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ADDRESS

CONTROLLING FIREARMS*

JOHN KAPLAN**

TO THE CHEERS OF THE ASSEMBLED DELEGATES, Dr. William S. Thayer, while serving as President of the American Medical Association, warned of the presence of tyranny in any legislation covering what we may or may not eat or drink.¹ Certainly, he could not have been referring to the Pure Food and Drug Act, which has been vigorously supported by the medical establishment. However, this meeting was convened in July of 1929, and the reference was to the legislation which created Prohibition. The denunciation of Prohibition, though simple on its face, was the result of weighing a large number of facts about alcohol, the way people use it, and the enforcement of the laws against it. Since he probably believed the facts to be completely different with respect to other drugs, such as opiates or marijuana, he would have reached entirely different conclusions about them.

One may ask why I am beginning a lecture entitled "Controlling Firearms" with analogies between drugs and alcohol. The reason is simple: I propose to draw an analogy between drugs and firearms. Part of the reason for this is that I have worked in the drug area for over a decade while my interest in guns is much more recent. In addition, the similarities in the way we discourse about drug control and about firearms control are striking. Finally, and most important, the issues with which we grapple in the drug control area may, on examination, turn out to be very similar to those that would concern us if we were to make a serious effort at controlling firearms.

Sociologists have often ascribed our drug control problems to the fact that the legislature has attempted to make criminal private conduct engaged in by very sizable numbers of people who value that conduct. A legislature is moved in part by its views of social damage wrought by drug use, in part by a desire to stigmatize those who use drugs, and in part by its views of proper moral behavior. The problem, moreover, seems to be compounded when significant portions of those who engage in the conduct have rationalizations for their behavior, and, hence, for their violations of the law, which outweigh their tendencies to be law-abiding. The effort to prevent drug use is extremely expensive both in material and human terms. This effort may nonetheless be ineffective in preventing massive violation.

Consequently, designing the appropriate legal treatment for a drug is a sensitive task. Careful judgments about the type of regulation for any substance must be balanced against the social cost. The problems encountered in balancing the costs and benefits of various kinds of drug regulation may be instructive in examining the problem of "gun control."

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¹ N.Y. Times, July 9, 1929, at 1, col. 7.

The computation of the social damage caused by the use of an illegal drug is an extremely complicated one, since many of the costs attributed to a drug's use can be traced in great part to its use under conditions of illegality.² Thus, both the heroin overdose and the marijuana arrest — two of the most serious consequences of the use of those respective drugs — turn out to be caused by the prohibition as well as the use of the drug.

Despite their exaggeration by the public, some social costs, entirely apart from those created by our system of legal regulations, occur due to the use of the illegal drugs. None of the drugs is completely safe, even though the law clearly makes street heroin much less safe than it would be if it were dispensed legally by pharmacists,³ and marijuana seems to be well within the limits of safety we permit for our legal but also potentially dangerous drugs, alcohol and tobacco.⁴ Despite this, no one has argued that every user of legal marijuana or of legal heroin under all conditions would emerge unscathed from the experience or, more precisely, from the repeated experience. At the very least, either drug, if overused, can interfere with scholastic achievement or job performance,⁵ and it certainly seems that the chronic smoking⁶ or intravenous injection of any substance increases the likelihood of various health complications.

To ascertain the social costs of drug use, we must look at our most abused drug — alcohol. Since it is freely and legally available, we can examine the effects of its use, uncontaminated by either the costs or the public health benefits of illegality. The social cost of alcohol use is so staggering and obvious that we need not even attempt to compute it here.⁷ Nor can we argue that there is some inherent difference between alcohol and the illegal drugs which, for the most part, we will compare to guns. In fact, an accurate estimate of the costs of an activity, uncontaminated by the costs of its prohibition, is best obtained when the activity is legal.

The legality of alcohol is simply an artifact of time. Fifty years ago, it was prohibited. In ten more years, marijuana, which is now prohibited, may be legal as well. Both alcohol and marijuana, and, we might add, heroin and cocaine, were and are drugs; they have all been both legally available and criminalized in the United States at different times in this century; their use, even legally, will impose costs upon society; and, as the cases of alcohol⁸ and another legal drug, tobacco,⁹ show, the public health risks and other costs of drug use can be enormous, entirely apart from the costs imposed by the system of legal regulation.

Indeed, it is beside the point whether, with respect to a given drug, these

² J. KAPLAN, *MARIJUANA — THE NEW PROHIBITION* (1975) [hereinafter cited as J. KAPLAN, *MARIJUANA*]. See also E. BRECHER, *LICIT AND ILLICIT DRUGS* (1972); A. LINDSMITH, *THE ADDICT AND THE LAW* (1965); Kaplan, *A Primer on Heroin*, 27 STAN. L. REV. 801 (1975) [hereinafter cited as Kaplan, *Heroin*].

³ See Kaplan, *Heroin*, *supra* note 2, at 820-21.

⁴ J. KAPLAN, *MARIJUANA*, *supra* note 2, ch. 4.

⁵ *Id.* at 61, 62-63, 84, 192-94, 273.

⁶ PUB. HEALTH SERV., U.S. DEP'T OF HEALTH, EDUC. & WELFARE, *SMOKING AND HEALTH: A REPORT OF THE SURGEON GENERAL* (1979) [hereinafter cited as *SMOKING*].

⁷ See, e.g., PUB. HEALTH SERV., U.S. DEP'T OF HEALTH, EDUC. & WELFARE, *3D SPECIAL REPORT TO THE U.S. CONGRESS ON ALCOHOL AND HEALTH* (1978) [hereinafter cited as *ALCOHOL*].

⁸ *Id.*

⁹ *SMOKING*, *supra* note 6.

costs would be greater or less under a different legal treatment. One can argue persuasively that the overall costs of marijuana use plus the enforcement of marijuana laws could be lessened by licensing the drug and making it more or less freely available.¹⁰ We accepted a similar argument with respect to alcohol when we repealed Prohibition — and most of us would probably not repudiate that decision. For our purposes here, however, the important point is that the existence of each of these substances and of people who wish to use them imposes costs on society which differ with the method of legal regulation but which can be substantial no matter what kind of regulation we adopt.

