

# SUBMISSION IS NOT THE ANSWER: LETHAL VIOLENCE, MICROCULTURES OF CRIMINAL VIOLENCE AND THE RIGHT TO SELF-DEFENSE

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## OVERVIEW

Professors Zimring and Hawkins have performed an important service.<sup>1</sup> As we close out the twentieth century, it is clear that crime (and more particularly the fear of crime) has become a disturbing and, even worse, a defining feature of contemporary American culture. To an extent that is truly frightening, our politics,<sup>2</sup> popular culture,<sup>3</sup> and even more alarming, the

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1. This article was part of a symposium discussing FRANKLIN E. ZIMRING & GORDON HAWKINS, *CRIME IS NOT THE PROBLEM: LETHAL VIOLENCE IN AMERICA* (1997), held at the University of Colorado School of Law, February 20-21, 1998. This article was also presented in draft form before a faculty forum at Fordham University School of Law. I would like to acknowledge the helpful comments made at both forums. I would also like to acknowledge the helpful research assistance of Jeffrey Harrington, 2L, George Washington University Law School; Miriam Moore, 2L, George Washington University Law School; and Sara Rab, junior, sociology major, Columbian School of Arts and Sciences, George Washington University. I am also indebted to Matthew Huffman of the sociology department and Joseph Gastwirth of the statistics and economics departments at George Washington University for discussing various methodological issues with me. Scott Pagel of the George Washington University Law School provided superb bibliographical assistance. My work in this article has greatly benefitted from discussions with Charles Craver, Deborah Denno, Raymond T. Diamond, Elizabeth Geltman, Philip Hamburger, Nicholas Johnson, Don B. Kates, Jr., Bruce Kobayashi, Richard Pierce, Daniel Polsby, and Mike Selmi. Regression and other statistical analysis and illustrative charts were performed with SPSS 6.1.

2. During the 1990s, we have seen virtually the complete collapse of political support for once prevailing criminological strategies that emphasized offender rehabilitation and the role of socio-economic influences on criminal behavior. In their place has come a renewed emphasis on punishment as a means of retribution and of safeguarding society either through the warehousing or elimination of dangerous offenders. Although some of this might arguably be viewed as a necessary antidote or corrective to what was often an overly sentimental view of criminal offenders that prevailed in many circles during much of the 1960s and 1970s, the correction has also produced a strident, and in my view demagogic, politics of crime. The politics of crime in the 1990s has, more often than not, been a contest by office

seekers constantly attempting to demonstrate "tough on crime" credentials through the advocacy of ever harsher penal measures, often with little consideration of whether the harsher measures work, are counterproductive, or whether those measures indeed might do considerable harm to other important values that we hold, or like to believe that we hold as a society.

This is perhaps best illustrated in the politics of the death penalty in America in the 1990s. I freely confess here that I am an opponent of capital punishment and that clearly colors my view. Still, I wonder if even conscientious supporters of the death penalty can be comfortable with the role that capital punishment has assumed in American politics in the 1990s. The death house door has become a macabre prop for those seeking office. It has been true for liberal and conservative politicians seeking state office. Thus, in 1990, Democratic Senator Dianne Feinstein, in her run for governor of California, proclaimed that she was "[t]he only Democrat for governor for the death penalty." See Robin Toner, *California Showdown*, N.Y. TIMES, Sept. 30, 1990, § 6 (Magazine), at 29. In the 1990 Democratic gubernatorial primary in Texas, candidate Mark White ran advertisements with him walking in front of mug shots of criminals executed while he was governor. See Victor Kamber, *Imposing Death Penalty Is a Crime*, USA TODAY, May 18, 1990, at 12A. In the 1990 Texas gubernatorial race between Democrat Ann Richards and Republican Clayton Williams, Williams proclaimed his cure for drug dealers: "If you elect me dictator, I'll behead them." See *Taking the Offensive Seems to Work in Texas Campaign*, ORLANDO SENTINEL TRIB., Aug. 19, 1990, at A15.

Death house politics has also become a part of the race for the White House in the 1990s. It was certainly a part of President George Bush's successful campaign against Democratic candidate Michael Dukakis in 1988. During the 1992 race, President William Jefferson Clinton, then governor of Arkansas, presided over the execution of Ricky Ray Rector, convicted of the murder of an Arkansas police officer. Clinton's refusal to grant clemency has been sharply criticized by many death penalty opponents because Rector had shot himself in the head, sustaining permanent brain injury. Medical observers have indicated that he had the functional equivalent of a frontal lobotomy. Rector was probably not aware what it meant to be executed since, *inter alia*, he indicated that he would finish his pecan pie from his last meal after his execution. See Robert J. Cottrol, *Hard Choices and Shifted Burdens: American Crime and American Justice at the End of the Century*, 65 GEO. WASH. L. REV. 506, 508 n.16 (1997) (reviewing MICHAEL TONRY, *MALIGN NEGLECT—RACE, CRIME AND PUNISHMENT IN AMERICA* (1995)).

Death row again became a prop in presidential politics in 1996 when Republican presidential candidate Bob Dole staged a photo opportunity at San Quentin's Death Row to demonstrate his "tough on crime" credentials. See Carla Marinucci, *The Battle for California, Image and Issue Take Center Stage in Fight for Top Prize: State's 54 Electoral Votes*, S.F. EXAMINER, May 19, 1996, at A3. While at San Quentin, Dole indicated that he would work to speed up executions. See Susan Yoachum, *Blue Is Out, Brown Is In, at Dole Event*, S.F. CHRON., Mar. 25, 1996, at A2.

3. Consider the popularity of the *Death Wish* movies. Five of these films were produced between 1974 and 1994. All of them starred Charles Bronson as Paul Kersey, a previously pacifistic architect-turned-vigilante due to the death of his wife at the hands of criminals. *Death Wish* and its sequels each had protagonist Kersey decide to act as a vigilante because of the failure of the law to protect people close to him. See *DEATH WISH* (21st Century Film Corp. 1974); *DEATH WISH II* (21st Century Film Corp. 1982); *DEATH WISH III* (21st Century Film Corp. 1985); *DEATH WISH IV: THE CRACKDOWN* (21st Century Film Corp. 1987); *DEATH WISH V: THE FACE OF DEATH* (21st Century Film Corp. 1994). The movies were reportedly very popular

way we order our daily lives<sup>4</sup> are dominated by a pervasive fear of crime. This fear often persists even in venues of relative safety<sup>5</sup> and even in locations, or on occasions, where there are hopeful indications of a turnaround in the crime problem.<sup>6</sup>

If we simply examine the role crime plays in contemporary American politics, we must acknowledge that the politics of the war on crime has contributed to a coarsening of our cultural values<sup>7</sup> and is presenting real systemic threats to the long-term

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with urban audiences fearful of street crime. Some observers have noted the parallels between the movies and the actions of real life subway vigilante Bernhard Goetz. See Pete Axthelm & David L. Gonzalez, *A "Death Wish" Vigilante*, NEWSWEEK, Jan. 7, 1985, at 10.

4. One example of this is the rise in recent years of gated communities, patrolled by private security forces and designed to insure the safety of community residents. See, e.g., Suzanne Fields, *Life in Fortress America*, WASH. TIMES, Jan. 12, 1998, at A15; Joanna Weiss, *Locals Buy into Gated Security: Fear of Crime Fuels Popularity*, NEW ORLEANS TIMES-PICAYUNE, Dec. 28, 1997, at A1.

5. Surveys on public fear of crime find that respondents frequently exaggerate the probability of the average citizen experiencing crime. Respondents also tend to overestimate the likelihood that the sub-group of the population to which they belong is likely to experience crime. Of course, particular groups often have considerable reason to be more fearful than the general criminological data might indicate. This may be because the general data is inadequate or improperly interpreted with respect to particular groups. See generally FRED DUBOW ET AL., REACTIONS TO CRIME: A CRITICAL REVIEW OF THE LITERATURE (1979); WESLEY G. SKOGAN & MICHAEL G. MAXFIELD, COPING WITH CRIME: INDIVIDUAL AND NEIGHBORHOOD DIFFERENCES (1981); Frank Clemente & Michael B. Kleiman, *Fear of Crime in the United States: A Multivariate Analysis*, 56 SOC. FORCES 519 (1977); John H. Lindquist & Janice M. Duke, *The Elderly Victim at Risk: Explaining the Fear-Victimization Paradox*, 20 CRIMINOLOGY 115 (1982); Suzanne T. Ortega & Jessie L. Miles, *Race and Gender Effects on Fear of Crime*, 25 CRIMINOLOGY 133 (1987); Mark C. Stafford & Omer R. Galle, *Victimization Rates, Exposure to Risk, and Fear of Crime*, 22 CRIMINOLOGY 173 (1984).

6. See, e.g., Douglas S. Massey, *Getting Away with Murder: Segregation and Violent Crime in Urban America*, 143 U. PA. L. REV. 1203, 1204-05 (1995); Desiree Chen & Meg McSherry Breslin, *Reduced Crime in Suburbs Not Lowering Guard: Police Stress Protection, but Try to Avoid Alarmism*, CHI. TRIB., Nov. 18, 1997, at 1; Pama Mitchell, *Georgians Fear of Crime High Despite Drop in Rates*, ATLANTA J. & CONST., Aug. 8, 1996, at F2.

7. Probably nowhere is this better illustrated than in the carnival-like atmosphere that frequently occurs during high profile executions. The execution of Karla Faye Tucker in early February 1998, was one such occasion. Tucker, who had been sentenced to death for two brutal murders, received considerable attention in the months prior to her execution because executions of women are rare in the United States, and because her rehabilitation and having become a "born again Christian" led to calls for clemency on the part of a number of conservative religious leaders, including Jerry Falwell and Pat Robertson, who normally support the death penalty. On the night of her execution crowds of death penalty supporters were observed cheering, singing, and generally participating in what has been termed a "carnival-like atmosphere." See Corky Siemaszko, *A Circus Surrounds the Prison*,

health of our constitutional traditions of individual liberty.<sup>8</sup> The politics of crime, driven by large-scale and often justifiable public fears, has led to an ever escalating spiral of efforts on the part of office seekers to appear harsher and more draconian in their advocacy of punishments. Often this escalation occurs with little consideration as to whether increased application of harsh measures is likely to have an effect on reducing crime.<sup>9</sup>

*Crime Is Not the Problem: Lethal Violence in America* presents in many ways a welcome and reasoned alternative to the often unreasonable and improperly focused public debate on the critical issue of crime in American society. Professors Zimring and Hawkins properly urge the development of priorities that would concentrate our concerns and resources from the problem of crime in general to the narrower, more critical and perhaps more manageable issue of lethal violence. Although I am skeptical concerning their attempt to separate the issues of crime and violence and also concerning many of their suggested solutions, I believe Zimring and Hawkins are correct in highlighting violence—and particularly lethal violence—as the compelling priority for those of us with professional and personal concerns regarding criminal law and criminal justice.

The Zimring-Hawkins thesis raises a host of critical issues concerning policy prescriptions, methodological perspectives, and the integration of normative analysis into the business of policy formation, of which lawmaking in both its legislative and judicial incarnations is of course a major part. In some ways, the major issue posed by Zimring and Hawkins is a methodological one. *Crime Is Not the Problem* illustrates the unfortunate separation

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N.Y. DAILY NEWS, Feb. 4, 1998, at 4; Bruce Tomaso & Lee Hancock, *Shouts and Prayers Mix in Carnival Air Outside Prison: Rare Circumstances Draw Crowd of Gawkers, Protesters, Jokesters*, DALLAS MORNING NEWS, Feb. 4, 1998, at 1A.

8. Fear of crime has brought intense pressure to weaken a number of guarantees of the Bill of Rights including the Fourth Amendment's protection against unreasonable search and seizure, the Fifth Amendment's guarantees of protection of due process and immunity from double jeopardy, the Sixth Amendment's right to counsel and, yes, the Second Amendment's right to keep and bear arms. Much of the demand for erosion of these rights has escalated with the escalation of the drug wars. See, e.g., Randy Barnett, *Bad Trip: Drug Prohibition and the Weakness of Public Policy*, 103 YALE L.J. 2593, 2611-12 (1994) (reviewing STEVEN B. DUKE & ALBERT C. GROSS, *AMERICA'S LONGEST WAR: RETHINKING OUR TRAGIC CRUSADE AGAINST DRUGS* (1993)); Paul Finkelman, *The Second Casualty of War: Civil Liberties and the War on Drugs*, 66 S. CAL. L. REV. 1389, 1396, 1410-30, 1451-52 (1993).

9. See, e.g., Cottrol, *supra* note 2, at 507-10.

that often exists in American social science between those who do empirical work frequently designed to support policy analysis and development, and those who grapple with the more elusive questions of cultural analysis with all the necessary uncertainty and imprecisions that such studies require.<sup>10</sup> There are implicit cultural assumptions that are integral to the work done by Professors Zimring and Hawkins. These must be made explicit and examined before any meaningful critique of their policy prescriptions can be attempted.

Similarly, *Crime Is Not the Problem* has implicit normative assumptions that also must be confronted before any discussion of its policy alternatives can meaningfully begin. To achieve the objective of bringing explicit cultural and normative considerations to their proper places near the forefront of this discussion, this article is divided into three parts. Part I, Violence and Culture, outlines the difficulty in doing comparative criminology without explicitly confronting the issue of culture. In particular, Part I reveals the importance of examining the relative tolerances of different cultures and subcultures for lethal violence. Perhaps most important in the context of this discussion is the relative abilities of different cultures and subcultures to harbor microcultures that generate large amounts of criminal violence. Part II, Crime, Violence, and Lethal Violence: American Exceptionalism Considered, challenges some of the assertions made in chapter 2, "Violence and the Growth of Crime: Some Lessons from Recent History," of *Crime Is Not the Problem*. The evidence presented in this part indicates that at least for the United States since the Second World War, the link between the growth in crime and the growth in homicide has been quite strong. This indicates that while the problems of crime and lethal violence are distinguishable, they are not as unrelated as some of Zimring and Hawkins's non-U.S. data might indicate.

Part II continues with a closer examination of the frequently made criminological comparisons between the United States and other modern western democracies. This part contends that among other critical differences, there are subcultures in Ameri-

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10. For a particularly valuable discussion of the need to reintegrate cultural analysis into a social science field that over the last generation has become particularly quantitative and acultural, see Peter Temin, Presidential Address to the Economic History Association, in *Is It Kosher to Talk About Culture?*, 57 J. ECON. HIST. 267 (1997).

can society that produce highly violent microcultures<sup>11</sup> and that these subcultures have few counterparts in other western nations. One group that will be looked at with special scrutiny is that of disadvantaged, young urban black men, a group that accounts for a vastly disproportionate number of both homicide victims and perpetrators in contemporary America. Part III, Violence Reduction and Culture Change: Hard Questions in an Unfair Society, argues that any strategy for reducing violence has to be seen as an effort to change the culture and to change it in part through the use of criminal law. This necessarily involves often painful normative choices concerning who should bear the burden of criminal sanctions designed to reduce microcultures of violent criminal behavior. Here, I indicate what I believe is both of doubtful utility and normatively problematic with the direction being urged upon us by Professors Zimring and Hawkins.

## I. VIOLENCE AND CULTURE

My commission in this symposium is to examine Part III of *Crime Is Not the Problem*, specifically that part of the book that examines proposed remedies for the problem of lethal violence in contemporary American society. Yet, before this task can begin, the analytical foundation on which the book rests has to be

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11. For an anthropological discussion of the term "microculture" see ULF HANNERZ, *CULTURAL COMPLEXITY: STUDIES IN THE SOCIAL ORGANIZATION OF MEANING* (1992). I am using the term to reflect the fact that, even in subcultures or subpopulations that account for a disproportionate amount of lethal violence, the number of people who either commit homicide or become victims of homicide is miniscule compared to the subculture's population as a whole. If we take young black men between the ages of 15 and 24, the group that by far has the largest homicide rate, the homicide rate as an absolute percentage of that population is still incredibly small. The homicide rate for that group in 1994 was 157.6 out of 100,000 or less than two-tenths of one percent. See BUREAU OF THE CENSUS, U.S. DEP'T OF COM., *STATISTICAL ABSTRACT OF THE UNITED STATES: 1997*, 103 tbl.140 (117th ed. 1997) [hereinafter *STATISTICAL ABSTRACT*].

