch steel plate at fifty yards range. Koffler, *Zip Guns and Crude Conversions—Identifying Characteristics and Problems*, 60 J. CRIM. L.C. & P.S. 520, 529 (1969).

217. 1968 *Hearings* 471-72 (statement of J. Dingell).

equipment.²¹⁸ Nor is zip gun use in control areas limited to juveniles. One-half of the improvised firearms confiscated by New York City police were found in the hands of adults.²¹⁹ It seems unlikely that controls will be able to significantly restrain markets in improvised firearms.²²⁰

Even where neither black-market guns nor improvised firearms are available, other weapons may be employed as substitutes for firearms. Knife wounds frequently cause serious internal damage²²¹ and require but little strength to inflict.²²² The knife is inferior to the firearm with respect to range, but since most encounters take place at short distances²²³ this advantage may not be of great importance. It is also possible to construct other stabbing weapons with greater reach and power, such as pikes, bows or machetes. The experience of past ages suggests that such weapons are quite capable of killing an opponent.²²⁴

Some authorities have argued that the probability of illegal pur-

218. H. KLEIN, *THE POLICE: DAMNED IF THEY DO, DEMAND IF THEY DON'T* 58-59 (1968).

219. Koffler, *Zip Guns and Crude Conversions—Identifying Characteristics and Problems*, 61 J. CRIM. L.C. & P.S. 115, 125 (1970).

220. Some advocates of controls have suggested that regulation of ammunition sales might limit the use of zip guns. See 1967 *Hearings* 953 (statement of W. Arrington). See also C. BAKAL, *THE RIGHT TO BEAR ARMS* 17 (1966). Ammunition controls would seem at best a doubtful remedy. Over 4.4 billion cartridges were produced in this nation in 1967. NEWTON & ZIMRING 135-36. Cartridges cannot be assigned serial numbers in light of their small size and the large numbers used. It therefore becomes almost impossible to trace or limit the use of any particular lot of ammunition once it leaves the dealer's shelf. Moreover, the most powerful zip guns use fire-crackers as propellant, rather than cartridges. See text and authorities cited note 215 *supra*.

221. See GLAISER & RENTOUL, *MEDICAL JURISPRUDENCE AND TOXICOLOGY* 273-74 (London, 1966); K. SIMPSON, *FORENSIC MEDICINE* 64 (London, 1964). But see Jordan, *Pancreatic Injuries*, 3 *TRAUMA* 12 (1961).

222. C. POULSON, *THE ESSENTIALS OF FORENSIC MEDICINE* 110 (1965).

223. Wolfgang found that a majority of the homicides studied occurred within a house. M. WOLFGANG, *PATTERNS IN CRIMINAL HOMICIDE* 123, 130 (1958). A study of cases where policemen were killed in New York over the past century has revealed that the combat range in no case exceeded twenty-one feet, and in most cases was ten feet or less. PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 256 (1967).

224. For example, at Adrianople in 378 A.D., the Romans lost over 40,000 men in a single day to Gothic forces using the bow and lance. J.F.C. FULLER, *ARMAMENT AND HISTORY* 46 (1945). Among cavalymen, the debate over the advantages of the saber and lance compared to the pistol continued well into this century. See B. VON BERNHARDI, *CAVALRY IN WAR AND PEACE* x-xv, 267 (U.S. Cavalry Assn. 1910); G. DENISON, *A HISTORY OF CAVALRY* 422-26 (London, 1913). In Japan, where firearms are rare, the past century has seen knife and sword assassinations of a minister of state, a Prime Minister, and a general. See D. BERGAMINI, *JAPAN'S IMPERIAL CONSPIRACY* 262, 322, 615 (1971).

chasing or improvising weapons is not great, since most murders are crimes of passion, and the potential murderer's rage would cool by the time he could obtain a weapon by these means.²²⁵ This response contradicts the argument often used to justify federal, as opposed to state, firearms regulations, the argument that present state controls are circumvented by murderers traveling to other jurisdictions to purchase and bring back firearms.²²⁶ It would seem that if the time factor prevents a murderer from turning to an illegal outlet, it would also prevent him from traveling to another state, purchasing a firearm, and returning to kill his victim.²²⁷ Moreover, the nature of murder does not preclude the use of illegal channels of acquisition. A person who becomes a murderer may well procure his weapon in advance of, and for other purposes than, the homicide in which it is ultimately used.²²⁸ There are essentially three motives for procuring a weapon; sporting use, self protection, and criminal use. The last two are especially sig-

