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# **"SHALL ISSUE": THE NEW WAVE OF CONCEALED HANDGUN PERMIT LAWS\***

CLAYTON E. CRAMER\*\* AND DAVID B. KOPEL\*\*\*

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What would happen if essentially all adults who passed a background check and safety test could qualify for a permit to carry a concealed handgun? About one-third of all states have adopted laws or practices that enable persons who are legally allowed to possess a handgun in their own home to be eligible for a license to carry a concealed handgun for protection. The laws require that after passing a background check (and sometimes a firearms safety class), eligible persons must be granted the permit if they apply. If the application is rejected, the burden of proof is on the non-issuing sheriff, police chief, or judge to show that an applicant is either unqualified or a danger to public safety. Typically, about one to four percent of a state's population decides to obtain such a permit.<sup>1</sup>

This Article examines how these laws have been written to satisfy concerns about public safety. The Article specifically investigates the concern that more permits will lead to more needless killings. After analysis of all available data, the Article concludes that concealed carry laws can be enacted by states with little fear that such laws will compromise public safety. In some cases, such laws may even enhance public safety.

## I. A SHORT HISTORY OF CONCEALED HANDGUN PERMITS

In most of the United States, laws prohibiting concealed carrying of handguns without a permit are relatively recent. While some antebellum

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1. See *infra* Part II.

In most of the United States, laws prohibiting concealed carrying of handguns without a permit are relatively recent. While some antebellum statutes did address concealed carrying, they did so by outlawing the practice entirely, rather than by setting up a system under which concealed carrying would be lawful only with a permit. These statutes usually had no exemptions for sheriffs or other peace officers, even when on duty.<sup>2</sup> During the 1920s and 1930s, many states adopted "A Uniform Act to Regulate the Sale and Possession of Firearms." This model law, adopted by the National Conference of Commissioners on Uniform State Laws and supported by the National Rifle Association, prohibited unlicensed concealed carry.<sup>3</sup>

Recognizing that at least some civilians would have a legitimate need for concealed carry of a handgun, most states adopted provisions allowing a sheriff, police chief, or judge to issue concealed handgun permits. Significantly, such statutes were broadly discretionary; while the law might specify certain minimum standards for obtaining a permit, the decision whether a permit should be issued was not regulated by express statutory standards.<sup>4</sup>

Concealed handgun permit statutes were passed in some parts of the United States as a method of prohibiting blacks from carrying arms. In the words of a Florida Supreme Court justice, "The statute was never intended to be applied to the white population and in practice has never been so applied."<sup>5</sup>

While the motivations behind California's concealed handgun statute are not as clearly understood, the effect has been similar to frankly racist statutes. California's legislative research body studied the issue in 1986

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2. See *State v. Reid*, 1 Ala. 612 (1840). See generally CLAYTON E. CRAMER, FOR THE DEFENSE OF THEMSELVES AND THE STATE: THE ORIGINAL INTENT & JUDICIAL INTERPRETATION OF THE RIGHT TO KEEP AND BEAR ARMS 76-78 (1994).

3. See, e.g., CALIFORNIA ASSEMBLY OFFICE OF RESEARCH, SMOKING GUN: THE CASE FOR CONCEALED WEAPON PERMIT REFORM 6 (1986) [hereinafter SMOKING GUN].

4. See *infra* Part II. See also, SMOKING GUN, *supra* note 3, at 6-8. For details of the late arrival of concealed handgun statutes in the North and West, see CRAMER, *supra* note 2, at 172-78, 263-64; Don B. Kates, Jr., *Toward a History of Handgun Prohibition*, in RESTRICTING HANDGUNS: THE LIBERAL SKEPTICS SPEAK OUT 7-30 (Don B. Kates, Jr. ed. 1979).

5. *Watson v. Stone*, 4 So. 2d 700, 703 (Fla. 1941) (Buford, J., concurring specially). Commenting on the historically racist origins of the statute, Justice Buford stated:

[The] Act was passed for the purpose of disarming the negro laborers and to thereby reduce the [number of] unlawful homicides . . . and to give the white citizens in sparsely settled areas a better feeling of security. . . . [T]here has never been, within my knowledge, any effort to enforce the provisions of this statute as to white people, because it has been generally conceded to be in contravention of the Constitution and non-enforceable if contested.

males.”<sup>6</sup> Because so many victims of violent crime are female or non-white, discriminatory granting of carry permits is especially hard to justify.<sup>7</sup>

Not every state adopted the Uniform Act. Some states had already enacted their own statutes.<sup>8</sup> Vermont adopted *no* statute prohibiting concealed carry of handguns, at least partly because of the Vermont Supreme Court’s expansive reading of the Vermont Constitution’s protections in *State v. Rosenthal*.<sup>9</sup> Even today, Vermont has no laws prohibiting or regulating concealed carry except “with the intent or avowed purpose of injuring a fellow man . . .”<sup>10</sup>

#### A. Modern Discretionary Permits

In many jurisdictions which continue to retain unlimited administrative discretion, abuse of discretion is common. Conversely, persons granted permits are often politically influential, rather than the people really in need of carrying firearms.<sup>11</sup>

Denver Police Chief Ari Zavaras slashed the number of carry permits, granting only forty-five permits in a city of one-half million people.<sup>12</sup> Detective William Phillips, the administrator of Zavaras’ permit program, explained that only applicants with a “true and compelling need” could be granted permits. “Just because you fear for your life is not a compelling reason to have a permit,” he elaborated.<sup>13</sup> After Chief Zavaras retired, he admitted that he carries a handgun almost constantly. “Now, when wandering around Denver, I very rarely go without one.”<sup>14</sup>

Denver talk-show host Alan Berg was Jewish, passionate, highly provocative, and fond of insulting people with whom he disagreed. When Berg began receiving death threats from white supremacists, he went to a local police department to apply for a handgun carry permit. The police

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6. SMOKING GUN, *supra* note 3, at 2.

7. According to the FBI, 49.6% of murder victims in 1991 were black. FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS FOR THE UNITED STATES 1991 16 tbl. 2.4 (1992).

8. At least one state, California, replaced an existing statute with the Uniform Act. See STATUTES OF CALIFORNIA AND AMENDMENTS TO THE CODES PASSED AT THE FORTY-SECOND SESSION OF THE LEGISLATURE 221 (1917) (comparing the 1917 California concealed handgun statute and the Uniform Act adopted by California in 1923).

9. 55 A. 610, 611 (Vt. 1903).

10. VT. STAT. ANN. tit. 13, § 4003 (1974). The statute also prohibits the non-authorized carrying of a “dangerous or deadly weapon” within the confines and grounds of state institutions. *Id.*

11. See *infra* Part II.

12. Steve Garnass, *Cops Get Tougher on Gun Permits*, DENVER POST, Apr. 24, 1988, at A1.

13. *Id.*

14. *Id.*

chief attempted to dissuade Berg and finally rejected his application. Shortly thereafter, Berg was assassinated by members of the Aryan Nation.<sup>15</sup> No one will ever know whether, had Berg been armed, he might have frightened off his murderers. What is known is that Berg was unarmed and was speedily killed.

From 1984 to 1992, in the City of Los Angeles police administration refused to issue any permits. In a city of over three million people, not one person was found needful of a handgun permit. The Los Angeles policy changed, however, on June 28, 1992. The new police chief, Willie Williams, twice failed practice versions of the POST (Police Officer Standards and Training) test. As a result, although he could retain the appointive position of police chief, Mr. Williams could not legally qualify to be a police officer in Los Angeles. Nonetheless, Mr. Williams was issued a concealed carry permit, the first civilian since 1984 to be so honored. The City of Los Angeles was subsequently sued for its discriminatory handling of permits; the City settled before trial, promising to issue licenses on the basis of need.<sup>16</sup>

Despite the City's agreement to the settlement, only five permits were issued in the ensuing nine months. Three permits went to government employees, and two went to private attorneys. On the basis of the absence of a "compelling" need, a permit was denied to a jeweler who 1) routinely carried large amounts of jewelry and valuables, 2) had been burgled, 3) had received police-documented death threats from a criminal he had helped to apprehend, and 4) had passed a defensive handgun class.<sup>17</sup>

Licensing in the rest of California is similarly haphazard and local officials enforce their own criteria in determining who is *qualified* to exercise the *privilege* of self-defense with a firearm.<sup>18</sup> For example, in addition to other requirements, the police department of Escalon, California requires applicants to pass a written exam with questions such as the following:

The shock of firing may on occasion place an unusual stress on the gun resulting in damage or a need for adjustments. Which of the following parts are likely to require attention after firing:

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15. STEPHEN SINGULAR, TALKED TO DEATH 142 (1987). The police department in question was in Englewood, a suburb of Denver.

16. Patrick McGreevy, *Permit Rules on Concealed Guns Eased*, DAILY NEWS (Los Angeles), June 30, 1993, at 1.

17. John Hurst, *LAPD's Tight Control on Gun Permits May Prompt New Lawsuit*, L.A. TIMES, June 25, 1994, at A30, A31.

18. In Los Angeles County, a female private detective was disqualified from obtaining a permit because of her gender. Paul H. Blackman, *Carrying Handguns for Personal Protection: Issues of Research and Public Policy* 9 (paper presented at annual meeting of the American Society of Criminology, San Diego, Nov. 13-16, 1985).

- the screws of the face plate
- the ejector rod if revolver
- the firing pin
- all of the above.<sup>19</sup>

Such questions are equivalent to conditioning the issuance of a driver's license on passing a test for becoming an auto mechanic.

In New York City, carry permits are arguably awarded on the basis of political and social influence. Permits have been awarded to the following individuals:

- Laurence Rockefeller (a gun control advocate whose justification for the permit was "carry large sums of money")
- Gun prohibition advocate and *New York Times* publisher Arthur Ochs "Punch" Sulzberger (justification: "carry large sums of money, securities, etc.")
- Brady Bill advocate William F. Buckley (whose first application cited his need for "protection of personal property while traveling in and about the city")
- The husband of Dr. Joyce Brothers (Dr. Brothers has written that gun ownership is a sign of sexual dysfunction in males.)<sup>20</sup>
- Celebrities including Bill Cosby, Howard Stern, and publisher Michael Korda.<sup>21</sup>

Other licensees include an aide to a city councilman widely regarded as corrupt, several major slumlords, a Teamsters Union boss who was a defendant in a major racketeering suit, and a restaurateur identified with organized crime and alleged to control important segments of the hauling industry.<sup>22</sup>

Conversely, permits are generally not awarded to persons in genuine need of carrying firearms. For example, crime victims are denied permits even though they are cooperating with the police, will testify against a criminal, and are receiving death threats from the criminal. Such persons will not even have their permit applications for home handgun possession processed within the required six months. And while being a publisher of a respectable publication such as the *New York Times* or *National Review*

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19. NRA Institute for Legislative Action, Report, Mar. 23, 1994 (Sacramento, Cal.) (on file with authors).

20. *Permit 29,000 to Pack Guns*, DAILY NEWS (New York), June 22, 1981, at 1; Carol R. Silver & Don B. Kates, Jr., *Self-Defense, Handgun Ownership, and the Independence of Women in a Violent, Sexist Society*, in RESTRICTING HANDGUNS, *supra* note 4, at 153. See also Susan Hall, *Nice People Who Carry Guns*, NEW YORK, Dec. 12, 1977, at 38.

21. Susan Lehman, *If Punch Sulzberger's Packing Heat, Screw Mogul Fumes, Why Not Me?* N.Y. OBSERVER, Dec. 21, 1992, at 1; Colum Lynch, *Elite in NYC are Packing Heat*, BOSTON GLOBE, Jan. 8, 1993, at 21.

22. William Bastone, *Born to Gun: 65 Big Shots With Licenses to Carry*, VILLAGE VOICE, Sept. 29, 1987, at 11, 12.

is apparently sufficient in itself for a carry permit, being the recipient of death threats such as "kill the white creep," "you will be shot," and "This is no joke. We are going to kill Al Goldstein," is not a sufficient basis. Mr. Goldstein, while the recipient of death threats considered serious by the police, is also the publisher of the highly unrespectable *Screw* magazine.<sup>23</sup>

Class discrimination pervades the permit application and approval process. New York City taxi drivers, although greatly at risk of robbery, are denied gun permits because they carry less than \$2000 in cash. Many taxi drivers carry weapons anyway. As the courts have ruled, ordinary citizens and storeowners in the city may not receive carry permits because they have no greater need for protection than anyone else in the city.<sup>24</sup>

Not surprisingly, given the problems inherent with a discretionary permit system, many people have begun calling for—and many legislatures have enacted—laws to regularize the carry permit application process.<sup>25</sup>

#### *B. The New Breed Of Concealed Handgun Permit Laws*

Since 1987, states have increasingly adopted a new breed of concealed handgun permit laws that make easier the process for many adults to get a permit to carry a concealed handgun. While most residents of these states

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23. Lehman, *supra* note 21, at 1.

24. Slatky v. Murphy, N.Y.L.J., Oct. 14, 1971, at 2.

Class discrimination is not limited to New York City. A federal district court in California recently upheld Los Angeles County's policy of issuing handgun carry permits almost entirely to retired police officers and to celebrities. The court found the county's policy rational "because famous persons and public figures are often subjected to threats of bodily harm." *Hickman v. County of Los Angeles*, No. CV 91-5594-RMT(Bx) (C.D. Cal. Apr. 21, 1994) (Takasugi, J.). The court's point is obviously correct; but the fact that famous persons who are subjected to threats of bodily harm are legitimately issued permits does not prove that nonfamous persons who are also subjected to equally serious threats of bodily harm can rationally be denied permits. Similarly, the court upheld the policy of issuing permits to ex-police officers because they are "particularly well-trained in the use of weapons." *Id.* The fact that ex-police may be particularly well-trained does not provide a justification for denying a permit to an applicant who can prove that he or she is as well-trained (or even better-trained) than a former police officer. The case against Los Angeles County is distinct from the case against the City of Los Angeles, discussed *supra* text accompanying notes 16-17.

25. Courts have sometimes stepped in to deal with egregious licensing abuses. For example, the Supreme Judicial Court of Maine held that the word "may" in a licensing statute means that a police department "must" issue permits to qualified applicants. *Schwanda v. Bonney*, 418 A.2d 163, 167 (Me. 1980). As the discussion on the pages above illustrates, however, the judiciary has been unable or unwilling to stop the rampant abuse of discretion in many jurisdictions; legislative reform remains the surest, most effective remedy for licensing abuse.

are unlikely ever to apply for a concealed weapon permit, the process is a matter of choice.<sup>26</sup>

These more permissive, nondiscretionary laws invite certain questions. How many permits have been issued? What happened to the murder rate when these laws took effect? How many serious problems developed because of the laws? The state-by-state analysis below in subpart I. C. will examine (1) the peculiarities of each state's non-discretionary concealed handgun permit law and (2) what happened to murder rates before and after these laws took effect.

### C. Methodology for Judging Effects of the Laws

Proponents of carry reform have hoped that such laws would reduce crime of all types, including homicide. Reform advocates suggest that crime will fall not only because lawfully armed citizens will use guns to thwart criminal attack, but also because the general deterrent effect of citizens carrying guns will cause some criminals to desist from confrontational crime.

The expectation of carry advocates is consistent with research performed for the National Institute of Justice. When professors James D. Wright and Peter H. Rossi interviewed and polled felony prisoners in ten state correctional systems, fifty-six percent of the prisoners said that a criminal would not attack a potential victim who was known to be armed. Thirty-nine percent of the felons had personally decided not to commit a crime because they thought the victim might have a gun; and eight percent said that this experience had occurred "many times." Criminals in states with higher civilian gun ownership rates worried the most about armed victims.<sup>27</sup>

Nonetheless, opponents of carry reform have argued that reform will lead to tragic increases in homicide. While there is a need for further research to examine what, if any, effect the carry reform laws have had on crimes such as rape and robbery, the examination of murder rates is a reasonable starting point for carry reform analysis. In particular, studying the murder rates allows an evaluation of the "worst case" scenario offered by carry opponents: that carry reform will lead to increased homicide.

Simply to compare the murder rates of each reform state after the new laws took effect to that of the national average is not an appropriate comparison. Many of the states that adopted non-discretionary permit laws have always been low murder rate states. Therefore, any comparison that fails to see how much murder rates *changed* because of these laws will give an artificially rosy analysis of the effects of carry reform.

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26. See *infra* Part II.

27. JAMES D. WRIGHT & PETER H. ROSSI, ARMED AND CONSIDERED DANGEROUS: A SURVEY OF FELONS AND THEIR FIREARMS 149-51 (1986).

An examination of simply whether the murder rates declined after the new laws took effect would also be inappropriate because many of the new laws took effect between 1986 and 1990, when the murder rates for the entire country were on the rise. Thus, to necessarily attach significance to a rising murder rate in a reform state when most other states were also experiencing a rise would be misleading.

A more meaningful measurement is *murder rate percentage*: What is the relationship between the murder rate for a particular state and the murder rate for the rest of the United States? As an example, if Florida's murder rate for 1975 was 13.5 per 100,000 people per year, and the murder rate for the rest of the United States was 9.3 per 100,000 people per year, then Florida's murder rate percentage for 1975 was 145%. In other words, for every 100 murders per 100,000 people in the rest of the United States, there were 145 murders per 100,000 people in Florida. Because the murder rates for many states rise and fall roughly in parallel with the rest of the United States, the *murder rate percentage* can be a meaningful measure of how a particular state's policies influence the murder rate.

Recognizing that some readers will regard with suspicion such a synthetic measure (Disraeli's epigram—"lies, damn lies, and statistics"—comes to mind), we supply graphs for the murder rate of each state and the rest of the United States for the years examined.

This study also examines the years in which these laws were passed. The logic behind such an examination is two-fold. First, in some cases the law took effect part-way through the year, as it did in Florida. Second, the deterrent effect of such laws may be related to public discussion of these new laws. Thus, some benefit may be witnessed even before a particular reform law takes effect, as it increases the criminal's fear that the next victim may be armed.

## II. STATE-BY-STATE ANALYSIS

### A. Washington

The state of Washington adopted the Uniform Pistol & Revolver Act in 1935. In 1961, the state departed from the discretionary permit system, and required that if the applicant for a concealed weapon permit was allowed to possess a handgun under Washington law, the permit had to be issued.<sup>28</sup> At first glance, Washington's new policy appears quite remarkable. However, a little reflection on the nature of concealed weapons suggests the state's decision reflected a realistic understanding of handgun ownership.

The only circumstances under which a concealed handgun is likely to come to the attention of the police are that either the weapon was drawn, or that the person carrying it was searched by the police for some other,

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28. WASH. REV. CODE ANN. § 9.41.070(1) (West 1988 & Supp. 1994).

presumably criminal reason. If a person is allowed to possess a concealable firearm within the home, practically speaking, that person cannot be prevented from carrying the weapon concealed outside the home. As a New York court upholding New York State's handgun licensing law (the Sullivan Act) observed, "If he has it in his possession, he can readily stick it in his pocket when he goes abroad."<sup>29</sup> If large numbers of handgun owners choose to ignore a concealed weapon law, the state has only three ways of responding: repeal the law, restrict handgun ownership at home, or make concealed weapon permits available to nearly anyone who is allowed to own a handgun. Washington State decided to make permits easy to get, thus keeping handgun ownership safe and legal.

Washington's statute is astonishingly forceful:

The judge of a court of record, the chief of police of a municipality, or the sheriff of a county, shall within thirty days after the filing of an application of any person issue a license to such person to carry a pistol concealed on his or her person within this state for four years from date of issue, for the purposes of protection or while engaged in business, sport, or while traveling.<sup>30</sup>

The statute goes on to list conditions that would cause "[s]uch applicant's constitutional right to bear arms" to be denied. Among others, these conditions include the applicant's being (1) under twenty-one years old, (2) subject to a court order or injunction regarding firearms, (3) out on bail pending trial or appeal, (4) awaiting sentencing for a crime of violence, or (5) subject to an outstanding arrest warrant for a misdemeanor or felony.<sup>31</sup>

The same statute also includes provisions for filing a civil suit against any agency that wrongfully refuses to issue a license or modifies the requirements of the law.<sup>32</sup> Notably, the statute allows non-residents to obtain such permits, although the state has up to sixty days to perform a background check on non-residents and on residents who have moved into Washington within the previous ninety days.<sup>33</sup>

In 1983, Washington made two important changes. First, the licenses would be valid for a four-year term, increased from two years. Second, license applicants who were improperly denied and who successfully sued an issuing agency for wrongful denial would be automatically awarded attorneys fees.<sup>34</sup>

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29. *People ex rel. Darling v. Warden of City Prison*, 139 N.Y.S. 277, 285 (N.Y. App. Div. 1913).

30. WASH. REV. CODE ANN. § 9.41.070 (West 1988 & Supp. 1994).

31. *Id.*

32. *Id.* § 9.41.070(11).

33. *Id.* § 9.41.070(1).

34. *Id.* § 9.41.070(11).

As of 1993 there were 241,606 licenses outstanding in Washington.<sup>35</sup> Given Washington's population of approximately five million, about four percent of the state population have carry permits.<sup>36</sup>

The effects of the law in Washington State were subtle. As graphs (1) and (2) below show, after the passage of the nondiscretionary issuance law, murder rates rose and fell largely in line with the national rate. In the two years before the new law took effect, Washington's murder rate was somewhat less than half of the rate for the rest of the United States.<sup>37</sup> From 1961 through 1982, the Washington murder percentage rates stayed between forty-four and sixty percent of the rate for the United States. While U.S. murder rates dropped in the early 1980s, the Washington murder rate percentage continued to rise, reaching a peak of sixty-eight percent of the U.S. rate in 1988, before dropping back to more normal levels in 1980-82. The increased rates were most likely not the result of all those Washingtonians carrying concealed handguns. In fact, the murder rate percentage was rising *before* the new law took effect. In addition, at least part of the increase can be attributed to the actions of one individual, the Green River Killer, who murdered at least forty-eight Washington women during the years 1982-84.<sup>38</sup> Another infamous killer, Ted Bundy, murdered at least ten women in Washington State in 1974 before moving on to other states.<sup>39</sup> These aberrations must not be allowed to explain too much. The Green River Killer's activities stopped in 1984 for no known reason. Meanwhile, the murder rate percentages in Washington remained unusually high until 1989, when they suddenly plunged to levels typical of the period before 1982.

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35. Bill MacKenzie, *Packin' the Heat*, OREGONIAN (Portland), Nov. 4, 1993, at A1.

36. Washington, like Florida and some other states, issues concealed carry permits to non-residents, who can use the permit when traveling in Washington. Presumably, the number of nonresident permit holders is not so large as to significantly change the estimated percentage of the Washington population having a carry permit.

37. Unfortunately, the Uniform Crime Reports program only began to produce reasonably complete statewide murder statistics in 1959.

38. Andrea Sachs & Joni H. Blackman, *Stalking the Green River Killer*, TIME, July 31, 1989, at 57. Many of the Green River Killer's victims may not have been identified as *his* victims.

39. See generally STEPHEN G. MICHAUD & HUGH AYNESWORTH, THE ONLY LIVING WITNESS (1983). While Ted Bundy's bloody path of murders perpetrated with clubs and bare hands also led through Utah and Florida, the effects on murder rates in those states were less dramatic. In Utah, he did not kill as many people; in Florida, the murders were diluted in Florida's much larger population. *Id.*

Although Bundy did not use firearms in his crimes and his victims were apparently unarmed, citizen gun ownership did come into play at least once in Bundy's career. In June 1977, the Aspen, Colorado sheriff called out the *posse comitatus* (ordinary citizens with their own guns) to hunt for Bundy after he escaped from jail. *Id.*

The state of Washington remained an aberration for many years with its nondiscretionary permit process. Permits were relatively easy to get in many other states, and some courts were prepared to hold that a concealed weapon permit was, in some sense, a right guaranteed by state constitution.<sup>40</sup> Nonetheless, the language of many state statutes still allowed state officials substantial discretion to deny a permit.<sup>41</sup> This practice started to change in 1987, when the new wave of nondiscretionary concealed handgun permit laws began to appear.