Moving now from drugs to guns, we see that since guns are legal for the most part, the costs of their regulation today add relatively little to the present social costs of their possession. And despite a considerable amount of statistical naivete in many computations, which tends to exaggerate the benefits of doing away with various classes of guns,¹¹ there is little doubt that the possession of these weapons imposes significant costs upon society.¹² In some ways, the calculation here is easier than with respect to the drugs, since the more sudden and dramatic consequences of gun use allow us to keep a more accurate count. Indeed, quite a horrendous picture may be painted — and often is — of the consequences of civilian gun ownership.

The rate of firearm-caused homicide in the United States is vastly in excess of the corresponding rate in any other developed Western nation. By way of example, the United States rate was 6.6 firearm-caused homicides per 100,000 persons in 1974. It was 5.6 in 1971 and 4.5 in 1968.¹³ In contrast, Australia's rate of .6 per 100,000 ranks among the highest firearm-caused homicide rates among the other developed Western nations.¹⁴ Moreover, the problem is increasing, not decreasing. During the decade from 1964 to 1974, the homicide rate doubled in the United States, and the percentage of homicides caused by firearms rose from fifty-five to sixty-eight percent.¹⁵

This same high incidence of gun use is found in connection with other violent crimes, such as robbery and aggravated assault. For instance, in 1974, one-fourth of the almost one-half million reported aggravated assaults involved the use of a gun.¹⁶ Of the almost one-half million reported robberies in 1974, about forty-five percent involved the use of a gun.¹⁷ And, in 1974, robberies resulted in about fifteen percent of our homicides, the bulk of which were caused by firearms.¹⁸

The costs of gun ownership can be broken down and classified in various ways. For our purposes here, it will prove helpful to distinguish between two

¹⁰ J. KAPLAN, *MARIJUANA*, *supra* note 2, at 332-52.

¹¹ See, e.g., NAT'L SHOOTING SPORTS FOUNDATION, INC., *FIREARMS PROHIBITION*; see also R. KUKLA, *GUN CONTROL* (1973).

¹² See BUREAU OF ALCOHOL, TOBACCO & FIREARMS, *MEMORANDUM ON THE PROBLEM OF THE CRIMINAL USE OF HANDGUNS* (1975) [hereinafter cited as *MEMORANDUM*].

¹³ FED. BUREAU OF INVESTIGATION, *UNIFORM CRIME REPORTS 1964, 1971, 1974* [hereinafter cited as *F.B.I.*].

¹⁴ NAT'L COUNCIL TO CONTROL HANDGUNS, *THE CASE TO CONTROL HANDGUNS* (1978).

¹⁵ F.B.I. 1974, *supra* note 13, at 7; F.B.I. 1964, *supra* note 13, at 3.

¹⁶ F.B.I. 1974, *supra* note 13, at 20.

¹⁷ *Id.* at 24, 26.

¹⁸ *Id.* at 18.

kinds of costs. First are costs wrought by gun owners who acquire the weapons with no thoughts of illegality or animus toward anyone. These guns, nonetheless, take a sizable toll on the gun owners, their relatives and their friends. Often this is the result of negligent storage, as where a child plays with the gun he has found, but more often someone in the heat of passion seizes and uses the readily available lethal weapon. As it turns out, the great majority of gun homicides — about 10,000 — falls into this category.¹⁹ Typically, only one shot is fired, but it is about five times more likely to kill than the knife used by one who has no gun available.²⁰

The second category of costs of gun ownership consists of the gun crimes of those who plan their crimes in advance, often acquiring the gun for that very purpose. The great majority of gun robberies and their associated homicides — about 6,000 — fall into this second category.²¹ Various efforts to lower the costs of gun use will have very different consequences with respect to these two kinds of costs.

Of course, any discussion of the respective costs of drug and gun use must inevitably reach what appears to be a major asymmetry between them. Drug use harms primarily the user, while the major harms arising from gun ownership are the injuries and deaths of innocent people. The analysis does not end here, however. First of all, though the major damage done by drug use is to the user himself, this is not the only type of damage caused by drugs. The matter is clearest with respect to the two drugs which, like most firearms, are presently legal — alcohol²² and tobacco.²³ The former causes the deaths of thousands of innocent people (in addition to the deaths of the “guilty” drinkers themselves) in both automobile and industrial accidents. And, in fact, alcohol is implicated in just about as many criminal homicides as are guns.²⁴

Also, although cigarette smoking is generally regarded as a classic example of drug use which harms only the user, a high percentage of fires arises as a result of cigarette smoking. Throughout the nation, about three times as many people are killed accidentally in fires as by firearms.²⁵ In short, the use of our two legal drugs doubtlessly causes the injury and death of more “innocent” people than does private gun ownership.

Moreover, even the illegal drugs represent some danger to the innocent. The use of amphetamines, barbiturates, and cocaine, like alcohol, is implicated in violent assaults.²⁶ And, though no one has made any effort to calculate the number who die as a result of someone else’s use of marijuana, such deaths probably occur. After all, the available evidence indicates that the driver under the influence of marijuana is at least somewhat impaired — if not

¹⁹ *Id.* at 19.

²⁰ G. NEWTON & F. E. ZIMRING, *FIREARMS AND VIOLENCE IN AMERICAN LIFE* 41 (1970).

²¹ F.B.I. 1974, *supra* note 13, at 18.

²² See *ALCOHOL*, *supra* note 7.

²³ See *SMOKING*, *supra* note 6.

²⁴ See *ALCOHOL*, *supra* note 7, at 85.

²⁵ *INFORMATION PLEASE ALMANAC* 779, 787 (32d ed. 1978).