Although the homicide rate among young black men is quite small in absolute terms, it is of course vastly larger than the rate found with other identifiable American groups. See *infra* Part II. The homicide rate among black men also plays a disproportionate role in affecting the overall American homicide rate. My use of the term microculture is thus intended to indicate that a very small part of a subculture can play a vastly disproportionate role in influencing a crime rate, particularly a rate of crimes of lethal violence. The term is also used to focus the cultural question of what in a subculture's experience plays a role in fostering a microculture that disproportionately engages in homicidal behavior. See *infra* Part III.

scrutinized to see if we have a proper presentation of the problem. To borrow a metaphor from medicine or public health, two fields which are increasingly encroaching into what had once been the exclusive province of the criminologist or criminal lawyer, we must first agree on the diagnosis before we can proceed to the cure. Despite my charge, this exploration of the source or sources of our problem with lethal violence will take up the major part of this discussion.

With that in mind, let me see if I can briefly recapitulate the Zimring-Hawkins thesis, the diagnosis if you will, concerning lethal violence in contemporary America. Property crime rates in the United States are not appreciably different from property crime rates in the rest of the contemporary industrial or post industrial world.<sup>12</sup> What is distinguishable about the United States is its often dramatically higher homicide rates.<sup>13</sup> There are admittedly many contributing factors to the greater American propensity to kill one's fellow citizens. One factor is paramount: the greater availability of lethal instruments, in particular firearms. The prevalence of firearms turns what are nonlethal confrontations in other societies into homicides in the United States. This is true whether we are talking about confrontations between criminals and ordinary citizens, or indeed confrontations between ordinary citizens. Consider, for example, the barroom brawl that would simply result in a few bruises in the United Kingdom or Australia. It has the potential to escalate into a tragic and lethal encounter in the United States.<sup>14</sup>

There is an implicit assumption in the cross-national analysis made by Zimring and Hawkins, namely that the United States is properly compared to other western industrial nations because of cultural similarities. Comparing crime rates in the United States with those in Western Europe, Japan, and other advanced industrial nations has long been a staple of comparative criminologists, especially those concerned with, among other issues, the question of firearms policy.<sup>15</sup> Crime rates, particularly homicide

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12. See ZIMRING & HAWKINS, *supra* note 1, at 1-20.

13. See *id.*

14. See *id.* at 47-50.

15. The discussion in *Crime Is Not the Problem* can be faulted for its limited comparisons. Zimring and Hawkins present data contrasting homicide rates in the United States with western societies with restrictive policies concerning firearms ownership and low incidence of firearms ownership. Their analysis indicates that such societies generally have significantly lower levels of homicide than the United

rates, in the United States in the second half of the twentieth century, are rarely contrasted with crime rates or homicide rates in societies that are readily acknowledged as being culturally dissimilar. American homicide rates are, thus, rarely contrasted with those in such societies as Russia or Mexico. Both nations lack the widespread possession of firearms found in the contemporary United States, but both nations have significantly higher homicide rates.<sup>16</sup> Nor do comparative analysts spend too much time pondering the comparisons that might be made between modern American homicide rates and those of late-Medieval England—a society with a homicide rate that exceeded that currently found in the United States despite the fact that firearms were unknown at the time.<sup>17</sup> These comparisons are not

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States. Absent from the discussion in *Crime Is Not the Problem* is an examination of western societies with widespread distribution of firearms among the general population and lower levels of homicide than the United States. Two nations, Switzerland and Israel, as a matter of national military policy issue service weapons (usually select-fire rifles or fully automatic submachine guns) to large segments of the adult male population. Both nations maintain a large citizen military reserve or militia with virtually all men required to participate for most of their adult lives (Israeli Arabs are the principal exception to this rule). The policy of issuing weapons to the male population is designed to aid training and mobilization. Both nations also have relatively liberal policies with regard to the acquisition of privately owned firearms (with again Israeli Arabs as something of an exception). Despite levels of firearms possession that probably exceed the generally agreed upon 50% of all households in the United States, both Switzerland and Israel have lower homicide rates than the United States. See DAVID B. KOPEL, *THE SAMURAI, THE MOUNTIE, AND THE COWBOY: SHOULD AMERICA ADOPT THE GUN CONTROLS OF OTHER DEMOCRACIES?* 278-302 (1992).

16. In 1992, the United Nations Demographic Yearbook listed the Mexican homicide rate as 16.8 per 100,000. See *National Homicide and Suicide Rates for 76 Nations, c. 1987-1991*, 1992 U.N. Demo. Y.B., U.N. Doc. ST/ESA/STAT/SER.R. By way of contrast, the reported homicide rate for the United States in 1991 was 10.5 per 100,000. See STATISTICAL ABSTRACT, *supra* note 11, at 204 tbl.319. A recent study of crime in Russia indicated that in 1993 that nation had a murder rate of approximately 19.5 per 100,000 (that year there were 29,200 murders in Russia out of a population of 150 million). See STEPHEN HANDLEMAN, *COMRADE CRIMINAL: RUSSIA'S NEW MAFIA* 178, 349 n.3 (1995). That same year, the U.S. homicide rate was reported at 10.1 per 100,000. See STATISTICAL ABSTRACT, *supra* note 11, at 204 tbl.319.

17. Ted Gurr's review of the historical literature indicates that an estimate of 20 homicides per 100,000 would be a reasonable one for thirteenth-century England. By the middle of the sixteenth century, he estimates a rate of roughly 16 homicides per 100,000. See Ted Robert Gurr, *Historical Trends in Violent Crime: A Critical Review of the Evidence*, in 3 *CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH* 295, 313 (Michael Tonry & Norval Morris eds., 1981). By way of contrast, the overall homicide rate in the United States in 1995 was 8.2 per 100,000. See STATISTICAL ABSTRACT, *supra* note 11, at 204 tbl.319; see also ROGER LANE, *MURDER IN AMERICA:*

commonly made because we essentially recognize that modern American culture is sufficiently dissimilar to those found in non-western or pre-modern societies to make such comparisons and policy inferences highly problematic.<sup>18</sup>

Culture, thus, must be part of any discussion of comparative crime or violence rates whether that comparison is cross-national, or a contrasting of groups or sub-groups within a particular nation, or even a comparison of one nation's or one group's experience over time.<sup>19</sup> A simple look at contemporary American society readily confirms this point. Why, for example, is the homicide rate among Americans of African descent so extraordinarily high<sup>20</sup> while the rate among Americans of Japanese descent is so incredibly low?<sup>21</sup> Certainly a simple instrumentality theory fails to account for the differences. Firearms and other lethal instruments are certainly not less readily available to Asian Americans than they are to black Americans. Clearly we must search for some other explanation. A number of researchers in

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A HISTORY 14-15 (1997).

18. Students of homicide in historical perspective have long noted that for most western nations ordinary homicides experienced a sharp decline in the twentieth century. This has been attributed to increased sensitization to interpersonal violence, part of a long term "civilizing process." For a discussion of this and some methodological difficulties with this thesis see Gurr, *supra* note 17, at 300-02. Many social scientists believe that the American experience was contrary to the experience in Western Europe, in other words, that while European nations experienced significant declines in homicide at the beginning of the twentieth century, the United States experienced a major increase in homicide. Sociologist Douglas Eckberg's research indicates that some of the alleged surge in early-twentieth-century American homicide rates has to be attributed to methodological difficulties in determining nineteenth- and early-twentieth-century homicide rates due to local reporting differences. His conclusions, based on econometric forecasting methods, are that the United States experienced a more modest increase in the homicide rate than had been previously believed. What is perhaps most important for our purposes is that Eckberg shares the view with other researchers that the American trend in the twentieth century has run counter to the trend in Western Europe, where there was a decline in ordinary homicides. See Douglas Lee Eckberg, *Estimates of Early Twentieth-Century U.S. Homicide Rates: An Econometric Forecasting Approach*, 32 DEMOGRAPHY 1 (1995).

19. For a cross-national discussion of violent crime rates over time see Gurr, *supra* note 17.

20. The figures for one recent year, 1994, can illustrate the point. That year, the FBI reported an overall U.S. murder (including non-negligent manslaughter) rate of nine per 100,000. The rate for black men that year was 65.1 per 100,000. The homicide rate for black men between ages 15 and 24 that year was listed as 157.6 per 100,000, nearly 18 times the national average. See STATISTICAL ABSTRACT, *supra* note 11, at 103 tbl.140, 201 tbl.313.

21. See KOPEL, *supra* note 15, at 45, 58.

recent years have tried to revive social science theories rooted in biological and pseudo-biological views of inherent racial differences.<sup>22</sup> Many have offered these theories as explanations for group differences in criminal behavior.<sup>23</sup> But these explanations, profound normative difficulties aside, also leave too many unanswered questions. They won't, for example, explain why white men in Minnesota have a homicide rate significantly lower than the national average, while white men in Mississippi have one that is significantly above the national average.<sup>24</sup> Few researchers seem particularly anxious to tackle the issue of biologically driven differential propensities to commit crime between those who are primarily of Scots-Irish descent and those who are primarily of Scandinavian descent. Nor would explanations rooted in biological arguments of inherent racial difference help account for significant increases or decreases in homicide rates for groups over time.<sup>25</sup>

Even, or perhaps especially, cross-national comparisons of the role of firearms in violent crime or in society more generally inherently involve cross-cultural comparisons. American law

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22. See, e.g., RICHARD J. HERRNSTEIN & CHARLES MURRAY, *THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE* (1994).

23. See, e.g., *id.*

24. In 1995, data published by the Mississippi Bureau of Public Health Statistics indicated a homicide death rate for white males at approximately 15.5 per 100,000. This is based on a recorded 128 deaths in the category homicide and legal intervention. See Mississippi Bureau of Public Health Statistics, *Table 11, P. 7: Deaths from Major Cause Groups and Certain Selected Causes by Race, Sex, and Age, Mississippi Residents, 1995* (last modified Mar. 13, 1998) <<http://www.msdh.state.ms.us/ochs/phs/1995/bulletin/bul11g.htm>>. The white male population that year was listed as 825,774, see Mississippi Bureau of Public Health Statistics, *Table P1: Projected Population by Age, Race, and Sex, Mississippi 1995* (last modified Mar. 13, 1998) <<http://www.msdh.state.ms.us/ochs/phs/1995/bulletin/bulp1.htm>>, for a rate of 15.5 per 100,000. By way of contrast, the homicide rate for white men nationwide in 1994 was listed as 8.5 per 100,000. See STATISTICAL ABSTRACT, *supra* note 11, at 204 tbl.319. In 1995, Minnesota recorded an overall homicide rate of 3.9 per 100,000 for white males. See STATISTICAL ABSTRACT, *supra* note 11, at 202 tbl.315. I have estimated the white male homicide rate to average approximately 2.8-3.0 per 100,000 for the mid-1990s. This is based on the following. For the year 1992, there were 57 recorded homicides of white males. See NATIONAL CENTER FOR HEALTH STATISTICS, VITAL STATISTICS OF THE U.S. 1992, at 337 (1996). The 1990 census indicated that Minnesota had a white male population of approximately 2,019,570 (based on a white population of 4,130,000 x male percentage of 48.9%). See STATISTICAL ABSTRACT, *supra* note 11, at 30 tbl.32. This would yield a homicide rate of 2.8 per 100,000 for the white male population.

25. See Gurr, *supra* note 17, at 304-15 (discussing variations in the homicide rate in England).

allows citizens relatively liberal access to firearms while British law is significantly more restrictive. Firearms ownership has been a much more common part of American culture in modern times than it has been of British culture.<sup>26</sup> The Swiss and Israelis have rates of firearms possession which rival and at times exceed that of the United States without the accompanying rate of violent homicide.<sup>27</sup>

A comparison with our northern neighbor further illustrates the point. Canadian laws governing the ownership of handguns are less restrictive than those of Washington, D.C., New York City, and Chicago, and yet homicides with handguns in Toronto, Montreal, and Vancouver are a fraction of the rates in the three American cities.<sup>28</sup> Even the differing roles of illegal guns in the hands of criminals in the two North American nations has to be considered culturally. If strict firearms restrictions fail to stop guns from moving from say North Carolina to New York City or Chicago, there is no particular reason why strict laws should stop the movement of guns from North Carolina to Montreal or Toronto, especially across what has long been celebrated as the world's longest undefended border. If there are fewer illegal guns in criminal hands in Canadian than in American cities, it must in part be due to lesser demand. That lesser demand has to be considered largely cultural. Either Canadian criminals feel that they can practice their professions with less violence, or they have stronger moral inhibitions against taking or risking lives, or they believe that lethal violence will result in harsher sanctions than their American counterparts. Whatever the reason, a different set of cultural values among criminals, rather than the difference in firearms legislation, seems to offer a better explanation for the lesser levels of firearms homicide in Canada.

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26. The generally accepted figure is that roughly 50% of American households have firearms. See GARY KLECK, *POINT BLANK: GUNS AND VIOLENCE IN AMERICA* 18 (1991); JAMES D. WRIGHT ET AL., *UNDER THE GUN: WEAPONS, CRIME, AND VIOLENCE IN AMERICA* 116-17 (1983). I have argued elsewhere that despite relatively liberal laws concerning firearms ownership in nineteenth- and early-twentieth-century Britain, relatively few British subjects owned modern firearms. This could be seen in the extreme shortage of small arms for the home guard in 1940. See Robert J. Cottrol & Raymond T. Diamond, *The Fifth Auxiliary Right*, 104 *YALE L.J.* 995, 1023-24 n.129 (book review).

27. See *supra* note 15.

28. See KOPEL, *supra* note 15, at 147.

Culture clearly plays a significant role in influencing national homicide rates as well as the homicide rates of particular subcultures within nations. But to say that by no means simplifies matters. Culture is an elusive concept. It is concerned with complex patterns of behavior, attitudes, and at times even learned reflexes<sup>29</sup> that help define groups and subgroups within particular societies.<sup>30</sup> The essence of a culture or subculture is rarely caught with great accuracy by the kinds of shorthands that we usually employ to describe individuals and groups. Although it is, thus, common to describe people by race, ethnicity, geographic origin, sex, or religious or political affiliation, the prudent analyst realizes that within these broad categories lies a wide array of subcultures and even microcultures all of which can exert and do exert profound "cultural" influences on individual behavior.<sup>31</sup>

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29. One particularly vivid and tragic example of cross-cultural differences in learned reflexes can be seen in the case of Yoshi Hattori. Hattori was a 16 year-old exchange student from Japan visiting Baton Rouge, Louisiana. He approached a house believing it was the site of a Halloween party. The home owner was frightened and believed Hattori was a burglar and came out of the house with a .44 magnum revolver. He yelled "freeze" but Hattori kept coming. Observers indicated that Hattori was unfamiliar with English and did not realize the significance of the term "freeze" in this context, although the gun was in plain sight. The homeowner fired and killed Hattori. It is hard to imagine an American in this context who would not have, almost as a matter of reflex stopped, "frozen," or in some other way indicated fear and acquiescence. Insofar as culture might be described as a system of shared communications, it is clear that Hattori the outsider was unable to understand a commonly understood set of communicative symbols in American culture. See Christopher Cooper, *Teen's Friend Recounts Shooting: Seeing the Gun Was Puzzling*, NEW ORLEANS TIMES-PICAYUNE, May 21, 1993, at A1; Sheila Johnson, *Perspective on Violence; Explaining America to the Japanese; Citizens, Visitors Share the Same Peril; There Are No Islands in a Furious World*, L.A. TIMES, Mar. 31, 1994, at B7; *World News Tonight with Peter Jennings* (ABC television broadcast, Oct. 21, 1992).

30. Sociologists and anthropologists have long been concerned with culture as, among other things, a system of communication. Cultures produce a set of shared symbols, implicit and explicit, sometimes formally verbalized, sometimes not, that enable members of the culture to communicate with each other. Sociologist Talcott Parsons was particularly concerned with the role of culture in socialization. See, e.g., Talcott Parsons, *The Superego and the Theory of Social Systems*, in SOCIAL STRUCTURE AND PERSONALITY 20-25, 28, 33 (1964). More recently, historical sociologist Charles Tilly has discussed the symbiotic relationship between culture and social interaction. See CHARLES TILLY, *ROADS FROM PAST TO FUTURE* 5-6, 44-46 (1997).

31. See, e.g., WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* 8-9, 13-14, 158-59, 182 (1987) (discussing the "culture of poverty" debate).

Culture can also be a difficult concept to grapple with because the boundaries between cultural influences on individual behavior and other influences are frequently imprecise and overlapping.<sup>32</sup> In almost every society and subculture, men tend to be more violent than women,<sup>33</sup> and the young more prone to commit homicide than the elderly.<sup>34</sup> Should these differences be simply attributed to differences in physical strength? Do men and women, or the young and the elderly, form different subcultures even when they come from the same national or religious or ethnic communities? Dealing rigorously with such a concept poses significant difficulties.

Culturally based explanations for group differences in crime, or indeed other forms of behavior, run another risk. They can be seen as, and sometimes unfortunately are intended to be, occasions for engaging in negative stereotyping. They can appear to be a condemnation of a culture's or subculture's mores to point out that it has a disproportionately high level of homicides—our concern in this discussion.