### B. Florida

Florida's 1987 reform law set off the modern wave of carry reform that has now been copied in many other states.<sup>42</sup> Among all the states, Florida has collected the most detailed information about the impact of the carry laws. Florida also provides a good test case for the possible negative impacts of carry reform.

A state such as Vermont, which has never required a license for open or concealed carry, might be expected to suffer few consequences from widespread handgun carrying; Vermont already has a low crime rate, is relatively homogeneous, and is mostly rural. Florida, however, has all the ingredients for concealed carry disaster: a high-crime state with heavy urbanization, a massively overcrowded prison system, and an extremely diverse (and often tense) ethnic population mix. Reform-related problems might be expected to be especially severe in Dade County (Miami), where crime and racial tensions are particularly high.

In 1987, Florida adopted a nondiscretionary concealed weapon permit law guaranteeing issuance of a concealed weapon permit to any Floridian who is (1) at least twenty-one years old, (2) "Does not suffer from a physical infirmity which prevents the safe handling of a weapon or firearm", (3) has not been convicted of a felony, (4) has not been convicted of a drug charge within the preceding three years, (5) has not been confined for alcohol problems within the preceding three years, (6) has completed any of a number of firearms safety classes, and (7) has not been committed to a

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40. Schubert v. DeBard, 398 N.E.2d 1339, 1341 (Ind. Ct. App. 1980).

41. Mr. Cramer has been repeatedly told by New Hampshire gun owners that concealed handgun permit issuance is non-discretionary in the Granite State. However, while New Hampshire authorities may issue permits readily, there is nothing in the statutes that requires them to do so. Conway v. King, 718 F. Supp. 1059, 1060 n.1, 1061 (D.N.H. 1989).

A number of Connecticut residents are also under the same impression. While Connecticut's concealed weapon permit law does provide an appeal process that appears to be weighted in favor of law-abiding citizens who wish a permit, there is nothing explicit in the statute that requires a permit to be issued. CONN. GEN. STAT. ANN. § 29-28 (West 1990 & Supp. 1994).

42. See *infra* subparts II. C. to O.

mental hospital within the preceding five years. A 1993 revision allows American citizens who are not Florida residents to obtain a permit that can be used when visiting Florida.<sup>43</sup>

The Florida reform law essentially ended the power of local law enforcement to deny carry permits for arbitrary reasons. Under the old system, for example, a doctor who performed abortions and whose clinic had been bombed was denied a permit because he was not in the professional security business.<sup>44</sup> The only area of discretion allowed by the Florida statute is that a license could be denied if an applicant has been convicted of any misdemeanor crime of violence, or is on probation for such a crime, within the preceding three years.<sup>45</sup> Judges are required to take the firearms safety class, but are otherwise exempt from the remaining requirements.<sup>46</sup>

The tenor of the national media coverage of the Florida reform was echoed internationally by the British newsweekly, *The Economist*. The magazine asserted that after taking a few hours of training, "Anyone who wants to carry a pistol may now do so."<sup>47</sup> According to *The Economist*, the provisions about minimum age requirements, drug abuse, and misdemeanor convictions apparently excluded no one.

How many permits were actually issued? From October 1, 1987, when the new law went into effect, to April 30, 1994, there were 233,870 applications received. A total of 1019 applications were denied (585 for criminal history, 434 for incomplete application). A total of 221,443 licenses were issued, of which 124,405 were valid as of April 30, 1994. Many licensees did not renew; several thousand applications were either in process, denied and under appeal, suspended, or withdrawn by the applicant.<sup>48</sup>

A total of 362 licenses have been revoked. The revocations were for: clemency rule change or legislative change (66), illegible prints (10), crime prior to licensure (78, of which 4 involved a firearm), crime after licensure (193, of which 18 involved a firearm), and "other" (15). Thus, of the 221,443 licensees, approximately 1 in 10,000 (1/100th of 1%) had a license revoked for a crime involving a firearm.<sup>49</sup>

Dade County has compiled even more detailed data. The number of permits increased dramatically from 1200 in September 1987 to 21,092 in

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43. FLA. STAT. ANN. § 790.06(2)(b) to (j) (West 1992 & Supp. 1994).

44. Blackman, *supra* note 18, at 8-9.

45. FLA. STAT. ANN. § 790.06(3) (West 1992 & Supp. 1994).

46. *Id.* § 790.061.

47. *Come Armed*, THE ECONOMIST, Oct. 10, 1987, at 31. The article does preface its conclusion by saying, "It is now legal for anyone except convicted felons, certified psychotics and twice-convicted drunks to carry handguns." *Id.*

48. FLORIDA DEP'T OF STATE, *Concealed Weapons/Firearms License Statistical Report for Period 10/01/87 - 04/30/94* 1 (1994).

49. *Id.*

August 1992. The Dade police kept records of all arrest and non-arrest incidents involving permit-holders in Dade County.<sup>50</sup>

The following incidents of criminal misuse of a firearm leading to a conviction and a license revocation were reported: two cases of aggravated assault involving a firearm (one of which involved the gun being fired), one case of armed trespass of cultivated land, and one case of a motorist shooting at another car. In addition to the above firearms crimes, one permit-holder accidentally attempted to enter the secured area at Miami International Airport carrying a firearm in her purse, and another individual accidentally shot himself in the leg.<sup>51</sup>

The Dade police recorded the following incidents involving the defensive use of licensed carry firearms: two robbery cases in which the permit-holder produced a firearm and the robbers fled, two cases involving permit-holders who unsuccessfully attempted to stop and apprehend robbers (no one was hurt), one robbery victim whose gun was taken away by the robber, a victim who shot an attacking pit bull; two captures of burglars, three scaring off of burglars,<sup>52</sup> one thwarted rape, and a bail bondsman firing two shots at a fleeing bond-jumper who was wanted for armed robbery.<sup>53</sup>

The combined Florida/Dade reports thus show the following:

- A very small number of permit holders were convicted of perpetrating crimes with firearms.
- A relatively larger, but still small overall number of permit holders used their firearms to thwart or attempt to thwart crimes.
- Not a single permit-holder intervened in an incompetent or dangerous manner, as by shooting an innocent bystander by mistake.

From the enactment of the 1987 Florida carry reform until August 31, 1992, the Dade County permit incident tracking project provided the most detailed information available about actual incidents involving carry permit holders. The tracking program had been created as a result of intense fears among some police administrators about the consequences of the carry reform law. The program was abandoned in the fall of 1992 because of the

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50. METRO DADE POLICE DEP'T, Aug. 31, 1992, at 1 (untitled report).

51. *Id.* at 2-7.

52. *Id.* Some of the burglaries occurred in the victim's home, a place where a concealed carry permit would not be necessary. Arguably, the greater familiarity with firearms encouraged by the carry law might have made some of the burglary victims more proficient with firearms.

53. A sample incident reported, "Victim thwarted a robbery. While at an intersection the subject approached her vehicle, produced a knife and demanded her money. The victim raised a .32 caliber handgun and stated, 'Let's see which is fastest, the bullet or the knife,' at which time the subject fled on foot." *Id.* at 6.

rarity of incidents involving carry permit holders and the subsequently diminished concern on the part of law enforcement administrators.

The very fact that negative incidents involving permit holders were so rare as to not be worth counting is evidence of the lack of negative effects of carry reform. Representative Ron Silver, the leading opponent of Florida's carry reform, graciously admitted in November 1990: "There are a lot of people, including myself, who thought things would be a lot worse as far as that particular situation [carry reform] is concerned. I'm happy to say they're not."<sup>54</sup> John Fuller, general counsel for the Florida Sheriffs Association, stated, "I haven't seen any instance of persons with permits causing violent crimes, and I'm constantly on the lookout."<sup>55</sup>

Based on the reports of incidents known to the police, the Florida carry reform law appears to be a net plus for public safety. This result becomes even more lopsided if one believes that the persons who committed crimes with their licensed firearms probably would have committed the same crimes even without a license. Nonetheless, the sum of known incidents does not reveal everything that would be desirable to know. Not all crimes are reported to the police. As a result, a number of crimes perpetrated or thwarted by permit holders never come to the attention of the police. Accordingly, a look at the overall trends in Florida murder rates gives an additional insight into the effects of the reform law.

Of all the states that enacted concealed carry reform, Florida shows the most dramatic change. As graphs 3 and 4 indicate, Florida's murder rate from 1975 to 1986 was between 118 and 157% of the murder rate elsewhere in the United States. After the passage of Florida's law, the state's murder rate began declining rapidly and consistently. The decline provided dramatic contrast to the increase in murder rates experienced in the rest of the United States. By 1991, Floridians were less likely to be murdered than people elsewhere in America.

Greater safety for Florida residents and American tourists may be a factor behind the recent and sensationalized criminal attacks on foreign tourists. These tourists stood out because of the distinctive rental car license plates that Florida issued until only recently. The head of the Florida Department of Law Enforcement suggests that unlike Florida residents or

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54. Michael Warren, *Concealed Weapons Owners No Trouble*, GAINESVILLE SUN, Nov. 4, 1990, at 1A, 12A.

55. *Police Say Concealed Weapons Law Has Not Brought Rise in Violence*, PALM BEACH POST, July 26, 1988, at 7 (views of executive director of Florida Chiefs of Police and an official with the Florida Sheriffs' Association). See also *Concealed Weapon Law Opponents Still Searching for Ammunition*, FLORIDA TIMES-UNION, May 9, 1988, at A1 (Florida Chiefs of Police efforts to document problems in every police department in the state results in finding none).

American tourists, foreign tourists were targeted because they would certainly be unarmed.<sup>56</sup>

### C. Virginia<sup>57</sup>

Virginia's concealed weapon statute was modified in 1988.<sup>58</sup> The changes were not quite as explicit as the Washington or Florida statutes. Nevertheless, the statute's intent remains clear:

The court, after consulting the law-enforcement authorities of the county or city and receiving a report from the Central Criminal Records Exchange, shall issue such permit if the applicant is of good character, has demonstrated a need to carry such concealed weapon, which need may include but is not limited to lawful defense and security, is physically and mentally competent to carry such weapon and is not prohibited by law from receiving, possessing, or transporting such weapon.<sup>59</sup>

Because some judges continually refused to renew permits, the law was amended in 1992 to require judges to renew permits "unless there is good cause shown for refusing to reissue a permit."<sup>60</sup>

Virginia has no centralized data base of concealed weapon permits. One must contact each of the 123 circuit courts in Virginia in order to determine how many permits are currently issued.<sup>61</sup>

As indicated in graphs 5 and 6, Virginia witnessed a dramatic decline in murder rate percentages during the first year following reform. This decline was short lived as the murder rate percentages returned to levels typical of the period before the law. However, one explanation of this return may be the fact that Virginia borders Washington, D.C. As a result, some of the increase in rates may represent spillover of rapidly increasing crime from the District of Columbia, where handgun possession is almost

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56. Doyle Jourdan, head of the Florida Department of Law Enforcement, observed, "The bad guys are not stupid. They understand that a tourist from Germany is far less likely to come back here and testify against them in court, and they know that these people carry large amounts of cash, don't have weapons and are generally not that well aware of where they're going." Larry Rohter, *Miami Unnerved by a Tourist's Killing*, N.Y. TIMES, Sept. 12, 1993, at 26.

57. The story of the remaining states is essentially the same as Washington and Florida. In general, the adoption of concealed carry reform did not lead to a noticeable increase in the homicide rate. In a few cases, the homicide rate dropped, but the drop cannot be necessarily tied to the new law. Readers in a hurry may wish to proceed directly to the "analysis" section. See *infra* subpart II.O.

58. VA. CODE ANN. § 18.2-203(D) (1988 & Supp. 1994).

59. *Id.*

60. Unlike the other nondiscretionary permit laws, Virginia's statute does not specify a maximum time limit in which an application must be processed. *Id.*

61. Letter from John B. Russell, Jr., Office of the Attorney General, Commonwealth of Virginia, to author Cramer, Oct. 14, 1992.

entirely outlawed.<sup>62</sup> Moreover, the Virginia Legislature has revised its statutes several times to make it clear that judges really *are* supposed to issue permits.<sup>63</sup> The need for repeated revision suggests that while the law required issuance of permits, many judges effectively nullified it by using unauthorized discretion.

While the law is currently applied as written in most of Virginia, in the two counties of Virginia closest to Washington, D.C., carry permit applicants must often spend thousands of dollars in legal fees to force courts to issue permits according to legislative command.<sup>64</sup> Thus, where permits are arguably the most needed, they are the least available.

#### D. Georgia

Georgia's concealed weapon permit law was somewhat ambiguous prior to 1989. One part of the concealed weapon statute states, "The judge of the probate court of each county may . . . issue a license . . ."<sup>65</sup> In contrast, a later portion specifies:

Not later than 60 days after the date of the application the judge of the probate court *shall* issue the applicant a license to carry any pistol or revolver if no facts establishing ineligibility have been reported and if the judge determines the applicant has met all the qualifications, is of good moral character, and has complied with all the requirements contained in this code section.<sup>66</sup>

Other portions of the statute specify that licenses shall not be issued to anyone under twenty-one,<sup>67</sup> a fugitive from justice, or anyone awaiting court proceedings for a felony or "forcible misdemeanor."<sup>68</sup> Also disqualified is anyone placed under supervision by a court within the last ten years for a "forcible felony," or the last five years for a "forcible misdemeanor or a nonforcible felony,"<sup>69</sup> or hospitalized for alcohol or drug treatment in the

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62. Handguns registered in Washington, D.C. before 1976 may lawfully be possessed under a "grandfathering" clause. However, carry permits are impossible for ordinary citizens to obtain, and even guns kept at home must be locked up, greatly reducing their defensive utility.

63. *See supra* notes 59-60 and accompanying text.

64. There are approximately 10,000 carry permits in Virginia, but in Fairfax County (next to Washington, D.C.), only three permits were issued during 1990-91. Carlos Santos, *10,000 in State Legally Carry Concealed Guns*, RICHMOND TIMES-DISPATCH, Oct. 3, 1993, at A1. Prince William County, also in northern Virginia, issued only seven permits during 1990-91. *Tidewater Dominates List for Gun Permits*, AP, Sept. 30, 1993.

65. GA. CODE ANN. § 16-11-129(a) (1992 & Supp. 1994) (emphasis added).

66. *Id.* § 16-11-129(d) (emphasis added).

67. *Id.* § 16-11-129(b)(1).

68. *Id.* § 16-11-129(b)(2).

69. *Id.* § 16-11-129(b)(3).

last five years.<sup>70</sup> Anyone convicted of any sort of manufacturing, distribution, or possession of a controlled substance is likewise ineligible for a license.<sup>71</sup>

Whether or not the issuance of a permit was discretionary remained a question. The use of "may" in one place suggested issuance was discretionary. Yet the language "shall issue" suggested nondiscretionary issuance. The Georgia Attorney General resolved the question in 1989 by issuing an opinion holding that a judge "has no discretion to exercise, but must issue the permit unless provided with information indicating the disqualification of applicant."<sup>72</sup>

The effect of the 1989 reinterpretation of the Georgia concealed weapon permit law was inconclusive. About 11,000 people in the Atlanta area now have permits.<sup>73</sup> As indicated in graphs 7 and 8, the Georgia murder rate fell 16% during 1989-92, while the rest of the United States experienced a 1.6% increase in murder rates. This contrast might indicate that the new interpretation of the law acted in a positive way to reduce the murder rate, relative to what the rate might otherwise have been.

One must not draw this conclusion too hastily, because examination of Georgia murder rates for the years 1975-88 shows a rather dramatic and otherwise unpredictable variation in the relationship between Georgia and U.S. murder rates. Examination after a few more years may provide an opportunity to evaluate more clearly the effectiveness of the change in the Georgia law. The most cautious conclusion to be drawn is that the change at least did no harm. More optimistically, the change *may* have reduced murder rates.

#### E. Pennsylvania

Pennsylvania took action in 1989. While not as explicit as Florida's law, or as forcefully worded as Washington's, the Pennsylvania reform put some teeth into the Pennsylvania Constitution's "right to keep and bear arms" provision. The requirements include that the applicant be twenty-one or over; have no drug convictions, no convictions for crimes of violence, no prior mental hospital commitments; not be addicted to "marijuana or a stimulant, depressant or narcotic drug"; not be "a habitual drunkard," convicted of a felony, or awaiting trial for a felony; an illegal alien; and not

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70. *Id.* § 16-11-129(b)(4).

71. *Id.* § 16-11-129(b)(5)(A). The maximum fee for processing is set at \$30. *Id.* § 16-11-129(c)(2).

72. Op. Att'y Gen. NO. U89-21 (Aug. 25, 1989); GA. CODE ANN. § 16-11-129 Compiler's notes.

73. As of December 1993, the permit figures for four major counties were: Cobb 2920; DeKalb 3050; Fulton 3100; and Gwinnett 2299. Mike Fish, *Atlanta Celebrities (quietly) Toting Guns*, ATLANTA JOURNAL-CONSTITUTION, Dec. 12, 1993, at A1, A14.

be dishonorably discharged from the U.S. military, or a fugitive from justice. Non-residents are eligible for a concealed weapon permit on the same basis as residents, except that the statute requires they must currently possess an equivalent permit in their home state, provided such permits exist.<sup>74</sup>

Some discretionary authority remains, however. A sheriff can refuse a permit to “[a]n individual whose character and reputation is such that the individual would be likely to act in *a manner dangerous to public safety.*”<sup>75</sup> While the emphasized phrase is not defined anywhere in the statute, the law does state:

A license to carry a firearm shall be for the purpose of carrying a firearm concealed on or about one's person or in a vehicle and shall be issued if, after an investigation not to exceed 45 days, it appears that the applicant is an individual concerning whom no good cause exists to deny the license.<sup>76</sup>

Accordingly, the burden of proof seems to fall on the sheriff to show good cause for refusing a permit.

One unique feature of the Pennsylvania law is that in a city of “the first class”—i.e., Philadelphia<sup>77</sup>—the chief of police retains the authority to deny a permit unless “the applicant has good reason to fear an injury to the applicant's person or property or has any other proper reason for carrying a firearm and that the applicant is a suitable individual to be licensed.”<sup>78</sup> In practice, “suitable individual to be licensed” could mean a politician or other person with political influence. Nonetheless, permits issued elsewhere in Pennsylvania are statutorily valid in Philadelphia.<sup>79</sup>

As of January 1992, 362,142 carry licenses were issued in the state. In other words, about three percent of Pennsylvanians had a permit.<sup>80</sup>

The Pennsylvania results are primarily interesting because even though Philadelphia is expressly exempted from nondiscretionary issuance of permits, permits issued elsewhere in the state are good in Philadelphia. Graph 9 shows no significant difference in Pennsylvania murder rate percentages after adoption of the new permit law. The murder rate

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74. PA. CONS. STAT. ANN. § 6109(e) (West 1983 & Supp. 1994).

75. *Id.* § 6109(e) (emphasis added).

76. *Id.*

77. PA. STAT. ANN. § 101 (West 1974 & Supp. 1994) defines the classes of cities based on population. Only Philadelphia currently qualifies as a city of “the first class” by having a population above one million; the next closest city, Pittsburgh, is declining in population.

78. PA. CONS. STAT. ANN. § 6109(e)(2) (West 1983 & Supp. 1994).

79. *Id.* § 6109(a).

80. As with the state of Washington, the number of non-residents issued permits is presumed not large enough to significantly change the estimated percentage of the Pennsylvania population which has obtained a permit.

percentage rose slightly during 1989-90. In 1991, the murder rate percentage declined, but then returned in 1992 to near the 1989-90 level.

As graph 10 indicates, however, when we plot the murder rates for Philadelphia by itself or for the rest of the state (excluding Philadelphia), the results are puzzling. Philadelphia experienced a small rise in murder rates in 1990, followed by declines during 1991-92 to below the 1989 level. In contrast, the murder rates for the rest of the state declined slightly in 1989, increased slightly in 1990-91 and leveled off in 1992. This result roughly paralleled what happened to murder rates in the rest of the United States. Because murder rates in most of the rest of Pennsylvania are very low, and the need to carry a concealed weapon may therefore be rare, the concealed weapon permit law may not have made much practical difference in those areas.

Nonetheless, the 1991-92 decline in Philadelphia, if it continues, may suggest some benefit from the increased number of permits being issued elsewhere in the state. Does the knowledge that people walking the streets of Philadelphia might be from other Pennsylvania cities, where permits are readily issued, act as some sort of restraint on Philadelphia criminals? Has there been a dramatic increase in the number of Philadelphia residents who have taken up residence elsewhere (at least from a legal standpoint) in order to obtain permits? Or, is this decline just another random variation? Only time will tell. At a minimum, the easy availability of permits does not seem to have made Pennsylvania a more dangerous state.

#### *F. Oregon*

In 1989, Oregon adopted its nondiscretionary policy for issuance of handgun permits. The requirements are similar, though not identical to those already discussed. The applicant must (1) be over twenty-one, (2) have a principal residence in the county where the application is made, (3) have no outstanding arrest warrants, (4) be "not free on any form of pretrial release," (5) have demonstrated competence through any of a number of firearm safety classes, (6) have no felony convictions, (7) have no misdemeanor convictions or mental hospital commitments in the preceding four years, and (8) not be prohibited by a court from owning a firearm for mental illness.<sup>81</sup>

The Oregon statute contains an escape clause similar to Pennsylvania's that allows a sheriff to deny a permit:

[I]f the sheriff has reasonable grounds to believe that the applicant has been or is reasonably likely to be a danger to self or others, or to the community at large, as a result of the applicant's mental or psychological

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81. OR. REV. STAT. § 166.291 (1993).

state, as demonstrated by past pattern of behavior or participation in incidents involving unlawful violence or threats of unlawful violence.<sup>82</sup>

The escape clause handles a situation such as an applicant who has a history of wandering the streets shouting threats at Martians or pink elephants, or getting into bar fights, but has so far managed to avoid criminal conviction or commitment to a mental hospital. Yet, the language is narrowly drawn so that a sheriff would need a "pattern" of behavior to refuse a permit. If the sheriff simply refused an applicant based on a single such incident, that refusal would lead to an appeal to the courts. If the applicant were to win the appeal, the sheriff would be liable for the filing fee.<sup>83</sup>

A unique provision requires the Oregon State Police to determine if any other states have substantially comparable requirements for issuance of a permit. If any such comparable state laws are found, permits from that state are to be recognized as valid in Oregon.<sup>84</sup> To date, however, the Oregon State Police have refused to recognize any other state's concealed handgun law as substantially comparable.

As graphs 11 and 12 indicate, murder rates were already on the decline in Oregon when the new law was passed, both relative to the U.S. rate, and compared to the 1986 state peak. As a result, it would be unrealistic to give the new law all the credit for the continuing sharp decline of murder rates in 1990. In addition, while murder rate percentages in 1991 and 1992 rebounded, examination of the murder rates chart shows this is more a result of the sharp decline in the U.S. murder rate in 1992, rather than because of a dramatic increase in the Oregon murder rate. Indeed, the Oregon murder rate in 1992 was on a par with the rate in 1989 when the new law was passed—well below the rate for the three years before the new law.

In Oregon, over 37,000 citizens—about 2% of the adult population—now have a carry permit. Women are applying for permits in increasing numbers.<sup>85</sup> Of the 37,390 Oregonians who have been issued permits, 194 (about one-half of one percent) have had their licenses revoked; revocations have been based on offenses such as shoplifting or assault. No license holder has been convicted of a crime involving a gun. Captain F. Sherwood Stillman, coordinator of the statewide licensing program, observed, "The people who get these concealed handgun licenses are not people we should be concerned about having firearms; these are law-abiding citizens."<sup>86</sup>

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82. *Id.* § 166.293(2).