²⁶ Ellinwood, *Amphetamine and Stimulant Drugs*, in *DRUG USE IN AMERICA: PROBLEM IN PERSPECTIVE* 140 (1973) (Appendix to the Technical Papers of the Second Report of the National Commission on Marijuana and Drug Abuse).

in comparison with the drunk driver, at least in comparison with the driver free from the influence of any drug at all.²⁷

More important, however, is the fact that we simply cannot ignore the harm to the willing user. Indeed, though we regard harm to others from an activity as more important, we often do prohibit activities which on the surface seem only to harm the willing victim. We justify this because those users who are harmed are of an age where they must be protected by the laws; because indirect injuries are inflicted on non-users who are deprived of support; because the overall productivity of society is lessened; because people who injure themselves cast a burden on the rest of society so long as we provide welfare and medical care; and, finally, because, at least to some extent, we are our brothers' keepers.²⁸

Indeed, one can argue that dividing the dead and the injured into innocent victims and guilty users is unduly punitive and moralistic. Not everyone shot by a gun is morally innocent in the altercation, and we often regard a dependent drug-user as faultless due to his condition. Also, with respect to both guns and drugs, the harm visited on the guilty is often so far out of proportion to their culpability that the distinction between the guilty and the innocent seems irrelevant.

No society concerns itself solely with harm to others while completely ignoring the injuries caused by self-harming conduct. Rather, we seem to be concerned primarily with two things: first, the total amount of social harm, with perhaps some weighting in favor of preventing harm to innocent non-users; and, second, efforts at enforcement of laws against consensual, self-harming conduct which usually raise serious practical problems and themselves impose major costs upon society.²⁹

Although it is not very important whether the overall social costs of recreational drugs or of guns is greater, we should note that it would be hard to devise a weighting of harms which would not make the drugs far more costly in social terms than the firearms. Indeed, either the seventy percent excess mortality ratio of cigarette smokers compared to non-smokers³⁰ or the \$55 billion estimated cost of alcoholism³¹ would seem, by itself, to dwarf the total cost of gun ownership.

It is not only the calculable cost of an activity that moves one to support its criminalization. As has been pointed out on various occasions, the law has a symbolic function as well. Those who wish an activity criminalized may be relatively indifferent to its actual costs or the costs of its criminalization; instead they may wish the law to make a statement about the kind of society this is and about the unworthiness of those people who engage in the behavior of which they disapprove.

Though the classic study of this phenomenon has focused on Prohibition,³²

²⁷ J. KAPLAN, *MARIJUANA*, *supra* note 2, at 62-63.

²⁸ Kaplan, *The Role of the Law on Drug Control*, 1971 DUKE L. J. 1065. *See also* Feinberg, *Legal Paternalism*, 1 CANADIAN J. PHILOSOPHY 105 (1971).

²⁹ H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 267 (1968).

³⁰ SMOKING, *supra* note 6, at 1-10.

³¹ ALCOHOL, *supra* note 7, at 16.

³² J. GUSFIELD, *SYMBOLIC CRUSADE: STATUS POLITICS AND THE AMERICAN TEMPERANCE MOVEMENT* (1963).

one can also discern a strong element of symbolism in both the literature advocating drug prohibition and that supporting gun "control." Entirely apart from the efficacy and costs of the laws in question, many advocates of drug prohibition desire a formal statement from the law-making bodies declaring that ours is a drug-free society and one that does not enjoy artificially induced or unearned pleasures.³³ Similarly, others value the ideal of a gun-free society — one that abhors violence and, hence, the means of deadly force.

Another strain often found in both the anti-drug and anti-gun literature is that the law should stigmatize the attitudes, values, and kinds of people who are associated with the particular behavior. An official governmental declaration that some kinds of people are less worthy than others may be an important symbol of their own righteousness to a significant percentage of the population.³⁴ Thus, those who do not use drugs perpetuate the large number of myths as to why others do: users are dope-fiends, radicals, or long-haired hippies; users are lazy, dirty, self-indulgent, interested only in their own pleasure, and unwilling to face this world.³⁵ Similarly, many people who do not own guns stigmatize gun owners as "gun nuts;" they are red-necks, violent, anti-intellectual, racist, reactionary and dangerous.³⁶

It is not particularly important at this point, but it is nonetheless interesting to note that the drug users and the gun users are among those most likely to hold the stereotypical views of each other, though there are, of course, many people who hold such views of both groups. It seems that, as a first approximation, the drug user and the gun user lie at opposite ends of a continuum of political viewpoints, lifestyles, and values, with perhaps one-fifth of the population lying on the gun end and perhaps somewhat fewer on the drug end.³⁷ Thus, the drug user — or at least the marijuana user — tends to be liberal, urban, young, and if educated, leaning toward the arts and humanities.³⁸ The gun owner tends to be conservative, rural, older, and if educated, more involved in engineering and the sciences.³⁹ Moreover, it seems that the greatest opposition to each side's position tends to come from the other, although between the two groups lies perhaps half the population which approves of neither and regards both as imposing serious costs upon society.

Related to the support of drug or gun control laws because of the symbolism they involve is the support such laws receive on moral grounds. Many people simply believe that, regardless of any utilitarian calculus, it is wrong for people to behave in certain ways and that the law should reflect this. Thus, they believe the drug user and the gun owner to be behaving

³³ J. KAPLAN, *MARIJUANA*, *supra* note 2, at 6-7.

³⁴ See J. Q. WILSON, *THINKING ABOUT CRIME* (1975).

³⁵ J. KAPLAN, *MARIJUANA*, *supra* note 2, at 6, 7, 17, 58, 60, 69, 152.

³⁶ R. KUKLA, *supra* note 11.

³⁷ As to guns, see M. HINDELANG, C. DUNN, L. P. SUTTON & A. AUMICK, *SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS — 1975* (1976) [hereinafter cited as HINDELANG]. As to drugs, see Abelson, Cohen, Shrayer & Rapoport, *Drug Experience, Attitudes and Related Behavior Among Adolescents and Adults*, in 1 *DRUG USE IN AMERICA: PROBLEM IN PERSPECTIVE*, 489 (1973) [hereinafter cited as Abelson].