Certainly black men, whose homicide rates disproportionately influence American homicide rates as a whole,<sup>35</sup> have been subject to strong negative stereotyping for most of American history.<sup>36</sup> Yet, of course, the overwhelming majority of African-

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32. There is, for example, an extensive body of literature discussing the extent to which the black experience in America has helped to shape a pervasive subculture of violence. See, e.g., LYNN A. CURTIS, *VIOLENCE, RACE, AND CULTURE* (1975); MARVIN WOLFGANG & FRANCO FERRACUTI, *THE SUBCULTURE OF VIOLENCE: TOWARD AN INTEGRATED THEORY IN CRIMINOLOGY* (1967). For a discussion that demonstrates how difficult it is to separate subcultural from other influences, see Robert J. Sampson, *Race and Criminal Violence: A Demographically Disaggregated Analysis of Urban Homicide*, 31 *CRIME & DELINQ.* 47 (1985).

33. See JAMES Q. WILSON & RICHARD J. HERRNSTEIN, *CRIME AND HUMAN NATURE: THE DEFINITIVE STUDY OF THE CAUSES OF CRIME* 104-25 (1985). A number of researchers have detailed patterns that indicate that murder is most often a crime committed by young, unmarried men. See, e.g., DAVID T. COURTWRIGHT, *VIOLENT LAND: SINGLE MEN AND SOCIAL DISORDER FROM THE FRONTIER TO THE INNER CITY* (1993). For one historical discussion, see Eric A. Johnson, *Women As Victims and Criminals: Female Homicide and Criminality in Imperial Germany, 1873-1914*, in 6 *CRIM. JUST. HIST.* 151-57 (1985).

34. See WILSON & HERRNSTEIN, *supra* note 33, at 126-47.

35. See Randy E. Barnett & Don B. Kates, Jr., *Under Fire: The New Consensus on the Second Amendment*, 45 *EMORY L.J.* 1139, 1251-52 (1996); John DiIulio, Jr., *The Question of Black Crime*, *PUB. INTEREST*, Fall 1994, at 3; Massey, *supra* note 6; *infra* notes 99-104 and accompanying text; see also *infra* figs. 1-5, 1-6.

36. For one look at the origins of Anglo-American racial attitudes, see generally WINTHROP D. JORDAN, *WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO* (1968).

American men are neither the perpetrators nor the victims of homicide and have strong inhibitions against such.<sup>37</sup> It would be unfair and inaccurate to use disproportionate homicide rates among black men as the occasion for the condemnation of a broad Afro-American culture or subculture.

What might be more accurate is to say that the experiences of a people play a significant role in conditioning deviant subcultures or perhaps more accurately microcultures within subcultures. French sociologist Emile Durkheim observed that deviant behavior is a normal part of the life of all communities.<sup>38</sup> In some communities, such prohibited behavior is accompanied by extreme violence, in others it takes on considerably more benign forms. The differences have a lot to do with the historical experiences of different cultural and subcultural communities, the sorts of behavior that have historically been rewarded or punished, the self-esteem of members of that community, the extent to which families are able to or prevented from transmitting values, and the extent to which hope can be said to have been preserved or frustrated within particular subcultures.<sup>39</sup> All of these can have profound influences on the deviant microcultures within communities and the propensities of such microcultures for violent behavior.<sup>40</sup>

## II. CRIME, VIOLENCE, AND LETHAL VIOLENCE: AMERICAN EXCEPTIONALISM CONSIDERED

As Professors Zimring and Hawkins quite correctly point out, property crime and violence, especially homicide, need not be closely related. It is not only possible to envision societies where most members of criminal subcultures have strong ethical or pragmatic inhibitions against murder, but also we have had a number of examples of such in recent times. Criminological observers have noted, for example, the existence of a virtual "social compact" between British criminals and the British police for most of this century. Neither went about their business

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37. See *supra* note 11 and accompanying text.

38. See EMILE DURKHEIM, *THE RULES OF SOCIOLOGICAL METHOD* 65-69 (George E.G. Caitlin ed., Sarah A. Solovay & John H. Mueller trans., 8th ed. 1958).

39. Sociologist Douglas Massey has discussed the high degree of violent crime in black communities as, in part, a cultural adaptation to hypersegregation. See generally Massey, *supra* note 6, at 1217-24.

40. See *id.*

armed.<sup>41</sup> It should be added that the mores of thieves as well as bobbies dictated unarmed law breaking and law enforcement. Guns were available on the black-market despite a regulatory regime far stricter than that which existed in the United States.<sup>42</sup> In any event, homicide rates were low and the demand for weapons on the part of criminals was small.<sup>43</sup> If this culture of nonviolent civil criminality has begun to break down as the twentieth century draws to a close,<sup>44</sup> it nonetheless provides a good illustration that property crime can take place within a context of nonviolent social mores.

The modern British experience represents one extreme of a spectrum, an extreme where property crime seems not to be closely associated with homicide. There are, of course, other societies where the association is much closer. The historical record certainly seems to indicate that this was true for Britain before the nineteenth century.<sup>45</sup> It seems, from the evidence offered by Zimring and Hawkins, also to be true of modern Italy and Canada, among others.<sup>46</sup>

And, of course, observers have long noted the link between criminal activity and homicide in the United States. Tales of nineteenth-century western desperados, or the midwestern bank robbers of the 1920s or early 1930s, or street hustlers on the mean streets of the modern American inner city, have certainly not suffered from a lack of celebration in American novels and films. The empirical and theoretical study of homicide by American criminals is certainly well-plowed, albeit still quite fertile territory.

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41. See KOPEL, *supra* note 15, at 97-98; Don B. Kates, Jr., *Some Remarks on the Prohibition of Handguns*, 23 ST. LOUIS U. L.J. 11, 25-26 (1979). Economist Kenneth Wolpin's research indicates that this might be attributable to Britain's fairly broad use of the death penalty for those convicted of murder prior to the 1960s. See Kenneth I. Wolpin, *Capital Punishment and Homicide in England: A Summary of Results*, 68 AM. ECON. REV. 422 (1978); see also A. Mitchell Polinsky, 68 AM. ECON. REV. 435-36 (1978) (commenting that any discussion of the marginal deterrent effect of executions has to take into account the amount of time actually served on the part of those sentenced to life imprisonment).

42. See KOPEL, *supra* note 15, at 89-90.

43. See *id.*

44. See *id.*; see also Justin Davenport, *Dealing Out Death on the Streets: People Used to Fight with Fists or Knives, Now They Go for a Gun*, EVENING STANDARD, May 27, 1997, at 12-13.

45. See KOPEL, *supra* note 15, at 94-95.

46. See ZIMRING & HAWKINS, *supra* note 1, at 28 tbl.2.1.

If, as Zimring and Hawkins contend, the link between theft crimes and homicide is hard to establish cross-nationally,<sup>47</sup> the data do indicate a considerably firmer link between the two for the United States during the middle and latter parts of the twentieth century. Using data collected by the U.S. Bureau of the Census, I did some very preliminary tests of the association between reported theft crimes (burglary, larceny, and robbery) and murder or homicide<sup>48</sup> and rape.<sup>49</sup> I broke down the data into two sets: one covering the period from 1937 to 1957, the other from 1957 to 1995.<sup>50</sup> For both periods, the association between

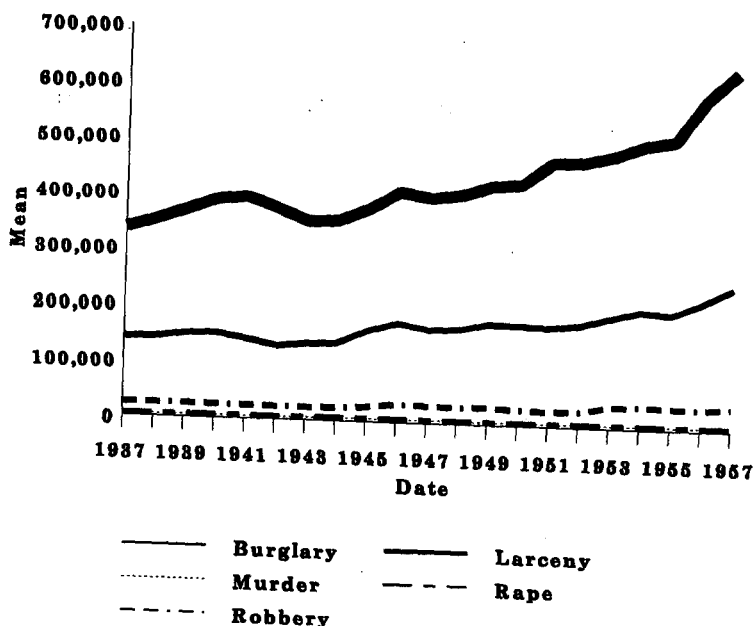
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47. Table 2.1 in *Crime Is Not the Problem* examines the growth in homicide between 1960 and 1990 in the seven G7 nations France, Britain, Germany, Italy, Japan, Canada and the US. See ZIMRING & HAWKINS, *supra* note 1, at 28 tbl.2.1. The data indicates that while the theft rate increased in all seven countries in the three decades under observation, the homicide rate increased in three of the countries, decreased in three others and remained unchanged in one. See *id.* Zimring and Hawkins use the data from that table to argue that the relationship between theft, or perhaps property crime more broadly, and homicide does not prevail when analyzed cross-nationally. See *id.* Actually, given the data presented in Table 2.1, it would be premature to make any assertions concerning the relationship between theft and homicide. Table 2.1 indicates a modest correlation between homicide and theft cross-nationally (.599) but not at the standard  $p < .05$  generally required to rule out chance (actual  $p = .156$ ). See ALAN BRYMAN & DUNCAN CRAMER, *QUANTITATIVE DATA ANALYSIS WITH SPSS FOR WINDOWS: A GUIDE FOR SOCIAL SCIENTISTS* 107-11, 178 (1997). The data set is simply too small and should have included more data from other nations. As it is, Table 2.1 does seem to indicate a significant relationship between the growth of theft and the growth of homicide in three nations, the United States, Canada and Italy. See ZIMRING AND HAWKINS, *supra* note 1, at 28 tbl.2.1. Obviously any discussion of a cross-national link between theft and homicide would have to control for other variables, particularly age of population and unemployment among others.

48. The homicide category included murder and nonnegligent manslaughter, and was taken from STATISTICAL ABSTRACT, *supra* note 11, at 197.

49. Although *Crime Is Not the Problem* does not discuss rape and its possible connection to other forms of criminal behavior, it properly belongs in this discussion. See ZIMRING AND HAWKINS, *supra* note 1. One of the more important questions raised by the Zimring-Hawkins study concerns the link between crime generally and crimes of violence. See *id.* At least some of the cross-national data provided in *Crime Is Not the Problem* suggests a weak or tenuous link between property crime and violent crime cross-nationally. See *id.* at 34-50; see also *supra* note 47. My hypothesis is that for cultural reasons, the relationship between crime and violence has been fairly strong in the United States, and that there has not been the widespread development of a cultural ethos of nonviolent criminality such has existed in Britain for most of the twentieth century. Indications of strong or weak associations between rape and theft crimes can therefore be helpful in indicating whether or not there are strong links between crimes of violence and property crimes.

50. The 1937 to 1957 data is from 1 UNITED STATES BUREAU OF THE CENSUS, *HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1970*, at 407-22

Figure 1-1: Major Crimes, 1937-1957<sup>51</sup>

the theft crimes as independent variables and rape and homicide as dependent variables was measured through the use of stepwise regression.<sup>52</sup> For the 1937 to 1957 period, the data indicate a modest relationship between robbery and murder ( $R = .67$ ), with a high level of statistical significance ( $p < .01$ ).<sup>53</sup> For the same period, the data also indicate a high relationship between

(1975) [hereinafter HISTORICAL STATISTICS]. The 1957 to 1995 data is from STATISTICAL ABSTRACT, *supra* note 11.

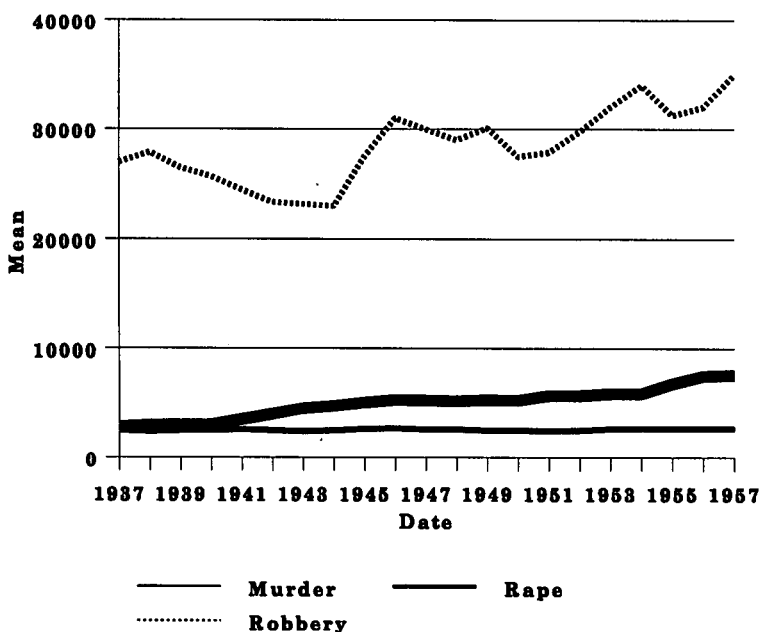
51. See HISTORICAL STATISTICS, *supra* note 50, at 413.

52. Stepwise regression is a procedure designed to test the extent to which additional specified independent variables add to the model's ability ( $R$ -squared) to make predictions concerning the dependent variable. The procedure has been subject to criticism for, among other reasons, including or excluding variables on statistical rather than theoretical grounds. Nevertheless because my concern here is with our ability to predict violent crime from property crime rather than to build a structural model, for which a variety of other independent variables would have to be considered, the stepwise procedure is useful for a preliminary examination of relationships. For further discussions of this procedure, see WILLIAM S. BROWN, INTRODUCING ECONOMETRICS 333-34 (1991); BRYMAN & CRAMER, *supra* note 47, at 261-68; A. H. STUDENMUND, USING ECONOMETRICS: A PRACTICAL GUIDE 187 (3d ed. 1997).

53. See HISTORICAL STATISTICS, *supra* note 50, at 413. Equation produced by this procedure:  $H = 1539.5 + .029Rb$ , where  $H$  = Homicide and  $Rb$  = Robbery.

burglary and rape ( $R = .85$ ), again with high levels of statistical significance ( $p < .01$ ).<sup>54</sup> The data for the years 1957 to 1995 is even more telling. For these years, stepwise procedure produced a model with very high levels of predictability between burglary and robbery as independent variables and homicide as the dependent variable (Multiple  $R = .97$ ), with high levels of statistical significance ( $p < .01$ ).<sup>55</sup>

**Figure 1-2: Robbery, Rape, Murder, 1937-1957<sup>56</sup>**



Similarly, the data from 1957 to 1995 indicate a very high level of association between robbery and rape ( $R = .95$ ), with a high level of statistical significance ( $p < .01$ ).<sup>57</sup> Despite modest to high levels of correlation between the indicated theft crimes and rape and homicide, the overall ratio of theft crimes to either rape

54. See *id.* Equation produced by this procedure:  $R_a = .029B$ , where  $R_a$  = rape and  $B$  = Burglary.

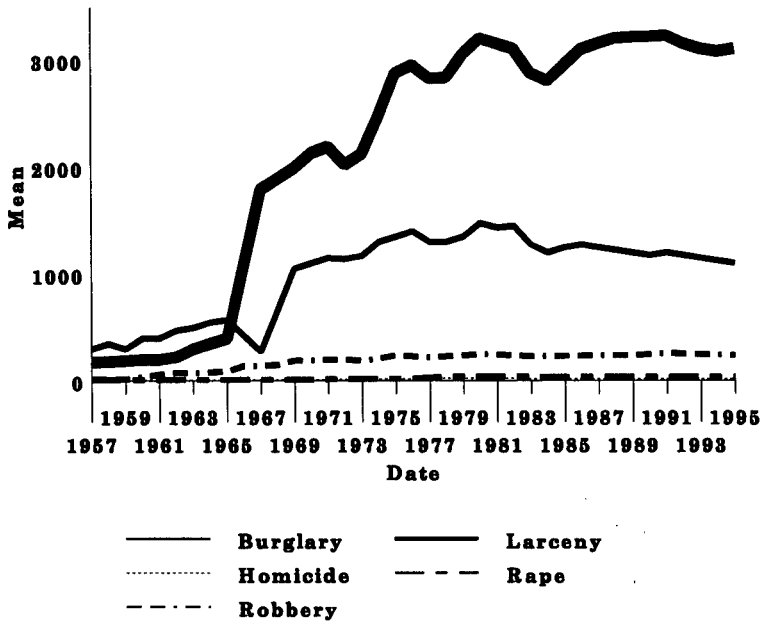
55. See STATISTICAL ABSTRACT, *supra* note 11. Equation produced by this procedure:  $H = 3.178 + .001B + .02R_b$ , where  $H$  = Homicide,  $B$  = Burglary and  $R_b$  = Robbery.