83. *Id.* § 166.274(8).

84. *Id.* § 166.292(4)(a).

85. MacKenzie, *supra* note 35, at A1. For example, in Multnomah County, police estimated that 25% of the 1993 permits would be issued to women. *Id.*

86. *Id.* at A16.

### G. West Virginia

West Virginia adopted a nondiscretionary permit system as the result of its voters adding a right to keep and bear arms provision to the state constitution in 1986.<sup>87</sup> A person charged with carrying a concealed weapon in violation of a state statute challenged the statute on the grounds that it violated the right given by the West Virginia Constitution to keep and bear arms. The plaintiff argued that the law gave too much discretion to local government to deny permits. The West Virginia Supreme Court agreed.<sup>88</sup>

The West Virginia legislature responded by writing a new concealed weapon permit law requiring an applicant to (1) be a U.S. citizen, (2) reside in the county where application was made, (3) be at least eighteen, (4) not be a drug or alcohol addict, (5) have no conviction of a felony or violent crime involving a deadly weapon, (6) be "physically and mentally competent to carry such a weapon," and (7) at least for first time applicants, complete one of a number of firearms safety classes.<sup>89</sup>

The lower courts were recalcitrant in issuing permits under the new law, and applicants who were denied permits appealed. In *In re Metheney*,<sup>90</sup> the West Virginia Supreme Court of Appeals clearly specified that while a judge was allowed discretion in determining whether the applicant's purpose was actually "defense of self, family, home or state, or other lawful purpose,"<sup>91</sup> if the evidence showed such to be the case, the judge was obligated to issue a permit.<sup>92</sup>

In West Virginia, the Department of Public Safety maintains information on concealed weapon permits. However, the filing system "is manual at this time, therefore, it would be virtually impossible to compile the data requested."<sup>93</sup>

Because West Virginia has a small populace, even a single criminal can make an enormous difference in the state's murder rate. As a result, the examination of the rate is inconclusive. As shown in graphs 13 and 14, the year the new law was passed, West Virginia experienced a dramatic increase in its murder rates. That increase was followed by a decline in 1990, and

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87. *City of Princeton v. Buckner*, 377 S.E.2d 139, 141-43 (W. Va. 1988).

88. *Id.* at 144-45.

89. W. VA. CODE ANN. § 61-7-4(a) (1992). The statute additionally requires "[t]hat the applicant desires to carry such deadly weapon for the defense of self, family, home or state, or other lawful purpose." *Id.*

90. 391 S.E.2d 635 (W. Va. 1990).

91. *See supra* note 89.

92. 391 S.E.2d at 638.

93. Letter from T.A. Barrick, W. Va. Dep't of Pub. Safety, to author Cramer (Aug. 26, 1992) (on file with author).

increases in 1991 and 1992. The number of murders in 1989 was 121; in 1990, 102; in 1991, 111; in 1992, 115.

#### H. Idaho

Idaho's change to a nondiscretionary permit system is more complex than most of the other states examined. As originally adopted in 1990, the language of the first paragraph was nearly identical to Washington's statute, even to the extent of asserting that a "citizen's constitutional right to bear arms shall not be denied him, unless . . ."<sup>94</sup> Like the Washington statute, the Idaho law provided for permits for both residents and non-residents. (The provision for non-resident permits was removed, effective July 1, 1991. An amendment effective April 2, 1991, adjusted the formula used for allocating the license fee to the various parts of the government.)<sup>95</sup>

Even with subsequent amendments, the Idaho statute is somewhere between the Washington and Oregon statutes in its liberality. It denies a permit to non-residents, anyone ineligible to own a firearm under state or federal law, anyone awaiting trial on or convicted of a felony, fugitives from justice, drug addicts, those lacking "mental capacity" as defined by Idaho law, the mentally ill, gravely disabled, or incapacitated, as defined by Idaho law, those dishonorably discharged from the U.S. military, anyone convicted of a violent misdemeanor in the last three years, and illegal aliens.<sup>96</sup>

There is *some* discretion in the Idaho statute—but in such a limited way as to provide no real obstacle to those over twenty-one. While the first part of the statute declares that those under twenty-one are ineligible for a permit, a later part provides that a sheriff *may* issue a carry license to an applicant between eighteen and twenty-one if the sheriff feels that good cause exists.<sup>97</sup> For an applicant over twenty-one, who is not in one of the prohibited categories listed above, the only discretionary authority available to the sheriff is that, "the sheriff may require the applicant to demonstrate familiarity with a firearm by any of the following [firearms safety classes], provided the applicant may select which one . . ."<sup>98</sup> The list of available firearms safety classes is sufficiently broad—including any NRA firearms safety, training, or hunter education course—that even if a sheriff exercises discretion in requiring one of these courses, it provides little obstacle to obtaining a permit.

As is typical of states with small populations, Idaho's murder rate is subject to major variations from year to year. As indicated in graphs 15 and 16, in the late 1970s the Idaho murder rate was as high as sixty-three

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94. IDAHO CODE ANN. § 18-3302 (1987 & Supp. 1994).

95. *Id.* § 18-3302 compiler's notes.

96. *Id.* § 18-3302(1).

97. *Id.* § 18-3302(11).

98. *Id.* § 18-3302(13).

percent of the rate for the rest of the nation. In the period 1980-89, under the old, discretionary concealed handgun permit law, Idaho's murder percentage rate had declined, staying in the twenty-eight to forty-eight percent range. In the two following years, the murder rate continued to decline, reaching nineteen percent of the United States murder rate in 1991. Is this result just another statistical fluke of small population?

The murder decline in 1990 could be just the result of Idaho's small population causing a random fall in murder rates, similar to the pattern in previous years. When the murder percentage rate fell again in 1991, however, one might suspect that progress is being made. Nevertheless, the 1992 results suggest random variation was the explanation for the 1990 and 1991 declines.

### *I. Montana*

In 1991, Montana adopted a statute similar to Idaho's. Whereas the old Montana law gave judges considerable discretionary authority to issue concealed weapon permits, the new statute was unambiguous and nondiscretionary: "A county sheriff shall, within 60 days after the filing of an application, issue a permit to carry a concealed weapon to the applicant."<sup>99</sup>

Unlike in Idaho, an applicant must be a resident for at least six months, be at least eighteen, and have some sort of state-issued picture identification card. The prohibited categories are similar to the other states: those ineligible under state or federal law to possess a firearm, those convicted of a felony, those with an outstanding arrest warrant, drug addicts (including such determinations in civil proceedings), the "mentally ill, mentally defective, or mentally disabled," those dishonorably discharged from the United States military, or those convicted in the last five years<sup>100</sup> of violating Montana's statutes that prohibit carrying a concealed weapon while under the influence, or in a prohibited place, such as a government building, bank, or bar.<sup>101</sup>

Montana has an escape clause similar to that of Pennsylvania and Oregon. The clause allows a sheriff to deny a permit to an applicant based on "reasonable cause" for concern about "the peace and good order of the community . . .".<sup>102</sup> While the Idaho statute allows the sheriff the discretion to require proof of firearms competence, the Montana statute requires an applicant to complete any of a number of firearms safety courses. The statute purposely avoids naming the NRA, by referring to "an organization that uses instructors certified by a national firearms associa-

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99. MONT. CODE ANN. § 45-8-321 (1993).

100. *Id.* § 45-8-321(1)(e).

101. *Id.* § 45-8-327, -328.

102. *Id.* § 45-8-321.

tion." Also unlike the Idaho law, the Montana statute refers to the carrying of concealed weapons as "this privilege" rather than as a right.<sup>103</sup>

By the end of 1993, Montana had 1369 residents with carry permits.<sup>104</sup> As demonstrated by graphs 17 and 18, Montana, like Idaho, has a very small populace with a resultant "notchy" murder percentage rate. Therefore, one should not attach too much significance to the apparent first year's murder reduction, especially since it followed 1990, a year with an unusually high murder rate percentage. Nonetheless, the 1991 Montana murder rate percentage was the lowest since 1975, and 1992's murder rate percentage is near the bottom of the rates for the period 1975-91.<sup>105</sup> Only time will provide evidence as to the effects of the Montana concealed handgun permit law.

#### *J. Mississippi*

Mississippi adopted a nondiscretionary concealed handgun law effective July 1, 1991. The statute requires an applicant to (1) be a resident of the state for at least twelve months, (2) be twenty-one, (3) have no "physical infirmity which prevents the safe handling of a pistol or revolver," (4) have no felony conviction in the United States, (5) have no drug abuse problem (as indicated by commitment to a treatment facility or conviction within the preceding three years), (6) have no mental hospital commitments in the last five years, (7) "not [have] been adjudicated mentally incompetent," and (8) not be a fugitive from justice.<sup>106</sup> The use of discretion by the Mississippi Department of Public Safety in issuing a permit is limited to one area. If a person has been convicted of "one or more crimes of violence constituting a misdemeanor" in the preceding three years, the department is not required to issue a permit.<sup>107</sup>

The permit is valid for four years, and the application fee is \$100. The renewal fee is \$50. Unlike many of the other non-discretionary permit laws, Mississippi's law includes a long list of places where this permit is *not* valid: police stations, courthouses, public parks, bars, schools, and meetings of the Mississippi Legislature.<sup>108</sup>

The Mississippi Department of Public Safety had issued at least 7000 permits as of October 27, 1993.<sup>109</sup> That means .27% of the total popula-

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103. *Id.*

104. *Concealed Weapons Permits Skyrocket in Montana*, GUN WEEK, Mar. 11, 1994, at 7.

105. The comments about declining United States murder rates in 1992 and Idaho's murder rate percentage rise apply here as well.

106. MISS. CODE ANN. § 45-09-101(2) (1993).

107. *Id.* § 45-09-101(3).

108. *Id.* § 45-09-101(13).

109. Letter from Jim Ingram, Comm'r of Pub. Safety, to Donald Newcomb

tion of the state obtained a permit in a little over two years following the passage of the new law. Like Montana, Mississippi's experience with nondiscretionary concealed handgun permit laws is too recent to meaningfully judge the results. However, as graphs 19 and 20 indicate, one can at least conclude that the murder rate did not rise dramatically during the first one and one-half years after the passage of the new law.

### K. Wyoming

Prior to 1994, Wyoming's concealed handgun law was somewhat different from that of most other states. Each county's sheriff was allowed to issue permits by discretion, but such permits were often not recognized in other counties.<sup>110</sup> As State Senator Mark Harris explained, "I tried to get permits from all the sheriffs along the Interstate from my home to Cheyenne [where the Wyoming Legislature meets] and I couldn't."<sup>111</sup> As a result, Senator Harris introduced legislation to reform the existing concealed weapon law.<sup>112</sup>

The usual provisions appear. Applicants must (1) be a resident of Wyoming for at least six months, (2) be at least twenty-one, (3) "not suffer from a physical infirmity which prevents the safe handling of a firearm," (4) be "not ineligible to possess a firearm" under federal law, (5) have no drug or alcohol abuse history, and (6) have no mental illness history. The statute also requires the applicant to demonstrate "familiarity with a firearm" through any of a wide variety of courses listed as acceptable. The Wyoming Attorney General's office is responsible for issuing the permits. The only discretion allowed in the issuance of permits is that applicants *may* be rejected for pleading guilty or no contest to any misdemeanor crime of violence in the preceding three years.<sup>113</sup>

Like that of many of the other states, Wyoming's law allows the sheriff of the applicant's residence county to deny a permit if that sheriff believes "that the applicant has been or is reasonably likely to be a danger to himself or others, or to the community at large as a result of the applicant's mental or psychological state, as demonstrated by a past pattern or practice of behavior . . . ." Similar to the practice in Idaho, permits *may* be issued to applicants between eighteen and twenty-one at the recommendation of the applicant's sheriff.<sup>114</sup>

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(Oct. 27, 1993).

110. WYO. STAT. § 6-8-104 (1994).

111. Sen. Mark Harris, telephone conversation with author Cramer, April 1994.

112. WYO. STAT. § 6-8-104 (1994).

113. *Id.* § 6-8-104(b).

114. *Id.* § 6-8-104(g), (j).

The application fee is \$50 plus actual fingerprinting costs, and the permit is good for five years. The permit must be issued or denied within sixty days of application.<sup>115</sup>

Perhaps reflective of Wyoming's experience with permits good only in the county of issuance, the Wyoming law recognizes permits issued in other states, as long as they are issued by "a state agency."<sup>116</sup> It is not clear whether permits issued under the authority of a state law, even if issued by a county sheriff, would qualify under this provision.

#### *L. Arizona*

Although Arizona has long allowed open carry of handguns, it did not have even a discretionary permit system for concealed carry. In April of 1994, a statute originally intended to prohibit the carrying of guns by minors was amended to create a nondiscretionary, concealed weapon permit system for adults. The new law requires the Department of Public Safety to issue a permit to anyone who is a resident of the state, at least twenty-one, not under indictment for and not convicted of a felony, not mentally ill or "adjudicated mentally incompetent or committed to a mental institution," "not unlawfully present in the United States," and who has completed a firearms safety training program approved by the Department of Public Safety.<sup>117</sup>

Unlike many of the other state laws that simply required some sort of safety training as a condition of permit issuance, Arizona specifies what such training must include. The training must deal with "the legal issues relating to the use of deadly force" along with the safe handling and maintenance of weapons.<sup>118</sup>

Permits must be issued or denied within sixty days. The permit is good for four years. Unlike the other state laws examined, the application fee is not specified in the statute, but is to be "determined by the director of the [Public Safety] department."<sup>119</sup> There is neither a provision for non-resident application for a permit, nor a recognition of out-of-state permits. Of course, Arizona law does allow non-residents to carry openly without need for a permit.

#### *M. Tennessee*

In May 1994, Tennessee passed a concealed handgun permit law that, while not as strong as some of the other laws considered, is nondiscre-

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115. *Id.* § 6-8-104(e), (m).

116. *Id.* § 6-8-104(a).

117. ARIZ. REV. STAT. ANN. § 13-3112(E) (1994).

118. *Id.* § 13-3112(N).

119. *Id.* § 13-3112(F).

tionary. The revised version of Tennessee Code § 39-17-1315 changes, “the sheriff may issue such a permit . . .” to “the sheriff *shall* issue such a permit . . .”<sup>120</sup> Unlike some of the other laws examined, the law does not explicitly prohibit the issuance of permits to convicted felons. The law rather allows the sheriff to refuse to issue a permit if, “in the sheriff’s opinion, [the applicant] has a history of instability or physical infirmity,” or “poses a likelihood of risk to the public . . .”<sup>121</sup>

Tennessee is unique among carry reform states in its requiring an applicant to have liability insurance or a surety bond of at least \$50,000. This requirement, along with the required completion of a training course in firearms, was retained from the prior law.<sup>122</sup>

#### *N. Alaska*

Like Arizona and Wyoming, Alaska has long allowed the open carry of handguns. In 1994, Alaska passed a concealed handgun permit law that, at first glance, seems similar to the other laws examined. However, the Alaska version contains some surprising differences. Nonetheless, it is still a nondiscretionary permit law.

The qualifications are quite similar to the previously examined statutes. The applicant must be twenty-one, “eligible to own or possess a firearm under the laws of this state and under federal law,” not convicted or under indictment for a felony, not convicted of any of a number of misdemeanors within the last five years or currently under indictment for any of those misdemeanors, “not now suffering, and [having] not within the five years immediately preceding the application suffered” from mental illness, not adjudicated “mentally incapacitated,” and a resident of Alaska. Anyone currently in a court-ordered drug or alcohol program is also prohibited, as well as anyone in such a program within the previous three years.<sup>123</sup>

Like many of the other states, Alaska’s law requires a demonstration of competence with a handgun. Unlike the other states, however, the certificate of competence must specify the “action type and caliber of handgun or handguns” with which the applicant has demonstrated competence. A permit holder may carry a lesser caliber gun of the same action type, but not a different action type.<sup>124</sup>

Like Arizona, Alaska specifies considerable detail about the content of the firearms safety course, including knowledge of “Alaska law relating to

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120. The statute continues, “The Sheriff *may*, for good cause and in the reasonable exercise of discretion, deny a permit.” TENN. CODE ANN. § 39-17-1315(b)(1) (1991 & Supp. 1994) (emphasis added).

121. *Id.* § 39-17-1315(b)(1)(C).

122. *Id.* § 39-17-1315(b)(2).

123. ALASKA STAT. §§ 11.61.220(b), .220(f); 18.65.705 (1994).

124. *Id.* § 18.65.715(a).

firearms and the use of deadly force.”<sup>125</sup> Unlike in all the other states examined, a permit holder must demonstrate competence not only when applying for a permit, but also in the twelve months immediately before renewing a permit.<sup>126</sup>

The application fee is to be based on the actual costs of processing the application fee, but not to exceed \$125 for original application and \$60 for renewal.<sup>127</sup> Permits are valid for five years. Permits must be issued or denied within fifteen days of the FBI providing background check information, and the background check request to the FBI must be made within five days of receipt of the application.<sup>128</sup>

Permits are not valid in a number of places that other states also restrict: jails, police stations, courthouses, and airline terminals. In addition, Alaska restricts concealed carry in many places where other states provide no such restriction: school grounds, “a building housing only state or federal offices or the offices of a political subdivision of the state,” “a vessel of the Alaska marine highway system,” “a facility providing services to victims of domestic violence or sexual assault,” financial institutions, and residences, businesses, or charitable organizations that have posted a sign prohibiting concealed carry.<sup>129</sup>

Most interesting of all is the authority given to cities to prohibit concealed carry by permittees. To do so, however, at least ten percent of the voters (as counted at the last regular election) must petition the city to put the matter on the next special election ballot, and a majority must vote to prohibit concealed carry.<sup>130</sup>

In signing the law, Governor Hickel explained that the decisive factor was the women who called his office: “Those that impressed me the most were the women who called and said they worked late and had to cross dark parking lots, and why couldn’t they carry a concealed gun?”<sup>131</sup>

The Alaska law certainly suggests less trust in people than many of the other laws examined. Most indicative of this lack of trust is the specific restriction of the sort of handguns that may be carried concealed. The law prohibits the carrying of derringers and “miniature handguns.”<sup>132</sup> Nearly every other state allows the permit holder to decide what sort of handgun to carry for self-defense. Alaska requires carry guns to have trigger guards so as to reduce the risk of accidental discharge—a not entirely unreasonable

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125. *Id.* § 18.65.715(a)(1).

126. *Id.* § 18.65.715(b).

127. *Id.* § 18.65.720.

128. *Id.* § 18.65.700(b).

129. *Id.* § 18.65.755 (Oral notice is sufficient for a residence.).

130. *Id.* §§ 18.65.780, .785.

131. *Alaska Legalizes Concealed Guns*, N.Y. TIMES, May 29, 1994, § 1, at 6.

132. ALASKA STAT. § 18.65.790 (1994). The statute defines miniature handguns as handguns lacking a trigger guard and having a barrel length of 3.5 inches or less.

requirement. Nonetheless, the authors are not aware of a single instance of an accidental discharge involving a derringer or other gun without a trigger guard in the states which do not specify which type of gun may be carried.

Finally, although two international jurisdictions have changed their handgun carry laws recently, data from which to draw any conclusions about the effects of these new laws is unavailable. Citizens of Lithuania and Estonia are now allowed to own and carry handguns for protection. The laws were enacted in response to the rising crime rates now characteristic of most of the former Soviet republics.<sup>133</sup>

#### O. Analysis of State Homicide Data

In the states discussed above, the dire consequences predicted by the gun control lobbies were not realized. That the carry laws appear not to have had a noticeable impact on the homicide rate in most states—Florida, perhaps, excepted—should not be surprising. To begin with, in most of the states studied, the general rise and fall of murder rates before the new laws took effect roughly approximated the rate in the rest of the country. This similarity suggests that changes in murder rates are generally determined by national causes.

Many criminologists have suggested that the state of the economy has a significant impact on murder rates, and that the mass media's glorification of violence plays a significant role in promoting violence.<sup>134</sup> Almost all criminologists agree that demographics play a crucial role in crime rates. For example, because males in the late teens and early twenties age groups are disproportionately involved in violent crime—about fifty percent of murderers are under twenty-five—as the percentage of the population in this age group increases, so will the murder rate.<sup>135</sup> One must also recognize the dramatic effects a small number of murderers can have in some of the smaller states from year to year. The murder rates of West Virginia, Idaho, and Montana are all highly variable from year to year because the populations are small. A single psychopathic criminal can dramatically raise the

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133. *Baltics Take Up Arms*, AP, Apr. 1, 1994.

134. A number of studies have examined whether and how violence in the electronic media promotes violence. Brandon Centerwall, *Television and Violence: The Scale of the Problem and Where to Go from Here*, JAMA, June 10, 1992, at 3059-63; Wendy Wood et al., *Effects of Media Violence on Viewers' Aggression in Unconstrained Social Interaction*, PSYCHOLOGICAL BULLETIN, May 1991, at 371-83 (one of the more detailed recent attempts to analyze existing statistical studies of the effects of television and film violence on children). But see Mary B. Harris, *Television Viewing, Aggression, and Ethnicity*, PSYCHOLOGICAL REPORTS, Feb. 1992, at 137-38 (suggesting that the link is so weak as to be undetectable).

135. BUREAU OF JUSTICE STATISTICS, REPORT TO THE NATION ON CRIME AND JUSTICE, 543 (1994) (provides information on the relationship between violent crime arrests and offender age).

murder rate one year, followed by a dramatic drop when that criminal is caught or moves on. As a result, the data of the larger states are more useful for judging the effects of the nondiscretionary issuance laws.

What, if any, conclusions may be drawn from the above state-to-state analysis? In Florida, carry reform appears to have done some good and perhaps saved a number of lives. Nevertheless, much more detailed statistical analysis would be required to isolate with certainty the carry reform law as a factor in the homicide rate decline. In Virginia, where some judges subverted the clear intent of the legislature, the reform law appears to have been ineffective. In Georgia, where the change resulted from an Attorney General's reinterpretation of the law, the evidence suggests that carry reform may have reduced murder rates. The West Virginia results are inconclusive. In Oregon, because the new law took effect with murder rates already in decline, it is impossible to determine whether or how much the new law contributed to that decline. In Pennsylvania, legal reform may arguably have done some good in Philadelphia, and apparently did no harm outside of Philadelphia. The Idaho, West Virginia, Montana, and Mississippi results are inconclusive.

In several of the states, the positive results seem to have been most dramatic the year of adoption, with results tapering off afterwards. This pattern may suggest that the publicity about the law either discouraged criminals or encouraged a short burst of law-abiding citizens applying for permits.

The most significant, certain conclusion to be drawn is that neither large nor small states evidence obvious long-term increases in murder rates after passage of these laws. The experience of the carry reform states plainly shows that homicide rates will not *increase* as a result of crimes committed by persons with carry permits. Carry reform legislation may or may not reduce the homicide rate, but reform legislation apparently does *not* raise the homicide rate.

### III. ADDITIONAL CARRY REFORM RESEARCH

In addition to the state-by-state research discussed above, two other research projects have examined the impact of concealed carry laws. One study (performed by author Cramer) looked at comparative data from California counties. The other study, a master's thesis at a public policy school, analyzed crime trends in six states.

#### A. *Effects of Different Policies Among California Counties*

To carry a concealed firearm in California requires a permit.<sup>136</sup> Open carry of a loaded firearm is prohibited in cities and the unincorporated parts

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136. CAL. PENAL CODE § 12025 (West 1992 & Supp. 1994).

of many of the more populated counties.<sup>137</sup> Even in those unincorporated areas where open carry of a loaded firearm is legal, social pressure or police harassment can make carrying a gun for self-defense impractical.