225. See 1967 *Hearings* 682 (testimony of Counsel Perian).

226. See R. CLARK, *supra* note 94, at 108; 1967 *Hearings* 877 (statement of J. Tydings).

227. 1967 *Hearings* 421 (statement of F. Church). The inconsistency involved in asserting that a time factor will prevent homicides under proposed national controls, and that time is no barrier to murders under present state controls, occurs with regularity in debates over firearm controls. For example, when one witness was questioned concerning the rising homicide rate in New York, he replied: "The answer, Senator, is the New York gun control law doesn't prevent people from going down to Mississippi and buying guns and taking them to New York." 1971 *Hearings* 235 (statement of A. Mikva). A short time later the same witness testified that "without the glut of handguns, people would not find it so easy, so convenient, or so tempting to kill other people." *Id.* at 238. Senator Tydings has suggested that the majority of gun murders involve "some sort of a situation where there was no premeditation, where it was a spur of the moment thing . . . and if there hadn't been a gun available a great many of those people would have been alive today." 1967 *Hearings* 877, and yet argues that "out of state sources provide a substantial number of guns to those who commit crime." 1968 *Hearings* 24-25. Clark has stated, in defense of controls, that "the criminal mind is rarely so logical. When guns are available, they are used. If guns are not at hand, the criminal will not find them" and also that "[m]ail order weapons were regularly delivered into dangerous hands" and "we are far too mobile and interdependent to rely on a network of state and local laws." R. CLARK, *supra* note 94, at 108, 112, 113 (1970).

228. A study of persons using firearms to commit various crimes, conducted by Donald Newman, is instructive. Newman found that, of the three gun murderers surveyed, two had owned the firearm used in the killing for six months to a year prior to the homicide. Of the nine who used firearms in aggravated assaults, six had bought what they thought were stolen guns, one made his own burglary to obtain the weapon, and the remaining two were too vague concerning the source of the weapon for any determination to be made. Of the 13 armed robbers who used firearms, half had had the weapon for one to two weeks prior to the robbery; five bought guns "on the street", four obtained them from burglaries; of the remaining subjects, one used a toy gun, one used a firearm obtained in a strongarm robbery, one borrowed weapons from unsuspecting friends, one used his wife's firearm. Only one purchased his gun from a licensed dealer. It failed to fire. See NEWTON & ZIMRING 183-85.

nificant in urban areas.²²⁹ Persons who are planning a crime, or who fear crime and desire protection, will procure or construct weapons and keep them at home. These weapons will be at hand should they later enter a homicidal rage. It therefore seems likely that the interposition of a period of time between the desire for a weapon and the obtaining of it would not substantially reduce homicides and, accordingly, murderers would continue to have a wide selection of extralegal means to obtain weapons. It is likely that the effect of firearms control would be impaired by the illegal purchase of guns, the construction of improvised firearms, and the use of substitute weapons such as knives.

The possibility that controls would be evaded through the use of substitute weapons has been the subject of two recent statistical studies, one by Seitz and the other by Zimring. The Seitz study²³⁰ centers on comparing the relation between state gun homicides and total homicides. Seitz argues that if murderers in gun control states merely substitute other weapons with equally lethal effect there should be no necessary relationship from state to state between the rates of murders with firearms and the total murder rate. Seitz then, on the basis of his scatter diagram, concludes that there is a strong relationship between gun homicide and total homicide rates. On the strength of this relationship, he concludes that substitution of other weapons for guns does not occur and that gun control is therefore likely to reduce homicide rates.

Assuming that Seitz is correct in finding a correlation between gun and total homicides in each state, the question focuses on the extrapolations that may be made from this finding. Upon closer analysis, the correlation does not prove, as Seitz contends, that the substitution theory is invalid. It does establish (contrary to his conclusion that murders are determined by prevailing firearms regulations) that there is a common determinant of firearm and non-firearm homicide rates. His study does not prove the substitution theory invalid, for it assumes what must be proven: present controls have restricted firearms availability and thereby made substitution necessary. To the extent that future murderers cannot be predicted, they can obtain guns legally under existing controls. To the extent that they have access

229. NEWTON & ZIMRING 21, 61.

230. Seitz, *supra* note 163, at 595. The discussion of the substitution theory occupies the first half of Seitz's study. The second portion, a statistical analysis of present homicide rates in controlling and noncontrolling states, is discussed in the text following note 163 *supra*.

to illegal markets, they can obtain illegal guns. These two factors make it likely that a lack of substitution of non-firearms would not be due to the impossibility of substitution, but rather to the ease of obtaining legal or illegal firearms despite control measures. In addition to failing to refute the substitution hypothesis, Seitz's correlations prove that controls are not a major determinant of homicide rates. Controls can reduce overall rates only by reducing that part of the total rate brought about with guns, for gun controls must leave the non-gun portion of the total rate untouched.²³¹ Since gun homicides are only a part of the total homicide rate,²³² a reduction in gun homicides will lower the firearm rate more than it lowers the total rate.²³³ Therefore, if existing control systems have a significant impact on the homicide rate, those states with controls would diverge significantly from the general ratio of gun to total homicide rates. But Seitz finds "there is an astonishing .98 correlation between the firearm homicide rate and the total homicide rate based on aggregate data for the fifty states."²³⁴ This strong relationship would be consistent with the hypothesis that gun controls are not determinants of the homicide rate; whatever determines the overall homicide rate affects both gun and non-gun homicides to the same degree, maintaining them in exact proportion, something which cannot be done by firearm controls.²³⁵ Thus it would seem that Seitz's study undercuts his own conclusions. It does not establish that the substitution hypothesis is untenable, but it does demonstrate that the predominant determinant of homicide rates is not the amount of control exerted over firearms.