56. See HISTORICAL STATISTICS, *supra* note 50, at 413.

57. See *id.* Equation produced by this procedure:  $R_a = -.178 + .153R_b$ , where  $R_a$  = Rape and  $R_b$  = Robbery.

or homicide is quite high. Our 1937 to 1957 data indicate that for every 100 additional robberies,<sup>58</sup> our best predictive variable, we could predict three additional murders, and approximately three additional rapes for every 100 additional burglaries.<sup>59</sup>

Figure 1-3: Major Crimes, 1957-1995<sup>60</sup>



Similarly, the data from 1957 to 1995 indicate that robberies are our best predictive variable for this data set and that here we could predict approximately two additional homicides for every 100 additional robberies<sup>61</sup> and roughly fifteen additional rapes for every 100 additional robberies.<sup>62</sup> It should be noted that in the

58. See HISTORICAL STATISTICS, *supra* note 50 and accompanying text; see also *supra* figs.1-1 & 1-2 (Figure 1-1 contrasts rape and murder with the three theft crimes: larceny, burglary, and robbery. Figure 1-2 contrasts rape and murder with robbery, the least prevalent theft crimes, in order to allow the rape and murder rate to stand out more clearly).

59. See *supra* note 54; see also *infra* figs.1-3 & 1-4 (Figure 1-4 was drawn contrasting rape and murder with robbery, the least prevalent theft crime in order to allow the figures for rape and murder to be more clearly visible).

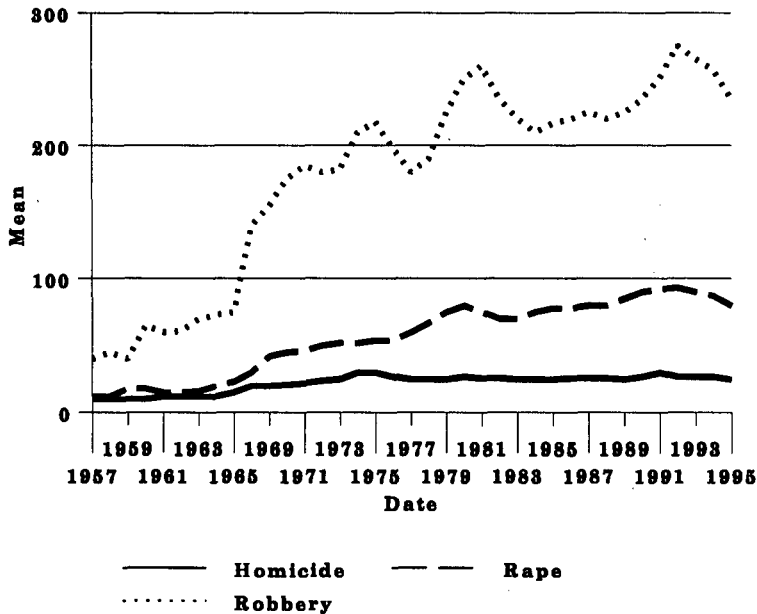
60. See HISTORICAL STATISTICS, *supra* note 50, at 413; STATISTICAL ABSTRACT, *supra* note 11.

61. See *supra* note 55 and accompanying text.

62. See *supra* note 57 and accompanying text.

latter period, both the correlations between rape and homicide as dependent variables and theft crimes as independent variables increased and the predicted number of rapes and homicides per 1,000 theft crimes also increased.

Figure 1-4: Robbery, Rape, Homicide, 1957-1995<sup>63</sup>



Although the association between theft crimes and serious violence seems much more significant in the United States in the twentieth century than the cross-national association between theft and homicide reported by Zimring and Hawkins, the reasons for this are not immediately obvious. An instrumentality thesis focusing on the greater prevalence of firearms in American society does not seem too promising as an explanation because the strong associations between theft crimes and homicides, particularly in the latter period, tend to indicate that a high percentage of homicides are being committed by violent career criminals who would probably find firearms or other lethal implements even if they were scarce for the general public.<sup>64</sup> The

63. HISTORICAL STATISTICS, *supra* note 50, at 413; STATISTICAL ABSTRACT, *supra* note 11.

64. Criminologist Gary Kleck has done research indicating extensive criminal

data on rape also tend to confirm the notion of career criminals playing a disproportionate role in crimes of violence. The strong correlations between property crime and rape<sup>65</sup> provide additional evidence of the link between crime in general and extreme violence in American society. The rape data also present difficulties for those who would argue that instrumentalities—the presence of firearms—play a disproportionate role in extreme violence in American society. Most reported rapes are accomplished without the aid of weapons.<sup>66</sup>

The strength of the association between property crimes and extreme and, indeed, lethal violence in America should cause us again to consider cultural explanations for the persistence of violence in American life. Let me suggest that three cultural or subcultural groups in the United States have historically played and continue to play a disproportionate role in the story of lethal violence in American society. The first group, immigrants, is not an ongoing group. Different immigrant populations have migrated to the United States from various world regions at different times in American history. They have come from often widely varying cultural backgrounds. Despite these differences, there have often been certain commonalities in the immigrant experience, particularly at the initial stages of a group's immigrant experience, that could lead to disproportionate levels of crime, particularly violent crime. These include disproportionately high numbers of single young men in immigrant populations,<sup>67</sup> overrepresentation of immigrant labor in low-paying undesirable jobs,<sup>68</sup> and often strained or difficult relations

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backgrounds on the part of those who commit homicide. See KLECK, *supra* note 26, at 169-70 (1991); Gary Kleck and David J. Bordua, *The Factual Foundation for Certain Key Assumptions of Gun Control*, 5 L. & POL'Y Q. 271, 291-94 (1983).

65. See *supra* notes 54 and 57.

66. See STATISTICAL ABSTRACT, *supra* note 11, at 208 tbl.326 (Table 326 indicates three percent of rapes occurred with the perpetrator using a firearm and three percent using another type of weapon, while 94% were accomplished with no weapon).

67. See, *inter alia*, Roger Lane's discussion of the experience of Italian immigrants in early-twentieth-century Philadelphia. See LANE, *supra* note 17, at 187-90. Charles Silberman has argued that the dissonance accompanying the transition from traditional peasant or folk culture to the new urban culture has increased the incidence of violent crime among some immigrant groups. See CHARLES E. SILBERMAN, CRIMINAL VIOLENCE, CRIMINAL JUSTICE 27, 32 (1978).

68. See LANE, *supra* note 17 (noting that in Philadelphia, between 1901 and 1907, the homicide rate for non-Italian whites was 1.3 per 100,000 annually. The rate for blacks was 12.9 per 100,000, and the rate for Italians was 26.5 per 100,000).

between immigrants and law enforcement authorities. All of these attributes have contributed to disproportionately high levels of violent crime in some immigrant communities. At least some of the differences between homicide in the United States and other advanced industrial societies should be attributed to the fact that immigrants historically and at present account for a greater percentage of the United States population.<sup>69</sup>

White southerners are another group that has been identified as having disproportionately high levels of violence including homicide. There is a substantial body of social science literature debating the issue of a southern subculture of violence.<sup>70</sup> Although this is not the place to enter that debate, a number of points should be made. Historically, much of the violence associated with American society has taken place in the South. Indeed much of what we think of as nineteenth-century frontier

Further noting that between 1908 and 1915, the rate had fallen to 11.4 per 100,000 as Italians began getting better access to industrial jobs in Philadelphia); see also SILBERMAN, *supra* note 67, at 164 (discussing the link between upward mobility and decreases in the rate of street crime for a number of ethnic groups).

69. Some social science studies of immigrant populations in Western Europe indicate that those populations account for disproportionate amounts of crime. See Wesley D. Chapin, *Auslander Raus? The Empirical Relationship Between Immigration and Crime in Germany*, 78 SOC. SCI. Q. 543 (1997); Martin Killias, *Immigrants, Crime and Criminal Justice in Switzerland*, 21 ETHNICITY CRIME & IMMIGR. 375 (1997); Peter L. Martens, *Immigrants, Crime and Criminal Justice in Sweden*, 21 ETHNICITY CRIME & IMMIGR. 183 (1997); Hans-Jorg Albrecht, *Ethnic Minorities, Crime and Criminal Justice in Germany*, 21 ETHNICITY CRIME & IMMIGR. 31 (1997).

70. See, e.g., D. Cohen & Richard E. Nisbett, *Self-Protection and the Culture of Honor—Explaining Southern Violence*, 20 PERSONALITY & SOC. PSYCHOL. BULL. 551 (1994); Jo Dixon & Alan J. Lizotte, *The Burden of Proof—Southern Subculture of Violence Explanations of Gun Ownership and Homicide*, 95 AM. J. SOC. 182 (1989); C.G. Ellison, *An Eye for an Eye—A Note on the Southern Subculture of Violence Thesis*, 69 SOC. FORCES 1223 (1991); Richard E. Nisbett, *Violence and United States Regional Culture*, 48 AM. PSYCHOLOGIST 441 (1993); Tom W. Rice & Carolyn R. Goldman, *Another Look at the Subculture of Violence Thesis—Who Murders Whom and Under What Circumstances?* 14 SOC. SPECTRUM 371 (1994). Sociologists Candice Nelsen, Jay Corzine, and Lin Huff-Corzine did research that indicates that by the early 1980s the West as a region was catching up to the South in terms of respective homicide rates. See Nelsen et al., *The Violent West Reexamined: A Research Note on Regional Homicide Rates*, 32 CRIMINOLOGY 149 (1994). Their thesis was dependent on controlling for the percentage of the black population in both regions, controlling for the level of metropolitanization of the black and white populations in both regions, and counting all Hispanics as white. See *id.* at 150-52. The latter proposition is highly dubious. The Hispanic population of the western states is largely of Mexican heritage, principally of Indian and Mestizo origins. Nevertheless, their study indicates that when all three controls were done there was a growing convergence of black and white homicide rates in both regions. See *id.*

violence was more southern than western in character. Much of white southern violence was racial. Historically, white southern violence was, of course, spurred on by the presence of a large racially subordinate black population whose victimization at the hands of whites was rarely addressed by the law.<sup>71</sup> It should also be added that southern law exhibited a wider degree of tolerance for private violence among whites than was generally the case in other regions of the country.<sup>72</sup>

What has come to be called the "southern subculture of violence" is important for any consideration of violence in American culture more generally. The South as a region has had more historic continuity in its population base than other American regions. A greater percentage of southerners, white and black, are descendants of early settlers than is the case elsewhere in the nation.<sup>73</sup> Thus with respect to violence, the South presents issues of both long-term intergenerational transmission of values and cultural homogeneity that can argue for the maintenance of values even when they might be at sharp variance with the mores of the nation at large.<sup>74</sup>

Any discussion of violence in southern culture inevitably leads to the topic of race and violence, and more specifically to the issue of black homicide. Historically, the Afro-American<sup>75</sup>

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71. See LANE, *supra* note 17, at 151-56.

72. See MICHAEL HINDUS, PRISON AND PLANTATION: CRIME, JUSTICE, AND AUTHORITY IN MASSACHUSETTS AND SOUTH CAROLINA, 1767-1878, at 33-55 (1980); LANE, *supra* note 17 at 150-51; Warren F. Schwartz et al., *The Duel, Can These Gentlemen Be Acting Efficiently?*, 13 J. LEGAL STUD. 321, 325-29 (1984).

73. See CARL N. DEGLER, PLACE OVER TIME: THE CONTINUITY OF SOUTHERN DISTINCTIVENESS 19-22 (1977).

74. The major social and cultural conflicts that have often divided Americans in the post World War II era provide ready examples of this. The South has been the region most resistant to racial desegregation, see C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW (3d ed. 1974), the elimination of school prayer, see *Ingebretsen v. Moore*, 88 F.3d 274 (1996), and gun control, see KLECK, *supra* note 26, at 375, to name but three such issues. In each of these cases, it could be argued that the South became an oppositional subculture, opposing modern national norms by clinging to beliefs and practices that were supported by a majority of Americans in earlier times.

75. I am consciously using the term "Afro-American" in place of the currently more popular term "African-American." It is being done in part to differentiate Americans of African descent who are predominately the descendants of Africans brought to North America as slaves in the seventeenth and eighteenth centuries, from Americans of African descent who are the descendants of more recent voluntary African immigration. Also the term "African-American" suggests continued links with African ethnic groups and cultural patterns which are hard to demonstrate and indeed problematic for longtime Americans of African descent. I should acknowledge that even the term "Afro-American" is also somewhat ambiguous, because it might

experience has been a southern experience. It is still rare to find an Afro-American in any region of the country without southern relatives including a parent or grandparent who was a native of the South. It was in the South that much of what we have come to regard as black culture developed. Some researchers, with considerable justification, have even contended that the problem of black homicide is really a subset of the larger issue of the southern subculture of violence.<sup>76</sup>

Whether or not the issue of contemporary black homicide should be linked to the historic Afro-American experience in the South, several points regarding the connection should be made. First, it is probably valuable to regard the historic South as a region shared by two overlapping yet distinguishable subcultures, a superordinate white subculture and a subordinate black subculture.<sup>77</sup> The superordinate white subculture was dominant, although the transmission of habits and mores was by no means entirely asymmetrical. For our purposes, certain aspects of southern culture may have played a particularly significant role in helping to develop the modern inner-city problem of black homicide. The southern legacy of resorting to private violence as a means of resolving disputes raises critical questions concerning the link between culture and homicide.<sup>78</sup> One critical question,

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reasonably be used to describe all of the peoples of African descent in the Western hemisphere. See Robert J. Cottrol, *Outlawing Outcasts: Comparative Perspectives on the Differing Functions of the Criminal Law of Slavery in the Americas*, 18 CARDOZO L. REV. 717, 718 n.3 (1996). There has, of course, been considerable Afro-Caribbean and Afro-Latin immigration to the United States. Although there has been some intermixture between Afro-Americans and these latter groups, significant cultural differences remain. My focus with respect to black homicide is on that part of the black population with long-term ancestry in the United States, to the extent that they are distinguishable in the data.

76. See, e.g., James W. Clarke, *Black on Black Violence*, 33 SOCIETY 46 (1996).

77. Cf. ROBERT WILLIAM FOGEL, WITHOUT CONSENT OR CONTRACT: THE RISE AND FALL OF AMERICAN SLAVERY 398-401 (1989) (discussing slavery as an effort, among other things, to eradicate African culture and replace it with an Afro-American culture more acceptable to Euro-Americans). The retention or eradication of African culture in the United States has long been a contentious one among Afro-Americanists. See, e.g., JOHN BLASSINGAME, THE SLAVE COMMUNITY: PLANTATION LIFE IN THE ANTEBELLUM SOUTH (1972) (arguing that some critical elements of African culture were able to survive the crucible of North American slavery).

78. See LANE, *supra* note 17. Sociologist Steven F. Messner has done interesting research indicating that southern cultural mores may confound traditional assumptions concerning the link between poverty and homicide. See Steven F. Messner, *Regional Differences in the Economic Correlates of the Urban Homicide Rate: Some Evidence on the Importance of Cultural Context*, 21 CRIMINOLOGY 477 (1983).

for our purposes, might be the extent to which, or perhaps under what conditions, a cultural value might be transmitted from one group to another and persist with the receiving group even in a very different ecological setting. To the extent that the white southern preference for private violence over a resort to law enforcement was transmitted to the southern black population, can that be said to be influencing rates of black violence in very late twentieth-century urban America, far removed from the historic rural South?

This, in part, involves a broader question of how cultural patterns are maintained or transformed, which might take us far from our discussion; but let me make a rather elementary point which should help us link the lessons concerning the utility of private violence learned in the South of another age with our contemporary concerns with lethal violence in the modern inner city. It takes no great exercise of the sociological imagination to assume that one reason a belief or practice might survive in a significantly different setting is that that belief or practice continues to serve the needs of a population or a significant segment of a population even in that different setting.

