

# **GUNS AND VIOLENCE SYMPOSIUM**

## **REFLECTIONS ON FIREARMS AND THE CRIMINAL LAW**

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### **I. INTRODUCTION**

A Symposium on firearms and violence in this Journal is at least a minor milestone in the career of the criminal law as an instrument of loss reduction. The eleven articles in these pages probably exceed the number of titles about firearms and violence previously published in the Journal since its founding by Dean Wigmore in 1910.<sup>1</sup> This Symposium reflects a widespread increase in scholarly interest in firearms and violence. I would guess that more titles on firearms and violence have been published in periodicals with scientific pretensions over the past decade than in recorded history prior to 1985.

While firearms concerns have attracted academics from many different disciplinary backgrounds, scholars of the criminal law have not been well represented in this emerging literature. Firearms and firearms control have never been an important issue in criminal law scholarship, even though firearms are used in many violent crimes and the criminal law is the principal mechanism used to regulate gun ownership and use in the United States. There are indications that the low visibility of firearms issues in academic criminal law may be changing. The continual debate about gun control has generated more academic interest in the last decade than ever before in fields as diverse as public health, public policy, medicine, economics, and criminology. Perhaps law scholars too will soon be paying serious at-

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<sup>1</sup> Christina Gabriel of this Journal's editorial board indulged my taste for empirical soundings by searching for articles with firearms-related terms in their titles over the generation since 1964. A total of seven lead-article titles were identified, but five of these concerned forensic matters not directly connected to firearms as an influence on the death rate from violence or regulatory policy toward guns.

tention to these problems.

The motivation for growing interest in guns is easy to explain, but its timing is something of a puzzle. Concern about violence and its control is the major reason for interest in firearms and firearms control, but what is not so clear is why a focus on violence emerged in the 1990s.

My wish is to use these pages as an occasion to ponder four linked issues:

1. The low estate of issues like firearms control in traditional academic criminal law.
2. The reasons why students of criminal policy and criminal law are paying more attention to questions of firearms currently than in the 1970s and 1980s.
3. The type of empirical research now being produced.
4. The lessons from research for policy analysis relevant to the criminal law.

## II. A LEGACY OF NEGLECT

It is not obvious to me which is the more interesting question—explaining why U.S. scholars now pay attention to guns or determining why they ignored the role of firearms in violence for as long as they did. For many years, firearms were an important part of the practical world of legislation and law enforcement but not of criminal law theory or scholarship. The use of firearms in robbery and assault was a significant element that aggravated the seriousness of the offense in most jurisdictions and often invoked a mandatory minimum punishment.<sup>2</sup>

A special set of laws regulating the carrying of concealed weapons was common in state penal codes. By 1930, special regulation of firearms sales at the state and city level was widespread.<sup>3</sup> Municipal and state laws regulating the time, place, and manner of gun use were universal. For most of this century, there were thousands of laws on the books at various levels of government, but these laws and their rationales attracted little scholarly attention until quite recently.

There are at least three reasons why criminal law theorists did not take a serious interest in firearms for most of the twentieth century. First, both scholars and students of criminal law devote most of their

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<sup>2</sup> See Franklin E. Zimring, *Firearms and Federal Criminal Law*, 2 WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS 1031, 1038 (1970).

<sup>3</sup> See George D. Newton, Jr. & Franklin E. Zimring, *Firearms and Violence in American Life: A Staff Report Submitted to the National Commission on the Causes and Prevention of Violence* 87-95 (1969).

attention to the individual offenses that are believed the most serious. The criminal law of the classroom is, for the most part, serious felonies; the centerpiece of academic analysis is the law of murder. Thus, the most significant analytic precursor to the Model Penal Code reform was the elegant deconstruction published in the late 1930s by Herbert Wechsler and Jerome Michael as *A Rationale of the Law of Homicide*.<sup>4</sup> When professors of law turned from the general to the special aspect of the criminal law in classroom settings, the bulk of attention was devoted to homicide and larceny.<sup>5</sup>

While this focus on serious crimes explains why no treatises were written on concealed weapons prohibitions, one would think that the dominant role of firearms in American lethal violence would have received more attention in the protracted academic analysis of murder and manslaughter. But instruments of lethal violence were not the subject of extensive analysis in large part because the emphasis in criminal law discourse was on the mental states associated with criminal actions, on determining the proper relationship between types of intention and the extent of penal liability. When viewing the penal law as a system for determining blameworthiness in particular cases, variations in individual culpability would seem more closely linked to different types of subjective mental states rather than with the particular instruments associated with criminal actions.