³⁸ J. KAPLAN, *MARIJUANA*, *supra* note 2, at 25, 30, 41, 153; see also Abelson, *supra* note 37.

³⁹ MEMORANDUM, *supra* note 12, at 15-16.

immorally in pursuing their own selfish interests. They conclude that the law should make a moral statement against the particular behavior, whatever the cost.⁴⁰

Regardless of whether the law criminalizing the activity is supported on pragmatic grounds because of the damage done by the activity or because of symbolic or moral reasons, the problem of enforcing the law remains. Drug use or sale, under the typical prohibition, is a consensual (sometimes called non-victim) crime; the violation typically takes place in private and no one reports the matter to the police. As a result the police must not only discover the criminal, they must also discover the crime. Hence the laws are typically extremely difficult to enforce.

A wide variety of policies has been suggested to lower the social cost of guns in our society, probably the most drastic of which is gun prohibition. Certainly, if everyone obeyed the law, the only cost to society would be the foregone benefits of gun ownership — a matter which many would regard as negligible anyway. The problem, of course, is that not everyone would obey.

In a sense, the most important lesson we have learned from attempting to enforce our drug laws is that criminalizing an activity does not in itself stop people from doing it. The National Commission on Marijuana and Drug Abuse estimates that twenty-two million people use marijuana regularly⁴¹ and that many others use illegal amphetamines, barbiturates, cocaine or heroin.⁴² One cannot make with confidence any firm estimate of the number of users who would violate a law forbidding the possession or acquisition of firearms. Nonetheless, there are some ominous signs. First of all, there are a great many gun owners. Approximately forty-three percent of American families possess at least one gun; about one in five has a handgun in the house.⁴³ Of course, we cannot directly compare the numbers of those who violate the laws against marijuana today with the numbers who engage in what is at present perfectly legal behavior with respect to guns. The question we must try to answer is how many would violate a gun prohibition if it existed. To do this, we will have to ask, among other things, how strongly those who practice a given behavior actually want to do so.

For instance, so far as marijuana is concerned, a major reason for the percentage of use is that users simply want to continue use. At the risk of caricature, one can sketch the many reasons they give for liking their drug use: they enjoy the feeling of being "high" or of being relaxed; they think of themselves as especially creative, original and interesting people and get a satisfaction out of looking down on the square world; and they relish talking learnedly about the advantages of one drug over another and feeling the fellowship of a group with similar interests.⁴⁴

The gun owners, too, have a variety of reasons for owning guns. Often owners enjoy the use of their guns in hunting or other sports, the feeling of

⁴⁰ J. KAPLAN, *MARIJUANA*, *supra* note 2, at 290-93.

⁴¹ Abelson, *supra* note 37, at 633.

⁴² *Id.*

⁴³ Harris, *Support for Gun-Control is Highest in Recent Years*, Nashville Banner, Aug. 7, 1978, at 6, col. 2.

⁴⁴ J. KAPLAN, *MARIJUANA*, *supra* note 2, at 6, 7, 17, 58, 60, 69.

power that comes of hefting such a lethal device, the feeling of security, whether or not warranted, that comes from knowledge that one has such a weapon at hand, the feeling of self-protection, and the symbolic association of guns with the frontier and with a large portion of the history of America.⁴⁵ In addition, those who like guns often find a certain fascination in the precision with which they are built.⁴⁶ The gun, after all, is a remarkable piece of engineering which can send a small piece of metal at extremely high speeds with an accuracy that one would regard as phenomenal if he did not know in advance about the properties of such weapons. Indeed, the gun is comparable only to the camera in its precision and in the intricacies of its mechanical engineering. Though there are no data on the issue, one might hypothesize that the same aspects of personality which may cause one person to be interested in cameras would cause another to be equally fascinated with guns.

Not only do drug users like drugs and gun users like guns, but at least many members of each group are prepared to offer rationalizations and justifications for their behavior in terms of contributing to a better world. Even if these reasons are not very persuasive to the rest of us, they bolster the desires of the users with the kind of ideology that makes such behavior more tenacious than if defended solely in hedonistic terms. Thus, the drug user may defend his drug use not only on the ground of freedom, with quotations from John Stuart Mill, but also on the ground that drug use makes one less competitive, less aggressive, more creative, more sensitive, and altogether better material with which to build a cooperative, modern, and different world.⁴⁷

Similarly, the gun owner may defend his gun ownership with reference to the second amendment. He may assert that an armed citizenry is important in a democracy to protect the freedoms of all from communist coups; to be ready to engage in guerrilla warfare should the country's armed forces be overwhelmed by those of a foreign power; or, in the words of one well-known civil libertarian, simply to make sure that we do not have to "trust the military and the police with a monopoly on arms and with the power to determine which civilians have them."⁴⁸

It is not necessary to agree with either kind of justification. Indeed, another parallel between drugs and guns is that a large fraction of the society does not engage in or value the use of either.⁴⁹ That segment simply does not understand why those who like the activities go to such trouble to engage in them. As a result, they think less of the drug and gun users.

Entirely apart from the strengths of the justifications used to defend the illegal behavior, there may well be a distinction between making criminal a behavior before it occurs and after it is engaged in by large numbers of people. If this distinction is important, the explosive growth of marijuana use in the past fifteen years is all the more remarkable. If, as in the case of marijuana, the behavior were criminalized before it became widespread, it

⁴⁵ MEMORANDUM, *supra* note 12, at 17.

⁴⁶ *Id.* at 17 n.30.

⁴⁷ J. KAPLAN, MARIJUANA, *supra* note 2, at 4-6, 10, 19, 315, 323.

⁴⁸ Kates, *Why a Civil Libertarian Opposes Gun Control*, 3 CIV. LIB. REV. 24 (1976).