Whether or not a greater willingness on the part of many blacks to use private violence can be traced to a long-standing transmission of white southern cultural values, that tendency was reinforced by the historic reluctance of law enforcement to regard black on black crime as serious. That was most pronounced in the South during the Jim Crow era. The law had little concern with protecting black life, even less concern than had existed under the slave regime. A current researcher, James Clarke, has vividly captured the flavor of southern justice during that era:

The roots of black on black violence can be traced back to the previous century, the southern experience, and the system of criminal justice that replaced slavery as a means of social control after emancipation. Long before the urban transformation of the black population that began with the Great Migration North in the second decade of this century, southern blacks were assaulting and killing one another at remarkable levels. By this time, blacks were also well aware that few whites cared whether they lived or died. The paradox of emancipation is that freedom removed the monetary value of blacks as white property, meaning that so long as their victims were also black and so long as such crimes did not affect white

interests, southern courts cared little about who was murdered, raped, or robbed, or by whom. The seriousness of black on black crime was almost solely determined by the criterion of color. Trial transcripts reveal that "Whose nigger are you?" or "Whose nigger was he?" were common questions asked by magistrates at murder trials.

If the victim was white, it was a different matter—as revealed in the long history of lynching, discriminatory capital sentencing, and convict labor. But black on black offenses were considered to be "Negro peccadilloes" and a waste of judicial time and money.<sup>79</sup>

The law's indifference to the plight of black victims had to have profound and perhaps still enduring cultural consequences. Such indifference would certainly embolden those inclined to be intraracial predators. Whether or not Afro-Americans as a whole internalized the South's undervaluing of black lives,<sup>80</sup> black predators knew that the legal system cared little about Negro victims and that they could be raped, killed or otherwise harmed with little censure from the law.<sup>81</sup> The law's indifference toward black victims also probably reinforced existing tendencies to use private violence instead of legal process.<sup>82</sup>

If the rural South of the nineteenth and early-twentieth centuries had helped develop an Afro-American subculture with a disproportionately large degree of toleration for private violence, those tendencies would be reinforced and indeed exacerbated during the black population's urbanization in the twentieth century. There are at least two important ways in which twentieth-century urbanization served to maintain and, indeed, increase the culture of black on black violence. First, the southern experience with indifferent and ultimately ineffective legal protection would be repeated. If the raw racism of the Jim Crow South was somewhat abated in the northern and western cities that received black southern migrants, strong anti-black antipathies and a relative lack of willingness to protect black lives and security would nonetheless remain a characteristic of American law enforcement and indeed the judicial system throughout much of the nation.<sup>83</sup>

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79. See Clarke, *supra* note 76, at 4.

80. See *id.*; see also KEN AULETTA, *THE UNDERCLASS* 31-32 (1983).

81. See Clarke, *supra* note 76, at 4.

82. See *id.*

83. See LANE, *supra* note 17, at 273.

This would change somewhat as the twentieth century unfolded. Certainly after the Second World War, and particularly since the 1960s, there have been improvements in racial attitudes,<sup>84</sup> a greater professionalization of police forces,<sup>85</sup> and the recruitment of more blacks into police ranks.<sup>86</sup> Even as these developments began to lessen the role of pure racism in denying black victims the protection of the law, other developments would insure that previous patterns of under protection would continue. Under protection has continued because of often severely diminished criminal justice resources, particularly in hard-pressed urban areas.<sup>87</sup> It has also persisted in some communities because of a failure to hold predators fully accountable, not because of the kind of traditional racism that was to be found in the Jim Crow South, but because of a liberal view that societal inequities helped produce the black criminal who was somehow less responsible for his predations.<sup>88</sup>

There was at least one other important way in which the twentieth-century urban experience not only continued but indeed helped enhance microcultures of violence within the Afro-American subculture. The experience of urbanization itself has proven to be inherently criminogenic for many cultures. Like the immigrants, black southern migrants also frequently found the city to be uprooting. It was a place where traditional ties of family, community, and other sources of values and stability had diminished influence.<sup>89</sup> It was also a place that attracted people

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84. See, e.g., R. Farley, *Racial Trends and Differences in the United States, 30 Years After the Civil Rights Decade*, 26 SOC. SCI. RES. 235 (1997); L. Sigelman & S. Welch, *The Contract Hypothesis Revisited—Black-White Interaction and Positive Racial Attitudes*, 71 SOC. FORCES 781 (1993).

85. See LANE, *supra* note 17, at 330-31.

86. See *id.*

87. See, e.g., *id.* at 331.

88. I have argued elsewhere that the central question of the criminal justice enterprise should be who should bear the burden of the criminal law. If we say the inner-city street criminal should not be punished or should be subject to lesser punishment because social and economic circumstances, including the legacy of racism, helped incline him toward criminal activities, we are to a large extent shifting the burden of the criminal law from that street criminal to people with similar social and economic disabilities who overwhelmingly are not street criminals. See Cottrol, *supra* note 2, at 506, 520-24.

89. The black urban experience is different from that of other migrant and immigrant groups, in that blacks experienced stronger discrimination, particularly in employment and housing. Also, while other groups tended to experience urban dislocation at initial stages of immigration, only to experience significant improvement after a certain degree of acculturation, for blacks prolonged contact

with strong ambitions, ambitions often thwarted by racial discrimination.<sup>90</sup>

It was perhaps this latter aspect of the urban experience that, more than any other, helped build the microculture of criminal violence that today plagues the nation's inner cities and the nation. If the experience of European immigrants earlier in the century had been one of initial social dislocation, accompanied by high crime including homicide, followed by decreasing crime levels with the opening of greater economic opportunities,<sup>91</sup> the history of blacks in twentieth-century American cities has taken a considerably different path. The city often simply added to the history of frustration for many Afro-Americans. Early in the century, naked discrimination often prevented black migrants and their descendants from gaining more than a precarious

with the city seemed to make matters worse. Thus, social scientists studying the phenomenon of the urban underclass have indicated far more crime, joblessness, and family dysfunction among northern-born than southern-born blacks. See WILSON, *supra* note 31, at 33-36, 55-56.

My view is that the growth of the underclass subculture in northern and western cities should be seen as the result of patterns of racial exclusion that began to take shape in urban America as early as the 1810s and 1820s. Briefly stated, by the early decades of the nineteenth century, blacks were outside of and often in an antagonistic relationship with institutions—the Democratic Party, the labor movement, the Catholic Church, and industrial employment—that would become particularly important in American cities in the twentieth century. These institutions would play a critical role in aiding upward mobility and in cushioning the shock of the American urban experience for European immigrants. They did so to a much lesser degree for, and at times were actually hostile to, the southern black migrant.

Consequently, the southern black migrant did not advance like other newcomers to the American city. Over time, the patterns of exclusion in urban America, and the failure to advance led to increased frustration and a rejection of the value of education and the work ethic on the part of a significant number of blacks in inner city communities. It did not happen with the first generation of migrants from the rural South, but ultimately it did occur with their children and grandchildren. The new behavior patterns would reach a critical mass by the 1960s. This occurred because young black people of the baby boom generation were particularly frustrated by their parents' lack of mobility. They were fully aware, because of television and other mass media, that others were experiencing much more in the way of prosperity and mobility than their parents. It is in the 1960s that we begin to see the soaring rates of female-headed households and the return of very high homicide rates in black communities after a relative downturn in the 1950s. See Robert J. Cottrol, *Law, Politics and Race in Urban America: Towards a New Synthesis*, 17 RUTGERS L.J. 483 (1986); Robert J. Cottrol, *A Tale of Two Cultures: Or Making the Proper Connections Between Law, Social History and the Political Economy of Despair*, 25 SAN DIEGO L. REV. 989 (1988).

90. See WILSON, *supra* note 31, at 33-36.

91. See *supra* note 67 and accompanying text.

foothold in then-thriving industrial and service sectors in many American cities.<sup>92</sup> Although discrimination lessened over the course of the twentieth century, urban blacks continued to suffer severe discrimination.

It is likely that the city exacerbated the problem of violent criminal behavior within black communities. It did so not because black migrants to cities were worse off than they had been in the rural South. Instead, it did so because their relative deprivation was greater and because their expectations were higher.<sup>93</sup> The thwarting of the hopes of the more ambitious Afro-Americans who left the rural South for cities contributed to increases in violent crime, including homicide in urban black communities, fairly early in the century.<sup>94</sup> The connection between increased frustration due to relative deprivation and greater involvement in criminal activity has been a long-standing concern among sociologists.<sup>95</sup>

Any discussion of the role of the city in nurturing micro-cultures of criminal violence in urban black communities has to confront the most difficult issue of all: principally, why has the problem gotten worse since the 1960s in the face of lessened discrimination and significant upward mobility for a considerable portion of the black population?<sup>96</sup> Some of the social science evi-

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92. There is reasonably broad consensus among urban historians that a legacy of exclusion from the factory in the nineteenth century carried over into the first decades of the twentieth century. Black workers were rarely hired as regular factory laborers and usually were able to gain such employment only as strikebreakers. That exclusion began to break down during the First World War, but potential black industrial laborers continued to be hampered by severe discrimination. *See generally* W.E.B. DUBOIS, *THE PHILADELPHIA NEGRO: A SOCIAL STUDY* 126-30 (1967); DAVID M. KATZMAN, *BEFORE THE GHETTO: BLACK DETROIT IN THE NINETEENTH CENTURY* 105-06 (1973); ALLAN H. SPEAR, *BLACK CHICAGO: THE MAKING OF A NEGRO GHETTO 1820-1920*, at 29-34 (1967); STEPHAN THERNSTROM, *THE OTHER BOSTONIANS: POVERTY AND PROGRESS IN THE AMERICAN METROPOLIS, 1880-1970*, at 188-94 (1973).

93. *See, e.g.*, R. Fowles & M. Merva, *Wage Inequality and Criminal Activity—An Extreme Bounds Analysis for the United States, 1975-1990*, 34 *CRIMINOLOGY* 163 (1996); Julie A. Phillips, *Variation in African-American Homicide Rates: An Assessment of Potential Explanations*, 35 *CRIMINOLOGY* 527, 529, 535, 549 (1997).

94. The homicide rate among blacks in rural communities remains considerably smaller than that found in urban communities. Sociologists have found the homicide rate among blacks in the South to be significantly smaller than the rate in the West because the South had a higher proportion of Afro-Americans living in rural communities. *See* Nelsen et al., *supra* note 70.

95. *See supra* note 93.

96. *See* WILLIAM JULIUS WILSON, *THE DECLINING SIGNIFICANCE OF RACE: BLACKS AND CHANGING AMERICAN INSTITUTIONS* 129-43 (1978); WILSON, *supra* note 31, at 109-10.

dence suggests that the very mobility that has been achieved in recent decades may have helped deepen an underclass subculture and an accompanying microculture of criminal violence in inner-city communities. Some social science research has suggested that this has occurred because upward mobility—and, in recent decades, the possibility of middle-class geographic mobility out of ghetto neighborhoods—has removed what previously had been middle-class and stable working-class role models out of inner-city communities.<sup>97</sup> Other research has suggested that the upward mobility of large numbers of working- and middle-class blacks in recent decades has increased the frustrations and rejectionism of those who have not benefitted from such mobility. This rejectionism has resulted in greater criminal activity.<sup>98</sup>

In any event, the black homicide rate has remained consistently higher than the white homicide rate throughout this century. The rate for black men has been extraordinarily high, generally averaging over forty homicides per 100,000 annually, with the exception of a small downturn during the 1950s.<sup>99</sup> Even the homicide rate for black women has remained higher than the U.S. average and the average for white men during the post-war era.<sup>100</sup> Although blacks constitute approximately twelve percent of the U.S. population, the black homicide rate since 1980 has accounted for roughly forty-six percent of the U.S. total.<sup>101</sup> Since the 1980s, the homicide rate for blacks, particularly black men, has gotten generally worse, averaging over sixty per 100,000.<sup>102</sup> Even more shocking are the homicide figures for young black men. In 1994, the Department of Justice recorded a homicide rate of 159 per

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97. See WILSON, *supra* note 31, at 55-57.

98. See, e.g., Gary LaFree & Kriss A. Drass, *The Effect of Changes in Intra-racial Income Inequality and Educational Attainment on Changes in Arrest Rates for African Americans and Whites, 1957-1990*, 61 AM. SOC. REV. 614 (1996).

99. See *infra* fig.1-5.

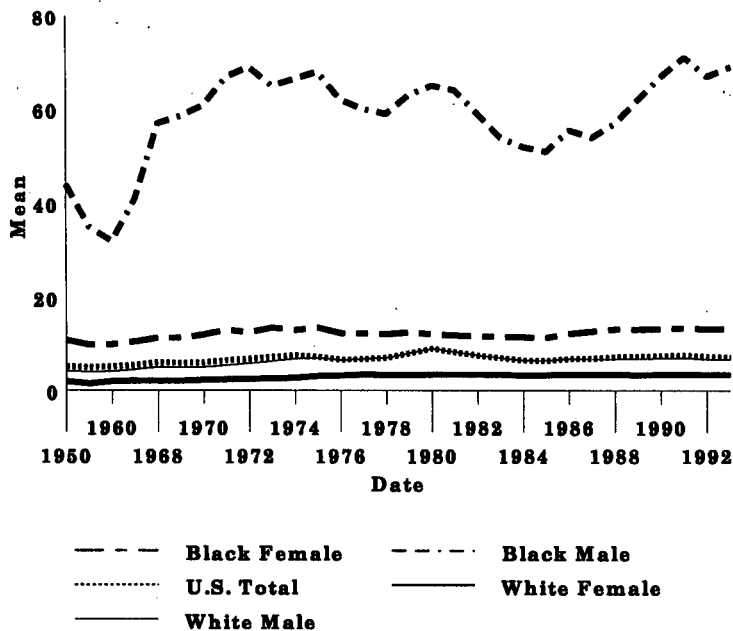
100. See *id.*

101. The NATIONAL CENTER FOR HEALTH STATISTICS, VITAL STATISTICS OF THE U.S. (1994) recorded 362,653 homicides between 1980 and 1994. Of these, 166,654 of the victims were black. Black victims accounted for 46% of the total. See STATISTICAL ABSTRACT, *supra* note 11, at 204 tbl.319.

102. See *infra* Figure 1-6. Between 1980 and 1994, the median number of homicides annually per 100,000 for black females was 61.1 (mean = 60.6, s.d. 7.9). The median for black males was 12.7 per 100,000 (mean = 12.6, s.d. =.95). For white males, the median was 8.6 (mean = 8.9, s.d. =.88). For white females the median was 2.9 (mean = 2.9, s.d. =.15). See STATISTICAL ABSTRACT, *supra* note 11, at 204 tbl.319.

100,000 for black men between ages fifteen and twenty-four.<sup>103</sup> It should, of course, be added that these homicides are overwhelmingly intraracial.<sup>104</sup>

Figure 1-5: Homicide by Race and Sex, 1950-1992<sup>105</sup>



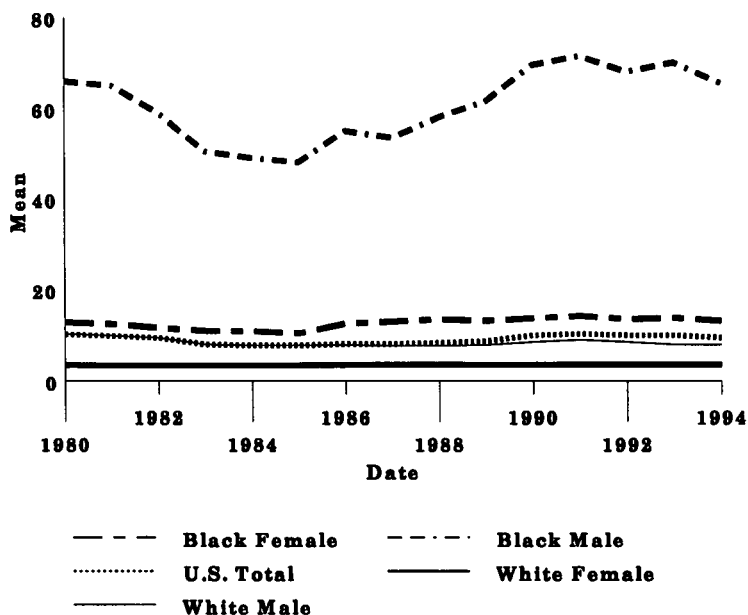
The raw numbers indicating deep and persistent differences in black-white homicide rates tell a profound and disturbing story. They point to, perhaps prove, the existence of microcultures of extreme violence and indifference to life within the subculture of the ghetto underclass. In a way, the data simply confirms the many anecdotal horror stories with which we have become all too familiar in recent decades. These stories suggest a deepening of those antisocial microcultures among a not insignificant segment of inner-city youth.<sup>106</sup>

103. See BUREAU OF JUSTICE STATISTICS, U.S. DEPT OF JUST., No. NCJ 147486, SELECTED FINDINGS FROM BUREAU OF JUSTICE STATISTICS, VIOLENT CRIME: NATIONAL CRIME VICTIMIZATION SURVEY (1994).