A more elaborate attempt to apply statistical techniques to the question of whether firearms could be replaced by other weapons of equal deadliness was made by Frank Zimring.²³⁶ Zimring's study begins with a general analysis of Chicago homicides during the years 1965 to 1967, from which he concludes that most homicides are not the product of a single-minded determination to kill, but rather spring from an ambiguous intent to inflict some manner of injury on

231. See text accompanying notes 131-133 *supra*.

232. Approximately three out of eight murders are committed with weapons other than guns. Benenson, *supra* note 96, at 720.

233. An example may clarify this point. Assume that a given state has 100 murders, 50 with firearms and 50 without. If controls reduced the gun homicide rate by 50%, gun homicides would drop from 50 to 25 and total homicides would drop from 100 to 75. The ratio of gun homicides to total homicides would be significantly altered from 50:100, or one in two, to 25:75, or one in three.

234. Seitz, *supra* note 163, at 596.

235. See text accompanying notes 131-133 *supra*.

236. Zimring, *Is Gun Control Likely to Reduce Violent Killings?*, 35 U. CHI L. REV. 721 (1968).

an opponent.²³⁷ Zimring then moves to a more detailed analysis of knife and gun attacks over a two month period in Chicago. From this analysis, he concludes that knife attacks stem from the same motives as do gun attacks. He argues that, since knife assaults outnumber gun assaults by 2.3 to 1, and knife homicides amounted to only half the number of gun homicides, an attack with a gun is about five times as likely to kill as an attack with a knife.²³⁸

The Zimring study is impressive and has been treated as though applicable nationwide,²³⁹ despite its being a limited two-month survey of one city. A closer examination of Zimring's conclusions in light of nationwide data reveals, however, that his conclusions regarding intent and deadliness are subject to question. First, there is substantial reason to question his conclusion that murder usually results from an ambiguous intent to injure. To support this conclusion, Zimring cites three categories of proof: indicators that murder is a crime of passion—victim and offender are often friends, the motive is a quarrel, the offender often had been drinking; indicators that the killer did not do all in his power to kill the victim—usually only one shot was fired; and indicators that homicides and assaults are products of the same type of situations—the victims of each have similarities. None of these arguments seem to establish clearly that homicide is ambiguously motivated. It appears that a person who seizes a gun and fires it into another person intended to do more than merely injure that person, whether his victim be a friend or an enemy and whether his intent to kill grew out of drunken rage or sober premeditation. An offender who uses a weapon has his fists for use as well. The choice of a deadly weapon over an appendage likely to injure but not kill creates at least an inference of intent to achieve something more than the infliction of bruises. Zimring's second argument, that only 30% of gun murderers shot their victim more than once, tends to strengthen rather than weaken this inference of intent to kill. Since all gun murders, by definition, resulted in the death of the victim, it seems likely that the 70% who fired only once were satisfied with inflicting the single fatal wound.²⁴⁰ That nearly one-third of the gun murderers thought it advisable to administer a coup-

237. *Id.* at 722-24.

238. *Id.* at 728.

239. See Zimring, *Firearms Control, Hard Choices*, 8 TRIAL Jan.-Feb. 1972, at 53 (1972); Seitz, *supra* note 163, at 598; NEWTON & ZIMRING 45. See also 1969 Hearings 104-06 (statement of National Commission on Causes and Prevention of Violence); *id.* at 154 (statement of G. Newton).

240. It is also possible that their aim was terrible, and they were fortunate enough to hit their victim once. See authority cited note 281 *infra*.

de-grace to a wounded victim suggests strongly that homicides may be the product of a clear intent to kill. Zimring's third argument, that victims of assault and homicide are similar in terms of race and sex also does little to establish that the difference between a homicide and an assault is a matter of chance. It seems equally probable that these similarities reflect the distribution of crime in general, and violent crime in particular, among the population, rather than establishing any unique relationship between homicide and assault.²⁴¹ Zimring's own evidence therefore does not establish that homicide is the product of an ambiguous intent to injure.

Zimring's conclusion of an ambiguous intent is further weakened by other studies which have found significant differences between participants in assaults and homicides. An extensive study of violent crime in seventeen major cities found male offenders and female victims were present in 17.5% of the murders, compared to 27% of the assaults; women were the victims in 21% of the murders, as against 34% of assaults.²⁴² Locational variations were also present: 37% of the murders occurred outdoors, compared to 52% of assaults; the street was the location of 25% of the killings versus 39% of the assaults, while 10% of the killings and only 3% of the assaults occurred in the bedroom.²⁴³ This study also found significant age differentials: offenders of age 17 or less committed 9% of the killings, as against 18% of the assaults.²⁴⁴ Another study found significant racial differences between women convicted of homicide and those convicted of assault.²⁴⁵ Homicide offenders and assault offenders thus appear to differ in several material aspects tending to indicate that homicide and assault are not

241. For example, nationwide figures for the years 1970-1972 disclose surprising similarity between persons arrested for murder and those arrested for larceny. The average age of the murderer was 29; that of the larceny offender was 28. Average ages at first arrest were 23 and 24. 21% of murderers and 27% of thieves had one prior arrest; 8% of each had two prior arrests; 4% of each had three. 58% of the murders and 59% of the thieves had been arrested in one other state. 1972 UCR 38, table A. Despite these similarities, there are few who would maintain that murder and larceny are but two sides of the same coin, that thieves are unsuccessful murderers or vice versa. The two would seem to coincide simply because the same social groups make up both categories of offenders, not because of any inherent connection between the offenses, and the same might well be true of similarities between homicide and assault. Mere similarity of offenders does not, alone, establish that the offenses are motivated by the same intent.