⁴⁹ See Abelson, *supra* note 37, at 631; HINDELANG, *supra* note 37, at 345, 350.

would be harder for those who then engaged in it to view the law as directed at them personally. At most, they might feel that a failure to repeal the law was an effort to stigmatize them.

Where the formerly legal behavior was popular — as was the case in Prohibition and as would be the case if guns were prohibited — one would expect the law to meet more resistance. Those who engage in the behavior may not only have the force of habit to push them toward continuing, but they also are more likely to see the law as a direct attack upon them. And, having joined others openly engaging in the behavior while it was legal, they may be able to count on the support of more-or-less organized groups in disobeying the law. Indeed, we are often told, as a reason for continuing the prohibition of marijuana, that Prohibition failed because alcohol was too strongly ingrained in American culture, the implication being that marijuana, having far less deep roots, should be easier to extirpate.

If this is so, it may be very important that gun ownership holds a unique place in American history. This continent was settled after the invention of firearms, and firearms were necessary not only to the body politic and for the militia, but also necessary for protection from hostile natives. Perhaps even more important, guns were used to provide a food supply.⁵⁰ In large areas of the United States gun ownership formed part of a rite of passage where boys learned to use weapons from their fathers and passed this along to their sons. Interestingly, the situation was quite different in Europe, which was well settled before the invention of practical firearms; there were no hostile natives, gun possession by the ordinary citizen was repressed as a threat to the classes in power, and hunting, for the most part, was a monopoly of the rich.⁵¹ It is not surprising that they do not have the kind of gun problem that we do today.

In the case of both marijuana use now and alcohol use during Prohibition, the desire of large numbers of people to engage in the activity, together with such factors as ideological justifications, produces violations of the law on a scale proportional to the ease of evasion. It is possible, of course, that guns might be different, although passions with respect to the rights of the gun owner seem to run at least as high as those with respect to the marijuana or the alcohol user.⁵²

It is possible, of course, that, unlike the marijuana user or the drinker during Prohibition, the gun owner's respect for law would outweigh his desires. There are, after all, differences between the drug user and the gun owner which might make wholesale violation of the law less likely in the latter than in the former case. After all, the gun user, so far as we can tell, is more likely to be conservative and devoted to law and order.

Nonetheless, one cannot make too much of this distinction. Many groups in society denounce the lack of respect for law and order in others but have rationalizations for their own misbehavior. The same police who deplored the law violations of draft evaders and anti-war demonstrators have joined in

⁵⁰ MEMORANDUM, *supra* note 12, at 15.

⁵¹ L. KENNETT & J. ANDERSON, *THE GUN IN AMERICA: THE ORIGINS OF A NATIONAL DILEMMA* 13-16 (1975).

⁵² Benenson, *A Controlled Look at Gun Controls*, 14 N.Y.L.F. 718, 741 (1968).

illegal strikes, and the very men who orchestrated the American presidential campaign most devoted to law and order felt little compunction about obstructing justice themselves.

It is an empirical question in each case whether the desire of an individual to engage in illegal behavior is outweighed by his adherence to law. Nonetheless, it is not unlikely that a sizable portion of the gun-owning population would simply ignore any law interfering with the possession of weapons, unless the likelihood of apprehension could threaten them into obedience. Yet, it is likely that any given gun owner would run an extremely small risk of apprehension; the great majority of them does nothing to attract police attention. Even if the authorities suspected someone, they would probably not have the probable cause necessary for a search warrant. Moreover, if the number of illegal handgun possessors were very large, it would be impractical to obtain and execute search warrants for any sizable percentage of their homes.

In fact, it is hard to think of any way we could coerce those gun owners determined to ignore any prohibition into giving up their weapons, short of instituting a massive program of house-to-house searches. These are, in fact, practiced occasionally in other countries — often in the wake of a revolution — to remove weapons from private hands. Typically, they are buttressed with summary and extremely high penalties, usually death, for those caught in violation. On constitutional, practical, political and moral grounds, this would be inconceivable in America today.

In any event, if the rate of violation of a gun prohibition approached that in the drug area, we would be faced with a whole series of problems. We will discuss later the rallying cry, “When guns are outlawed, only outlaws will have guns.” For our purpose here, it is more relevant to state, “When guns are outlawed, all those who have guns will be outlaws.” Laws which turn a high percentage of the citizenry into criminals impose serious costs on society over and above those incurred in attempted enforcement.⁵³

Indeed, a major cost of our marijuana laws would then be applicable to guns:

The marijuana user has been at least partially alienated from our society by the fact that even though he has not been caught, he has, nonetheless, been made into a criminal. This by no means follows simply from the high level of violation of our marijuana laws. A variety of sociological studies have shown that an important social norm may very commonly be broken without serious consequences to the individual or society. For instance, studies of college cheating have revealed that a very high — indeed, an amazingly high — percentage of college students has cheated on at least one occasion. Significantly, however, even those who have cheated tend to regard the rules against cheating as morally justified; and though they typically have some rationalization to justify their conduct to themselves, they consider themselves supporters of the rules against cheating and are fully prepared to censure those who are caught in

⁵³ See H. PACKER, *supra* note 29, at 332-42.

violations. The same is almost certainly true of tax evasion and a whole series of adult misbehaviors.

The situation is very different, however, with respect to marijuana. The laws are not only widely violated, but on the basis of various rationalizations . . . they are not even considered morally binding by those who have violated them. . . .

In part because marijuana-users — unlike cheaters — do not rationalize their use of the drug as an aberrant event unrelated to their total personality, it becomes especially unhealthy for their society to declare them serious criminals. It is obvious that when any society criminalizes such a large percentage of its . . . people, it raises very serious social problems. We do not know whether those who violate such serious criminal laws will thereby become more likely to violate others. It may or may not be true that the second crime comes easier. . . . It is hard to see, however, how a realization that one has committed what is officially a very serious crime can fail to engender at least a somewhat more generalized lack of respect for both the law and the society that has so defined his action. . . .