Concealed carry permits (CCWs) are issued at the discretion of the chief of police of a city in the county, or sheriff of the county, in which the applicant resides. As long as the applicant passes the background check provided by the California Department of Justice, a chief of police or sheriff may issue a permit.<sup>138</sup>

The ideal test of how different government approaches to CCWs affect crime rates would be to contrast two counties with comparable policing, laws, and demographics, with the only difference being that one county issued CCWs readily and the other did not issue them at all. Such a perfect test case does not exist; what does exist is an enormous variation in CCW issuance rates in California. In some counties, CCWs are nearly unobtainable; in other counties, more than three percent of the *total* population have such permits.<sup>139</sup> The question remains: Is there any evidence to support the notion that where CCWs are easily obtained, guns are more likely to be used criminally?

Before presenting the data, consideration should be given to the circumstances in which carrying a handgun for self-defense in public might be useful. The majority of murders in the United States are unlikely to be prevented by wider issuance of such permits. Domestic disturbances turned lethal usually do not take place on the streets, except as spillover from a fight inside a private dwelling. The homicidal attacks against which carrying a gun in public has the most hope of making a difference are those committed in the course of some other public felony such as robbery, burglary, rape, or kidnapping.

Of the 18,269 murders committed nationally in 1988, about nineteen percent were "felony type," one percent were "suspected felony type," and twenty-seven percent were classed as "Unable to determine"—the police either do not know who did it, or the suspect or witnesses could not or would not explain it.<sup>140</sup> Some of the remaining murders—"Romantic

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137. *Id.* § 12031.

138. *Id.* § 12050.

139. *See infra* note 145.

140. FEDERAL BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES, 12-13 (1988) [hereinafter FBI]. In a precise legal sense, a "felony murder" is an unintentional murder that occurs during a violent felony. For example, a bank robber shoots a gun into the ceiling to get the attention of the customers of the bank; the bullet strikes a chandelier which falls on a customer and kills her. Under traditional common law rules, the bank robber would be guilty of murder ("felony murder") under the theory that perpetrating the violent felony evinced such a disregard for human life that it is fair to punish the robber for the fatal, but unforeseen consequences of the robbery.

"Felony murder" is used in this Article and in FBI statistics in a broader sense to include all murders related to violent felonies, whether or not intentional. For example, a

triangle," "Argument over money or property," "Other arguments," and "Miscellaneous nonfelony type"— might be preventable by wider issuance of CCWs, but only to the extent that these involved stalking-type situations or confrontations in public areas. However, to the extent that murders involved fights between people who lived in the same household, or who met in other private circumstances, laws relating to carrying of concealed weapons would have little impact.

The California study presumes that more civilians carrying handguns for self-defense will not reduce the nonfelony murder rate: that all the nonfelony murders involve fights inside a home or other circumstances where handgun carrying would be irrelevant. What is left to consider is the twenty percent of murders that are felony or suspected felony murders. Some felony murders are simply not preventable by armed citizens because of the weapons used. For example, arson was the method for 258 of the murders committed nationally in 1988.<sup>141</sup> Similarly, murders committed with poison, explosives, and narcotics would seem outside the realm of an armed defense solution. But for the ninety-seven percent of felony murders using direct physical force—guns, knives, clubs, bare hands, or strangulation,<sup>142</sup> a handgun carried on the person of the intended victim or a fortuitous bystander at least has the *potential* to save the victim.

As with murder, many rapes do not involve attacks by total strangers outside the home. Concealed weapons permits are thus unlikely to help prevent either incestuous rape in the home or date rape. However, carrying of concealed weapons could possibly help prevent rapists who attack strangers in parking lots and other public spaces. Of course, to the extent that men continue to obtain concealed carry permits in greater numbers than women, the impact on rape would be reduced.

The crimes which a concealed handgun carried on public streets has the greatest potential to prevent are robbery and the murders which result from a robbery. Only 33.4% of reported robberies involve the use of a firearm, so an armed potential victim stands an excellent chance of defending himself successfully in the remaining two-thirds of robberies in which the perpetrator attempts to use brute force or weapons inferior to a gun.<sup>143</sup> A trained citizen could arguably prevail in a fight with a criminal who had a gun, because unlike many trained citizens, few criminals practice with their guns. Nonetheless, the citizen's odds of success are obviously higher when he is better-armed than the attacker. In addition, a significant portion of robberies take place in public places where the victim's carrying a concealed handgun would be relevant. In western states (including California), 49.7% of

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street robbery in which the robber deliberately kills the victim in order to eliminate a witness would be a "felony murder" for purposes of this Article.

141. *Id.*

142. *Id.*

143. *Id.* at 21.

robberies in 1988 were described by the FBI Uniform Crime Reports as "Street/highway."<sup>144</sup>

The final crime to be measured is aggravated assault, a crime which also frequently takes place out of doors. Some people have long held as an article of faith that the presence of a gun turns a fistfight into a gunfight, and battery into at least attempted murder. Accordingly, if the widespread availability of concealed firearms permits results in an increase of the murder rate, one mechanism might be by the escalation of the seriousness of conflicts that begin with an aggravated assault. Conversely, if the widespread carrying of concealed firearms proves to be a general deterrent effect to crime (because criminals do not know which potential victim is carrying a gun), then aggravated assault might be expected to decrease.

### 1. Permit Issuance In California

The California Department of Justice maintains statistics on issuance of CCWs, broken down by the particular police agency issuing the permit.<sup>145</sup> These statistics provide some great surprises. The City of Los Angeles, for example, with almost 3.5 million people, had *no* concealed weapons permits outstanding in 1989. Note that Table 1 shows concealed weapon permit figures by *county*, not city: all the permits issued in Los Angeles County in 1989 were issued by either the Los Angeles Sheriff's Department or by one of the other cities in Los Angeles County. By contrast, many small California cities with populations less than 10,000 had dozens of outstanding CCWs.

The study of the relationship between CCWs and crime rates on a county-by-county basis makes sense for two reasons. First, California law allows a person to obtain a CCW either from any police chief or the sheriff of the county in which the applicant resides. Second, few people restrict their activities to the city in which they live. The California study divides the state's fifty-eight counties into three groups: those counties where fewer than one-tenth of 1% of the population have CCWs; those counties where .1% to 1% of the population have CCWs; and those counties where more than 1% of the population have CCWs. As used here, "population" means everyone living in the county, including large numbers of people who are ineligible for CCWs because of age, criminal history, or mental illness.<sup>146</sup>

The first group is comprised of nineteen predominantly urban or urban dominated counties. The number of CCWs in these counties is less than

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144. *Id.* at 19.

145. CALIFORNIA DEP'T OF JUSTICE, AUTOMATED FIREARMS UNIT LICENSES TO CARRY CONCEALED WEAPONS TOTAL (1989). This report provides all CCW numbers contained in this Article.

146. All county population figures and crime rates are from OFFICE OF THE CALIFORNIA ATTORNEY GENERAL, CRIMINAL JUSTICE PROFILE (Statewide) 23-25 (1989).

one-tenth of one percent of the total population. In some of these counties, a criminal faces almost no risk of attacking a legally armed civilian on the street. In San Francisco, only 1.5 per 100,000 people have CCWs; in Los Angeles County, fewer than 5 per 100,000 people have CCWs. Stated another way, each of the following events are about equally likely to occur:

- A criminal will attack a Los Angeles citizen who has a permit to carry a concealed weapon.
- A poker player will be dealt a straight flush in the first five cards.<sup>147</sup>
- A randomly selected high school football player will one day be the starting quarterback in the Super Bowl.<sup>148</sup>

Thus, when a criminal in Los Angeles or San Francisco attacks someone, that criminal can essentially ignore the risk that the victim may be legally carrying a gun: the criminal is more likely to attack an off-duty or plainclothes police officer than a legally armed civilian. This probability is particularly significant because the first group of counties contains five-sixths of the state's population. As a result, the crime rates in these counties largely determine the statewide averages.

The second group is comprised of twenty-two counties, in which between .1% and 1% of the population held a CCW in 1989. Primarily rural, some of the counties, like Fresno and Sonoma, have at least one medium-sized city. This group's major violent felony rates were below the statewide average, although rape was barely so. In fact, the murder rate for this group was the *lowest* of all three groups of counties. However, the rate was not much lower than that of the third group.

The third group is comprised of seventeen counties, in which more than one percent of the population has a CCW. These counties are predominately rural with only a few small cities. Most of these counties have so few people that crime rates per 100,000 people can be somewhat misleading. For example, a single murder can make a county of 3600 people appear artificially dangerous. By contrast, some of these counties went all of 1989 without a murder. In 1989, this group had the lowest rates for rape, aggravated assault, and robbery. However, this group had a slightly higher murder rates than did the second group examined above. Even so, the third group's rate was *still* less than sixty-nine percent of the statewide average. Even this result may be a statistical fluke, because this third group of counties had the lowest murder rate in 1988. To give some idea of how smaller sample sizes can affect results, if these seventeen counties had experienced seven fewer murders in 1989, the third group would have had the lowest crime rates in *all* categories of violent crime. Significantly, more

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147. LES KRANTZ, WHAT THE ODDS ARE 213 (1992) (the odds are 72,192 to 1).

148. *Id.* at 108 (100,000 to 1).

than half the murders committed in the third group were in the two counties (Madera and Yuba) having the *lowest* CCW issuance rates in this group.

Now look at Table 2. Theoretical analysis predicted a correlation between a higher number of CCWs and a more effective prevention of robbery: and, indeed the liberal issuance counties experienced robbery rates that were only *fifteen percent* of the statewide average. The incidence of rape was expected to be relatively unaffected by a higher number of CCWs; and while rape rates were lower than the statewide average, the difference was not dramatic. Finally, murder and aggravated assault rates were about one-third below the statewide average, even with all those guns ready to be drawn.

TABLE 1: CALIFORNIA CONCEALED WEAPONS PERMITS  
& VIOLENT CRIME RATES

	CCW's per 100,000	Aggravated Assault	Homicide	Rape	Robbery
Highly restrictive counties	28.3	621.5	11.7	41.5	372.7
Moderately restrictive counties	437.5	449.9	6.5	40.4	124.4
Non- restrictive counties	1,736.5	414.2	7.5	31.3	48.5
California total	122.5	593.5	10.9	41.1	331.8

TABLE 2: CALIFORNIA COUNTY CRIME RATES  
AS A PERCENTAGE OF STATEWIDE AVERAGES

County Group	Permits per 100,000	Aggravated Assault	Homicide	Rape	Robbery
Highly restrictive counties	less than 100	105%	107%	101%	112%
Moderately restrictive counties	100 to 1,000	76%	60%	98%	38%
Non-restrictive counties	greater than 100,000	70%	69%	76%	15%

## 2. What Do the Data Tell Us?

It would, of course, be foolish to assert that the large percentage of outstanding CCWs in the third group of counties is *the* reason for the lower rates for aggravated assault, robbery, and rape. These are rural counties, with dramatically different demographics than the urban counties in California. Nonetheless, the correlation between the number of CCWs and the lower rates may be *a* reason. Why are the aggravated assault rates so low in these counties where an individual would seemingly have trouble walking down the street without passing an armed civilian? Perhaps the conventional wisdom—*have gun will fight*—is simply wrong. Perhaps the presence of a gun instead causes a great many aggressors simply to withdraw from the possibility of fight, because the risk of death is so obvious. The above are all suppositions. Nevertheless, even with all those people authorized to carry guns, the rates for murder, rape, aggravated assault, and most dramatically, robbery, were lower than the statewide average.

Put another way, although the percentage of the population who are licensed to carry a gun in this third group of counties is roughly analogous to the percentage of the U.S. population that watches the Phil Donahue show, the murder rate remains quite low.<sup>149</sup> Considering the large number

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149. One out of 15 households with television sets watches the Phil Donahue show. *Id.* at 260.

of CCWs outstanding in this third group of counties, if greater numbers of CCWs are really a threat to public safety, the other factors that determine murder and aggravated assault rates must be truly enormous to so completely overwhelm the effects of all those CCWs.

In sum, the comparative data from California counties suggest, but do not prove, that making concealed carry permits available to licensed, trained citizens may reduce the robbery rate, and perhaps the rates for other violent crimes. Conversely, the data are inconsistent with the hypothesis that CCW issuance will lead to more murders or other crimes.

#### *B. Six-State Comparative Study*

Brian Withrow, a master's degree candidate at Southwest Texas State University, took a different approach to the study of carry reform.<sup>150</sup> Withrow looked at three states which had implemented carry reform: Florida, Pennsylvania, and Oregon. He then paired each state with the closest matching state having similar demographics, but no carry reform. He paired Florida with Texas, Pennsylvania with Illinois, and Oregon with Arizona. As Withrow acknowledges, the pairings do not represent exact matches but only as similar as is possible.<sup>151</sup> The attempts to match any pair of states suffers from this limitation.

Withrow examined each pair of states to test the impact of carry reform laws.<sup>152</sup> If carry reform laws were effective in producing a statistically noticeable reduction in the crime rate, then a state which enacted carry reform would be expected to show an improving trend (relative to a non-reform state) in various crime categories. For example, assume Pennsylvania (pre-reform) and Illinois (no reform) had similar rape rates before concealed carry reform was enacted in Pennsylvania. However, if after Pennsylvania reformed its carry law, the Pennsylvania rape rate remained stable while the Illinois rate rose sharply, such a result would be consistent with the hypothesis that concealed carry reduces the rape rate.

The Withrow research suggests that concealed carry reform can save lives. The Florida/Texas and Pennsylvania/Illinois pairings are good test cases. Prior to any carry reform, all four states had strong laws against carrying firearms; after the reform laws were enacted, the Florida and Pennsylvania systems were allowed to work so that large numbers of citizens acquired permits (As compared to Virginia, where some local officials refuse to implement the state's "shall issue" system).<sup>153</sup>

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150. Brian L. Withrow, *The Effectiveness of Firearms Conceal Carry Laws on the Incidence and Pattern of Violent Crime* (1993) (unpublished M. Pub. Admin. thesis, Southwest Texas State University).

151. *Id.* at 3, 38-39.

152. *Id.* at 43-73.

153. See *supra* notes 60-61, 63-64 and accompanying text.

The Oregon/Arizona pairing, however, is poorly chosen. Although Arizona did not have a "shall issue" concealed carry law at the time of the Withrow study (Arizona enacted a "shall issue" law in 1994), Arizona has always allowed adults to carry an *unconcealed* handgun without a permit.<sup>154</sup> Unlike in some other states where open carry is ostensibly legal such as Colorado and North Carolina,<sup>155</sup> open carry in Arizona has always been tolerated by the police, and is common, even in downtown Phoenix. Accordingly, the Oregon/Arizona pairing compares a state which moved from limited concealed carry to widespread concealed carry (Oregon) with a state that has always had limitless open carry (Arizona). Unlike the Florida/Texas and Pennsylvania/Illinois pairings, the Oregon/Arizona comparison does not contrast a state which changed its restricted carry policy—e.g., Florida and Pennsylvania—with a state which retained its restrictive policy—e.g., Texas and Illinois. Thus, the Oregon/Arizona results do not provide worthwhile information about the contrast between a restrictive and a "shall issue" carry policy, and may be appropriately discarded.

By contrast, the results of the Florida/Texas and Pennsylvania/Illinois comparisons legitimately provide strong support for the hypothesis that concealed carry reform reduces murder, weak support for reduction in aggravated assault and in robbery, and no support for a statistically noticeable reduction in rape. Significantly, the results in both pairings are identical.

TABLE 3: SUPPORT FOR HYPOTHESIS THAT  
CONCEALED CARRY REFORM REDUCES CRIME<sup>156</sup>

State Pairs	Murder	Aggravated Assault	Rape	Robbery
Florida/ Texas	supports	w e a k l y supports	does not support	w e a k l y supports
Pennsylvania/ Illinois	supports	w e a k l y supports	does not support	w e a k l y supports
O r e g o n / Arizona	does not support	supports	does not support	does not support

Recall that in the state-by-state analysis of homicide trends, Florida, a highly populous state with a major homicide problem, was the only state to

154. See *supra* notes 117 and accompanying text.

155. COLO. REV. STAT. ANN. § 18-12-105(1)(b) (West 1990 & Supp. 1994); N.C. GEN. STAT. § 14-269(a) (1993).

156. Withrow, *supra* note 150, at 75.

show a major change in its homicide rate after the enactment of concealed carry.<sup>157</sup> The Withrow data reinforces the tentative conclusion suggested by the raw Florida data: in a large state with a serious crime problem, concealed carry reform may have a significant life-saving effect. Withrow's research also suggests that carry reform could have a small but statistically significant effect in reducing aggravated assault and robbery.

In sum, three different approaches to studying the effects of concealed carry reform on crime rates have been presented: (1) a comparison of state homicide trends with national trends, (2) a comparison of crime rates among different counties with different carry policies in California, and (3) before and after crime rates as compared between Florida and Texas, and between Pennsylvania and Illinois. The results are consistent in all three studies. Concealed carry reform may reduce murder rates, at least in large, high-crime states. Concealed carry reform may also reduce aggravated assault and robbery rates. Perhaps most significantly, evidence does not suggest that concealed carry reform will cause a net increase in the homicide rate, or in any other crime rate. Despite the results in the many American states which have passed carry reform, the gun control lobbies persist in predicting a major increase in homicide whenever concealed carry reform is introduced. This continued effort must be attributed to the triumph of ghoulish hope over experience.

#### IV. OTHER ISSUES

The evidence presented thus far cannot guarantee that carry reform will significantly reduce a state's homicide rate. So why change the laws if they are not *clearly* going to reduce murder rates? Conversely, however, if carry reform does not present a clear threat to public safety, why not allow law-abiding citizens who have passed a background check for criminal behavior and mental stability to have the means to defend themselves most effectively? Also, because results of carry reform in states such as Florida suggest that carry reform has the potential to contribute to public safety, why not allow law-abiding citizens to make their own choice about carrying? Thus, this Part explores issues specifically related to that choice.

##### A. Saving Lives

Carry reform is no panacea for crime. However, the failure to enact carry reform can have deadly consequences. In October 1991 in Killeen, Texas, George Hennard rammed his pickup truck through the plate glass window of Luby's cafeteria. Using a pair of ordinary pistols, he murdered twenty-three people in ten minutes, stopping only when the police arrived. Dr. Suzanna Gratia, a cafeteria patron, had a gun in her car. In conformity

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157. See *supra* subpart II.B.

to Texas law, however, the gun was not carried on her person; Texas, despite its Wild West image, was the first state in the nation to completely prohibit the carrying of handguns.<sup>158</sup> Carry reform legislation had almost passed the legislature, but had been stopped in the House Calendars Committee by the gun control lobby.<sup>159</sup>

A few months later, Dr. Gratia testified to the Missouri Legislature (concerning a concealed handgun permit law being considered in that state) that if she had been carrying her gun, she could have shot at Hennard:

I know what a lot of people think, they think, "Oh, my God, then you would have had a gunfight and then more people would have been killed." Unhunh, no. I was down on the floor; this guy is standing up; everybody else is down on the floor. I had a perfect shot at him. It would have been clear. I had a place to prop my hand. The guy was not even aware of what we were doing. I'm not saying that I could have saved anybody in there, but I would have had a chance.<sup>160</sup>

Hennard reloaded five times and threw away one pistol because it jammed, so plenty of opportunity existed for someone to fire at him. Dr. Gratia may not have been able to kill or wound Hennard. Nonetheless, Hennard would at least have been forced to dodge hostile gunfire and would not have been able to methodically finish off his victims as they lay wounded on the floor. The hypothetical risks of a stray bullet from Dr. Gratia's gun would have been rather small compared to the actual risks of Hennard not facing any resistance. Because of the restrictive Texas law, Dr. Gratia was helpless as Hennard murdered both her parents.

Two months later, a pair of criminals with stolen pistols herded twenty customers and employees into the walk-in refrigerator of a Shoney's restaurant in Anniston, Alabama. A customer, Thomas Glenn Terry, was hiding under a table. Unlike Dr. Gratia, Terry was armed with the .45 semi-automatic pistol he carried legally under Alabama law. One of the robbers discovered Terry, but Terry killed him with five shots in the chest. The second robber, who had been holding the manager hostage, shot at Terry and grazed him. Terry returned fire, critically wounding the robber.<sup>161</sup> Twenty-three innocent people died in Killeen, Texas, where carrying a gun for self-defense was illegal. Twenty innocent lives were saved in Anniston, Alabama, where self-defense permits are legal.<sup>162</sup>

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158. Cramer, *supra* note 2, at 113-19; Suzanna M. Gratia, *If I Had My Gun . . .*, WASH. POST, Feb. 27, 1993, at A21.

159. Telephone Interview with NRA official (Oct. 1991).

160. David B. Kopel, *Hold Your Fire*, POL'Y REV., Winter 1993, at 7.

161. J. Neil Schulman, *A Massacre We Didn't Hear About*, L.A. TIMES, Jan. 1, 1992, at B5.

162. Abraham Tennenbaum, *Handguns Could Help*, BALTIMORE MORNING SUN, Oct. 26, 1991, at 9A.

After the Luby's incident, the Texas legislature once again debated carry reform. In an ironic reversal of gun control advocates' frequent efforts to use massacres as springboards for various gun prohibition measures, these same advocates insisted that public policy should not be based on isolated massacres. Control advocates would suggest that, although Dr. Gratia might have saved lives with her gun, more lives would be lost in the long run because of mistakes made by angry or incompetent citizens carrying guns. As the research above has indicated, such a prediction has poor factual support.

Mass murders in public places are rare. Nonetheless, the Anniston incident is not the only time a citizen armed with a gun has stopped a potential massacre. In 1986, a homeless Cuban refugee, armed with a "two-foot ornamental blade apparently purchased in Time Square," went on a rampage on the Staten Island Ferry. He killed two people and wounded nine others, but was subdued by a retired police officer at gunpoint.<sup>163</sup> In Las Vegas in July 1993, a man with a shotgun screamed, "I'm sick of this, and I'm not going to take it any more," and then opened fire in a state disability insurance office. He jumped into his truck and began driving wildly through the building. A security guard shot him in the head.<sup>164</sup>

One could possibly argue that the above two cases are distinguishable because a retired police officer just happened to be present at fortuitous times. Unfortunately, not every mass-murderer makes the mistake of picking crowd that includes a retired police officer or a security guard. Nevertheless, assuming proper training and a background check, if the average citizen can use a gun and pose no more danger to society than does a former police officer or a security guard with a gun (as will be demonstrated below), then expanding the number of licensed, trained people who are allowed to carry firearms will commensurately reduce the potential for carnage by psychotic killers.

In Israel, a permit to own a handgun (which is granted to every law-abiding citizen) is equivalent to a carry permit. In April 1984, three terrorists opened fire with automatic rifles and began throwing hand grenades at the busiest intersection in West Jerusalem. As the *Los Angeles Times* reported, "One of the attackers was killed in a hail of answering fire from the owners and customers of nearby shops."<sup>165</sup> A wild firefight broke out between the Israelis and the two remaining terrorists until the police arrived and captured the terrorists. During the chaotic and flurried exchange of bullets, some of the Israelis were possibly wounded by

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163. Robert D. McFadden, *Man with a Sword Kills 2 and Wounds 9 on Staten Island Ferry*, N.Y. TIMES, July 8, 1986, at A1. The retired officer carried a gun for a part-time job as a security guard. *Id.*

164. *Man Shoots Up Disability Office*, L.A. TIMES, July 9, 1993, at A22.