242. MULVIHILL & TUMIN, *CRIMES OF VIOLENCE* 210-11 (1969) (Staff Reports to the National Commission on the Causes and Prevention of Violence, vol. 11).

243. *Id.* at 221.

244. *Id.* at 210-11.

245. See Ward, *Crimes of Violence by Women*, *CRIMES OF VIOLENCE* 903-04 (1969) (Staff Reports to the National Commission on the Causes and Prevention of Violence, vol. 13).

necessarily different products of the same motivation acting upon the same offenders. To the extent that persons who commit homicide are not the same type of persons who commit assault, a comparison of assault with murder does not give a true indication of how often attacks result in homicides and how often they do not. To this extent Zimring's comparisons cannot be used to conclude that one weapon is more likely to kill than another.

Zimring's premise that a lower "success rate" among knife attacks establishes that the knife is less deadly as a weapon than is the firearm is subject to question on a different basis. Several studies of homicide have suggested that those persons who attack with a knife may, as a group, have different characteristics and be motivated by different motives than those who attack with a firearm. If the two sets of weapons-users are not identical, then a comparison between their "success rates" may indicate little about the dealiness of the weapons employed. A recent California study has determined that killers who chose to use firearms were more likely than knife murderers to be found guilty of premeditated murder,²⁴⁶ which may infer that gun killers as a group are more likely to act pursuant to plans laid in advance.²⁴⁷ Significant racial differences in choice of weapons were found by Wolfgang in his Philadelphia study,²⁴⁸ a finding seconded by a more recent observer.²⁴⁹ To the extent that a firearm is disproportionately used by groups whose members are more likely to premeditate their killings,²⁵⁰ and to the extent that a premeditated murder is more likely to succeed than an unplanned attempt, comparisons between firearm and knife attacks are subject to external bias. Significant sexual differences have also been noted in homicide, with women resorting to knives more often and to guns less often than men.²⁵¹ To the extent that a woman is less likely to succeed in hand-to-hand com-

246. See I. RAMSEIER, *WILFUL HOMICIDE IN CALIFORNIA 1963-65*, 44 (Calif. Dep't of Justice 1967). Ramseyer found that gun killers were twice as likely to be convicted of murder in the first degree as were knife murderers (16.7% versus 8.3%). In contrast, 45.6% of the knife killers and 35.8% of the gun killers were convicted of manslaughter.

247. It is also possible that juries perceived the gun killings as more serious crimes and allowed this to affect their assessment of premeditation. Whether this can explain conviction rates differing by a factor of two, where both forms of attack are known by the juries to have resulted in the victim's death, is open to debate.

248. M. WOLFGANG, *PATTERNS IN CRIMINAL HOMICIDE* 85-86 (1958).

249. See C. O'HARA, *FUNDAMENTALS OF CRIMINAL INVESTIGATION* 524-25 (1970).

250. *Id.*; Benenson, *supra* note 96, at 728. See also M. WOLFGANG, *CRIMES OF VIOLENCE* 168 (1967) (report to the President's Commission on Law Enforcement and the Administration of Justice).

251. See S. PALMER, *A STUDY OF MURDER* 23 (1960); C. O'HARA, *supra* note 249, at 524-25; J. MACDONALD, *THE MURDERER AND HIS VICTIM* 34 (1961).

bat,²⁵² the knife homicide-ratio may not reflect its true deadliness were both sexes to utilize it fully. Finally, Wolfgang's study found significant disparities in alcohol consumption prior to the fatal attack, determining that both parties were completely sober in five out of ten gun homicides and only three out of ten killings with other weapons.²⁵³ The greater tendency of gun murderers to act while sober may indicate that gun killings are less likely to be the products of sudden passion, and may also indicate a lessened coordination and weakened offensive capacity among users of other weapons.²⁵⁴ It would appear that gun attackers differ from attackers who use other weapons, and that comparisons between the two may reflect factors other than the relative deadliness of the weapons involved.

The evidence which Zimring presents to suggest similarities between knife and gun attacks does not establish that both forms of attack can properly be compared. It does not seem likely, as Zimring appears to suggest, that virtually all the reported knife assaults were committed with the same intent as that behind homicides. Zimring's measure of unsuccessful attacks appears to be aggravated assaults as reported to the Chicago police.²⁵⁵ Under Illinois law, that offense encompasses any assault with a deadly weapon, regardless of intent or outcome.²⁵⁶ Zimring produces no evidence to demonstrate that any significant number of knife attacks that were not intended to kill were unreported and thus screened out of his figures. In view of the breadth of the statute and the probability that a person subjected even to a threat of attack with a deadly weapon would report the occurrence, such underreporting does not seem likely to be significant. Zimring also argues that knife and gun assaults occur in the same sort of dis-