A third reason why instrumentalities did not loom large in criminal law scholarship was the emphasis on individual acts in legal analysis. While the criminologist might investigate the nature of homicide by analyzing samples of cases, the criminal lawyer considers each act alone. In this sense, the criminal law deals with cases only on a retail basis, and the patterns and the common themes that emerge from analysis of criminal acts in wholesale quantities will be missed. The business of the criminal law was assessing blame, not assessing risks, and the unit of analysis was the individual case. It was not a setting suited to measuring the impact of the instruments of violence on the outcome of assaults.

Firearms were not the only topic to suffer undeserved obscurity in the academic criminal law of earlier times. In an era when drunk drivers caused twice as many deaths as all forms of intended killings, behaviors like drunk driving that risk harm without intending it were regarded as unimportant to criminal law scholarship.<sup>6</sup>

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<sup>4</sup> Herbert Wechsler & Jerome Michael, *A Rationale of the Law of Homicide*, 37 COLUM. L. REV. 701, 1261 (1937).

<sup>5</sup> See, e.g., SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES 415-586, 1089-178 (5th ed. 1989).

<sup>6</sup> James Jacobs of New York University wrote the first book-length scholarly analysis of

Indeed, even when risk-generating behavior was regarded as worth prohibiting, the law reformers wished to impute criminal intent to the risk taker. For example, the Model Penal Code stopped short of prohibiting the carrying of concealed firearms for what seem to have been political reasons. Instead section 5.06(1) prohibited only possession of a weapon "with the purpose to employ it criminally."<sup>7</sup> But section 5.06(2) provided:

If a person possesses a firearm or other weapon on or about his person, in a vehicle occupied by him, or otherwise readily available for use, it is presumed that he had the purpose to employ it criminally, unless:

- (a) the weapon is possessed in the actor's home or place of business;
- (b) the actor is licensed or otherwise authorized by law to possess such weapon; or
- (c) the weapon is of a type commonly used in lawful sport.<sup>8</sup>

This contorted reasoning highlights the preference of the Code for even constructive intention over a judgment that carrying concealed firearms should be disapproved without reference to subjective mental state. In the Code, what makes carrying a gun or any other weapon worth punishment is only that carrying the weapon is probative of the actor's intent to commit an offense with it. With that pattern of emphasis, nothing could be less interesting than a study of the mere instrument of violent intentions.

### III. WHY NOW?

Will scholars of the criminal law reflect the growing interest in firearms and violence in their own scholarship? My guess would be in the affirmative on this question and my reasons relate to the apparent sources of interest in other academic fields such as public health and criminology.

But the timing of the recent interest in firearms cannot be explained by recent variations in the rates of gun violence. The homicide rate in the United States doubled between 1964 and 1974<sup>9</sup> and

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the subject in the late 1980s. See JAMES B. JACOBS, *DRUNK DRIVING: AN AMERICAN DILEMMA* 42 (1989). See also *SOCIAL CONTROL OF THE DRINKING DRIVER* (Michael D. Laurence et al. eds., 1988). The similarity in the issues raised by drunk driving and firearms is one explanation for why the same scholars are involved in the two fields. Among the confirmed subject matter bigamists represented in this symposium are Professors Cook, Jacobs, and Zimring.

<sup>7</sup> MODEL PENAL CODE § 5.06(1).

<sup>8</sup> *Id.* § 5.06(2).

<sup>9</sup> See, e.g., FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, 1964 UNIFORM CRIME REPORTS FOR THE UNITED STATES 6 (1965) (reporting 4.8 homicides per 100,000 inhabitants); FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, 1974 UNIFORM CRIME REPORTS FOR THE UNITED STATES 15 (1975) (reporting 9.7 homicides per 100,000 inhabitants).

has been fluctuating around the new, higher rates for twenty years.<sup>10</sup> Firearms have been the leading cause of homicidal death in every year in which that data has been reported, so there is nothing newsworthy in the dominant position of firearms in homicide.<sup>11</sup>

What is novel in the recent past is the clear priority that life-threatening violence has assumed in public concern about crime and its control. Until the 1990s, the focus of concern was with crime and criminals. Lethal violence was, of course, the worse case of crime that inspired community fear, but the larger problem was crime generally.

A more specific concentration on lethal violence leads to greater emphasis on the role of firearms for a number of reasons. One is the question of relative prevalence: guns are known to be used in less than 5% of all index crimes in the United States, as the National Rifle Association is quick to remind us; but guns are involved in fully 70% of all criminal homicides.<sup>12</sup> A shift in emphasis from crime to lethal violence makes firearms appear a much more important issue. A focus on lethal violence also steers attention to firearms because it concentrates attention on death as an especially problematic outcome; this helps direct attention to circumstances of attacks that might increase the chances that death will result. The rationale for special attention to homicide puts emphasis on factors that influence the death rates from assaults.