This alienation from both the rule of law and our democratic society is probably the most serious cost of our marijuana laws.⁵⁴

Moreover, it is likely that if the violation rate is high, attempting to enforce any law against gun possession will be extremely expensive.⁵⁵ The drug area, particularly in the case of marijuana, but also in the case of heroin, has produced the paradox that the threat of sanctions is not sufficient to deter users. As a result, violations are so common that they frequently come to police attention without great police effort. Even though those apprehended constitute a very small number compared to the total number of violators, they are numerous enough to constitute a major burden on the criminal justice system.⁵⁶ If a similar situation is created with respect to gun owners, their numbers will raise similar problems, further overtaxing a criminal justice system already unable to cope with the kinds of violent and predatory crimes that upset us much more than does the private possession of guns.

Our experience in the drug area should alert us to the consequences of asking the police to enforce a law which results in violations so numerous that the police cannot possibly pursue them all. This simply invites selective enforcement, a problem all too common in American law with respect to drug and various other “non-victim” offenses.⁵⁷ Allowing the police to pick and choose among a group and to decide whom they will and whom they will not investigate or arrest for a crime leads to a feeling of unfairness among those selected for prosecution; to the bribery and corruption of the police; and to the covert use of all kinds of discriminations — including race, class, and “appropriate” attitude toward the arresting officer — which we would not

⁵⁴ J. KAPLAN, MARIJUANA, *supra* note 2, at 32-33, 36.

⁵⁵ MEMORANDUM, *supra* note 12, at 25; NAT'L SHOOTING SPORTS FOUNDATION, INC., *supra* note 11; F. E. Zimring, There's No Such Thing as a Free Lunch — Gun Control (May 15, 1978) (address given to the Annual Meeting of the Gun Control Federation of Greater Cleveland).

⁵⁶ J. KAPLAN, MARIJUANA, *supra* note 2, at 28-29.

⁵⁷ PACKER, *supra* note 29, at 332; J. KAPLAN, MARIJUANA, *supra* note 2, at 41.

condone if they were overt.⁵⁸ Since political deviants of the right or the left are among the most paranoid of Americans, and perhaps least likely to obey a gun prohibition, we would soon find the police bearing down most heavily upon them. This should be a matter of considerable concern to those worried about restrictions on first amendment freedoms.

To be sure, gun owners presumably would not come to the attention of the police as often as marijuana users, since marijuana use gives off a discernible odor. Nonetheless, we are familiar with the cast of characters which adds to the number of arrests in marijuana — the inquisitive baby sitter, the former lover working off a grudge, and the fireman on the premises to fight a blaze. All of these would presumably cause gun arrests as well.

Of course, in the case of guns, a death or injury resulting from the use of the illegal weapon will bring the violation to public attention. In many cases, the event would demonstrate the wisdom of the gun prohibition. Where the gun owner commits a murder with his weapon, prosecution on a gun possession charge might be a superarrogation, but the event itself would serve to reinforce the educational purposes of the criminalization.⁵⁹ Similarly, the lessons of the law would be taught where the now illegal gun goes off accidentally, though perhaps where a family member is killed, some would be offended by the prosecution of the bereaved on a gun possession charge.

Enough of the cases coming to the public attention, however, would involve a householder who fought off a burglar or rapist with an illegal gun. Though there seems to be no easy analogy here to drug prosecutions, we may speculate that these cases would cause law enforcement serious problems. Since the prosecutorial authorities presumably would not regard the subsequent use of the weapon as negating its initial illegality, they would probably prosecute the householder. In such cases, however, one would expect it to be extremely difficult to keep the jury's attention focused upon the violation of the gun possession law and away from the fact that the case before them was one where, to put it bluntly, the defendant was right and the law wrong about his or her need for firearm protection. The likely result of this, then, would be jury nullification and a refusal to convict.

Not only would convincing a unanimous jury to convict be a difficult and time-consuming task, thus adding to the expense of enforcing gun prohibition, but such cases would probably achieve political significance. Groups working to repeal the prohibition would have every incentive to make the case a cause célèbre in their campaign against the gun law. Since the case might drag on long after the burglar or rapist had been disposed of, its facts would be given greatly increased publicity, leaving the public with the impression that instances of successful self-defense with firearms are far more common than they actually are.⁶⁰ This, in turn, would help convince more people of the need to possess guns for self-defense and would encourage resistance to the gun law.

⁵⁸ H. PACKER, *supra* note 29, at 286-87; J. KAPLAN, *CRIMINAL JUSTICE: CASES AND MATERIALS* 695-99 (1973).

⁵⁹ P. J. Cook, *A Policy Perspective on Handgun Control with Suggestions for Research 5* (Nov. 5, 1976) (unpublished paper; on file with J. Kaplan at Stanford University).

⁶⁰ See, e.g., NAT'L SHOOTING SPORTS FOUNDATION, INC., *supra* note 11; P. J. Cook, *supra* note 59, at 4.

Of course, we would have to weigh the benefits against the costs of any prohibition. In the case of our drug prohibitions, the benefits are already known. Marijuana use is obviously below what it would be if the drug were freely available; heroin is unavailable to most of the United States' population; and the alcoholism rate during Prohibition seems to have been lower than the present rate. Similarly, it is likely that for its costs, a gun prohibition would do at least some good. Presumably the number of privately possessed guns would be reduced, since at least some people would obey the law.⁶¹ As a result, the number of guns available to cause social harm, either in the heat of passion or perhaps even when used by robbers, would be lower.