104. See Massey, *supra* note 6, at 1205-06; William Wilbanks, *Is Violent Crime Interracial?*, 31 CRIME AND DELINQ. 117, 126 (1985).

105. HISTORICAL STATISTICS, *supra* note 50, at 413; STATISTICAL ABSTRACT, *supra* note 11.

106. Unfortunately, it is all too easy to turn to the press and find graphic

Figure 1-6: Homicide Rate by Race and Sex, 1980-1994<sup>107</sup>

Let me suggest that the story of black homicide in the inner city and the history of Americans of African descent that helped produce it should suggest due caution concerning the business of making comparisons between crime and violence in the United States and other industrialized nations. Although other societies

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examples of truly horrific crimes involving very young offenders. See, e.g., Elizabeth Coady, *When Life Is Cheap: Tougher Penalties Urged for Black on Black Crime*, ATLANTA J. & CONST., Feb. 16, 1991, at B1; Michael Daly, *Loser Bloods Try, Try in Vein, Gang's Secret Rites Reveal Zeros at Work*, N.Y. DAILY NEWS, Feb. 12, 1997, at 4 (discussing initiation rite of street gang "the Bloods"—initiation rite includes slashing the face of robbery victims after the robbery has been accomplished); Philip P. Pan, *From Kids in the Basement to Killers: How a P.G. Gang Turned Vicious*, WASH. POST, Aug. 4, 1996, at A1 (discussing murder of a 14 year-old female member of the Bloods. Her head was slammed into a sink and she was stabbed 65 times. She was killed by two 15-year gang members who claimed they killed her out of fear that they would be killed if they did not follow orders.); Pierre Thomas, *Putting Children on the Front Lines; Crime Rate Reflects Gang Tactic*, WASH. POST, June 20, 1996, at A1; Tom Watson, *From Mom's Grief, Crusade Emerges Against Black-on-Black Violence*, WASH. POST, Feb. 11, 1991, at A5. A perusal of daily papers should also convincingly remind us that sociopathic young offenders come in all races. See, e.g., Steve Mills and Diego Bunuel, *Boy 12, Says He Killed 2 to Gain Gang's Respect*, ST. LOUIS POST DISPATCH, Feb. 6, 1998, at A10 (discussing 12-year-old white boy who killed two children in order to fit into Latino gang).

107. HISTORICAL STATISTICS, *supra* note 50, at 413.

have disadvantaged minorities, some far more so than the United States,<sup>108</sup> few if any industrial nations have a population whose experiences parallel those of Afro-Americans. A combination of unique circumstances came together in the inner cities of America in the second half of the twentieth century. Historic patterns of southern violence and urban violence combined with the frustrations of an American people, heirs to American notions of ambition and upward mobility,<sup>109</sup> but all too often unjustly frustrated in realizing those ambitions. That was a combination bound to feed resentment and frustration. To this explosive mixture was added a baby boom,<sup>110</sup> bringing with it the impa-

108. For a discussion of the extremely strong caste system in what we normally think of as a homogenous Japanese society see GEORGE A. DEVOS & HIROSHI WAGATSUMA, *JAPAN'S INVISIBLE RACE: CASTE IN CULTURE AND PERSONALITY* (1996).

109. See William Julius Wilson's discussion of class, race, and mobility in industrial America and the important role the frustrations of the black middle class had in fueling civil rights and racial protest movements. See WILSON, *THE DECLINING SIGNIFICANCE OF RACE*, *supra* note 91, at 18-23.

110. For a discussion of the postwar baby boom and its influence on the development of an underclass culture in inner cities, see Cottrol, *A Tale of Two Cultures*, *supra* note 89, at 1012-19. The *Statistical Abstract* indicates a somewhat younger age structure for the black population than for the white population for the years 1990 and 1996:

	White		Black	
	1990	1996	1990	1996
Under 5	7.3%	7.2%	9.6%	9.6%
5-14	13.7%	14.2%	18.2%	19.0%
15-44	46.6%	44.9%	48.2%	47.7%
45-64	19.5%	20.6%	15.7%	16.5%
65+	12.8%	13.0%	8.2%	7.3%

See STATISTICAL ABSTRACT, *supra* note 11, at 49 tbl.49. The *Statistical Abstract* also indicated a greater percentage of blacks in the high crime years of age 15-34 (33% for the black population versus 28% for the white population.) See *id.* at 24 tbl.24 (indicating a black population of 33,503,000 with 10,908,000, or 33% in the critical age group, as opposed to a white population of 219,749,000 with 61,665,000, or 28% in the critical age group).

Researchers have noted the influence of the age structure of the population on the homicide rate in the United States, but have also noted a lack of consistent influence of the age structure on homicide cross-nationally. See generally Rosemary Gartner and Robert Nash Parker, *Cross-National Evidence on Homicide and the Age Structure of the Population*, 69 SOC. FORCES 351 (1990); see also WILSON, *supra* note

tience of the young, family dissolution in many inner-city communities,<sup>111</sup> and most recently a war on drugs that, whatever its noble intentions, has simply served to exacerbate the problem of crime and violence in inner-city communities.<sup>112</sup> American crime and violence is different from crime and violence in seemingly comparable countries because a very different history has produced very different cultural dynamics.

### III. VIOLENCE REDUCTION AND CULTURE CHANGE: HARD QUESTIONS IN AN UNFAIR SOCIETY

I suspect Professors Zimring and Hawkins would agree that any significant improvement in the problem of lethal violence in American society must come about through cultural change. Indeed, although they focus on the putative contribution of firearms to the problem of homicide in America in *Crime Is Not the Problem* and some of their other works,<sup>113</sup> they are also making cultural assumptions and offering prescriptions for cultural change. These are critical both because they raise difficult questions concerning the didactic functions of criminal law and because they pose hard questions concerning the direction in which we would like to move our culture.

In part, *Crime Is Not the Problem* also assumes that violent cultural norms are a major contributor to the high homicide rate in the United States. If I may speak for Professors Zimring and

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31, at 68-70 (discussing the age structure of the black female population and its impact on female-headed households).

It is particularly important that the postwar baby boom coincided with the rise of the female headed household in the black population. This combination probably helped increase crime first because of the generally greater tendency of young people to get involved in street crime, second because the female headed household had less economic resources and third, particularly for young men, there were fewer examples of stable law abiding working class men in inner-city communities than there had been in previous generations.

111. See WILSON, *supra* note 31, at 21, 26-29, 32, 63-66.

112. See, e.g., MICHAEL TONRY, MALIGN NEGLECT: RACE, CRIME AND PUNISHMENT IN AMERICA 107-11 (1995).

113. See, e.g., FRANKLIN E. ZIMRING, THE CITIZEN'S GUIDE TO GUN CONTROL (1987); Franklin E. Zimring, *Handguns in the Twenty-First Century: Alternative Policy Features*, 455 ANNALS AM. ACAD. POL. SOC. SCI. 1 (1981); FRANKLIN E. ZIMRING & GEORGE D. NEWTON, FIREARMS AND VIOLENCE IN AMERICAN LIFE: A STAFF REPORT SUBMITTED TO THE NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE (1969); Franklin E. Zimring & Gordon Hawkins, *Is American Violence a Crime Problem?*, 46 DUKE L. J. 43 (1996).

Hawkins, I think their reasoning goes somewhat like this. There are cultural values in the United States that contribute to the tragedy of excessive lethal violence. An important component of this cultural problem is that large numbers of ordinary Americans are armed for the specific purpose of self-defense, indeed lethal self-defense if they perceive the need.<sup>114</sup> This contributes to an American culture of violence in three significant ways. First, Americans armed for self-defense are likely to turn ordinary confrontations into lethal ones—the American barroom brawl that turns into a shoot-out.<sup>115</sup> Second, Americans with their preoccupation with armed self-defense are likely to overreact and tragically misconstrue utterly benign situations, as occurred in the Hattori shooting.<sup>116</sup> Finally, the American practice of arming for private self-defense merely escalates the culture of violence. Ordinary citizens get guns to protect themselves from criminals. Criminals in turn secure guns or more guns because they fear armed citizen resistance. Armed confrontation becomes an expected part of the business of property crime, a part of the culture, if you will, of those planning to act as predators as well as those fearing that they will become victims. Far from providing protection, the presence of defensive firearms simply makes a bad situation worse.

This culture of escalation and counterescalation must be attacked and dismantled. Perhaps we might enlist the agents of socialization, the schools, Hollywood and the like to inculcate a new ethic of nonviolence and nonresistance. We should probably try to stigmatize the instruments of violent resistance, so far as possible.<sup>117</sup> Along the way, *Crime Is Not the Problem* also suggests creating an environment at once less threatening and also perhaps less inviting to the street criminal. We could, for example, combine a lesser use of cash in public life, by providing shops, taxicabs, newsstands and the like with minimal amounts of currency, with an ethic of nonresistance that dictates submission to robbers.<sup>118</sup> Part of our effort along these lines should also

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114. See KLECK, *supra* note 26, at 27-34 (discussing the difficulties of separating defensive from other reasons for gun ownership).

115. See *supra* text accompanying note 14.

116. See *supra* note 29.

117. See ZIMRING & HAWKINS, *supra* note 1, at 208.

118. See *id.* at 204-05.

be designed to make people aware of the often morally ambivalent statuses of those who claim they are acting defensively.<sup>119</sup>

But for Professors Zimring and Hawkins, the principal solution lies in drastic curbs in the use of firearms; curbs presumably enforced through criminal sanctions. The ideal mechanism would probably be prohibitory legislation consisting of either outright prohibition or severely restrictive licensing mechanisms that essentially deprive all but an excepted few of the right to own handguns, the weapons most frequently owned for defensive purposes.<sup>120</sup> But both Zimring and Hawkins have been around the gun control block enough times to know that the prohibitory legislation option is fraught with difficulty. It is politically problematic. Indeed, support for handgun prohibition as opposed to support for less comprehensive regulatory measures seems to be a distinctly minority position with the American public.<sup>121</sup> And, of course, both Professors Zimring and Hawkins are aware, particularly from their work on the issue of drug prohibition, of the difficulties of enforcing prohibitions on commodities demanded by large portions of the population.<sup>122</sup>

In light of these difficulties, *Crime Is Not the Problem* suggests another possible strategy for de-escalating the violence: a reconsideration or truncation of the right of self-defense. Is the American version of that right too robust?<sup>123</sup> If outright prohibi-

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119. See *id.* at 192.

120. See KLECK, *supra* note 26, at 27-32.

121. See *id.* at 368-77. Kleck makes the important point that, prevailing stereotypes notwithstanding, even support among liberals for radical handgun prohibition is problematic. After a referendum to ban handguns in 1976 failed in Massachusetts, a follow-up survey indicated that 66% of conservatives indicated that they had voted against the measure as opposed to 64% of liberals. See *id.* at 374. More recently, in 1993, a referendum to ban handguns failed in Madison, Wisconsin, not exactly one of the nation's hotbeds of reaction. See Joel Broadway, *Gun Ban Proposal Defeated*, WIS. ST. J., Apr. 7, 1993, at A1. The measure was defeated by a vote of 28,808 to 27,591. See *id.*

122. See, e.g., FRANKLIN E. ZIMRING & GORDON HAWKINS, *THE SEARCH FOR RATIONAL DRUG CONTROL* (1992).

123. Although Zimring and Hawkins may view American law as permitting an overly robust right of self-defense, at least some other western societies allow even broader latitude. Despite the Model Penal Code's recommendation, see MODEL PENAL CODE § 3.04, subsection b(i), a majority of states have rejected the retreat rule. See, e.g., WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *CRIMINAL LAW* 460-61 (2d ed. 1986). Interestingly enough, German law traditionally rejected the retreat rule. See GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 865 (1978). Fletcher notes that German law traditionally even would have allowed the use of deadly force to stop trivial offenses such as shooting a fleeing apple thief, a position rejected by Anglo-

tions on gun ownership are, perhaps, too difficult to achieve, can we at least gain some of the benefits of prohibition by radically cutting back on what is regarded as legally justifiable homicide? Certainly a greater reticence to use deadly force would have made a tremendous difference in the Hattori tragedy and doubtless others as well.

*Crime Is Not the Problem* does not provide a very clear picture of what this less robust right to self-defense might look like. But we, nonetheless, have seen in recent decades some efforts to legally cut back the right of self-defense. These efforts might serve as concrete models of the kind of limitations that Professors Zimring and Hawkins are suggesting.

One of these efforts involved an attempt by the Massachusetts Supreme Judicial Court to establish a duty to retreat from the home. In 1975, the Massachusetts high court considered the case of one Roberta E. Shaffer.<sup>124</sup> Shaffer, who was separated from and in the process of being divorced from her husband, lived with her two children in a one-room ranch house in Sharon, Massachusetts. Also living in the same house was her new fiancé, John Ferruzzo.<sup>125</sup> According to the facts accepted by the Massachusetts Supreme Judicial Court, Ferruzzo was highly abusive, had beaten Shaffer on several occasions, and had threatened to kill her.<sup>126</sup> Shaffer had attempted to persuade her fiancé to get psychiatric help. On one occasion, an altercation developed between Shaffer and Ferruzzo. When threatened, she ran to the basement where her two children were watching television. Ferruzzo stood at the top of the stairs and yelled that if she did not come up, he would come down and kill her and the children.<sup>127</sup> Shaffer started to telephone the police but when Ferruzzo started coming down the stairs, she picked up a .22

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American law. *See id.* at 871. He does note that German law in the post-war era has moved closer to Anglo-American notions of proportional response. *See id.*; *see also* RICHARD MAXWELL BROWN, NO DUTY TO RETREAT: VIOLENCE AND VALUES IN AMERICAN HISTORY AND SOCIETY (1991).

124. *Commonwealth v. Shaffer*, 326 N.E.2d 880 (Mass. 1975); *see also* Mary Sullivan Tracy, Note, *Criminal Law-Self Defense—A Duty to Retreat, the Rule Now Hits Home—Commonwealth v. Shaffer*, 10 SUFFOLK U. L. REV. 100 (1975); Peter Bonventre et al., *The Right to Kill*, NEWSWEEK, Sept. 1, 1975, at 69.

125. *See Shaffer*, 326 N.E.2d at 882.

126. *See id.*

127. *See id.*

caliber rifle, shooting and fatally wounding him. She was convicted of manslaughter at her trial.

In *Commonwealth v. Shaffer*, the Massachusetts Supreme Judicial Court sustained her conviction indicating, at sharp variance with Anglo-American legal tradition, a broad duty to retreat from the home under Massachusetts law.<sup>128</sup> The decision was met with strong adverse public reaction and was partially responsible for the passage of the "castle doctrine" legislation in Massachusetts allowing the use of deadly force in the defense of one's dwelling.<sup>129</sup>

If the Massachusetts Supreme Judicial Court in the mid-1970s was anxious to scale back the traditional parameters of the right to self-defense, its views were in line with the thinking of much of the elite bar and many social commentators in the 1960s and 1970s.<sup>130</sup> The attempt to radically truncate the right to self-defense in the hopes that the resulting less confrontational, less threatening citizenry would bring about a reduction in criminal violence, particularly homicide, probably reached its zenith in the early and mid 1970s. It was an integral part of the early national gun control movement,<sup>131</sup> many of whose founders expressed an

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128. In doing this, the Massachusetts Supreme Judicial Court was expanding what had been a minority rule requiring retreat from the dwelling in the face of an attack by a cohabitor. The notion in those jurisdictions that had adopted that rule was that a cohabitor was in a different legal and moral footing than an aggressive intruder. See LAFAVE & SCOTT, *supra* note 123, at 460-61, especially n.62; H. J. Alperin, *Homicide: Duty to Retreat Where Assailant and Assailed Share the Same Living Quarters*, 26 A.L.R. 3d 1296, 1298, 1299-1301 (1997). The Massachusetts Court expanded the minority doctrine in two significant ways. First, even in those states that recognized a privilege to retreat in the face of an attack by a cohabitor also recognized a duty to use deadly force if the retreat from the dwelling could not be safely achieved. Considering that Shaffer would have had to get herself and her children out of the dwelling, it is by no means clear that that could have been achieved without considerable risk to herself and her children. Second, the Court's pronouncement went beyond the cohabitation rule and pronounced a general duty to retreat from the home. See Thomas Katheder, Note, *Lovers and Other Strangers: Or, When Is a House a Castle?*; State v. Bobbitt, 11 FLA. ST. U. L. REV. 465 (1982) (discussing a more narrowly decided Florida case dealing with a duty to retreat in the face of an aggressive cohabitor).

129. See "Shoot Thy Neighbor" Law Takes Effect in Massachusetts, Mar. 23, 1982, available in LEXIS, Nexis Library, UPI File.