252. See M. WOLFGANG, *supra* note 248, at 163.

253. Bacon, *Alcohol, Alcoholism and Crime*, in *CRIME IN AMERICA* 208 (B. Cohen ed. 1970).

254. *Id.*

255. Zimring is vague concerning what measures were employed to determine attacks. His only reference is to "serious attacks", but no evidence is given of any screening system used to eliminate attacks not in earnest. There are several factors suggesting that aggravated assaults, as reported by the police, were employed. The overall Chicago study involved over 26,000 attacks. Zimring, *supra* note 236, at 728. The sheer mass of these reports would probably preclude any sifting of the facts of individual police reports. Further, no mention is made of any screening system; in attempting to deny the likelihood that many non-earnest attacks were involved, Zimring only notes that the police may have screened out some such attacks by not reporting them as criminal incidents. *Id.* at 729. Finally, when the Chicago study was paraphrased for a staff report to a presidential commission, the attacks employed in the computations were labelled "total attacks" rather than "serious attacks." See NEWTON & ZIMRING 41.

256. ILL. REV. STAT. ch. 38, § 12-2(a)(1) (1973).

putes,²⁵⁷ but this does not prove that those who attack in those circumstances with a specific intent to kill are as likely to choose a knife as a gun. He also suggests that the racial distribution of knife and gun assaults is about the same, a result which has been contradicted by other studies²⁵⁸ and which ignores at least one substantial difference found in his own study.²⁵⁹ Zimring lastly notes that the distribution of wounds on the anatomy of the victim is about the same in attacks with guns as in attacks with knives. The assumption that the location of a wound is an indicator of the attack's intended deadliness ignores the fact that the location of a particular wound may be largely a product of chance.²⁶⁰ The attacker, whether intending to kill or merely to injure, is likely to miss the area for which he was aiming. The tendency of non-fatal wounds to involve only one hit may not indicate that the attacker did not follow up his attack; it may well be accounted for by the poor marksmanship of the offender,²⁶¹ or by the attempts of intended victims to flee.²⁶² Thus it seems that knife and firearm attackers differ significantly in several respects, and that a comparison of the homicide-ratios of the two does not indicate the deadliness of the weapons involved.

A third reason for questioning the results of the Zimring study is that an examination of nationwide figures indicates that the ratio of murders to assaults may not be an accurate indicator of the dead-

257. Zimring, *supra* note 236, at 727. It should be noted, however, that Zimring's table discloses certain distinctions between homicides committed by shooting and by stabbing. 21% of the shootings, as against 25% of the stabbings, grew out of general domestic disputes; 41% of the shootings, compared to 30% of the stabbings, did not fit into any of the listed categories and were classified under "other" disputes.

258. See authorities cited notes 248, 249 *supra*.

259. According to Zimring's data, among men, 16% of white murderers, compared to 21% of black murderers, used knives. Among women, the disparity jumped to 55% versus 33%. Zimring, *supra* note 236, at 727, Table 5.

260. A study conducted after World War II by James Hopkins may illuminate this issue. This study concerned the anatomic distribution of wounds inflicted on U.S. servicemen by enemy forces during the fighting in New Georgia and Burma. Of the 91 rifle wounds examined, 44 were inflicted on an arm or a leg rather than the trunk of the body. Hopkins, *Casualty Survey—New Georgia and Burma Campaigns in Wound Ballistics* 261-62, table 39 (U.S. Army Medical Dept. 1962). It would seem that the difficulty of hitting another person, even with a rifle, when that person is doing his best to avoid being hit is such that the location of wounds inflicted is largely a matter of chance. That nearly half the wounds were found on the extremities hardly indicates that the enemy armed forces were lacking in lethal intent.

261. See authorities cited note 281 *infra*.

262. Many pistols in common use today are of relatively low power. A person struck by one of these, if he is not killed outright, may be able to flee or even to subdue his attacker despite the serious character of his wound. See Bristow, *Which Cartridge for Police*, 53 J. CRIM. L.C. & P.S. 249 (1962); M. JOSSERAND & J. STEVENSON, *PISTOLS, REVOLVERS AND AMMUNITION* 154-55 (1972).

liness of attacks. Zimring argues that homicides and assaults flow from the same motives and that therefore a high ratio of murders to assaults indicates the use of a more deadly means of attack. An application of this theory to the nation at large produces some curious results. The murder-assault ratio for the western states is 1:29, almost 50% below the nationwide average ratio of 1:18.²⁶³ Yet the western states have the second highest regional rate of gun ownership and the highest rate of pistol ownership in the nation.²⁶⁴ Apparently, either extensive gun ownership does not increase the deadliness of attacks, or else the murder-assault ratio is not a proper indicator of this deadliness. An examination of state crime figures also shows several states with a very low murder-assault ratio, but which are known neither for anti-gun traditions nor for stringent control laws.²⁶⁵ Indeed, of the ten states with the lowest "kill-ratios" only two, Rhode Island and Massachusetts, are generally considered strong gun-law states.²⁶⁶ There are also several states which are similar in location, cultural factors, and lack of firearm controls, yet which show massive disparities in homicide-assault ratios.²⁶⁷ Further, these ratios may vary dramatically from year to year within the same state, despite a lack of apparent change in firearms regulations.²⁶⁸ It seems unlikely that the actual deadliness of attacks varies to this degree from year to year or from state to state; accordingly, it is probable that murder-assault ratios do not properly register variations in deadliness. Finally, the application of this approach to nationwide figures in the long term produces some unusual conclusions. It is clear that the possession of firearms,²⁶⁹ as well as firearm use in homicide,²⁷⁰ has been increasing. Yet the nationwide

263. These figures have been computed from data contained in 1972 UCR, table 3.

264. NEWTON & ZIMRING 10.

265. For example, Arizona at 1:39, Montana at 1:41 and Utah at 1:34, all of which have much lower "kill-ratios" than such control states as New York (1:22), New Jersey (1:21) or Pennsylvania (1:17). See 1972 UCR, table 5.