Unfortunately, the basic problem with prohibiting any activity is that the costs of the attempted suppression are proportional to the number of people who nonetheless continue to engage in the activity, while the benefits of even a successful prohibition are proportional to the far lower number of violators who cause social harm. The fact is that the solid majority of the users of either drugs or guns engage in such activities without causing any social problem at all. This is true not only of marijuana, where the disparity is enormous,⁶² and of alcohol, where nine-tenths of the users have no difficulty with the drug,⁶³ but even with respect to heroin.⁶⁴ Similarly, the vast majority of gun owners are non-criminal, and their guns create no social problems.⁶⁵ It is true that the gun which created no problem at all this year may, next year, kill in an accident or in a crime of passion, or be sold or stolen and thereafter used in a robbery.⁶⁶ Even so, when one considers that there are over 100 million guns in private possession,⁶⁷ it seems clear that on a *per gun* basis, the vast majority of guns in private hands will impose no costs at all upon society.

Still another lesson we have learned from our experience with prohibiting drugs is that prohibitions are differentially effective with respect to different kinds of users. Typically, they are most effective with respect to the users about which we are least worried. For instance, the laws against marijuana are most effective in denying access to the drug to middle-class citizens of middle-age or above. They are far less successful, indeed almost completely unsuccessful, with respect to the high school students, the unstable, and the marginally adjusted — those who are far more likely to cause social harm through their use of the drug.⁶⁸

With respect to guns, it is likely that the reduction in gun possession would not produce a proportionate decrease in the social harm caused by guns. It is, of course, a considerable exaggeration to say that "When guns are outlawed, only outlaws will have guns" if by this one means that only those involved in

⁶¹ MEMORANDUM, *supra* note 12, at 23.

⁶² J. KAPLAN, MARIJUANA, *supra* note 2, at 311-54.

⁶³ ALCOHOL, *supra* note 7, at 11.

⁶⁴ L. G. Hunt, Relationship of Heroin Supply to Increases in Use and Other Epidemiological Observations on the Effects of Liberalizing the Heroin Laws (May, 1978) (Center for Planning and Research, Inc.).

⁶⁵ See note 11 *supra*.

⁶⁶ P. J. Cook, A Preliminary Report on the Demand for Guns in Robbery (Oct. 5, 1976) (unpublished paper; on file with J. Kaplan at Stanford University).

⁶⁷ G. NEWTON & F. E. ZIMRING, *supra* note 20, at 4.

⁶⁸ J. KAPLAN, MARIJUANA, *supra* note 2, at 23-26, 166-67; Abelson, *supra* note 37.

property and violent crimes would be gun owners. There would, of course, be many others who illegally kept their guns and would not otherwise act in any criminal manner. Nonetheless, we would expect that individuals who already risk more serious criminal sanctions for committing crimes with their guns would be among those least affected by a gun prohibition.

The more interesting and important question involves the basically law-abiding individuals who would otherwise use their guns in crimes of passion. To the extent that they give up their guns because of the law, their homicide rate presumably will be lowered. However, not only are we unable to predict the overall rate of non-compliance with a gun prohibition law by otherwise law-abiding citizens, we are also unable to tell whether those who would use their guns in a crime of passion are less likely to obey a prohibition than the average non-criminal gun owner. It is hard to think of any reason why those individuals who would commit crimes of passion with their guns would be likely to obey the prohibition. And if, as seems likely, those who commit the crimes of passion are less law-abiding than the rest of non-criminal gun owners, they might be less likely to obey the gun prohibition law as well.

Another problem faced in the drug area can be expected to decrease further the benefits we might anticipate from obedience to a gun prohibition. Any calculation of the social cost of drug use must reckon with the fact that at least some portion of this damage would be accomplished in another way if the drug in question ceased to exist. We simply do not know how many heroin addicts would be alcoholics if no more heroin were available to them, how many alcoholics would be psychotics if they could not escape into alcoholism, or how many marijuana users would use a more dangerous drug if marijuana disappeared. The chances are that in all these cases, the number would be significant.⁶⁹

The same argument is applicable to the case of guns. But here, remarkably, we can make a better guess as to the savings in human life if no guns were in private hands. Zimring's classic study reveals that an attempt to kill is about four times as likely to end fatally if a gun is used rather than a knife.⁷⁰ Presumably, then, we should lower somewhat our estimate of the maximum number of lives which might be saved by a gun prohibition of any given degree of effectiveness. Because of the lessened availability of guns, the saving in life should be in the neighborhood of eighty percent due to a decrease in deaths resulting from crimes of passion and accidental shootings.

The effect of a gun prohibition on suicides, which account for over half of firearm deaths, is not clear. It is likely, of course, that some who would otherwise commit suicide with a gun would think better of self-destruction if that instrumentality were not easily available to them. On the other hand, we simply do not know enough to make an educated guess as to what percentage of gun suicide victims would have persevered and used some presumably more difficult or less satisfactory means of self-destruction if they did not have a gun at hand.

Finally, though presumably it would be much more effective with respect

⁶⁹ Maddux & Elliot, *Problem Drinkers Among Patients on Methadone*, 2 AM. J. DRUG & ALCOHOL ABUSE 245, 250-52 (1975).

⁷⁰ Zimring, *Is Gun Control Likely to Reduce Violent Killings?*, 35 U. CHI. L. REV. 721 (1968).

to law-abiding citizens, a gun prohibition would probably not be completely ineffective even in lowering the availability of guns to robbers. To the extent it was successful, the effect of the prohibition would be quite complex. Presumably, it would cause some robberies that would otherwise be committed with guns to be committed without them, thus saving the lives of about eighty percent of those who would have been the victims of the attendant homicides.

One major consequence of a robber's possession of a gun is that it allows him to attack better defended and more lucrative targets, such as commercial establishments, rather than more vulnerable elderly persons.⁷¹ Rather elementary economic reasoning would predict that a lessened availability of firearms to robbers would not only lower the number of gun robberies but also displace some robberies from less to more vulnerable targets.⁷² Since a robbery with a gun results in a somewhat greater percentage of deaths while a robbery without a firearm results in a higher likelihood of serious injuries, a lessened availability of guns to robbers might lower the number of deaths but increase the number of serious injuries. Moreover, a lessened availability of guns might increase the total number of robberies since some robbers might have to increase their activity to maintain a constant income from less lucrative targets.⁷³

Of course, we would hope that a lowered availability of guns to robbers would reduce the number of robberies and hence the total number of injuries. We would expect that the lessened availability of guns to robbers would lower the robbery rate significantly.⁷⁴ After all, a gun does make it appear easier and safer for a robber and allows even the physically weak or the very young to rob strangers.