130. See, e.g., GEORGE FLETCHER, A CRIME OF SELF-DEFENSE: BERNHARD GOETZ AND THE LAW ON TRIAL 34-36 (1988) (discussing limitations on the use of deadly force in confrontation with burglars that developed in the 1950s and 1960s and more recent legislative efforts to restore rather broad rights to use lethal force against burglars); see also *infra* note 135 and accompanying text.

131. Many leading gun control advocates have expressed the view that gun

admiration for the essentially defenseless position of the population in other nations, a condition considered more civilized than that which prevailed in the United States.<sup>132</sup> The move to severely limit the right to self-defense met with only very limited success in the 1970s.<sup>133</sup> Most of those successes have proven to be

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ownership for defensive purposes is an attack on civilization itself, saying implicitly and sometimes explicitly that it is better if victims are helpless in the face of attack rather than prepared to defend themselves. The advocates of this position might be roughly divided into two camps. The first represents a group that insists on a state monopoly of force. Thus, for example, former Attorney General Ramsey Clark in 1971 claimed that gun ownership for protective purposes was an insult to the state, saying: "a state in which a citizen needs a gun to protect himself from crime has failed in its first purpose." See Don Kates, Jr., *Public Opinion: The Effects of Extremist Discourse on the Gun Debate*, in DON KATES, JR. & GARY KLECK, *THE GREAT AMERICAN GUN DEBATE: ESSAYS ON FIREARMS AND VIOLENCE* 93-122 (1997).

Other gun control advocates have echoed this view, including long time gun control supporter, historian, and writer Garry Willis, who has stated:

Every civilized society must disarm its own citizens against each other. Those who do not trust their own people become predators. The sick thing is that the haters of fellow Americans often think of themselves as patriots. . . . Every handgun in America is an implicit declaration of war on one's own neighbor. When the chips are down, its owner says, he will not trust any other arbiter but force personally wielded.

See *id.*

Leading gun control advocates James and Sarah Brady also fall into the category of those who urge a state monopoly of force, both have expressed the view that self-defense is not a legitimate reason for gun ownership and that the only legitimate purposes for gun ownership are sporting purposes. See *id.*

Another group of gun control advocates seem to represent a strain of Protestant pacifism that gained a number of adherents in the 1960s and 1970s. In 1972, for example, the Reverend Kathy Young, then director of the criminal justice program of the Presbyterian Church, USA, testified before Congress in support of banning handguns: "The General Assembly [of the Presbyterian Church, USA] has declared in the context of handgun control and in many other contexts that it is opposed to the killing of anyone anywhere for any reason." See *id.*

Those whose gun control advocacy is rooted in an ideology of ethical pacifism have at least the virtue of consistency. They presumably would urge the state to disarm on the moral grounds that all killing is evil. Let me suggest, however, that gun control advocates who nonetheless support the continued arming of the police and the maintenance of the armed forces have a somewhat more problematic normative argument. If the citizen who is arming against the potential predator is a hater of his fellow citizens, should not the same be said of the state which equips its police officers and soldiers? While a pragmatic case might be made for the disarmed citizenry and the armed state, the normative case that says that the state should have the prerogative of deadly force while that same prerogative should be denied the citizen, even that the cost of her life, has little to recommend it from the ethical point of view.

132. See *id.*

133. See *supra* notes 123-31 and accompanying text. Another important example of the effort to severely limit the right, or at least the means, to self-defense in the 1970s was the gun control statute passed by the District of Columbia City

short-lived. Indeed, in the last decade, American law has been moving in the direction of an expansion of the right of private individuals to use lethal force in self-defense.<sup>134</sup> Even leaders of the gun control movement in recent years have tended to be reluctant to openly express a desire to limit the right of self-defense, although that view has not been completely abandoned.<sup>135</sup>

So, what of that largely rejected alternative of curtailing the right of self-defense through a combination of more restrictive gun control laws, greatly expanding the duty to retreat, and perhaps holding people legally culpable for homicides that result because of a failure to comply with the demands of robbers?

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Council in 1975. The statute required the registration of all firearms. No pistols could be registered unless they were registered prior to September 24, 1976, effectively prohibiting the lawful ownership of pistols acquired after that date and effectively prohibiting the lawful ownership of handguns for people who moved into the District of Columbia after that date. Rifles and shotguns could be owned but they were required to be unloaded and disassembled, essentially prohibiting their use for home defense. See D.C. CODE ANN. § 6-2301, -2372, & -2312 (1997). It is interesting that by 1996, some D.C. police officials were openly telling residents to disregard the provision requiring long guns to be disassembled and unloaded, urging residents to use shotguns to defend their dwellings. See Robert E. Pierre, *Shocked Into Self-Defense: Crime on Capitol Hill Spurs a Call to Arms*, WASH. POST, Mar. 22, 1996, at A1. At a meeting of Capitol Hill residents concerned with crime and victimization, one police officer said "[shotguns are] not supposed to be loaded . . . but you know how that goes." *Id.*

134. An example of this is the passage in a number of states of so-called "make my day" laws designed to relieve individuals of criminal and sometimes *civil* liability when they kill intruders in the home. See, e.g., Peggy Lowe, *'Make My Day' Sequel Passes Hurdle in Senate*, DENV. POST, Mar. 26, 1998, at A19; Jim Schutze, *Shooting to Save Property at Night Is a Long Time Right*, HOUS. CHRON., Feb. 18, 1996, at A1; Dennis Wagner, *Shoot the Burglar; Deadly Force OK Sometimes*, PHOENIX GAZETTE, July 19, 1995; Beth Powell, *Governor Approves 'Make My Day' Bill*, UPI, Apr. 30, 1987; Harvey Fischer, *Deadly Force Bill Voted by N. J. Senate*, RECORD, Oct. 31, 1986.

135. Although the leaders of the gun control advocacy group Handgun Control Inc. have expressed the view that gun ownership should be limited to those who intend to use firearms for sporting rather than defensive purposes. See *supra* notes 131-32. They sponsored a law in Maryland that established a handgun roster board that passed on the sale of handguns in Maryland. The criteria that the board uses to determine which guns may be sold in Maryland includes guns suitable for self protections. See MD. CODE ANN., art. xxvii § 36J (1997). They did so, in part because the measure, designed to be an anti-Saturday Night Special Measure had to pass a referendum, and past experience had demonstrated that public sentiment was in favor of the ownership of pistols for defensive purposes, see *supra* note 116. Evidently the inclusion of defensive purposes as a legitimate reason to own handguns led to the authorization of far more firearms than the original supporters of the measure had intended. See Steve Crane, *600 Guns Ok'd, 8 Barred in Maryland*, WASH. TIMES, Dec. 5, 1989, at B1.

Would moving in this direction help alleviate our homicide problem? Would this approach—a combination of instrumentality control and an attempt at cultural change—bring about the desired reduction in lethal violence?

Let me suggest that there is a threshold issue that needs to be confronted by Professors Zimring and Hawkins and others urging a strong alteration of the legal right to self-defense, including radical gun control measures. Such measures should be explicitly acknowledged for what they are: a significant shifting of the law's criminal sanctions from those microcultures involved with crime and particularly criminal violence to the broader population.

This burden shifting would come about in two ways. First, new categories of *malum prohibitum* offenses would have to be created and offenders vigorously prosecuted. It would probably be necessary, if these measures are to be effective, to violate norms concerning proportional punishment.<sup>136</sup> Because the law would be attempting to prevent behavior that large portions of the population believe proper and indeed necessary, the law's enforcement is likely to be harsh or risk becoming a dead letter.<sup>137</sup> This has already happened in jurisdictions which rigorously restrict gun ownership for defensive purposes.<sup>138</sup> In such

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136. For a discussion of the question of punishment and proportionality within the context of another large scale prohibition, see Olivia Outlaw Singletary, Comment, *Harmelin v. Michigan: The Most Recent Casualty in the Supreme Court's Struggle to Develop a Standard for Eighth Amendment Proportionality Review*, 54 OHIO ST. L.J. 1205 (1993). The proportionality doctrine prohibits punishment more severe than that deserved. The criminal laws make clear that nonviolent crimes are less serious than crimes marked by violence or the threat of violence. See *id.* at 1211-12.

137. We have had some recent evidence of this in legislative attempts to ban so-called assault rifles. California legislation passed in 1989 required persons who owned the prohibited weapons before the date of the enactment of the statute to register their weapons. An estimated 300,000 to 600,000 owners of the weapons have refused to comply. See Carl Ingram, *State Begins Campaign for Assault Gun Registration*, L.A. TIMES, Nov. 20, 1991, at 25. It should be noted that unlike handguns, assault rifles are usually not owned for self-defense but instead tend to be owned by hobbyists, target shooters, and the like. A question that needs to be asked is if this kind of resistance is likely to be encountered by hobbyists who are required to register, not surrender their weapons, what level of noncompliance would we encounter on the part of people who perceive a need to have guns for self-defense and what criminal justice regime would be required to enforce compliance?

138. Massachusetts law provides a good example of how an attempt to rigorously limit the use of firearms for self-defense can lead to disproportionate penalties and sentencing anomalies at sharp variance with prevailing norms in American society. If we consider two cases heard in Massachusetts courts in the late

jurisdictions, cases of self-defense with illegal guns by otherwise law-abiding citizens inevitably raise the real possibility of the imprisonment of essentially peaceable citizens for attempting to save their lives in perilous circumstances.<sup>139</sup> The truncated self-defense strategy runs the real risk of creating a criminal justice system that increases our imprisonment of victims who feel compelled to become *malum prohibitum* offenders, while decreasing the imprisonment of actual predators.<sup>140</sup>

There is another important way in which a strategy of limiting the right of self-defense would, in essence, unfairly shift the burden of crime from predators to victims. It would change the dynamics of violent confrontations in ways that most Americans would not find satisfactory. Assume, for example, that the opinion in *Shaffer* had not only survived, but indeed had become the prevailing doctrine in much of the country. The nonaggressor at home would have a duty to retreat from her dwelling in the face of deadly force, presumably with the caveat that a retreat was only required if she could do so safely.<sup>141</sup> Let us further assume that we not only have the actual case of *Commonwealth v. Shaffer*, but *Shaffer II*, *Shaffer III*, *Shaffer IV*, and so on, all vividly reminding the public of its obligation to flee the home in the event of violent intrusion. A course of jurisprudence of this

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1980s, we can see striking sentencing disparities. The first case involved Sylvester Lindsey, who was convicted of carrying a pistol without a permit. Under Massachusetts law, that offense carries a mandatory one-year prison sentence with no possibility of probation or suspended sentence. In 1986, the Massachusetts Supreme Judicial Court held that this sentence applied even if Lindsey had saved his life by carrying the pistol (he had been threatened and attacked by a co-worker). See *Commonwealth v. Lindsey*, 489 N.E.2d 666 (Mass. 1986). In 1989 in a trial court in Massachusetts, a 44 year-old man was given a suspended sentence for twice committing sexual assault on an eight year-old girl. See Richard Kindleberger, *Ruling in Beverly Assault Case Leaves Scars*, BOSTON GLOBE, Mar. 26, 1989, at 25. Despite whatever case that might be made concerning the potential dangerousness of the unlicensed carrying of firearms and despite whatever case might be made for individual consideration in sentencing, a legal order that mandates prison time for a *malum prohibitum* offense that arguably may have saved the defendant's life, while setting at liberty an adult who has sexually assaulted a child is more than normatively problematic. It is grossly distorted.

139. See, e.g., Jerry DeMarco, *Lawyer Says Grocer Fired in Self-Defense; Cops: No Evidence Victim Stole*, RECORD, Apr. 17, 1996, at 3; John DeSantis, *If You're Caught with One, Go Directly to Jail*, NEWSDAY, Feb. 22, 1994, at 36; Jorge FitzGibbon, *Self-Defense, Shooter Says*, N.Y. DAILY NEWS, May 8, 1996, at 19; Mitch Gelman, *Three Killed in 2 Robberies at Bronx Bodegas*, NEWSDAY, Jan. 19, 1989, at 7.

140. See Cottrol, *supra* note 2, at 527-28.

141. See *Commonwealth v. Shaffer*, 326 N.E.2d 880, 883 (Mass. 1975).

sort would certainly be empowering to aggressors. In a lethal confrontation, the citizen at home, presumably frightened and deterred by *Shaffer* and progeny, would have to calculate whether she could safely remove herself and her family from the dwelling before the aggressor could do damage. She would also have to guess, and guess correctly, that the intruder did not have confederates on the outside ready to harm her and her family. It would represent a significant shift in the balance of power between predators and victims in our society.

An acknowledgment that Zimring and Hawkins seek some shifting of the criminal law's infliction of pain from those who have traditionally been regarded as criminals to their potential victims is disturbing. But it is not necessarily dispositive of the issue. If many of us have strong normative objections to bringing criminal sanctions to bear on those who act to defend their lives, the claim that a truncated right to self-defense might reduce criminal homicide has to at least be considered in order for us to assess the potential positive gain that will be purchased at the price of a significant normative loss.

Any assessment of potential positive gains that might result from the kind of trade-off implicit in the Zimring-Hawkins thesis has to begin with an examination of two interrelated assumptions offered by those who have urged a truncated right to self-defense as a strategy for reducing lethal violence. The first has to do with a presumed fecklessness of the average citizen in a situation requiring deadly force in self-defense. The average citizen lacks the training and temperament necessary to act responsibly in such a situation. Allowing a robust right of self-defense, particularly with firearms, will return us to the bad old days of "Dodge City."<sup>142</sup> We are, so the argument goes, simply asking for overreactions, mistakes, and shootouts over parking confrontations and the like. The second assumption is that genuine cases of successful self-defense, particularly with firearms, are rare and

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142. See, e.g., HANDGUN CONTROL INC., YEAR END REPORT ON U.S. CONCEALED WEAPONS LAWS PART 1 OF 2 (1997); Terry Flynn, *Gun Toting Kentuckians Hold their Fire*, CINCINNATI ENQUIRER, June 16, 1997, at A1 (indicating that the prophesied anti-social behavior on the part of pistol licensees did not materialize); John R. Lott, Jr. & David B. Mustard, *Crime Deterrence and Right-to-Carry Concealed Handguns*, 26 J. LEGAL STUD. 1, 1-5 (1997) (critiquing the view that a liberalized right to carry would lead to an increase in illegal shootings).

on the whole not worth the carnage caused by the widespread availability of guns.<sup>143</sup>

These assumptions have run up against some stubborn, contrary empirical evidence in recent decades. Beginning with the Wright-Rossi study in 1983,<sup>144</sup> social scientists have become increasingly interested in the question of defensive gun use and the potential societal benefits that might derive from widespread private firearms ownership. The question of defensive gun use is a difficult one to examine. At one time, researchers in this area were content to ask the fairly unsophisticated question of how many excusable or justifiable homicides were committed by civilians.<sup>145</sup> Since the late 1970s, researchers concerned with this issue have approached the question with more sophistication. Researchers posing questions about defensive gun use have included brandishing firearms in the face of criminal threats, holding intruders for the police, and other forms of nonfatal defensive uses of firearms.<sup>146</sup> Estimates from these methods indicate an astonishingly high incidence of defensive use of firearms by the American public. The low end estimates derived from the National Crime Victimization Survey ("NCVS") indicate between 65,000 and 80,000 defensive gun uses per year.<sup>147</sup> Gary Kleck's research indicates a range of between 600,000 and 1.2 million defensive uses per year on the part of the public.<sup>148</sup>

The Kleck estimates are the subject of a controversy, that will not be engaged in here, on the part of social scientists in the field.<sup>149</sup> Several points should nonetheless be made with regard to the Kleck estimates. The first is that while some critics have argued that Kleck's estimates should be discounted on the basis of some presumed pro-gun bias,<sup>150</sup> compatible estimates have

143. See *supra* notes 115-19 and accompanying text, 131-32 and accompanying text.

144. WRIGHT ET AL., *supra* note 26.

145. See *id.* at 138.

146. See *id.* at 138-49; KLECK, *supra* note 26, at 104-08.

147. See PHILIP J. COOK & JENS LUDWIG, SUMMARY REPORT, GUNS IN AMERICA: RESULTS OF A COMPREHENSIVE NATIONAL SURVEY ON FIREARMS OWNERSHIP AND USE 59 (1996).

148. See KLECK, *supra* note 26, at 104-45. For a discussion of the methodological differences between the National Crime Victimization Survey and Kleck's research, see GARY KLECK, TARGETING GUNS: FIREARMS AND THEIR CONTROL 149-54 (1997).