266. The ten lowest states are Rhode Island (1:118), South Dakota (1:71), Vermont (1:42), Montana (1:41), Arizona (1:39), Nebraska (1:36), Delaware (1:34), Utah (1:34) and Connecticut (1:33). See *id.* The unusually low rate of Rhode Island marks a sudden jump in the rates: in 1970 its ratio was 1:38, in 1971, 1:42. See 1970, 1971 UCR.

267. For example, North and South Carolina show ratios of 1:25 and 1:17, differing by one-third; North and South Dakota stand at 1:24 and 1:71, a difference of nearly 300%. See 1972 UCR, table 5.

268. Between 1970 and 1971, Arizona went from 1:22 to 1:37, South Dakota moved from 1:16, above the national average, to 1:56, the lowest in the nation, while North Dakota rose from 1:43 to 1:20, and Oregon jumped from 1:28 to 1:49. See 1970, 1971 UCR.

269. NEWTON & ZIMRING xi. See also R. CLARK, *supra* note 94, at 103.

270. See NEWTON & ZIMRING xii.

murder-assault ratio has gone from 1:7 in 1933 to 1:20 in 1963,²⁷¹ falling by a factor of three. Either increased firearms ownership and use in crime does not increase the deadliness of attacks, or else the ratio employed by Zimring is an inaccurate indicator of deadliness. Either possibility renders questionable the application of the Zimring approach to the advisability of future firearms legislation. Neither the Zimring nor the Seitz studies dispel the possibility that those with homicidal intent would still accomplish their ends by other means under a system of controls, nor can they establish that the control administrators would be able to divert firearms from those with homicidal tendencies. In view of the difficulty of predicting future killers, in light of the probability that such killers would be able to obtain in advance illegal firearms or other weapons with which to effectuate their intent, it is probable that additional firearms regulations will encounter serious difficulties in attempting to reduce homicide rates.

In summary, the advisability of further firearms legislation at the federal level is subject to serious question. The experience of jurisdictions that have adopted firearm controls does not seem to indicate that such controls have materially reduced the homicide rate. Comparisons by means of statistical tools likewise have been unable to demonstrate that controls have been significant determinants of the homicide rate. Additional legislation does not appear to hold much prospect for restraining future homicide rates. The absence of a practical, accurate and fair test to determine future homicidal tendencies, as well as the difficulties posed by illegal markets, improvised firearms, and substitute weapons suggest that such legislation would have a very limited impact.

EVALUATION OF CURRENT PROPOSALS

The focus of proposed federal firearm legislation has shifted substantially over the past five years. The proposals advanced following the civil disorders of the 1967 - 1968 period were oriented toward both handguns and long arms.²⁷² These proposals sought to register the firearms and prohibit ownership by certain groups of individuals.²⁷³

271. Glasser, Kenefich & O'Leary, *The Violent Offender*, in *CRITICAL ISSUES IN THE STUDY OF CRIME* 109 (1968).

272. See S. 3691, 90th Cong., 2d Sess. (1968); 18 U.S.C. § 921-928 (1970).

273. See generally 18 U.S.C. § 922 (1970); HAWAII REV. STAT. § 134-7 (Supp. 1973); ILL. REV. STAT. ch. 38, §§ 24-3(d), 24-3.1(a)(3) (1973); MICH. ANN. STAT. tit. 28, § 28.92 (Supp. 1973). Some of the categories most frequently employed bear little relation to violent tendencies. The 1968 federal act included several unusual categories, such as users of marijuana and those given dishonorable military discharges.

During the 1970's, however, the trend has been toward controls narrower in scope but more restrictive in application. The emphasis has been primarily on handguns, and the proposed restrictions have ranged from a prohibition on future sales²⁷⁴ to a complete ban on private ownership.²⁷⁵

Proposals for a complete ban on pistol ownership avoid the difficulty of predicting future offenders, since all private possession of the weapon in question is made illegal. They do not, however, avoid the difficulties involved in preventing illegal sales, substitute weapons and improvised firearms.²⁷⁶ In addition, handgun controls encounter a unique problem, the danger of substitution of long arms for handguns in homicide. It appears likely that many murderers who now employ handguns would find long arms of equal utility. The handgun has two major advantages over the rifle as an agent of homicide. The pistol is concealable and it is easier to bring it to bear on a target at very close range. The advantage of concealability may be greatly overestimated. Around 34% of homicides occur in the home,²⁷⁷ where the ability to transport the weapon to the scene of the crime is unimportant. Another 37% occur outdoors²⁷⁸ where the ranges are likely to be longer and the very limited effective range of the handgun is a severe handicap.²⁷⁹ This leaves only 26% of homicides, those which occur outside the home but indoors,²⁸⁰ where the pistol is likely to prove more useful to a murderer than a long arm.