165. Norman Kempster, *48 Wounded in Terrorist Attack in Jerusalem*, L.A. TIMES, Apr. 3, 1984, at 1, 19.

"friendly fire."<sup>166</sup> When the shooting stopped, however, the only death was that of a terrorist. The next day, the surviving terrorists were presented to the media. They explained their foiled plan to machine-gun a succession of crowded areas, fleeing before the police arrived. One terrorist complained indignantly that his bosses had not told him that Israeli citizens carry guns.<sup>167</sup>

Now contrast the opposite results of two otherwise similar incidents. In November 1993, a lone gunman shot twenty-two unarmed, innocent victims on the Long Island Railroad. Four months later, a terrorist group intent on sabotaging the new peace accord between Israel and the Palestinians, attempted to perpetrate a mass murder of people using public transportation in Israel. The Associated Press reports:

A Palestinian opened fire with a submachine gun at a bus stop near the port of Ashod today, killing one Israeli and wounding four before being shot to death by bystanders . . . . National police spokesman Erich Bar-Chen said today's attacker, who was armed with an Uzi submachine guns, was shot and killed by a civilian and a soldier who were at the bus stop and hitchhiking post used by soldiers. Ashod is 15 miles south of Tel Aviv and 15 miles north of the Gaza Strip.<sup>168</sup>

At the very least, carry permits for licensed, trained citizens clearly have saved lives when madmen or terrorists have attempted mass murder in public places. Accordingly, opponents of carry licenses must bear the burden of demonstrating that the number of lives lost from the issuance of carry licenses will outweigh the lives saved during attempted massacres. As detailed above, opponents of carry reform cannot carry their burden of proof. Evidence does not suggest that carry reform will cause any increase in murder, let alone an increase so large as to outweigh the significant number of lives that could be saved by allowing people like Dr. Suzanna Gratia to help protect the public.

#### *B. Peace of Mind*

Another important benefit to be derived from properly licensed, trained, and armed citizens is peace of mind. By way of analogy, many people choose to buy automobiles with passenger-side air bags or other safety features. Many people also choose to use the seat belts in a car. Of course, the odds are small that on any given automobile trip there will be an accident in which the safety belt or other safety device will serve its ultimate purpose. Similarly, the odds are small that a person who goes out

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166. *Id.*

167. Don B. Kates, Jr., *Firearms and Violence: Old Premises, New Research*, in 1 VIOLENCE IN AMERICA 209 (Ted R. Gurr ed., 1989).

168. AP, Apr. 7, 1994, reprinted in MARIN INDEPENDENT JOURNAL, at A3.

in public will be attacked by a criminal on any given day. But even on days when drivers are not struck by other cars, the car's safety devices confer a genuine benefit because the drivers feel safer. Likewise, if people feel safer because they carry a gun and in turn lead happier lives because they feel safer and more secure, then the carrying of guns makes a direct and nontrivial contribution to their overall quality of life.<sup>169</sup> If women feel safer walking at night because they can carry a firearm, then the firearm makes a tangible contribution to a better society, whether or not a statistically significant drop in the crime rate results.

Of course, the increased peace of mind that results from people knowing they will be able to protect themselves would not be ultimately beneficial if the increased carrying of firearms actually caused more criminal violence. As the data presented above indicate, however, allowing licensed, trained citizens to carry firearms for protection does not appear to cause more gun crime.

### C. *The Morality of Defensive Firearms*

#### 1. Taking the Law into One's Hands

The use of firearms for lawful self-defense by licensed, trained citizens is sometimes decried as "taking the law into one's hands." In a legal sense, however, the use of armed force for self-defense is not "taking the law into one's hands." Using deadly force or the threat thereof to defend against a violent felony is legal in all fifty states. American law unanimously authorizes deadly force whenever no lesser force will suffice—not merely against attempted murder, but also to thwart violent felonies such as rape.<sup>170</sup> Many circumstances therefore legally justify exercising the choice to use force for self-defense or defense of another. Accordingly, using such force cannot be "taking the law into one's hands" any more than exercising other lawful choices, such as signing a contract. Moreover, every American state recognizes the right of citizens to arrest a person committing a violent felony in their presence.

Thus, more accurately speaking, when criminals violate the law and use force, they truly take the law into their own hands. When law-abiding citizens react by using or threatening force to stop the law-breaking act, they are merely taking the law *back* from the criminals, *restoring* the law to its rightful owners—law-abiding citizens.

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169. James D. Wright, *The Ownership of Firearms for Reasons of Self Defense*, in FIREARMS AND VIOLENCE 327 (Don B. Kates, Jr. ed., 1984).

170. Don B. Kates, Jr. & Nancy J. Engberg, *Deadly Force Self-Defense Against Rape*, 15 U.C. DAVIS L. REV. 873, 877-80 (1982).

## 2. Violence Begets Violence

Some may assert that carrying or using a gun for protection is immoral, or that "violence begets violence." For example, author Betty Friedan argues "that lethal violence even in self-defense only engenders more violence."<sup>171</sup>

Ms. Friedan's remark implies that a woman who shoots a homicidal rapist should be condemned for engendering violence, rather than be commended for preventing even worse violence. According to Ms. Friedan's logic, victims of murderous assault should forgo violence and rather rely, post-mortem, on the police to arrest the murderer. Although pacifism may have its adherents, the American legal system is not among them. As criminal law scholar Herbert Wechsler observed, the right of crime victims to use deadly force is based on what Wechsler called the "universal judgment that there is no social interest in preserving the lives of aggressors at the cost of those of their victims."<sup>172</sup>

The American people overwhelmingly believe in the moral legitimacy of the use of deadly force against criminal attack. A 1985 Gallup survey asked, "If the situation arose, would you use deadly force against another person in self-defense?" Only thirteen percent said "no." Presumably, some were expressing their own preference, but still would not felonize persons who chose differently.<sup>173</sup>

After Bernhard Goetz shot four teenagers who were attempting to rob him on a Manhattan subway in 1984, a *Newsweek* poll asked the following question: "Do you feel that taking the law into one's own hands, often called vigilantism, is justified by circumstances?"<sup>174</sup> Intentionally or not, the question was phrased in a way that was quite prejudicial to self-defense; "vigilantism" has nothing to do with self-defense, but instead refers to extra-judicial punishment of a suspect by a mob.<sup>175</sup> The question was asked in two separate surveys. In one group, twenty-three percent said violence was never justified; in the other survey, seventeen percent so opined.<sup>176</sup>

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171. Ann Japenga, *Would I Be Safer With a Gun?*, HEALTH, March/April 1994, at 54.

172. Herbert Wechsler & Jerome Michael, *A Rationale of the Law of Homicide: I*, 27 COLUM. L. REV. 701, 736 (1937).

173. Tom Morganthal et al., *A Goetz Backlash?*, NEWSWEEK, Mar. 11, 1985, at 53.

174. *Id.*

175. Richard M. Brown, *The American Vigilante Tradition*, in THE HISTORY OF VIOLENCE IN AMERICA: HISTORICAL AND CONTEMPORARY PERSPECTIVES 154-217 (Hugh D. Graham & Ted R. Gurr eds., 1969).

176. Morganthal et al., *supra* note 173, at 53. New York Governor Mario Cuomo stated, however, that "[i]f this man was defending himself against attack with reasonable force, he could be legally [justified, but] not morally . . ." "Deathwish" Vigilante, NEWSWEEK, Jan. 7, 1985, at 10.

Plainly then, the very large majority of the American people believe that use of force, including deadly force if necessary, is a legitimate response to dangerous criminal attacks. In a society that respects liberty of conscience, this large majority should not attempt to force its morality of lawful self-defense onto the minority of the population that would prefer not to use such force. At the same time, the pacifist minority should not attempt to force its morality onto the majority that approves of otherwise lawful, defensive force.

### 3. Religion

Whenever legislative bodies debate concealed carry laws, representatives of organizations such as the National Council of Churches commonly show up and announce the “moral” opposition to concealed carry on behalf of “the religious community.” Nonetheless, reflexive hostility to the lawful use of force for legitimate defense is hardly the only moral position a sincerely religious person may hold.<sup>177</sup>

The *Book of Exodus* specifically absolves a homeowner who kills a burglar under certain circumstances.<sup>178</sup> The Sixth Commandment, “Thou shalt not kill,” refers to murder only, and does not prohibit the taking of life under any circumstances; notably, the law of Sinai specifically requires capital punishment for a large number of offenses.<sup>179</sup> Earlier in *The Bible*, Abram, the father of the Hebrew nation, learns that his nephew Lot has been taken captive. Abram (whom God later renames “Abraham”) immediately calls out his trained servants, sets out on a rescue mission, finds his nephew’s captors, and attacks and routs those captors, thereby rescuing Lot.<sup>180</sup> *The Bible* presents Abram’s violent rescue of an innocent captive as the morally appropriate and necessary choice.

Gun prohibitionists who look to *The Bible* for support cannot find specific interdictions of weapons, but rather point to general passages about peace and love. They cite such verses as “Do not resist an evil person. If someone strikes you on the right cheek, turn to him the other also”,<sup>181</sup>

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177. For a thorough discussion of the issue, see BRENDAN FURNISH & DWIGHT SMALL, THE MOUNTING THREAT OF HOME INTRUDERS: WEIGHING THE MORAL OPTION OF ARMED SELF-DEFENSE (1993).

178. *Exodus* 22:2 (NIV) (“If the thief is caught while breaking in and is struck so that he dies, the defender is not guilty of bloodshed.”). The next verse continues, “[B]ut if it happens after sunrise, he is guilty of bloodshed. ‘A thief must certainly make restitution, but if he has nothing, he must be sold to pay for his theft.’” *Id.* 22:3.

179. *Id.* 21-22.

180. *Id.* 14.

181. *Matthew* 5:39.

"Love your enemies and pray for those who persecute you";<sup>182</sup> and "Do not repay anyone evil for evil."<sup>183</sup>

None of these exhortations take place in the context of an imminent threat to life. A slap on the cheek is a blow to pride, but not a threat to life. Reverend Anthony Winfield, author of a study of Biblical attitudes towards weapons, suggests these verses command the faithful not to seek revenge for evil acts and not to bear grudges against persons who have done them wrong. He cites *Romans* 12:18, "If it is possible, as far as it depends on you, live in peace with everyone," as showing an awareness that in extreme situations, one may find it impossible to live in peace.<sup>184</sup>

The preaching of John the Baptist and Peter, both of whom converted soldiers, further evidences that the New Testament does not command universal pacifism. Neither John nor Peter demanded that the soldiers lay down their arms or find another job.<sup>185</sup> John instructed the soldiers, "Don't extort money and don't accuse people falsely," just as he instructed tax collectors, "Don't collect any more than you are required to."<sup>186</sup> John plainly implies that being a soldier or a tax collector is not itself wrong, so long as the inherent power of these positions is not used for selfish or improper purposes.

Of course, many gun prohibitionists would approve of soldiers carrying and using weapons when necessary. But if—as the New Testament strongly implies—a person may be both a good soldier and a good Christian, then one cannot claim *The Bible* always forbids the use of violence, no matter what the purpose. The conversions of the soldiers support Winfield's thesis that general "peace and love" passages are not blanket prohibitions on the use of force in all circumstances.<sup>187</sup>

*The Bible's* approving attitude towards the bearing of arms is not confined to professional soldiers. At the Last Supper, Jesus begins his final instructions to the apostles before his death:

"When I sent you without purse, bag or sandals, did you lack anything?"  
"Nothing," they answered.

[Jesus] said to them, "But now if you have a purse, take it, and also a bag; and if you don't have a sword, sell your cloak and buy one. . . . [W]hat is written about me is reaching its fulfillment."<sup>188</sup>

The disciples then announced, "See Lord, here are two swords." Jesus replied, "That is enough."<sup>189</sup> Even if the passage is read with absolute

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182. *Id.* 5:44.

183. *Romans* 12:17.

184. REV. ANTHONY L. WINFIELD, SELF-DEFENSE AND THE BIBLE 28-32 (1991).

185. *Luke* 3:14; *Acts* 10:22-48.

186. *Luke* 3:13-14.

187. See *supra* note 184 and accompanying text.

188. *Luke* 22:35-37.

189. *Id.* 22:38.

literalness, Jesus was no more commanding that every apostle *must* carry a sword than was he commanding them to carry a purse or a bag. For the eleven,<sup>190</sup> two swords were sufficient or "enough."

More importantly, Jesus may not have been issuing an actual command that anybody carry swords, or purses, or bags. Jesus was making the broader, metaphorical point that after he was gone, the apostles would have to take care of their own worldly needs to some degree. The purse (generally used for money), the bag (generally used for clothing and food), and the sword (generally used for protection) are all examples of tools used to take care of such needs. When the apostles took Jesus too literally and started showing him their swords, Jesus, possibly frustrated that they missed the metaphor, ended the discussion.

Even when reduced to metaphor, however, the passage still contradicts the rigid pacifist viewpoint. In the metaphor, the sword, like the purse or the bag, is treated as an ordinary item for any person to carry. If weapons and defensive violence were illegitimate under all circumstances, Jesus would not have instructed the eleven to carry swords, even in metaphor, any more than Jesus would have created metaphors suggesting that people carry demonic statues for protection, or that they metaphorically rape, rob, and murder.

A few hours later, when soldiers arrived to arrest Jesus, Peter sliced off the ear of one of their leaders. Jesus healed the ear and then commanded, "No more of this,"<sup>191</sup> or "Put your sword away,"<sup>192</sup> or "Put your sword back in its place, for all who draw the sword will die by the sword."<sup>193</sup>

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190. Judas Iscariot had already left to meet with those who would arrest Jesus. *John* 13:27.

191. *Luke* 22:49-51.

192. *John* 18:11.

193. *Matthew* 26:52. The quotation is sometimes rendered, "He who lives by the sword will die by the sword."

Biblical scholar John Spong suggests that the sword incident in the Garden of Gethsemane never happened. He notes that *The Gospel According to Mark*, generally agreed to be the oldest of the four gospels, mentions no such incident. As the gospels proceed chronologically in order of composition from *Matthew* to *Luke* to *John*, the garden confrontation is introduced and then additional details are added. Spong notes the considerable textual evidence that when Jesus was arrested, the disciples panicked and fled, and did not regain their courage until after Easter. Spong suggests that the story of the disciples confronting the Roman soldiers was an invention of the later gospel authors (or their sources) who simply would not accept the humiliation of the disciples' apparent, if temporary, cowardice. JOHN S. SPONG, RESURRECTION: MYTH OR REALITY? 224-25 (1994). Spong subscribes to the "reality" side of the question posed by his book's title, although he finds considerable myth in many of the details and argues that a significant number of stories in the gospels are not intended as literal history.

Jesus then rebuked the soldiers for “com[ing] out with swords and clubs,” for Jesus was not “leading a rebellion.”<sup>194</sup>

The most immediate meaning of these passages is that Jesus was preventing interference with God’s plan for the arrest and trial.<sup>195</sup> Additionally, Jesus was instructing the eleven not to begin an armed revolt against the local monarchy or the Roman imperialists. Jesus had already refused the Zealots’ urging to lead a war of national liberation.

Do the passages also suggest a general prohibition against drawing swords or other weapons for defense? Luke and John’s versions of the story do not indicate such a prohibition, but the version in *Matthew* could be so read.

If *Matthew* is analyzed along the lines of “He who lives by the sword will die by the sword,” the passage is an admonition that a person who centers his life on violence (such as a gang member) will likely perish. On the other hand, a translation of “all who draw the sword will die by the sword” could be read as a general rule against armed violence in any situation.

Most theologians would concur that the best way to understand *The Bible* is not to look at passages in isolation, but rather to carefully study passages in the context of the rest of *The Bible*. If the single line in *Matthew* were interpreted to mean that to draw the sword is always wrong, then it would be difficult to account for other passages which suggest that drawing a sword as a soldier (or carrying a sword as an apostle) is neither inappropriate nor prohibited. Viewed in the context of the rest of *The Bible*, this passage in *Matthew* is a warning against violence as a way of life, rather than as a complete ban on defensive violence in all situations.

The Vatican’s Pontifical Council for Justice and Peace recently surmised, “In a world marked by evil and sin, the right of legitimate defense by armed means exists. This right can become a serious duty for those who are responsible for the lives of others, for the common good of the family or of the civil community.”<sup>196</sup>

The Catholic Church recognizes people as saints because, among other reasons, the lives of saints are considered to be worthy of study and emulation. February 27 is the feast day of Saint Gabriel Possenti. According to *The One Year Book of Saints*, as a young man in nineteenth-century Italy, Francesco Possenti was known as the best dresser in town, as

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194. *Matthew* 26:55; *Mark* 14:48; *Luke* 22:52.

195. After telling Peter to put his sword away, Jesus rhetorically asks, “Shall I not drink the cup the Father has given me?” *John* 18:11. See also *Matthew* 26:53.

196. PONTIFICAL COUNCIL FOR JUSTICE AND PEACE, THE INTERNATIONAL ARMS TRADE: AN ETHICAL REFLECTION 12 (1994). The document notes that “the right” to armed defense “is coupled with the duty to do all possible to reduce to a minimum, and indeed eliminate, the causes of violence.” *Id.*

a "superb horseman," and as "an excellent marksman."<sup>197</sup> The young Possenti was also a consummate partygoer, who was engaged to two women at the same time. Twice during school he fell desperately ill, promised to give his life to God if he recovered, and then forgot his promise. One day at church, Possenti saw a banner of Mary. He felt that her eyes looked directly at him, and he heard the words "Keep your promise." As a result of his vision, Possenti immediately joined an order of monks, taking the name Brother Gabriel.<sup>198</sup>

Saint Gabriel Possenti is primarily remembered for the following incident:

On a summer day a little over a hundred years ago, a slim figure in a black cassock [Possenti] stood facing a gang of mercenaries in a small town in Piedmont, Italy. He had just disarmed one of the soldiers who was attacking a young girl, had faced the rest of the band fearlessly, then drove them all out of the village at the point of a gun. . . . [W]hen Garibaldi's mercenaries swept down through Italy ravaging villages, Brother Gabriel showed the kind of man he was by confronting them, astonishing them with his marksmanship, and saving the small village where his monastery was located.<sup>199</sup>

Saint Gabriel Possenti displayed his "astonishing marksmanship" after having disarmed the soldier. The mercenaries' leader told Possenti that it would take more than just one monk with a handgun to make the mercenaries leave town. Possenti pointed to a lizard that was running across the road. He then shot the lizard through the head. The mercenaries immediately decided that discretion was the better part of valor, and fled the village.

Jewish law draws the same conclusion as the Vatican Pontifical Council: "If someone comes to kill you, rise up and kill him first."<sup>200</sup> Bystanders are likewise required to kill persons who are attempting rape.<sup>201</sup> Although Jewish law imposes a duty of self-defense, the duty to defend others takes precedence.<sup>202</sup>

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197. REV. CLIFFORD STEVENS, THE ONE YEAR BOOK OF SAINTS 66 (1989).

198. *Id.*

199. *Id.*

200. *Babylonian Talmud, Sanhedrin* 72a. The context of this passage is a discussion of the protection of one's property. The passage is a direct response to the offending thief having reasoned, "If I go there, he [the owner] will oppose me and prevent me; but if he does, I will kill him." *Id.*

201. *Id.* 73a.

202. For excellent discussions of Jewish law and the duty to use force, see George P. Fletcher, *Defensive Force as an Act of Rescue*, SOC. PHIL. AND POL'Y, Spring 1990, at 170, and George P. Fletcher, *Self-Defense as a Justification for Punishment*, 12 CARDOZO L. REV. 859 (1991).

The view that forcible resistance to evil attack is itself evil presents serious implications. According to this logic, Patrick Henry and the other founding fathers were wrong to urge armed resistance against the British Redcoats; the Jews who led the Warsaw Ghetto revolt against Hitler were immoral; Jeffrey Dahmer's victims would have been wrong to use a weapon to protect themselves; Saint Gabriel Possenti was a paragon of evil; Abraham should not have rescued his kidnapped nephew; and police officers who fire their guns to protect innocent people are sinful.

Consider the following situation. A mother in a rough Los Angeles neighborhood is confronted with an escaped psychopathic murderer who has broken into her house. The woman has good reason to fear that the intruder is about to slaughter her three children. If she does not shoot him with her .38 special, the children will most likely be dead before the police can arrive. Is the woman morally obligated to simply murmur "violence engenders violence," keep her handgun in the drawer, and watch her children die? Or, is the mother rather morally *obligated* to save her children by using her gun to stop the intruder?

The view that life is a gift from God and that permitting the wanton destruction of one's own life (or the life of a person under one's care) amounts to hubris is hardly new. As stated in a 1747 sermon in Philadelphia:

He that suffers his life to be taken from him by one that hath no authority for that purpose, when he might preserve it by defense, incurs the Guilt of self murder since God hath enjoined him to seek the continuance of his life, and Nature itself teaches every creature to defend [it]self.<sup>203</sup>

Whatever their disagreements on other matters, the natural rights philosophers who provided the intellectual foundation of the American Revolution collectively viewed self-defense as "the primary law of nature," from which many other legal principles could be deduced.<sup>204</sup>

As the great Justice Louis Brandeis proclaimed: "We shall have lost something vital and beyond price on the day when the state denies us the right to resort to force in defense of a just cause."<sup>205</sup>

Leading criminal law scholars have emphasized a different, less philosophical point: Victims protect the entire community when they kill a

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203. C. Asbury, *The Right to Keep and Bear Arms in America: The Origins and Application of the Second Amendment to the Constitution* 39-40 (1974) (unpublished Ph.D. dissertation in history, University of Michigan) (available at U. of Mich. Graduate Library), quoted in Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 230 (1982).

204. 3 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* \*4 (also asserting that the right was inalienable); THOMAS HOBBES, *LEVIATHAN* 88, 95 (1964) (such a covenant against self-defense is void); 2 MONTESQUIEU, *SPIRIT OF THE LAWS* 64 ("Who does not see that self-defense is a duty superior to every precept?").

205. THE BRANDEIS GUIDE TO THE MODERN WORLD 212 (Alfred Lief ed., 1941).

dangerous criminal rather than leaving that criminal free to prey on others. To theorists such as Bishop and Pollock, "sudden and strong resistance to unrighteous attack is not merely to be tolerated," not merely "a necessary evil," but "a just and perfect" right.<sup>206</sup> A good citizen attacked thus has "a moral duty" to use all force necessary to apprehend or otherwise incapacitate criminals rather than to submit or retreat.

The assertion that use of force to defend innocent life is immoral necessarily presumes that persons who use such force are "selfish." To the extent that social science can shed any light on this presumption, the presumption of selfishness is unfounded. A study of "Good Samaritans" who came to aid of victims of violent crime found that eighty-one percent "own guns, and some carry them in their cars. They are familiar with violence, feel competent to handle it, and don't believe they will be hurt if they get involved."<sup>207</sup> Are these people thus inferior moral beings who "engender violence"?

Regardless of one's response to the above question, as a moral or practical matter, one may claim that a crime victim should rely on the government for protection *only if* the government has an obligation to protect the victim. Under United States law, the government quite clearly has no such obligation.

#### D. The Absence of a Legal Government Obligation to Protect Citizens

It is well-settled law that police in the United States have no legal duty to protect any individual citizen from crime, even if the citizen has received death threats and the police have negligently failed to provide protection.<sup>208</sup> For example, the New York Court of Appeals explicated the rule

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206. F. POLLOCK, TREATISE ON THE LAW OF TORTS 123 (15th ed. 1951); ROLLIN M. PERKINS, CRIMINAL LAW 997-1004 (2d ed. 1969) (describing view of Bishop).