149. See, e.g., COOK & LUDWIG, *supra* note 147, at 57-76.

150. See, e.g., Don B. Kates, Jr., *Controlling Guns Won't Control Crime*, CHI.

been developed by scholars supportive of strict gun control measures.<sup>151</sup> Even Kleck's critics concede that his estimates cannot be lightly dismissed.<sup>152</sup>

The Kleck estimates, or even the more conservative estimates drawn from the NCVS, raise the question of how many lives are saved, how many assaults are stopped, and how many rapes are prevented annually by private citizens using firearms in self-defense. This is a somewhat tricky question. If we take the NCVS lowest estimate of 65,000 defensive uses of firearms annually, it would clearly be inaccurate to contend that this represents 65,000 lives actually saved, or even assaults or rapes prevented.<sup>153</sup> It would be even more dubious to take the outer estimates of Professors Kleck, Cook, and Ludwig and assert that between two and three million lives are saved each year through defensive gun use.<sup>154</sup> We should keep in mind there are about 20,000 to 24,000 homicides annually.<sup>155</sup> Any contention that three times as many, to say nothing of 100 times as many, homicides would occur absent defensive gun use is, to say the least, highly suspect. But the question still remains, and it is one

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TRIB., Apr. 5, 1994, at 19. It should be noted that Kleck takes great pains to note that there is no connection between him and the National Rifle Association. At the beginning of *Point Blank*, Kleck has an Author's Voluntary Disclosure notice which says:

The author is a member of the American Civil Liberties Union, Amnesty International USA and Common Cause, among other political liberal organizations. He is a lifelong registered Democrat, as well as a contributor to liberal Democratic political candidates. He is not now, nor has he ever been, a member of, or contributor to, the National Rifle Association, Handgun Control Inc., or any other advocacy group on either side of the gun control issue, nor has he received funding for research from any such organization.

KLECK, *supra* note 26, at 1

What I find interesting is not so much Professor Kleck's political orientation but that he felt the need for such a disclaimer fearing, unfortunately with reason, that some would use his research as the occasion for ad hominem attack rather than as a springboard for analytical and methodological response.

151. See, e.g., COOK & LUDWIG, *supra* note 147, at 61. In this report prepared for the Police Foundation, Professors Cook and Ludwig acknowledged that an examination of the results of survey research would bring about an estimate of some 3.12 million claimed defensive gun uses annually. See *id.* Their survey research indicated some 1.64% of the population claimed to have an experience with defensive gun use in a given year as opposed to Kleck's 1.33%. See *id.*

152. See *id.*; see also Marvin E. Wolfgang, *A Tribute to a View I Have Opposed*, 86 J. CRIM. L. & CRIMINOLOGY 188 (1995).

153. See *supra* note 147 and accompanying text.

154. See *supra* notes 148-52 and accompanying text.

155. See STATISTICAL ABSTRACT, *supra* note 11.

that should be critical to any discussion of gun policy: how many lives are saved or indeed rapes or assaults prevented by these self-reported defensive gun uses?

Part of the difficulty in answering these questions has to do with the nature of these self-reported incidents. Assume, for the present, that the modal defensive gun use incident begins with an armed private citizen who is approached by a stranger who appears threatening. Let us call her Ms. Jones. Perhaps that threatening stranger is shouting profanities and has his hand in his pocket indicating that he has a weapon. Ms. Jones draws her revolver from her handbag, points it at the threatening stranger, and tells him she will shoot if he does not withdraw. He leaves. What has happened? There are several possibilities. First, the threatening stranger may have been totally harmless, rude, scary looking, unpleasant perhaps, but with no intent to harm. Ms. Jones has simply scared off a noncriminal. The second possibility is that our threatening stranger was going to attempt to rob our private citizen but that he would not have resorted to force if the victim resisted, fled, or lacked money. In that case Ms. Jones has stopped a robbery or attempted robbery. Perhaps the threatening stranger was prepared to kill or injure Ms. Jones if she resisted or lacked what the robber believed was an appropriate amount of money. Then Ms. Jones may have saved her life or saved herself from serious injury. Maybe the threatening stranger was not a robber but a rapist. In that case, Ms. Jones may have saved herself from rape. In a large number of such cases the victim is never totally sure, and of course victimization surveys must be read with that limitation in mind.

But even a recognition that there is a fair amount of uncertainty in this area should not deter us from the task of attempting to estimate how many deaths, injuries, and rapes may be prevented by defensive gun uses on the part of civilians. The regressions run earlier in this discussion<sup>156</sup> might provide a launching point for such an estimate, although they can also illustrate some of the difficulties in making realistic estimates. If, as the data indicate, we can predict two additional homicides per 100 additional robberies and fifteen additional rapes per 100 additional robberies, then it might not be totally outlandish to predict two lives saved per 100 additional robberies averted or

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156. See *supra* notes 48-57 and accompanying text.

fifteen additional rapes prevented per 100 additional thwarted robberies.<sup>157</sup> If we start with this premise, we might assume 1,300 to 1,600 lives saved and between 9,750 and 12,000 rapes prevented using the conservative NCVS estimates.<sup>158</sup> The 1,300 to 1,600 estimate of lives saved seems low. Kleck's examination of a category he termed civilian legal defensive homicides indicated that for the year 1980, between 1,500 and 2,800 felons were killed by guns in the hands of civilians.<sup>159</sup> We should probably regard the vast majority of these cases as ones where the defensive shooter was in serious peril of death or grave injury. These are cases reviewed by police, prosecutors, and sometimes courts with little inclination to exonerate those who killed without a very reasonable perception of danger. If we took the middle range of Kleck's estimate, about 2,150 defensive shootings, it is significantly larger than our 1,300 to 1,600 estimate derived from the regressions. If we further assume, as Kleck rightly does, that actual killings with firearms represent only a small fraction of defensive uses,<sup>160</sup> then we might reasonably assume that the number of lives saved far exceeds 2,800, the outer end of Kleck's estimates of annual defensive killings.

We also have difficulties if we attempt to extrapolate the number of lives saved from Kleck's estimate of 2.5 million defensive uses a year. Attempting to predict the number of lives saved by predictions from the regressions, we get a possible 50,000 homicides and 375,000 rapes prevented annually by defensive gun uses.<sup>161</sup> These latter figures seem way too high given the actual number of annual homicides and rapes. As a nation, we average some 20,000 murders per year.<sup>162</sup> A methodology that suggested we would have two and one-half times that many murders absent defensive gun use is highly suspect. Similarly, since 1980, we have averaged some 97,000 reported rapes annually.<sup>163</sup> It seems extremely unlikely that we would virtually quadruple rapes absent defensive gun use.

However, the combination of the annual cases of legal defensive homicide and the possible predictions from the regres-

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157. *See id.*

158. *See id.*

159. *See* KLECK, *supra* note 26, at 112-13.

160. *See id.* at 113.

161. *See supra* notes 48-57 and accompanying text.

162. *See* STATISTICAL ABSTRACT, *supra* note 11, at 204 tbl.317.

163. *See id.* at 205, tbl.320. Median = 97460, mean = 96780 (s.d. = 8901.286).

sions, by showing us the outer bounds of the discussion, might help us arrive at estimates worthy of debate. Focusing solely on the homicide issue, if we agree that the 2,800 defensive homicides represents too low a figure for homicides averted and the 50,000 derived from the two and one-half million represents too high a figure, might we then reasonably estimate a range between 5,000 and 15,000 lives saved by defensive uses of firearms by civilians as the arena in which the debate should take place? If so, and such a range does not seem out of bounds given the reporting, then we might have to consider the very real possibility that strict limitations on gun ownership or the right to self-defense might have the unintended consequence of increasing our homicide rate by twenty-five to seventy-five percent.<sup>164</sup>

The importance of defensive gun use may lie not in an overall suppression of the crime rate, but in a shift from confrontational crimes, robberies, burglaries of occupied dwellings,<sup>165</sup> or carjackings, for example, to nonconfrontational crimes such as stealing unoccupied cars or burglaries committed on unoccupied homes.<sup>166</sup> Here we are dealing with a question even more elusive than our previous attempt to estimate actual lives saved by making extrapolations from claimed defensive gun uses. We are instead trying to estimate deterrence. A claimed defensive use begins with an incident or alleged incident that we may attempt

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164. We should also consider the possibility that the total number of lives saved by defensive uses of firearms might equal or even exceed the number of homicides committed with firearms. Using figures supplied by the Census Bureau for 1980, 1990, 1994 and 1995, I calculated an average of over 13,700 gun homicides per year (1980 = 13035, 1990 = 13641, 1994 = 15459, 1995 = 13790). Mean = 13981, s.d. = 1038, median = 13716. See STATISTICAL ABSTRACT, *supra* note 11, at 204 tbl.317.

The business of trying to estimate the number of lives saved or rapes or serious assaults prevented by defensive uses of firearms is of particular importance, I would argue, in light of the problematic nature of prohibitions. If our prior experiences with alcohol and drug prohibitions can serve as a guide, the law's ability to take firearms out of the hands of those most likely to misuse them is problematic, at best. See *supra* note 122 and accompanying text. We might on the other hand find that a strict prohibition effort might disproportionately disarm peaceable citizens who have firearms for self-defense. In short, it is certainly possible to envision a gun control regime that has little or no effect on current rates of firearms homicide, but one that also increases the overall homicide rate by disarming people who use firearms in legitimate self-defense.

165. Social scientists have long noted that the United States tends to have significantly fewer "hot burglaries," or burglaries of occupied dwellings, than countries with much stricter gun control laws. See, e.g., Lott & Mustard, *supra* note 142, at 3.

166. See *id.*

to evaluate. Did the stranger really threaten Ms. Jones' safety?<sup>167</sup> A deterred incident on the other hand begins with something that did not occur. How can we prove why something did not happen? Despite these uncertainties, we do have information concerning firearms and deterrence. In surveys, felons have certainly indicated that they have been deterred by armed private citizens and that they take pains to avoid dwellings and businesses whose occupants are known to be armed.<sup>168</sup>

Deterrence can, of course, also be measured by statistical examination of changes in aggregate behavior following legal change, or by examining differences in aggregate behavior in different jurisdictions with different legal rules or different applications of seemingly similar legal rules. This has been an area where economists have made an important contribution to criminological discussion, and it has been a particularly contentious topic since the publication of Issac Ehrlich's work on deterrence and the death penalty in the mid 1970s.<sup>169</sup> In this regard, the research of economists John Lott and David Mustard has an important bearing on the discussion of firearms and self-defense.<sup>170</sup> Lott and Mustard examined states that had liberalized laws governing the carrying of concealed firearms.<sup>171</sup> Their research indicated substantial shifts from confrontational crimes to nonconfrontational crimes and substantial decreases in rape and homicide by felons.<sup>172</sup> Their research indicated no significant

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167. See *supra* notes 147-49 and accompanying text.

168. See JAMES D. WRIGHT & PETER H. ROSSI, *ARMED AND CONSIDERED DANGEROUS: A SURVEY OF FELONS AND THEIR FIREARMS* 144-45 (1986).

169. See, e.g., Issac Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life and Death*, 65 *AM. ECON. REV.* 397 (1975); Issac Ehrlich, *Capital Punishment and Deterrence: Some Further Thoughts and Additional Evidence*, 85 *J. POL. ECON.* 741 (1977); Issac Ehrlich & Joel C. Gibbons, *On the Measurement of the Deterrent Effect of Capital Punishment and the Theory of Deterrence*, 6 *J. LEGAL STUD.* 35 (1977); Deryck Beyleveld, *Ehrlich's Analysis of Deterrence: Methodological Strategy and Ethics in Issac Ehrlich's Research and Writing on the Death Penalty as a Deterrent*, 22 *BRITISH J. CRIMINOLOGY* 101 (1982); William J. Bowers & Glenn L. Pierce, *The Illusion of Deterrence in Issac Ehrlich's Research on Capital Punishment*, 85 *YALE L.J.* 187 (1975); Richard M. McGahey, *Dr. Ehrlich's Magic Bullet: Econometric Theory, Econometrics and the Death Penalty*, 26 *CRIME & DELINQ.* 485 (1980).

170. See generally Lott & Mustard, *supra* note 142.

171. See *id.*

172. See *id.*

increases in intentional or accidental homicides attributable to the liberalizations.<sup>173</sup>

The question of how many lives might be saved, serious injuries, rapes, and other crimes averted by armed citizens is important if difficult to answer. That Professors Zimring and Hawkins do not seriously engage this issue is a critical weakness in *Crime Is Not the Problem*. If we are going to consider a major cultural shift designed to limit the right of self-defense, we must have an appreciation for the benefits as well as the costs of that right. If, as Sanford Levinson rightly reminded us, the Second Amendment poses embarrassing questions for those who urge radical gun control,<sup>174</sup> the issue of defensive gun use does so even more forcefully.

An approach that posits that there is a generalized problem of lethal violence in America that can best be cured through wholesale approaches like radical gun control and a greatly limited right to self-defense has a certain seductive appeal. It has the potential of taking us away from the unpleasant topic of the hard microculture of violence that has grown up within our inner-city subculture.<sup>175</sup> It can also take us away from the unpalatable reality that we are faced with the difficult choice of either visiting criminal sanctions on members of the microculture of violent criminals, themselves often victims of society's violence and neglect, or allowing members of that microculture to prey on their neighbors, victims of the same social and historical forces.<sup>176</sup>

That concern should lead us to perhaps the hardest question of all. Is the notion that a less threatening public will produce a less dangerous criminal, one who will simply take the money and run, borne out by our experiences? I think not. We already have in some inner-city communities—Washington D.C.,<sup>177</sup> New York City,<sup>178</sup> perhaps the housing projects of Chicago, and a handful of other venues—the virtual disarmament of the noncriminal element that Zimring and Hawkins seek. Hard experience tells us that the residents of those venues are no safer. Indeed, there is evidence that the helplessness of those populations has even

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173. *See id.*

174. *See* Sanford Levinson, *The Embarrassing Second Amendment*, 99 *YALE L.J.* 637 (1989).

175. *See* Cottrol, *supra* note 2, at 522-23.

176. *See id.* at 520-21.

177. *See supra* note 133.

178. *See supra* note 28 and accompanying text.

emboldened the microculture of violent criminals that menace inner-city life.<sup>179</sup>

But that should not surprise us. For history shows us that helpless people are rarely left unmolested. Professors Zimring and Hawkins began with a premise that an examination of foreign crime and foreign homicide have much to tell us about crime and violence in America. Let me close by agreeing with that observation and also by saying that we frame the comparative criminological question far too narrowly. Perhaps we give our European and Japanese colleagues too dangerous a pass when we silently let them chide us for a high homicide rate linked to widespread private ownership of firearms.<sup>180</sup> As I read the history of this century, the homicide rate in territories under various European and Japanese administrations has been far higher. The murderers were not conventional criminals caught up in crimes of property or passion, but government agents assigned to liquidate defenseless populations.<sup>181</sup> With that

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179. Certainly the prospects for witness intimidation are greatly enhanced when witnesses are essentially defenseless. For an interesting news story discussing witness intimidation and the fears of inner city residents in Washington, D.C., who were considering participation in a Neighborhood Watch program, see DeNeen L. Brown, *Some Residents Being Won Over By the Enemy in D.C. Drug War: Dealer's Often Buy Loyalty with Cash, Threats*, WASH. POST, Aug. 13, 1989, at A1. The news article related how potential organizers of a Neighborhood Watch felt an almost police state like fear. *See id.* They were intimidated because they were unsure whether there were informers from the drug gangs attending the organizing meeting. *See id.* District of Columbia residents are forbidden to own firearms for defensive purposes. *See supra* note 133.

180. *See, e.g.*, JEAN-CLAUDE CHESNAIS, HISTOIRE DE LA VIOLENCE EN OCCIDENT DE 1800 À NOS JOURS 73-75 (1981); *Leaders: America and Guns*, ECONOMIST, Apr. 4, 1998, at 16.

181. I have argued elsewhere that the failure of the intellectual community to seriously consider the relationship between disarmed and defenseless populations and large scale state sponsored homicide is a dangerous self-imposed limitation on intellectual discourse that has caused us to ignore perhaps the most critical question of the century we are leaving. *See Cottrol & Diamond, supra* note 26, at 1025-26 and especially n.141.

In a century where easily over 100 million people have been murdered by the governments that ruled over them, perhaps we need to shift our inquiry concerning arms and homicide from the narrowly criminological question of whether the prevalence of firearms in a population facilitates ordinary criminal homicide to the broader question of whether the complete lack of a means of resistance on the part of a population makes easier the business of genocide or democide—large scale, state or group sponsored massacres of civilian populations. The latter has by far been the more serious homicide problem in the twentieth century. For an important discussion of this issue, see Daniel D. Polsby and Don B. Kates, Jr., *Of Holocausts and Gun Control*, 75 WASH. U. L.Q. 1237 (1997).

history in mind, we should look long and hard before we accept a solution that calls for a more submissive population less capable of self-defense.