The second advantage of the pistol, the ease with which it can be brought to bear on nearby targets, also seems to be of questionable significance. At very close ranges, a knife attack could probably be executed as easily as a pistol shot. At anything beyond the closest ranges, inexperienced shooters are likely to miss their victim entirely

18 U.S.C. § 922 (1970). The latter prohibition has been upheld against a challenge on bill of attainder grounds. See *United States v. Karnes*, 437 F.2d 284 (9th Cir. 1971), cert. denied 402 U.S. 1008 (1971), noted in 26 *RUTGERS L. REV.* 141 (1972). See generally Note, *Firearms: Problems of Controls*, 80 *HARV. L. REV.* 1328, 1333-38 (1967).

274. See H.R. 5063, 93d Cong., 2d Sess. (1973); H.R. 2582, 93d Cong., 1st Sess. (1972).

275. See H.R. 15875, 93d Cong., 1st Sess. (1972).

276. The problem of improvised weapons may have even greater effect on this form of statute. .22 caliber rifles could be purchased legally and then converted into impromptu pistols by shortening the barrel and the stock. See Smith, *Unusual Handguns*, 6 *J. FOR. SCI.* 501 (1961); Smith, *Zip Guns*, *POLICE* Jan.-Feb. 1963, at 12.

277. MULVIHILL & TUMIN, *supra* note 242, at 221.

278. *Id.*

279. See authorities cited note 281 *infra*.

280. MULVIHILL & TUMIN, *supra* note 242, at 221. (Percentages do not add to 100% since the location of the homicide could not be determined in 2.5% of the cases).

with a pistol.²⁸¹

Were murderers forced to rely upon long arms rather than pistols, these factors might nonetheless cause a limited reduction in the number of occasions upon which an attacker is able to inflict a gunshot wound. This reduction in the infliction of wounds might well be offset by the increased probability that the wounds inflicted would result in death. Data from military studies indicate that rifle projectiles inflict more severe injuries and are more likely to kill than even the largest pistol projectiles, due to the greater velocity and energy of the rifle projectile.²⁸² Approximately half of present handgun murders involve very small caliber weapons,²⁸³ which have a fatality rate less than half that of the larger pistols.²⁸⁴ It therefore seems probable that a shift from handguns to longer weapons would involve a substantial increase in the fatality rate for firearm wounds, which would be likely to offset any effects of a reduction in attacks. Prohibition of pistol ownership is thus not likely to affect homicide rates materially, even assuming that the controls managed to prevent illegal acquisition of handguns.²⁸⁵

281. See T. WHEELER, *MISTER RIFLEMAN* 139 (1965); *Guns on Capitol Hill*, THE NATION, June 24, 1968, at 13. Colonel Wheeler describes as typical the performance of one inexperienced pistol shooter who missed completely a four by six foot target fifty times out of fifty shots at a range of only fifteen yards.

282. See French and Callender, *Ballistic Characteristics of Wounding Agents in WOUND BALLISTICS* 94-95 (U.S. Army Medical Dept. 1962). This study found that with handguns "the comparatively low velocities produced minimal wounds" while rifles inflicted "at combat ranges, comparatively severe wounds . . . much more so than with the usual sidearms missile and velocity." *Id.* They concluded that even the massive ".45 caliber bullet is of little value as a wound producing agent. The bullet often fails either to penetrate or to fracture bone and practically never shatters bone in the manner common to the rifle bullet." *Id.* at 140.

French and Callender found that the amount of tissue destruction caused by a bullet was directly proportional to its kinetic energy at impact. *Id.* at 133. The .30-06, a standard sporting rifle, fires a projectile with a muzzle energy of 2,440 foot-pounds, over twenty times as much energy as the .22 long rifle, which is often used in pistol homicides. See J. AMBER, *GUN DIGEST* 346-47 (1971); authorities cited note 262 *supra*.

283. See 1971 *Hearings* 29 (testimony of B. Bayh) (43% of handgun homicides involve .22 or .25 weapons); Zimring, *The Medium is the Message*, 1 J. LEGAL STUDIES 97, 102 (1972).

284. Zimring, *supra* note 283, at 103 (single wounds: .22 fatal in 36% of shootings, .38 in 83%; multiple wounds: 36% versus 100%, respectively).

285. During the 1960's, when the controls being urged applied to handguns and long arms alike, many of the advocates of such control argued that pistol controls alone would achieve little. See NEWTON & ZIMRING 106-107; 1967 *Hearings* 674-75 (statement of R. Perian); *id.* at 1017-18 (statement of R. Hughes); 1968 *Hearings* 43 (statement of H. Fong); 1969 *Hearings* 161 (statement of T. Dodd). For a rather vitriolic dialogue between Sen. Thomas Dodd, arguing for moderately strict controls on all firearms, and Frank Zimring, supporting complete abolition of pistol ownership alone, 1969 *Hearings* 161-64.