207. Ted L. Huston et al., *The Angry Samaritans*, PSYCHOL. TODAY, June 1976, at 64. The study does suggest, however, that anger toward criminals may be the motivation behind the actions of a "samaritan" rather than concern for a victim. *Id.*

208. See, e.g., CAL. GOV'T CODE §§ 845-846 (West Supp. 1994) (no liability for failure to arrest or to retain arrested person in custody); Bowers v. DeVito 686 F.2d 616 (7th Cir. 1982) (no federal constitutional requirement that police provide protection); Calogrides v. City of Mobile, 475 So. 2d 560 (Ala. 1985); Davidson v. City of Westminster, 649 P.2d 894 (Cal. 1982); Stone v. State, 165 Cal. Rptr. 339 (1980); Warren v. District of Columbia, 444 A.2d 1 (D.C. 1981); Sapp v. City of Tallahassee, 348 So. 2d 363 (Fla. Dist. Ct. App.), *cert. denied* 354 So. 2d 985 (Fla. 1977); Jamison v. City of Chicago, 363 N.E.2d 87 (Ill. App. Ct. 1977); Keane v. City of Chicago, 240 N.E.2d 321 (Ill. App. Ct. 1968); Simpson's Food Fair, Inc. v. City of Evansville, 272 N.E.2d 871 (Ind. Ct. App. 1971); Silver v. City of Minneapolis, 170 N.W.2d 206 (Minn. 1969); Wuethrich v. Delia, 382 A.2d 929, 930 (N.J. Super. Ct. App. Div.), *cert. denied* 391 A.2d 500 (1978); Chapman v. City of Philadelphia, 434 A.2d 753 (Pa. Super. Ct. 1981); Morris v. Musser, 478 A.2d 937 (Pa. Comm'n Ct. 1984).

in *Riss v. City of New York*.<sup>209</sup> The government is not liable even for a grossly negligent failure to protect a crime victim. In *Riss*, a young woman telephoned the police and begged for help because her ex-boyfriend had repeatedly threatened, "If I can't have you, no one else will have you, and when I get through with you, no-one else will want you." The next day, the ex-boyfriend threw lye in her face, blinding her in one eye, severely damaging the other, and permanently scarring her features. "What makes the City's position particularly difficult to understand," wrote a dissenting judge, "is that, in conformity to the dictates of the law, Linda did not carry any weapon for self-defense. Thus, by a rather bitter irony she was required to rely for protection on the City of New York which now denies all responsibility to her."<sup>210</sup>

In *Warren v. District of Columbia*,<sup>211</sup> two women were upstairs when they heard their roommate being attacked by men who had broken in downstairs. They immediately telephoned the police for assistance. Crawling from their window onto an adjoining roof, they saw police arrive and then leave without entering the house. The two women went back inside and again heard screams. They called the police a second time. Their roommate's screams having ceased, they assumed the police must have arrived and taken care of the situation. Actually, their second call was somehow never dispatched. The women called out to their roommate and alerted the attackers of their presence. As the court's opinion graphically describes: "For the next fourteen hours [all three] women were held captive, raped, robbed, beaten, forced to commit sexual acts upon each other, and made to submit to the sexual demands" of their attackers.<sup>212</sup>

The roommates later sued the District of Columbia for ignoring their phone call for help. The District of Columbia's highest court exonerated the District and its police, concluding it is "a fundamental principle of American law that a government and its agents are under no general duty to provide public services, such as police protection, to any individual citizen."<sup>213</sup>

Given the doctrine of police immunity, the contention that trained citizens should not be allowed to carry firearms in order to protect

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Ruth Brunell called the police on 20 different occasions, begging for protection from her husband. He was arrested only one time. Mr. Brunell telephoned his wife one evening and told her that he was coming over to kill her. When she called the police, they refused her request for protection, telling her to call back when he got there. Mr. Brunell stabbed his wife to death before she could call the police. The court held that the San Jose police were not liable for ignoring Mrs. Brunell's pleas for help. *Hartzler v. City of San Jose*, 120 Cal. Rptr. 5 (Cal. Ct. App. 1975).

209. 240 N.E.2d 860 (N.Y. 1968).

210. *Id.* at 862 (Keating, J., dissenting).

211. 444 A.2d 1 (D.C. 1981).

212. *Id.* at 2.

213. *Id.* at 6.

themselves would appear untenable. At the very least, in cases where the government affirmatively interferes with a person's ability to protect, government immunity from lawsuit should be waived. If a person passes a background check and a safety class, and is then denied a firearms carry permit because the police administration does not believe that citizens should carry guns, government legal immunity should not apply if that person is subsequently injured by a criminal. The government should not be able to take away person's right of self-defense, and then assert that it has no responsibility for the consequences. If the person is killed because the police failed to act, the survivors should have the right to sue.<sup>214</sup>

Some police administrators and politicians use legal immunity to disclaim government responsibility to protect ordinary people, but these same officials hypocritically carry guns and work in buildings protected by government-issue police bodyguards. In addition, they generally live in relatively safe areas. Yet these same officials use overly restrictive handgun carry laws to prevent from ordinary citizens from protecting themselves.

Judge David Shields, who sits on Chicago's special "gun court," explained to Congress the kinds of persons who came before his court for failing to possess a handgun carry permit (impossible to obtain in Chicago, except for the politically connected):

For most, this is their first arrest of any kind. I don't mean now that this is their first conviction, but I mean this is their very first arrest of any kind, and many of them are old people. Many of them are shopkeepers, persons who have been previous victims of violent crimes.

I think most of the defendants who come to court believe that they need a gun to protect themselves in the community, and I have one statement that was made by an elderly defendant that I think summed up the attitude of such people. When he responded, he said, "I would much rather be caught by the police with a gun than to be caught out on the street in my neighborhood without a gun."

And I didn't think that when that remark was made that he was in any way capricious or arbitrary with the court. I think that was his sincere belief. I think the courts and probably most members of this committee aren't really exposed to the problems of the ghetto community and it is probably fair to say that most of us aren't likely to voluntarily go into those communities except under the most optimum circumstances; meaning broad daylight and certainly not alone or at night or on foot.<sup>215</sup>

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214. Precedent for such a conclusion could be based on *Chambers-Castanes v. King County*, 669 P.2d 451 (Wash. 1983) (en banc), which upheld an exception to the immunity principle when some form of privity is found between police and specific victims, and when the victims are dissuaded from taking steps to protect themselves because when they relied on specific police assurances that help was on its way.

215. *Firearms Legislation, 1975: Hearings on H. 521-38 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 94th Cong., 1st Sess. 587 (1975).

*E. Can Citizens Use Guns Competently?*

Whenever and wherever the concealed carry issue is raised in the future, objections will undoubtedly be raised by reform opponents, including many law enforcement professionals who claim expertise on the issue. These opponents predict that ordinary people, even if they have passed a firearms safety class, cannot be trusted to use guns competently. Supposedly, the guns will be taken away by criminals, or the gun-owners will shoot an innocent bystander by mistake.

The existing body of research provides no support for these fears. The best evidence as to what happens when people have carry permits is the experience of the many American states that issue such permits routinely. From these states, the most detailed data are those compiled by the Dade County (Miami) police.<sup>216</sup> As discussed in subpart II. B., the police kept track of every known incident involving the county's more than 21,000 handgun carry permittees over a six-year period. In that six-year period, only one known incident of a crime victim having his gun taken away by the criminal was reported. No known incidents of a crime victim injuring an innocent person by mistake were reported. Although the handgun permit holder was not always successful in preventing a crime, no innocent person was injured as a result of a mistake by a permit-holder.

Another study examined newspaper reports of gun incidents in Missouri that involved both police and civilians. Civilians were successful in wounding, driving off, or capturing criminals eighty-three percent of the time, compared with a sixty-eight percent success rate for the police. Civilians intervening in crime were slightly less likely to be wounded than were police. Only two percent of shootings by civilians, compared to eleven percent of shootings by police, involved the shooting of an innocent person mistakenly thought to be a criminal.<sup>217</sup>

The Missouri research does *not* prove that civilians are more competent than police in armed confrontations. Civilians can often choose whether or not to intervene in a crime in progress, whereas police officers are required to intervene. Accordingly, police officers quite naturally have a lower success rate and make more mistakes. Attorney Jeffrey Snyder elaborates:

Rape, robbery, and attempted murder are not typically actions rife with ambiguity or subtlety, requiring special powers of observation and great book-learning to discern. When a man pulls a knife on a woman and says, "You're coming with me," her judgment that a crime is being committed is not likely to be in error. There is little chance that she is going to shoot the wrong person. It is the police, because they are rarely at the scene of the crime when it occurs, who are more likely to find themselves in

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216. See *supra* notes 50-53 and accompanying text.

217. Silver & Kates, *supra* note 20, at 139-70.

circumstances where guilt and innocence are not so clear-cut, and in which the probability for mistakes is higher.<sup>218</sup>

In addition, the Missouri study was not restricted to "carry" situations, but also included self-defense in the home. Persons using a gun to defend their own home, who know its layout much better than does an intruder, might be expected to have a higher success rate than would persons using a gun in a less familiar public setting.

Professor Gary Kleck, a member of the ACLU and Common Cause, has compiled the most detailed information about civilian defensive gun use in his book *Point Blank: Guns and Violence in America*. In 1992, the American Society of Criminology awarded the book the Hindelang Prize, as the most significant contribution to criminology in the previous three years. In *Point Blank*, Kleck presents his study of computer tapes from the United States Department of Justice's National Crime Survey, for the years 1979-85. Analyzing the data from over 180,000 crime incidents in the National Crime Survey, as well as from other studies, Kleck found the following:

- In no more than one percent of defensive gun uses was the gun taken away by a criminal.
- The odds of a defensive gun user accidentally killing an innocent person are less than 1 in 26,000.
- For robbery and assault victims, the lowest injury rates were among victims who resisted with a gun (17.4% for robberies, and 12.1% for assaults).
- The next lowest injury rates were among persons who did not resist. Other forms of resistance such as shouting for help or using a knife, had higher injury rates than either passive compliance or resistance with a gun.<sup>219</sup>

Significantly, the above data do not separate defensive home use (where victim success rates would be expected to be higher) from use in public areas. Still, taken as a whole, the National Crime Survey data, like the Missouri data,<sup>220</sup> suggest that uniformed government employees are not the only class of people who can use a firearm successfully to defend self and others.

#### *F. The Wild West, or "What If Everyone Carried a Handgun?"*

Persons opposed to carry reform sometimes state that allowing licensed, trained citizens to carry guns would make modern America like the Wild

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218. Jeffrey R. Snyder, *A Nation of Cowards*, THE PUB. INTEREST, Fall 1993, at 40, 50.

219. GARY KLECK, *POINT BLANK: GUNS AND VIOLENCE IN AMERICA* 120-26 (1991).

220. *See supra* note 217 and accompanying text.

West. A shorthand version of this statement is simply to raise the rhetorical question: "What if everyone carried a gun?"

Asking a question such as "What if everyone did X?" contributes to a debate only if a realistic possibility exists that everyone might actually do X. What if everyone had fifteen children? What if everyone remained celibate?<sup>221</sup> Universal celibacy would destroy the human race in one generation, whereas the universal bearing of fifteen children per family could cause huge social and environmental problems. If "What if" questions guided public policy, then it would be logical to enact a law requiring every family to have exactly two children, thus preventing the horrible potential consequences of universal celibacy or universal over-fecundity. In the real world, however, some people choose to be celibate, and some people choose to have fifteen children. Most people choose something between these extremes, resulting in a reasonable population growth rate without the need of government regulation.

In the real world, the question "What if everyone carried a gun?" is as meaningless as the question "What if everyone tried to park at the state capitol at the same time?" The research presented throughout this Article demonstrates that no more than four percent of a state's population is likely to choose to obtain a handgun carry permit.<sup>222</sup> If the "What if" question does have any relevance, such can best be found by looking at the most recent era in American history when everyone really did carry a gun.

Late twentieth-century Americans have an image of the "Wild West" that is based primarily on television and the movies. In contrast, historian Roger McGrath set out to study the West in detail in order to determine how violent it really was. In *Gunfighters, Highwaymen, & Vigilantes*, McGrath examines the nineteenth-century Sierra Nevada mining towns of Aurora and Bodie.<sup>223</sup>

Aurora and Bodie certainly had more potential for violence than most other places in the West. The population was mainly young, transient males who recognized few social controls. There was one saloon for every twenty-five men; brothels and gambling houses were also common. "Sobriety was thought proper only for Sunday school teachers and women," McGrath observes.<sup>224</sup> Governmental law enforcement was ineffectual, and sometimes the sheriff doubled as the head of a criminal gang. Nearly everyone carried a gun.<sup>225</sup>

The homicide rate in these towns was extremely high, as the "bad men" who hung out in saloons shot each other at a fearsome rate, in some cases

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221. Blackman, *supra* note 18, at 29.

222. See *supra* Part II.

223. ROGER D. MCGRATH, *GUNFIGHTERS, HIGHWAYMEN, & VIGILANTES: VIOLENCE ON THE FRONTIER* (1984).

224. *Id.* at 255.

225. *Id.* at 250.

exceeding the homicide rate in modern Washington, D.C.<sup>226</sup> These shootings amounted to consensual violence among disreputable young men who enjoyed getting drunk and getting into fights. The presence of guns thus turned many petty drunken quarrels into fatalities.<sup>227</sup>

Other crime in Aurora and Bodie, however, was virtually nil. The per capita annual robbery rate was seven percent of modern New York City's. The burglary rate, less than one percent. Rape was unknown.<sup>228</sup> "The old, the weak, the female, the innocent, and those unwilling to fight were rarely the targets of attacks," McGrath found.<sup>229</sup> One resident of Bodie did

not recall ever hearing of a respectable woman or young girl in any manner insulted or even accosted by the hundreds of dissolute characters that were everywhere. In part, this was due to the respect depravity pays to decency; in part, to the knowledge that sudden death would follow any other course.<sup>230</sup>

Nearly everyone carried a gun. Except for young men who liked to drink and fight with each other, everyone was far more secure than today's residents of cities, where ordinary people cannot carry a firearm for protection.

The experience of Aurora and Bodie was repeated throughout the West. One study of five major cattle towns with a reputation for violence—Abilene, Ellsworth, Wichita, Dodge City, and Caldwell—found that the towns had a combined average of around two criminal homicides per year.<sup>231</sup> During the 1870s, Lincoln County, New Mexico, was experiencing in a state of anarchy and civil war. The homicide rate was astronomical. Similar to the experience in Bodie and Aurora, however, these homicides were almost exclusively confined to drunken males upholding their "honor." Modern big-city crimes such as rape, burglary, and mugging were virtually unknown.<sup>232</sup> A study of the Texas frontier from 1875-90 found that

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226. The homicide rate in Aurora was approximately 64 per 100,000; in Bodie, the rate was 116. *Id.* at 254.

227. *Id.* at 255.

228. Bodie had an annual robbery rate of 84 per 100,000 persons. In 1980, the rate in New York City was 1140; in San Francisco-Oakland, 521, and in the United States as a whole, 243. The annual Bodie burglary rate was 6.4 per 100,000. In 1980, the New York City rate was 2661; the San Francisco-Oakland rate was 2267. The overall American rate was 1668. The Bodie theft rate was 180. By contrast, the New York rate was 3369 while San Francisco-Oakland had a rate of 4571. The American rate was 3156. *Id.* at 247-54.

229. *Id.* at 255.

230. Grant H. Smith, *Bodie, Last of the Old-Time Mining Camps*, 4 CAL. HIST. SOC'Y Q. 78-79 (1925).

231. ROBERT A. DYKSTRA, THE CATTLE TOWNS 144-47 (1968). "The average number of homicides per cattle town trading season amounted to only 1.5 per year." *Id.* at 146.

232. ROBERT M. UTLEY, HIGH NOON IN LINCOLN: VIOLENCE ON THE WESTERN

except for bank, train, and stage-coach robberies, robberies of homes and business were essentially nonexistent. People did not bother locking doors; and except for young men shooting each other in voluntary "fair fights," murder was rare.<sup>233</sup>

John Umbeck's investigation of the High Sierra gold fields in the mid-nineteenth century yielded similar results. After the discovery of gold at Sutter's Mill in 1848, thousands of prospectors rushed to gold fields in the California mountains. There was no police force. Indeed, no property rights law existed because the military governor of California had just proclaimed as invalidated the former Mexican land law without offering a replacement. The competitive greed for gold was intense, and nearly everyone carried firearms. Yet, hardly any violence occurred.<sup>234</sup> Similarly, when much of the Indian territory of Oklahoma simultaneously opened for white settlement, heavily armed settlers rushed in immediately to stake their claims long before effective law enforcement arrived. Still, almost no shooting occurred.<sup>235</sup>

In sum, historian W. Eugene Hollon found "the Western frontier was a far more civilized, more peaceful, and safer place than American society is today."<sup>236</sup> Frank Prassel concluded that this "last great frontier left no significant heritage of offenses against the person, relative to other sections of the country."<sup>237</sup> Americans living with the prevalence of guns of the Old West were thus arguably far safer than Americans living in modern cities such as San Francisco, Detroit, or Cleveland—cities where citizens are restricted in the means with which they may legally protect themselves when they leave their homes.

In modern Washington, D.C., criminals sometimes murder drivers stopped at a traffic light, simply for the pleasure of watching them die. The city government, seemingly incapable of protecting these drivers, forbids the law-abiding populace to possess a handgun in their car, their home, or on their person. Columnist Samuel Francis describes this and other similar city

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FRONTIER 173-79 (1987). Again, as in Aurora and Bodie, the ubiquity of firearms turned many drunken quarrels into homicides. *Id.* at 176.

233. W.C. Holden, *Law and Lawlessness on the Texas Frontier 1875-1890*, 44 SW. HIST. Q. 188 (1940).

234. John Umbeck, *Might Makes Rights: A Theory of the Formation and Distribution of Property Rights*, 19 ECON. INQUIRY 38 (1981).

In other parts of the West, citizens also successfully used a variety of private mechanisms to protect property rights in the absence of effective government. Terry L. Anderson & P.J. Hill, *An American Experiment in Anarcho-Capitalism: The Not So Wild, Wild West*, 3 J. LIBERTARIAN STUD. 9 (1979).

235. Robert Day, 'Sooners' or 'Goners,' *They Were Hell Bent on Grabbing Free Land*, SMITHSONIAN, Nov. 1989, at 192, 202.

236. W. EUGENE HOLLON, FRONTIER VIOLENCE: ANOTHER LOOK x (1974).

237. FRANK R. PRASSEL, THE WESTERN PEACE OFFICER: A LEGACY OF LAW AND ORDER 17 (1972).

government systems as "anarcho-tyranny."<sup>238</sup> Such government provides little effective protection against violent criminals, but mobilizes the full power of the state against crime victims who attempt to protect themselves.

Crime flourishes in modern American cities because the American people and their government tolerate it. Bodie, Aurora, and the rest of the Old West had little high culture. Their streets were made of dirt and littered with horse manure. Nonetheless, a woman could walk alone safely after dark in those towns; good people did not cower in fear and allow predatory thugs to terrorize the innocent. Perhaps the people of the Old West better understood what *civilization* implied than do modern Americans.

The evidence from Aurora, Bodie, and the rest of the United States does not prove that guns are an unalloyed good, or that no form of gun control is desirable. Guns in the wrong hands can wreak great harm. Disarming gun abusers would obviously benefit society. The problem with the laws proposed by the various "gun control" groups, however, is that the very persons who have no compunction about perpetrating violent crime will also have no compunction about illegally carrying guns.

#### *G. Police Opinion and Police Competence*

Virtually all United States citizens agree that the police may lawfully use force to protect crime victims. Accordingly, the question is not whether force per se is legitimate, but who may legitimately use force. As a moral matter, the creature of government should not have powers greater than its creator, the people. An individual police officer, acting under the best judgment and reasonable understanding of the facts of a particular encounter, has the individual moral authority to fire a weapon for protection of self or another person. How then can the same act, performed by a crime victim, suddenly become immoral? Many police officers would agree that citizen self-defense is legitimate.

The first survey of police attitudes toward concealed carry was a 1976 poll conducted by Boston Police Commissioner Robert diGrazia. Ironically, the poll was part of an effort to find national police support for an initiative to ban handgun ownership in Massachusetts. In the national survey, fifty-one percent of police chiefs agreed with the statement, "Persons who have a general need to protect their own life and property, like those who regularly carry large sums of money to the bank late at night, should be allowed to possess and carry handguns on their person." Fifty-seven percent of chiefs expected their subordinates to be more supportive of such carrying.<sup>239</sup>

Rank-and-file police officers are even more supportive of citizens carrying guns. In 1991, *Law Enforcement Technology* conducted a poll of

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238. Samuel Francis, *Anarcho-Tyranny, U.S.A.*, CHRONICLES, July 1994, at 14-19.

239. Blackman, *supra* note 18, at 31.

all ranks of police officers. Seventy-six percent of street officers believed that all trained, responsible adults should be allowed to obtain handgun carry permits; fifty-nine percent of managers agreed.<sup>240</sup> In fact, the above data suggests that police are arguably *more* supportive of carry reform laws than is the general public. Carry reform generally garners about thirty-five percent support in opinion polls of the general public; the range is between about twenty and fifty-seven percent.<sup>241</sup>

Those who hold that the police, and the police alone, should carry defensive firearms apparently presume the police possess abilities that are not possessed by licensed, trained permit holders. As demonstrated earlier in subpart IV. E., however, both scholarly research and police data indicate that ordinary citizens are capable of using firearms competently for defense. In addition, while the vast majority of police officers are likewise competent, police officers are not immune from the foibles and stresses that can lead to unlawful or accidental shootings.

One study of 911 incidents involving police use of deadly force concluded that 125 innocent civilians (16%) were killed in error.<sup>242</sup> Another study found almost thirteen percent of killings by Chicago officers during 1969-70 to be "prima facie cases of manslaughter or murder," and "several others presented factual anomalies sufficient to suggest that a thorough investigation might well have revealed such prima facie cases."<sup>243</sup> Only one of these cases resulted in prosecution or even reprimand, despite being in plain violation of official policy.<sup>244</sup> By contrast, seventy-

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240. *The Law Enforcement Technology Gun Control Survey*, LAW ENFORCEMENT TECH., July-Aug. 1991, at 14-15. The poll was based on readers sending in a survey form to the magazine. Because the polling was not conducted by random sample, the poll arguably may not reflect a true cross-section of all police opinion. Of course a cadre of police chiefs who show up at a state capitol to testify against a concealed carry bill may also not be representative of police opinion, especially the opinion of street patrol officers.

241. For example, in a recent U.S. NEWS & WORLD REPORT poll, 29% of 1000 citizens polled favored allowing "ordinary Americans . . . , after proper training, to carry a concealed weapon." *News Release*, U.S. NEWS & WORLD REPORT, Aug. 8, 1994, at 4. See also *supra* note 173 and accompanying text.

242. Arthur L. Kobler, *Figures (and Perhaps some Facts) on Police Killings of Civilians in the United States 1965-1969*, 31 J. SOC. ISSUES 185, 190 (1975). Internal police department review of Kansas City police shootings in which a person was struck by a bullet found that for the years 1973-1978, 40.2% of the discharges were unjustifiable. WILLIAM A. GELLER & MICHAEL S. SCOTT, DEADLY FORCE: WHAT WE KNOW 282 (1992).

243. Richard W. Harding & Richard P. Fahey, *Killings by Chicago Police, 1969-70: An Empirical Study*, 46 S. CAL. L. REV. 284 (1973). See also William A. Geller & Kevin J. Karales, *Shootings of and By Chicago Police: Uncommon Crises, Part I: Shootings by Chicago Police*, 72 J. CRIM. L. & CRIMINOLOGY 1813 (1981).