The shift in emphasis to homicide, a category that also is of central importance in health statistics, meant that public health and medical scientists were familiar with the behavior and interested in its

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<sup>10</sup> See, e.g., FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, 1979 UNIFORM CRIME REPORTS FOR THE UNITED STATES 6 (1980) (reporting 9.7 homicides per 100,000 inhabitants); FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, 1984 UNIFORM CRIME REPORTS FOR THE UNITED STATES 6 (1985) (reporting 7.9 homicides per 100,000 inhabitants); FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, 1989 UNIFORM CRIME REPORTS FOR THE UNITED STATES 7 (1990) (reporting 8.7 homicides per 100,000 inhabitants); FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, 1993 UNIFORM CRIME REPORTS FOR THE UNITED STATES 13 (1994) (reporting 9.5 homicides per 100,000 inhabitants).

<sup>11</sup> See, e.g., FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, 1961 UNIFORM CRIME REPORTS FOR THE UNITED STATES 90 (1962) (finding that firearms were used in 52.5% of homicides); FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, 1971 UNIFORM CRIME REPORTS FOR THE UNITED STATES 114 (1972) (finding that firearms were used in 66.2% of homicides); FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, 1981 UNIFORM CRIME REPORTS FOR THE UNITED STATES 10 (1982) (finding that firearms were used in 62.4% of homicides); FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, 1991 UNIFORM CRIME REPORTS FOR THE UNITED STATES 17 (1992) (finding that firearms were used in 66.3% of homicides); FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, 1993 UNIFORM CRIME REPORTS FOR THE UNITED STATES 18 (1994) (finding that firearms were used in 69.6% of homicides).

<sup>12</sup> FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, 1993 UNIFORM CRIME REPORTS FOR THE UNITED STATES 18, 29, 32, 59 (1994).

study. Once physicians and epidemiologists began to publish research and participate in public dialogue on violence, the role of firearms was highlighted by the statistical patterns that public health researchers favor. Their focus on homicide encouraged the entry of new researchers. The methods of these researchers featured the role of firearms as a contributing cause to homicidal outcomes.

All of the changes mentioned above originated outside of the criminal law, but would be expected to put some pressure on criminal law scholars to think professionally about firearms and violence. Law professors read newspapers and share in public concern. In the disorganized market for legal research topics, extensive public discourse and activity in other academic disciplines will also make it more likely that law professors will pay attention to guns. A consistent emphasis on firearms and gun control in these exterior domains will probably provoke interest within criminal law.

But there have also been shifts within criminal law that make the intellectual environment of the field more congenial to work on instrumentality effects in assault and on weapons controls than a generation ago. Many criminal law professors of the 1990s now employ the methods of social science and policy analysis with a seriousness that was not widespread thirty years ago. Part of the contribution of policy analysis is to pay attention to situational and structural factors that affect the losses suffered from criminal conduct and to consider the aggregate impacts of criminal behavior as well as the individual cases that were the traditional fare of the criminal lawyer. Negligent behavior like drunk driving, once low on the academic totem pole, suddenly became the subject of books by American law professors. And driving under the influence of alcohol was regarded more seriously as the strong relationship between high blood alcohol and traffic fatalities was etched in public consciousness.

Just as the strategies and tactics available to control drunk driving became part of the subject matter of criminal law scholarship once the target behavior became important, so we can expect firearms control strategies to generate the interest of those legal scholars who regard the role of guns in lethal violence to be a priority topic. I do not expect that the minuscule output of academic criminal law on the topic will be replaced by a flood, but the criminal law of firearms and violence is likely to be a subtopic of some importance for the foreseeable future, roughly analogous to the current status of drunk driving. There remains, however, the important question of what sort of information is available for the curious criminal law scholar, and what it can teach the eager student about the potential of firearms control to reduce violent killing in the United States.

## IV. THE LESSONS OF CURRENT RESEARCH

The seven empirical studies reported here illustrate the range and character of current research on firearms and violence. Diverse in specific subject and methodology, these studies show us how many different subtopics are relevant to making policy about guns. Surveys are used to assess gun ownership (Smith, Bjerregaard and Lizotte), reported gun use (Kleck), and attitudes toward guns (Hemenway et al.). Homicide data is tracked over time to assess changing patterns of violence among youth (Blumstein) and the impact of legislative change on gun-related violence (McDowall et al.). The disciplinary backgrounds of authors range from sociology to economics to public health to operations research. Viewing this group of studies collectively, there is a striking level of specificity and compartmentalization. Each author seems content to define and examine a part of the complex of issues involving guns and violence rather than attempting a single assessment of a general question. In this sense, the empirical work of 1995 displays many of the characteristics of a second generation of social science. We are still rather early in the second generation of this work, so that gaps in knowledge and huge discrepancies in prevalence estimates are not rare. But gone are the days when one can wrap a modest empirical study in a blanket title like "Is Gun Control Likely to Reduce Violent Killings?" without risk of embarrassment.