A proposal of still more limited effect has been directed at limiting the trade in "Saturday Night Specials," which are cheap, poorly constructed handguns.²⁸⁶ This legislation would ban the manufacture of handguns constructed from zinc castings or other metal which melts at less than 800 degrees Fahrenheit. Since more costly weapons could still be manufactured, this proposal could easily be circumvented, but at least it would have the effect of removing from the market certain shoddy weapons of no legitimate value.²⁸⁷ This approach may point the way to legislation which could establish suitable quality standards for firearms, a measure which could eliminate useless guns while improving the quality and desirability of the firearm market. A simple proof test, such as requiring a firearm to withstand a 50% pressure overload, would not screen out weapons now used by sportsmen but would stop a great many guns constructed from zinc and pot metal. Requirements of reasonable but close tolerances in working parts would do much to end markets for "Saturday Night Specials" but would not hinder production of quality firearms. Such requirements must, however, be fixed with an eye to the nature and limitations of the particular type of firearm involved.²⁸⁸

Perhaps the best approach is that taken by the framers of the 1968 Act,²⁸⁹ limiting the federal standards to prevention of interstate

286. See H.R. 3611, 93d Cong., 1st Sess. (1973); H.R. 4218, 93d Cong., 1st Sess. (1973); ILL. REV. STAT. ch. 38, § 24-3 (1973). See generally Note, *Gun Control—Recent Legislative Developments*, 23 DE PAUL L. REV. 535 (1973). The term "Saturday Night Special" has also been applied to all handguns with short barrels, some of which are of high quality and cost. As used here, it refers only to the very cheap firearms of poor construction, not to the expensive firearms of good quality put out by reputable manufacturers.

287. A quality handgun can have several legitimate uses, including formal and informal target shooting, hunting, and self-defense. Handgun hunting is becoming more popular with time, and the recent introduction of birdshot loads for pistols makes handguns suitable for snake protection for hikers, as well as proper for a lightweight survival weapon. A cheap pistol of loose tolerances and weak structure is useless for these purposes.

288. For instance, it might seem reasonable to impose a requirement that a pistol not fire if dropped on its hammer. Certain forms of handguns, such as single-action revolvers, have a mechanism which makes it difficult to prevent such a blow from firing the gun. Persons who prefer the single-action—and many do—simply carry only five rounds in the cylinder, leaving an empty chamber under the hammer. This precaution is quite practical with the single-action and renders it entirely safe. The application of this particular requirement to this particular form of handgun would therefore be improper. In the same way, pressure tests for automatic pistols should not be set so high as those for revolvers, since automatics require a mechanism which is more vulnerable to overloads. Application of minimum size and weight limitations to imported pistols under the 1968 Act has led to some rather gross distortions of high-quality pistols manufactured in Europe in an attempt to retain the American market, without stopping the domestic production of cheap, low quality firearms. See M. JESSERAND & J. STEVESON, *supra* note 262, at 308-318.

289. 18 U.S.C. §§ 921-928 (1970).

evasion of existing state laws. It should be obvious that the desirability of firearms legislation varies from state to state, as does its disadvantages; there seems to be no logical reason for imposing standards suitable for New York City upon such areas as Wyoming and Utah. With interstate evasion prevented, the population of each state may balance the competing interests involved in firearms legislation and determine what form of control, or noncontrol, is best for their particular situation. No justification, other than prevention of evasion, has ever been given for the imposition of a single, nationwide standard. In view of the diversity of homicide rates, urbanization, and opportunities for legitimate gun use, it seems doubtful that such a justification is possible.

CONCLUSION

Should additional firearm controls be enacted at the federal level, it seems likely that they will be considered constitutional. Such a view, however suited to present needs, seems to contravene the intent of the framers and what would appear to be the better interpretation of the words of the second amendment. The approach intended by the framers appears to be oriented toward denying the national government all power to limit the ownership of arms by the citizenry, the motive for this limitation being both to enable the states to draw from the pool of armed citizens and also to enable the citizens to better deter possible government oppression. Both the framer's apparent intent and these motives are inconsistent with the existence of any national power to disarm individual citizens, whether or not they have become members of an organized military unit. The accepted interpretations of the second amendment thus turn upon distinctions not intended by the framers and create a grant of power which the framers sought specifically to negate.

The imposition of nationwide firearm controls would not have a significant impact upon homicide rates. The experience of existing controls, whether assessed by simple comparisons or by elaborate statistical tools, does not indicate that existing controls have had a measurable influence upon homicide rates. Additional controls would face serious impediments due to the difficulty of predicting future killers, illegal firearm markets, improvised firearms and substitute weapons. These impediments, complicated by the mass of firearms involved, form significant barriers to the effectiveness of any system of firearm controls.

IIT/CHICAGO-KENT LAW REVIEW

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PUBLISHED BY THE STUDENTS OF THE
ILLINOIS INSTITUTE OF TECHNOLOGY/CHICAGO-KENT COLLEGE OF LAW
10 N. FRANKLIN STREET, CHICAGO, ILLINOIS 60606

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VOLUME 51

SUMMER 1974

NUMBER 1