244. Harding & Fahey, *supra* note 243, at 284.

five percent of shootings by Los Angeles police officers led to either the disciplining or retraining of the officer because of error.<sup>245</sup>

New York City police officials review any incidence when a police officer fires a gun other than during target practice. Such reviews have found that about twenty percent of discharges are accidental, and another ten percent are intentional discharges in violation of force policy. In other words, only seventy percent of firearms discharges by New York City police are both intentional and in compliance with force policy.<sup>246</sup>

Not only are police misuses of firearms in the line of duty far from uncommon, police misuse of guns outside the line of duty is all too frequent. When an off-duty New York City policeman fires a gun, one out of four firings will be an "accident, a suicide, or an act of frustration."<sup>247</sup> The rate of substantiated crimes perpetrated by New York City police officers is approximately 7.5 crimes per year, per thousand officers. The number of New York police crimes alleged is 112.7 per thousand officers.<sup>248</sup>

Opponents of concealed carry readily suggest hypotheticals of how an armed citizen might overreact to a particular situation. In reality, however, actual instances of such overreaction by licensed, trained citizens are rare.<sup>249</sup> In contrast, actual instances of police overreaction are well known.

In Portland, Oregon, police officers on a drug raid used German MP-5 submachine guns to shoot a grandfather at least twenty-eight times. The autopsy suggested that over twenty shots were fired into his back as he lay

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245. Eric Lichtenblau, *LAPD Officers Faulted in 3 of 4 Shooting Cases*, L.A. TIMES, Aug. 14, 1994, at A1.

246. Gina Goehl, *1989 Firearms Discharge Assault Report* (New York: Police Academy Firearms and Tactics Section, April 1989) (BM 369). For 1985-89, the cumulative figures are 1193 total discharges, 824 intentional and not in violation of force policy (69.1%), 112 intentional and in violation (9.4%); 135 accidental but not in violation of policy (11.3%), and 122 accidental and in violation (10.2%). The percentages and numbers are slightly different from those in the Report itself, due to a Departmental mathematical errors in addition; the Department mistakenly totals the number of intentional lawful shootings as 836 (rather than 824), and mistakenly records the total of all incidents at 1,143, rather than 1,193. As a result, the Department reports the sum of all categories of incidents is 105.4%, rather than 100%. In Philadelphia, accidents in 1989 comprised 27% of police firearms discharges; in Dade County that same year, accidents were 31%. GELLER & SCOTT, *supra* note 242, at 196.

247. *The Guns of Kennesaw*, N.Y. TIMES, Mar. 18, 1982, at A26. Some studies suggest that as many as one in four police officers may be an alcoholic. GELLER & SCOTT, *supra* note 242, at 288 n.26.

248. RICHARD NEELY, *TAKE BACK YOUR NEIGHBORHOOD: A CASE FOR MODERN-DAY VIGILANTISM* 74-75 (1990). Other major cities reported similar rates of substantiated allegations. *Id.*

249. See *supra* subpart IV.E.

face down over a chair. Rationalizing the police action, the police chief predicted the shooting was "a sign of things to come as criminals become better armed and the police try to match their firepower." The grandfather had been carrying an unloaded two-shot derringer.<sup>250</sup>

In Tyler, Texas, a police officer, previously accused of using excessive force, shot to death a bedridden eighty-four-year-old black woman during an early-morning drug raid. No drugs were found.<sup>251</sup>

In Los Angeles, an officer entered the following message on his computer report: "I almost got me a Mexican last nite [sic] but he dropped the dam [sic] gun to [sic] quick, lots of wit."<sup>252</sup>

The above incidents are, of course, exceptions to the generally high level of police conduct. Therefore, anecdotal stories of police abuse do not provide a good reason for believing that the police as a whole cannot be trusted with guns. By the same reasoning, unsupported hypotheticals about how a licensed, trained citizen *might* act do not provide appropriate argument for believing that citizens cannot be trusted with guns. Moreover, with the proliferation of high-technology training and firearms schools, citizens willing to invest some time can be readily schooled in defensive firearms use to at least the same level of competence as the average police officer.<sup>253</sup>

Few persons who object to ordinary citizens carrying handguns raise the same objections about security guards carrying handguns.<sup>254</sup> Ironically, security guards generally receive even less training than the police.<sup>255</sup> Security guards are visible targets for attack, but so are women who must walk alone at night in dangerous neighborhoods. If law-abiding citizens pass a licensing and training system equivalent to that of security guards or police, no basis exists for denying these citizens a permit. A wealthy owner of a jewelry store can hire security guards for protection. Generally, however, a low-income owner of a convenience store cannot afford a security guard. If the convenience store owner is as objectively qualified as most security guards to carry a gun, to deny a handgun permit results in

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250. James Crawford, *Police Firepower a Cause for Concern*, OREGONIAN, May 29, 1991, at C11; Letter from Hap Wong, attorney for the family of the shooting victim, to James Crawford (Mar. 16, 1992) (on file with authors).

251. *Texas Grand Jury Fails to Indict Officer Who Killed Elderly Black Woman in "Cocaine Raid" That Yielded No Drugs or Charges*, NEWS BRIEFS, Aug. 1992, at 8.

252. GELLER & SCOTT, *supra* note 242, at 205.

253. For a good analysis of giving the police special handgun privileges, see James B. Jacobs, *Exceptions to a General Prohibition on Handgun Possession: Do They Swallow Up the Rule?*, 49 LAW & CONTEMP. PROBS. 5 (1986).

254. "Private security guards are simply vigilantes for the rich," observes West Virginia Supreme Court Justice Richard Neely. NEELY, *supra* note 248, at 51.

255. *Id.* at 51-52.

economic discrimination that values the property of the jewelry store owner more highly than the life of the convenience store owner.

#### *H. Does the Gun Control Lobby Mean What it Says?*

If the forces that have imposed a national background check for purchasing a handgun are serious about their goals, they should endorse concealed carry reform. The gun control lobbies support all sorts of bills as being worthwhile if it saves just one life. Concealed carry reform clearly passes the "saves one life" test.<sup>256</sup> Nevertheless, the gun control lobbies have opposed concealed carry reform in every state where it has been proposed.

Concealed carry reform laws usually feature the exact kinds of controls that groups such as Handgun Control, Inc. (HCI) claim are the essence of a sensible gun policy: mandatory safety training, licenses which must be renewed every few years, fingerprinting, background checks, disqualifications for people with records of alcoholism or drug abuse, and a months-long application/cooling-off period.<sup>257</sup> Although every one of these HCI-backed controls is also backed by the National Rifle Association and by other advocates of concealed carry reform, HCI rejects any idea that concealed carry reform can form the basis of any kind of compromise regarding gun control. As HCI Chair Sarah Brady put it, "To me, the only reason for guns in civilian hands is for sporting purposes."<sup>258</sup> Brady's husband, former White House press secretary, Jim Brady, answered a reporter's question about whether any handguns were defensible: "For target shooting, that's okay. Get a license and go to the range. For defense of the home, that's why we have police departments."<sup>259</sup>

The views of HCI's current leaders are consistent with those of its patriarch, the late Nelson "Pete" Shields, who advised: "As police officers have said for years, the best defense against injury is to put up no defense—give them what they want, or run. This may not be 'macho,' but it can keep you alive."<sup>260</sup> HCI's advice may be prudent when a victim believes a mugger's promise that handing over the wallet will speedily end the encounter. But should Mr. Shield's philosophy become the binding legal rule for potential rape victims? For stalking victims? For persons who reasonably fear that the mugger will kill them, so as to eliminate a witness?

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256. See *supra* subpart IV.A.

257. See *supra* Part II.

258. Tom Jackson, *Keeping the Battle Alive*, TAMPA TRIB., Oct. 21, 1993, at 1, 6.

259. James Brady, *In Step With: James Brady*, PARADE MAGAZINE, June 26, 1994, at 18 (The author is coincidentally named James Brady.). Brady further argues that having a firearm to defend one's home is "six times more likely to kill a loved one." *Id.*

260. PETE SHIELDS, GUNS DON'T DIE, PEOPLE DO 124-25 (1981).

HCI has a right to participate in the political process and to advance laws based on the belief that civilians should not have guns for defensive purposes. The gun control debate would be more productive, however, if HCI's moral intuition were not subsumed to the implausible claim that the very laws which HCI considers perfect for determining who may buy a gun suddenly become hopelessly flawed when used to determine who may carry a gun.

## V. DOMESTIC VIOLENCE AND OTHER IMMINENT PERILS

Regardless of how the general issue regarding concealed carry reform is resolved, one law deserves consideration for immediate enactment in every jurisdiction in the country: that stalking victims, domestic violence victims, and other persons who are in immediate peril may carry a firearm, without a need to go through the carry permit application process. Such a law is already in effect in California. It states:

A violation of Section 12025 is justifiable when a person who possesses a firearm reasonably believes that he or she is in grave danger because of circumstances forming the basis for a current restraining order issued by a court against another person or persons who has or have been found to pose a threat to his or her life or safety.<sup>261</sup>

The California law reflects the reality that, even in a jurisdiction where a sheriff may appreciate the need of citizens to protect themselves, the carry permit application process may take weeks or months. When a stalker may attack within hours, a six-week delay may be fatal. The California law is also carefully bounded because it does not allow a person to carry a gun simply because of vague, subjective fears. The California law applies only when an independent governmental body—a court—has found a particular threat to the victim, a threat sufficient to warrant a restraining order. Notably, the California law applies only so long as the restraining order remains in effect. Once the threat has passed, so does the exemption from the normal carry permit law.<sup>262</sup>

Ohio has an even broader exemption from the need for a carry permit. Under the Ohio statute, any merchant who is engaged in or going to or from his or her business may also carry a firearm for defensive purposes without obtaining a permit. In addition, any other person who reasonably has cause to fear criminal attack may carry.<sup>263</sup>

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261. CAL. PENAL CODE § 12025.5 (West 1992 & Supp. 1995).

262. *Id.*

263. OHIO REV. CODE ANN. § 2923.12(C) (Anderson 1993 & Supp. 1994). The law is discussed in *Ohio v. Assad*, 614 N.E.2d 772 (Ohio Ct. App. 1992) (reversing conviction of merchant who carried a gun).

Because criminals will carry anyway, whether or not they are being threatened, the Ohio law deserves consideration by legislatures that want to avoid getting into the detail of creating a licensing system. Even in states which do have a licensing system, the California and Ohio statutes may be appropriate exceptions to the requirement to obtain a license.

## VI. FEDERAL CARRY PERMITS?

At the state or federal level, a law similar to that of the state of Washington—clear and unambiguous as to who may obtain a permit, and clearly excluding people who are threats to public safety—ought to satisfy gun control advocates whose goal is keeping handguns out of the wrong hands, rather than banning handguns entirely. Consistent with general principles of federalism, carry reform laws might best be adopted by the individual states, rather than imposed by the federal government. As the fact that concealed carry reform protects rather than endangers public safety becomes clearer with the experience of various states, the remaining nonreform states will have the option of copying or refining successful carry reforms.

Nonetheless, a national concealed weapon permit would facilitate interstate travel by simplifying the permit status of a person who travels from state to state. The supporters of a national background check have no problem with the federal government imposing on the states a handgun purchase background check or waiting period. Accordingly, gun control advocates would be inconsistent to claim that a national carry permit law using a “Brady Bill” type background check would violate states’ rights.

National carry reform would prevent such a situation as recently occurred in New Jersey. A North Carolina man was driving through New Jersey when he was stopped and his car searched. The New Jersey police arrested the man and confiscated his gun. The arrest was based on the theory that anyone who sets foot (or tire) in New Jersey, for even a moment, may not possess any firearm unless the person has a New Jersey gun permit.<sup>264</sup>

National carry reform legislation could, however, be an imposition on (1) those states that have no concealed weapon statute, such as Vermont, or (2) states whose concealed carry statutes only apply in cities and towns, such as Idaho. Accordingly, a federal reform statute could require states to

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264. Tom Joyce, *Price of Freedom: North Carolina Man Gives up Gun He Can Carry at Home*, GLOUCESTER COUNTY TIMES (N.J.), Apr. 6, 1993, at 15. The man accepted a plea bargain in which he agreed to probation, making regular visits to a New Jersey probation officer, and forfeiting his handgun. Allegedly, the man had been speeding when he was stopped on the New Jersey Turnpike. Having no basis for any suspicion, the arresting officer asked the man if he had any weapons in the car. Being an honest person, the man admitted that he did. *Id.*

issue permits, but need not prevent states from allowing citizens to carry in their own states without a permit. Alternatively, at least as a starting point, each state could be required to honor every other state's concealed handgun permits, just as drivers licenses are recognized by all states.

Advocates of national carry reform legislation should recognize the inherent risks that the sometimes more restrictive training and misdemeanor disqualification portions of carry permit laws might be expanded into conditions for mere possession of handguns. Given the current national administration's fixation with gun control, the potential for such restrictions being enacted at the national level is much greater than the prospects for similar restrictions at the state level.

A federal carry permit could additionally lead to partial federal registration of gun owners, because everyone applying for a permit would be on a federal list. State-level carry reform laws also create a risk of centralized record-keeping of gun owners. State or federal carry reform could minimize the centralization of data by having licenses issued by city or county officials and forbidding the consolidation of the local government data. But, as the computer hacker saying goes, "Data want to be free." Any system of licensing or permitting any activity relating to individual gun owners thus necessarily creates risks of government registration, especially as sharing of information in computer data bases becomes easier.

A law requiring states to issue carry permits to licensed, trained citizens after a background check would probably not violate principles of federalism. First of all, under section five of the Fourteenth Amendment of the Constitution, Congress has the power to enact laws that require states to respect fundamental civil rights.<sup>265</sup> Accordingly, Congress would have the power to pass remedial legislation regarding states whose carry laws infringe the Second-Amendment right "to keep and bear arms." This remedial power would also extend to the separate right to own and carry handguns for self-defense, which recent scholarship suggests is contained within the Ninth Amendment.<sup>266</sup> Because Congress has repeatedly determined that the Second Amendment guarantees an individual right,<sup>267</sup> and because the

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265. The Fourteenth Amendment states in part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. CONST. amend. XIV, § 1.

Furthermore, "[T]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article." *Id.* § 5.

266. E.g., Nicholas J. Johnson, *Beyond the Second Amendment: An Individual Right to Arms Viewed Through the Ninth Amendment*, 24 RUTGERS L.J. 1 (1992).

267. When introducing the Second Amendment and other guarantees in the Bill of Rights, Congressman James Madison explained that the amendments "relate first to private rights." James Madison, 12 PAPERS 193-94 (1979). Madison praised the major popular analysis of the Second Amendment, which explained, "the people are confirmed . . . in their

history of the Fourteenth Amendment shows that it was adopted with the expressed intent to end state infringements on the right to bear arms,<sup>268</sup> congressional use of the Fourteenth Amendment to enforce the Second Amendment would pose few constitutional problems.

In addition, Article IV of the Constitution guarantees that “[t]he Citizens of each State shall be entitled to all Privileges and Immunities of citizens in the several States,” and Congress is empowered to enforce the guarantee.<sup>269</sup> Precedent suggests that the right to carry a firearm for protection is within the scope of the “privileges and immunities” clause.<sup>270</sup>

Although the modern American debate over the carrying of defensive firearms dates from Florida’s 1987 reform statute,<sup>271</sup> the issue is much older. The founders of the American republic were well aware of the severe gun control laws in despotisms such as France, especially regarding the carrying of firearms. Although monarchists defended these laws on the grounds of public safety, the founders cynically viewed such laws as merely a prop for authoritarian rule. John Adams and Thomas Jefferson, who disagreed on many issues, both cited with approval the following passage from Cesare Beccaria’s 1764 book, *On Crimes and Punishments*:

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right to keep and bear their private arms.” *Id.* at 239-40, 257; Tench Coxe, FED. GAZETTE, June 18, 1789, at 2.

In 1982, the Senate Subcommittee on the Constitution investigated historical evidence, and unanimously concluded that the Second Amendment guaranteed an individual right to arms that was made enforceable against the states by the Fourteenth Amendment. Staff of Senate Comm. on the Judiciary, 97th Cong., 2d Sess., Report on The Right to Keep and Bear Arms 11 (Comm. Print 1982) (unanimous report). In 1986, Congress enacted the Firearm Owners’ Protection Act, whose preamble stated: “The Congress finds that—(1) the rights of citizens—(A) to keep and bear arms under the Second Amendment to the United States Constitution [and Fourth, Fifth, Ninth, and Tenth Amendment rights]” required additional protection, which Congress was enacting. In enacting the Property Requisition Act of 1941 to meet defense needs for the global conflict, Congress specifically forbade the requisitioning or registration of firearms. In enacting the Fourteenth Amendment, Congress made frequent references to its desire to prevent state governments from interfering with the right to freedmen to keep and bear arms. See Stephen P. Halbrook, *Congress Interprets the Second Amendment: Declarations of a Coequal Branch on the Individual Right to Keep and Bear Arms*, 62 TENN. L. REV. 597 (1995).

268. Michael K. Curtis, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* 52-53, 56, 72, 88, 104, 140-41, 164 (1986).

269. U.S. CONST. art. IV, § 2, cl. 1.

270. In the notorious but never overruled *Dred Scott* decision, Chief Justice Taney asserted the “absurdity” of the idea that a black man had equal rights with a white man under the United States Constitution by listing the results that would stem from such a decision. Blacks would be free to travel wherever they wished “without pass or passport,” would enjoy “full liberty of speech in public and in private,” and would be allowed “to hold public meetings upon political affairs, and to keep and carry arms wherever they went.” *Dred Scott v. Sandford*, 60 U.S. 393, 417 (1856).

271. *See supra* subpart II.B.

False is the idea of utility that sacrifices a thousand real advantages for one imaginary or trifling inconvenience; that would take fire from men because it burns, and water because one may drown in it; that has no remedy for evils, except destruction. The laws that forbid the carrying of arms are laws of such a nature. They disarm those only who are neither inclined nor determined to commit crimes. Can it be supposed that those who have the courage to violate the most sacred laws of humanity, the most important of the code, will respect the less important and arbitrary ones, which can be violated with ease and impunity, and which, if strictly obeyed, would put an end to personal liberty—so dear to men, so dear to the enlightened legislator—and subject innocent persons to all the vexations that the guilty alone ought to suffer? Such laws make things worse for the assaulted and better for the assailants; they serve rather to encourage than to prevent homicides, for an unarmed man may be attacked with greater confidence than an armed man. They ought to be designated as laws not preventative but fearful of crimes, produced by the tumultuous impression of a few isolated facts, and not by thoughtful consideration of the inconveniences and advantages of a universal decree.<sup>272</sup>

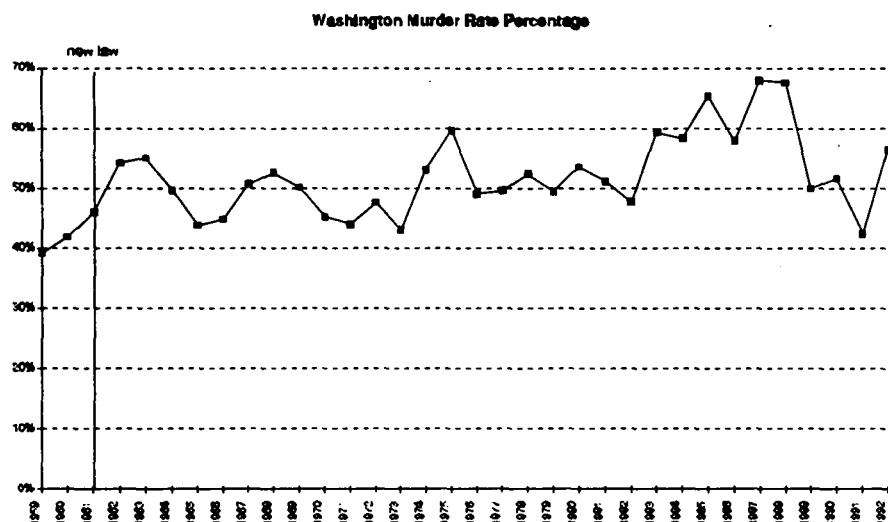
Whether or not concealed carry reform becomes an important issue before Congress, the issue will continue to arise before state legislatures. Concealed carry reform does not turn otherwise law-abiding citizens into hot-tempered murderous psychopaths. To the contrary, the evidence shows that concealed carry reform is sometimes associated with saving lives; and where it does not appear to have done any good, it at least did no harm.

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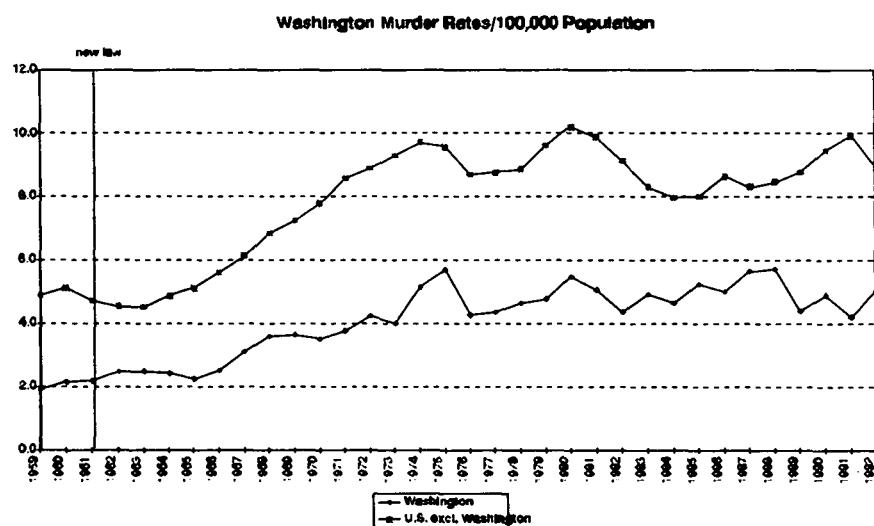
272. CESARE BECCARIA, ON CRIMES AND PUNISHMENTS 87-88 (Henry Palolucci trans., 1963) (1764). Beccaria is generally regarded as the founder of criminology. Adams quoted Beccaria's analysis at the opening of the Boston Massacre trial. Kates, *supra* note 203, at 234 n.132.