The studies reported in this Volume may qualify as second generation in another sense; some basic issues are no longer the subject of active controversy. An important question preliminary to any serious interest in gun controls as a method of reducing violence was whether the use of guns rather than other instruments of attack has an independent influence on the death rate from assault and robbery. If not, controlling weapons is barking up the wrong tree to reduce the cost of violence. A substantial amount of research over the period from 1968-1985 concerned this issue. While the affirmative answer most published research produced to this question did not satisfy all social science critics,<sup>13</sup> few of the empirical studies published in recent years are chiefly concerned with this issue, and most of the work published in this and other journals is premised on the theory that gun use in robbery and assault elevates the rate of death and injury from that which would result if the same assailants had used other weapons.

There is one other respect in which much of the work collected in this Symposium does not have the feel of first generation work. Many of this Issue's studies are building on or responding to earlier

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<sup>13</sup> See JAMES D. WRIGHT ET AL., *UNDER THE GUN: WEAPONS, CRIME, AND VIOLENCE IN AMERICA* 189-212 (1983).

work and are, in that sense, self-consciously incremental (see, e.g., the articles by Smith and Kleck). And almost all the scholars represented in this collection are multiple recidivists in subject matter scholarship. Indeed, many subtopics on firearms and violence have accumulated their own small literatures in the past decade, in no small part due to the efforts of this Symposium's authors.

If the cumulative impact of all this research is far from scientific consensus, the key issues in more than a few subtopics are now sharply drawn and empirical resolution seems possible. The literature in 1995 can guide an interested reader to a variety of significant questions that connect to the relationship between firearms and violence, and can provide what the current linguistic fashion would label a thicker account of the significance of firearms use in American violence than previously existed. Whether existing knowledge can guide us to correct firearms policy is another matter; it is also the final issue the Symposium's editors wish us to address.

#### V. IN LIEU OF BOTTOM LINES

There are so many different reasons why existing data do not point unambiguously to particular firearms control policies that it is almost comforting to list them: important data are not yet available or the facts are in dispute; the value to be assigned to unrestricted gun ownership is a key variable in assessing the desirability of gun policies and is not an empirical question; and the impact of particular control strategies on violence is not known. The determination of proper firearms policy never was simply a matter of processing data and never will be.

But the data we have does support some conclusions that help sharpen a policy dialogue about gun control. First, as previously mentioned, there is ample evidence that gun use is an important contributing cause to the high lethality produced by American violence. The serious assault rate in the United States is about 30% greater than in England. The homicide rate is 530% greater.<sup>14</sup> Guns are an important part of the problem of lethal violence in the United States.

A second major conclusion is that real problems do not mean easy solutions. The inertia and social momentum associated with free availability of guns in the United States are substantial. Relatively low-cost interventions that do not interfere with the general availability of guns can probably have only a limited impact on the death rate from

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<sup>14</sup> The comparison is between serious assault as reported by the Home Office in Great Britain for 1990 and aggravated assault in the Uniform Crime Reports for the same year. Homicide reports for 1990 are from the World Health Organization reports.



violence.

So each side in the great American gun control debate has a natural advantage in a key subtopic where empirical research has accumulated. The pro-control advantage concerns the relationship between firearms and violence. The anti-control advantage concerns the difficulty of producing interventions that substantially reduce death and injury.

But to speak in sweeping general terms about "gun control" as a unitary phenomenon misses the most important lesson to be learned from existing data. There may have been a time when it seemed that the basic equipment required to write an article about firearms was a general predisposition either for or against gun control laws. But now it must be recognized that there is a very wide variety of different strategies of control and no reason to suppose that all should be equally effective or ineffective.

Only a few years ago, a short article on gun control would typically take the form of a "tour de horizon" that came to general conclusions about gun control as a unitary concept. Arguments that sweep so broadly were probably never appropriate to the subject. But the research and analysis reported in these pages rubs our noses in the complex reality of firearms control. So the major momentum from studies like this collection is from the general to the specific. There are effective and ineffective strategies for firearms control just as there are good and bad penal laws governing larceny or rape. Nobody would dare generalize in the pages of this Journal to the effect that criminal laws as a class are either effective or ineffective. It is only slightly less farfetched to think that all the conceivable ways of reducing the use of firearms in assault have the same prospect for successful implementation.