## APPENDIX: STATE GRAPHS

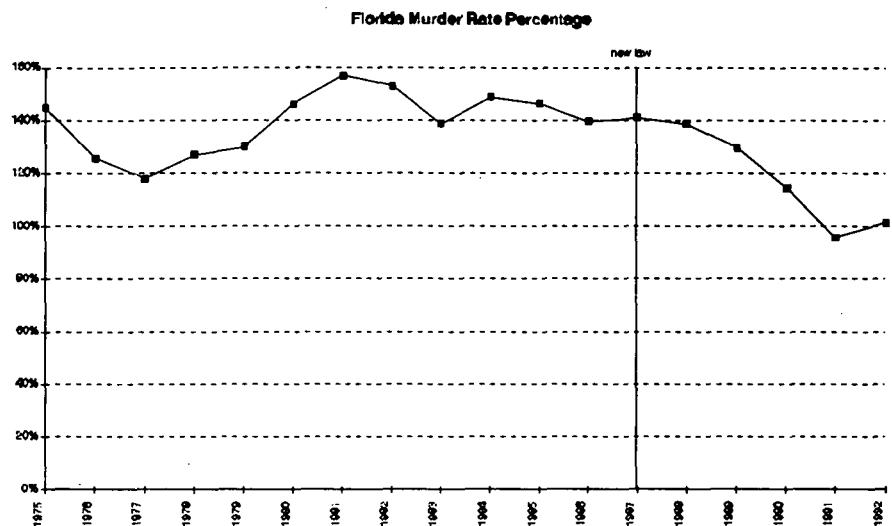
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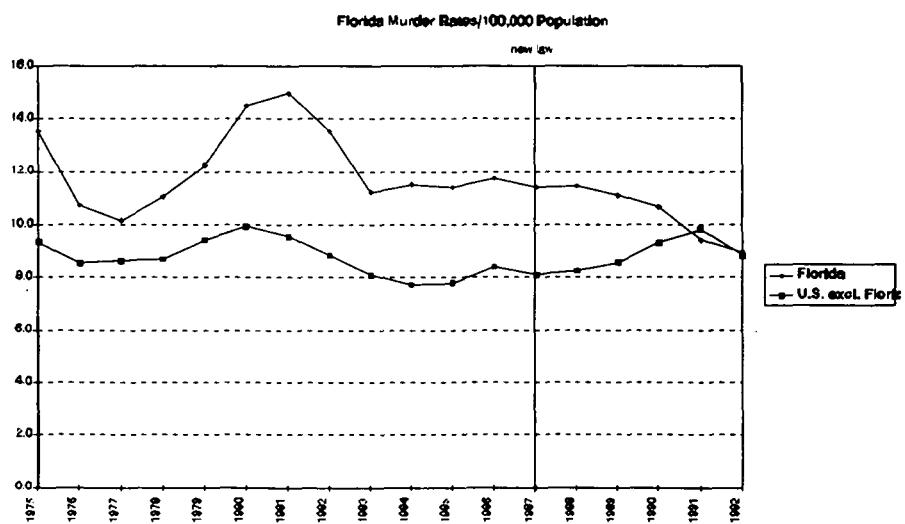
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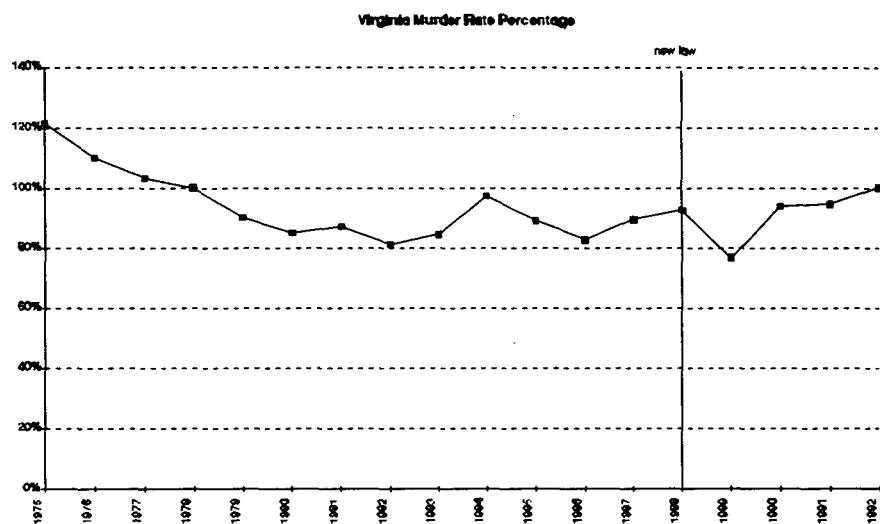
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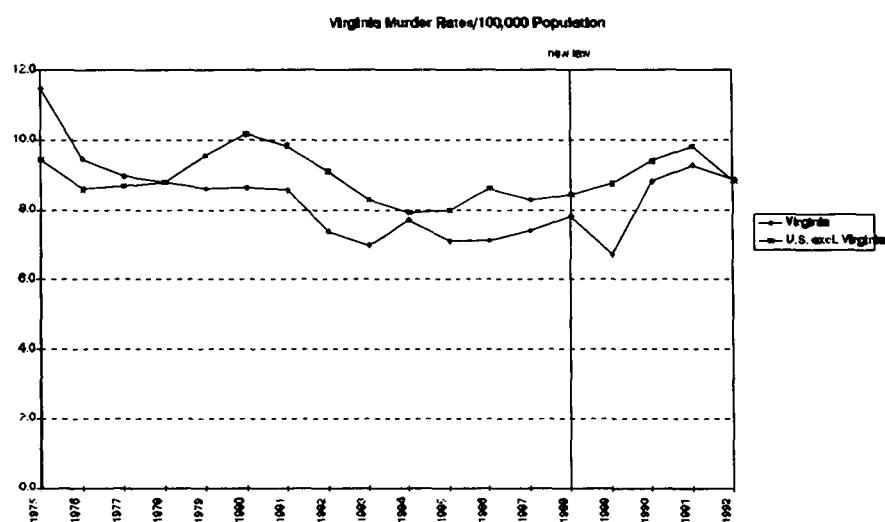
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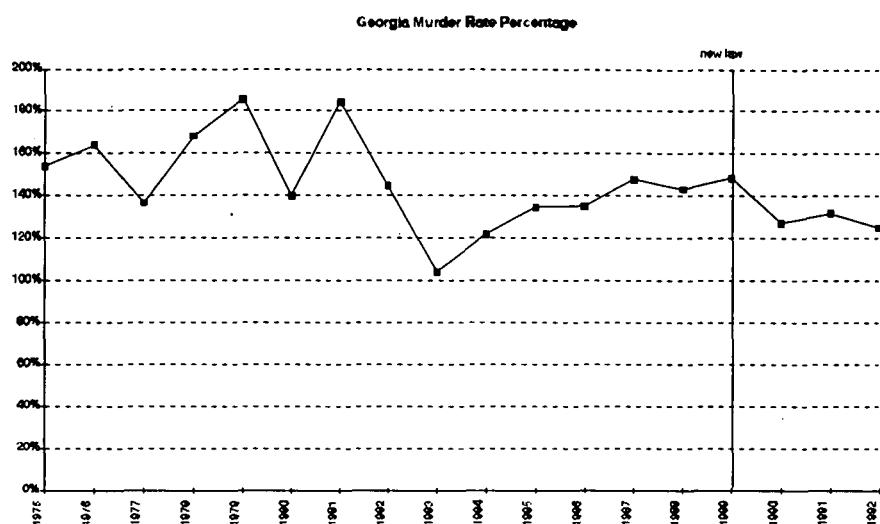
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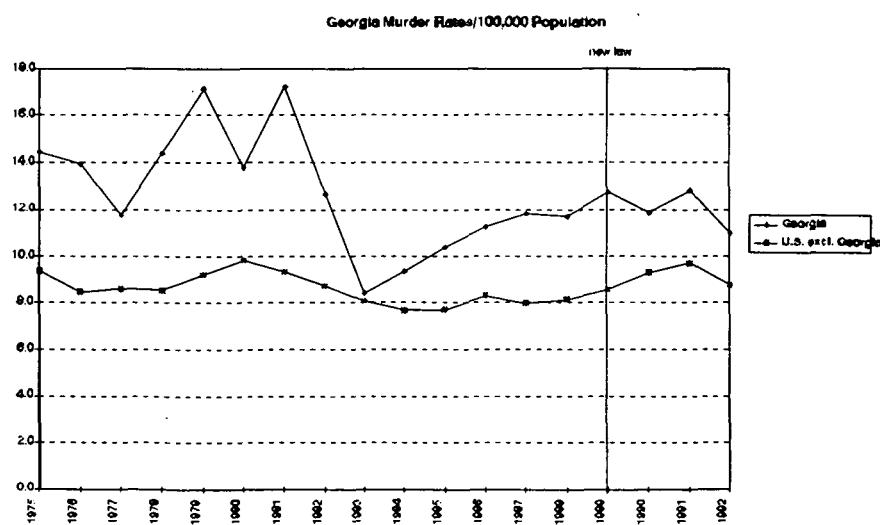
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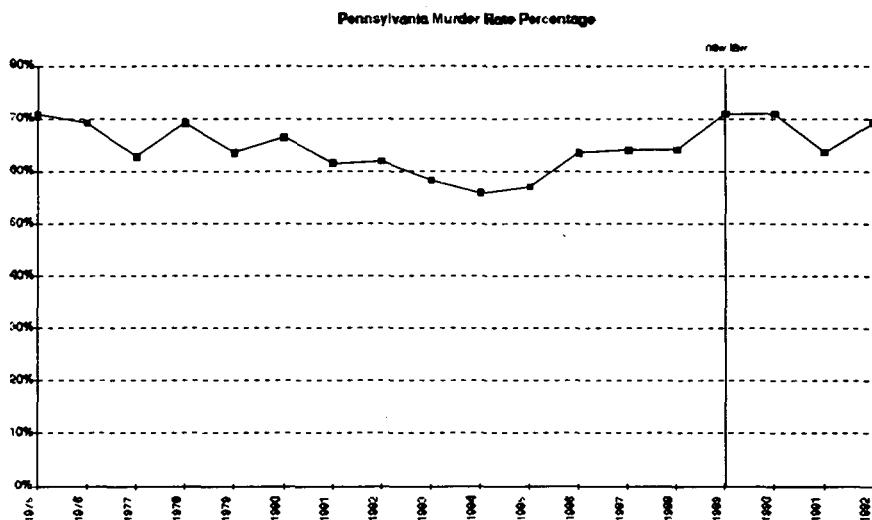
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GRAPH 8

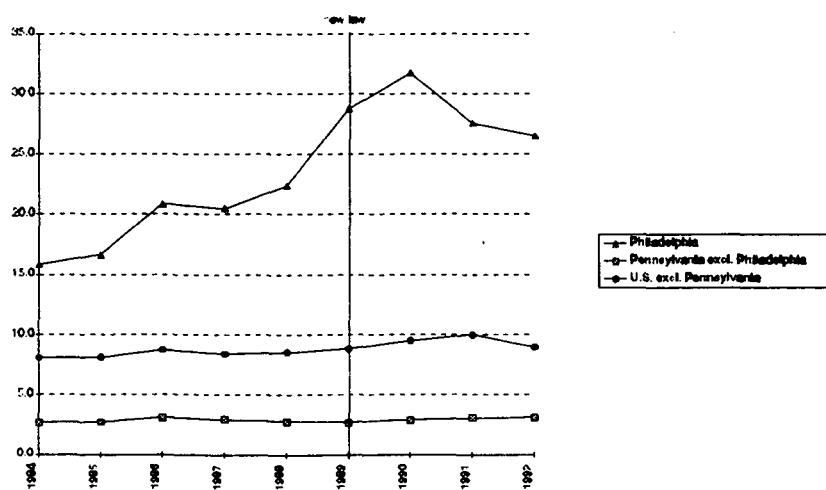


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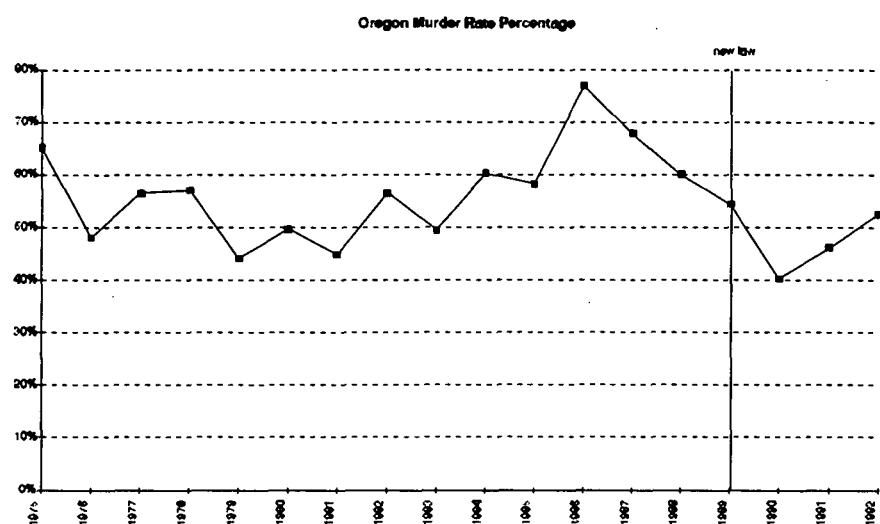


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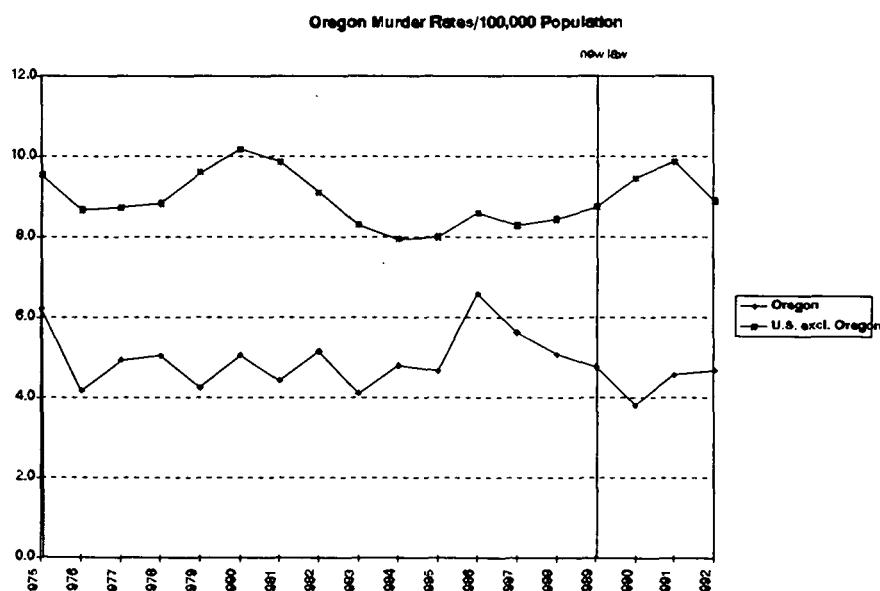
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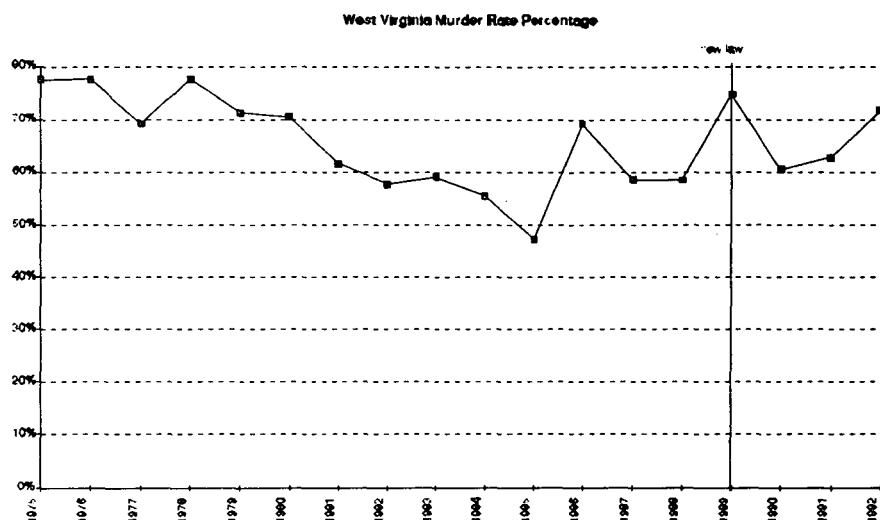
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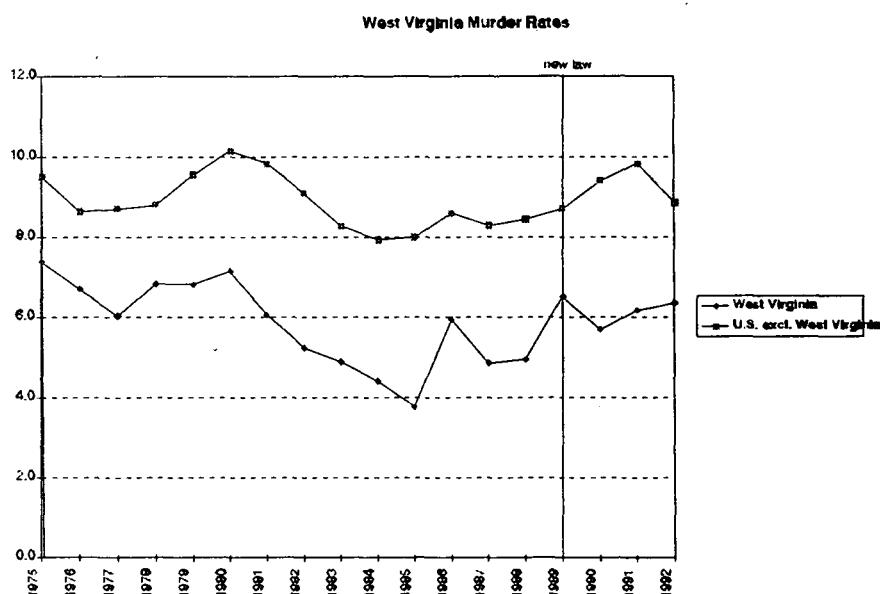
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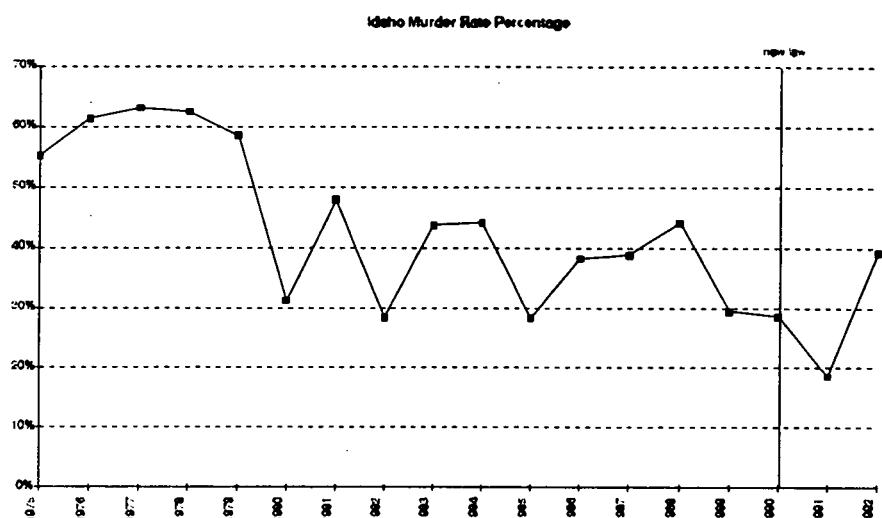
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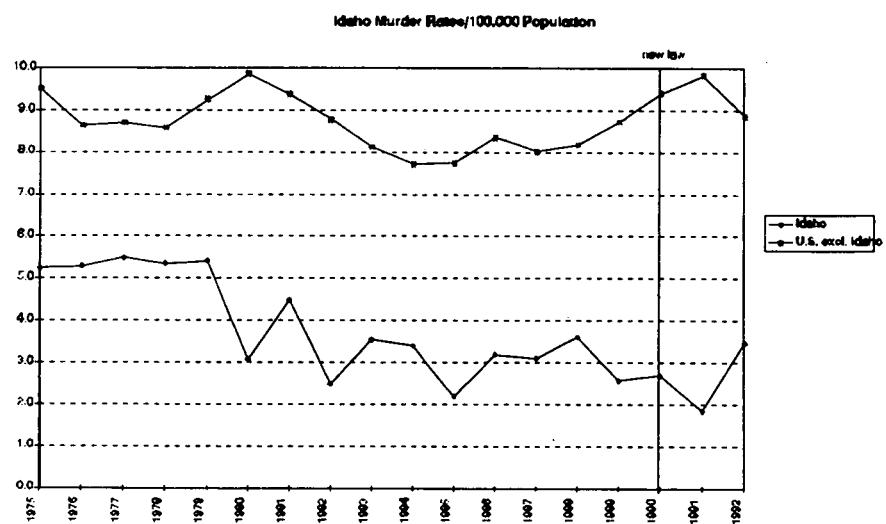
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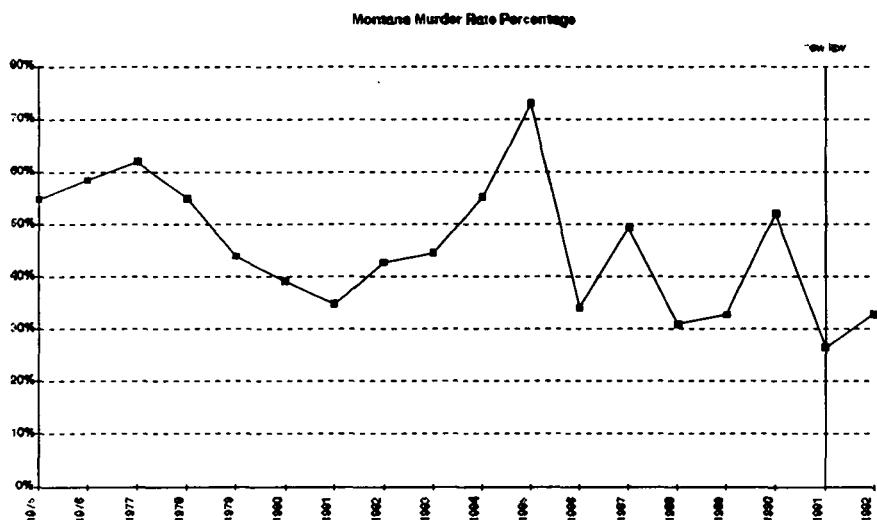
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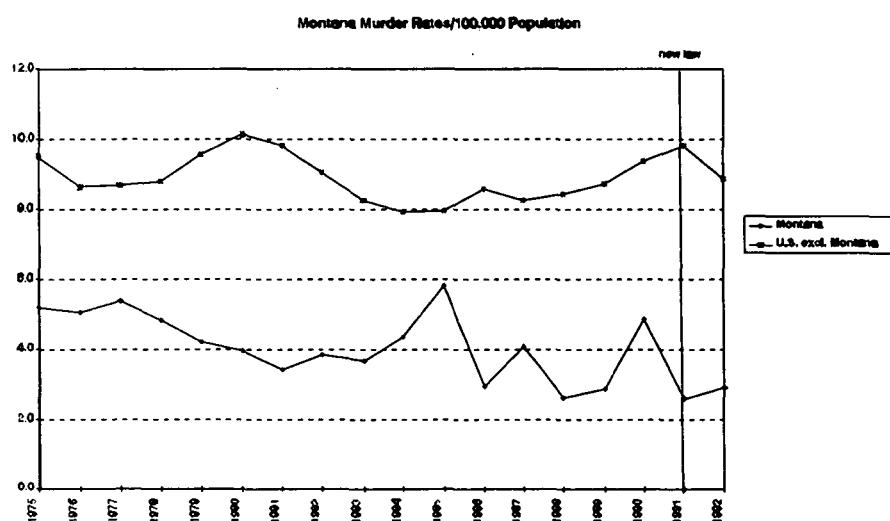
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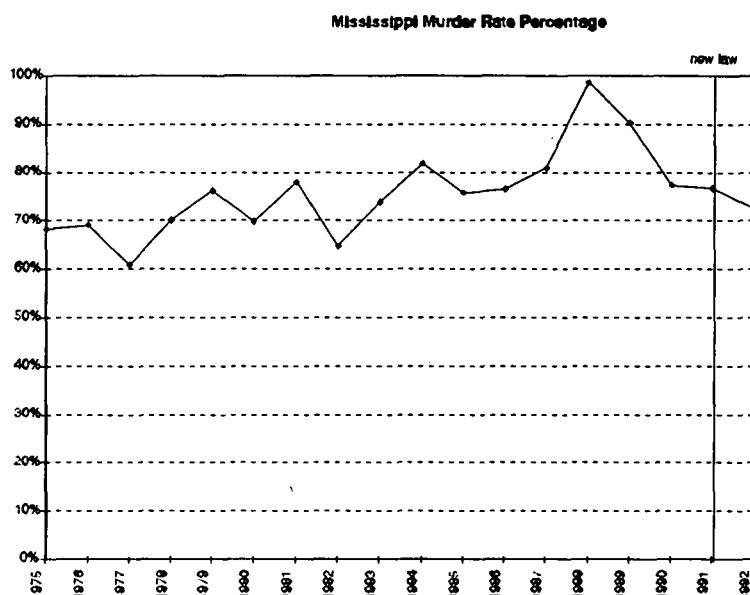
GRAPH 17



GRAPH 18



GRAPH 19



GRAPH 20