Finally, in thinking about the benefits of gun prohibition in reducing the toll taken by firearms, we should also consider whether there are any societal benefits in gun possession which might be decreased as well. Even though we may not regard as worthwhile the uses of guns in hunting and sports or the feeling of security that gun ownership may create, we should not neglect the possibility that widespread private ownership of firearms may in fact deter some burglaries and robberies. It has been calculated that a burglar is about one-tenth as likely to be shot by his victim as he is to be sent to prison,⁷⁵ and the figure may be even higher for the armed robber. Neither event is, of course, a very likely one, but it is hard to believe, considering the magnitude of the two sanctions, that the threat of private violence is an insignificant deterrent to the would-be burglar or robber.

Since the crucial determinant of the balance of costs and benefits in any prohibition law is the extent of violation, a matter which is very difficult to predict, one can only speculate upon the result of a gun prohibition. We do not now have any such prohibition, and it is impossible to prove any hypothetical

⁷¹ See P. J. Cook, *supra* note 59. See also W. G. Skogan, *Weapon Use in Robbery*, in *VIOLENT CRIME* (J. Inciardi & A. Pottier eds. 1978).

⁷² W. G. Skogan, *supra* note 71, at 67-68.

⁷³ See Kates, *Reflections on the Relevancy of Gun Control*, 13 *CRIM. L. BULL.* 122 (1977); P. J. Cook, *supra* note 59; W. G. Skogan, *supra* note 71.

⁷⁴ P. J. Cook, *supra* note 59; W. G. Skogan, *supra* note 71.

⁷⁵ See, e.g., NAT'L SHOOTING SPORTS FOUNDATION, INC., *supra* note 11; P. J. Cook, *supra* note 59.

statement true or false. Nonetheless, insofar as we can guess, the better speculation would be that the magnitude of violations would be such that the costs of attempting to enforce a gun prohibition would clearly outweigh the benefits we might achieve from a lowered availability of firearms.

Such a conclusion, of course, does not resolve the issue of gun control. We can apply yet another lesson we have learned from our experience with drugs. In determining our drug control policy, we have long known that drugs need not all stand or fall together. Putting the most rational face possible on our decisions, we have attempted to pick out and criminalize what we consider to be the most dangerous drugs, with the exceptions of alcohol and tobacco, which, though dangerous, are also so widely used that their prohibition would impose intolerable costs on the society. However, even though we cannot criminalize a drug because the costs imposed by wholesale violations of the law would be too great, we nonetheless may criminalize its most dangerous and abusable forms or attempt to lessen its availability differentially to the specific groups whose use of the drug will impose the greatest social costs on us.

In these ways, we may hope to influence consumption while bearing far lesser costs than would be imposed by a more complete criminalization. Thus, even though we have legalized alcohol after a brief experiment with Prohibition, the highest proof and presumably most abusable forms of the drug are still often criminalized.⁷⁶ Moreover, though alcohol is for the most part freely available, it is often legally withheld from a limited class of people — minors and, in some states, alcoholics.

Of course, we have long applied just this kind of reasoning to guns and different kinds of guns have already been subjected to differing regulations. Machine guns and sawed-off shotguns are prohibited; sales of handguns are legally restricted, though in a somewhat half-hearted way; and long guns are subject to even less regulation. As a result, it may be argued that even if the criminalization of all firearms would impose costs which would outweigh its benefits, the balance might tilt the other way with respect to a more specific category of guns. Of course, the type that first comes to mind is the handgun. After all, there are far fewer handguns than long guns in private hands, and on a per gun basis handguns are far more dangerous, accounting for about eighty percent of the gun homicides.⁷⁷

Though a prohibition of handguns would have many aspects in common with the more general prohibition of all guns, the lesser number of weapons involved and the greater social cost per weapon would lead us to expect that, all other things being equal, it would achieve a better balance of costs and benefits. Despite this, there are still a great many handgun owners who, should they be resistant to complying with the prohibition, would impose on us many of the costs we have previously discussed. We cannot tell, of course, whether handgun owners as a class will be more or less resistant to a prohibition than other gun owners. There are reasons, however, to expect some differences.

While the owners of long guns primarily give hunting and sport as their reasons for gun ownership, the most common reason given by handgun

⁷⁶ Kaplan, *Heroin*, *supra* note 2.

⁷⁷ G. NEWTON & F. E. ZIMRING, *supra* note 20, at 49.

owners is self-protection. One would think that this kind of elemental justification, whether valid or not, would be the hardest to override through the threat of legal punishment. Nonetheless, it may be that the much greater danger to the owner and his family inherent in handguns makes the owners more ambivalent about their possession. It is interesting, as well, that while the long gun has deep cultural roots in America, the widespread possession of handguns is a relatively recent phenomenon. In fact, in 1964, less than 750,000 new handguns were purchased in this country. The number had doubled by 1967 and increased more than three-fold in 1968.⁷⁸

It can be argued that if the handgun prohibition is partially effective, the law might lower the perceived need to own firearms for self-defense. This in turn might increase obedience to the prohibition and become part of a circular process which feeds upon itself to make the prohibition more and more effective. The problem is that most handgun owners do not see their weapons as necessary to protect them from others with handguns. Rather, they see their weapons as protection from unarmed but younger or stronger intruders. On the other hand, if handgun owners really do keep their guns for protection, they can perhaps be talked out of the idea. So far as we can tell, handguns are not much good for defense since they are much more likely to injure the owner and his family than to protect them.

Again, the major unknown in computing the likely costs and benefits of a handgun prohibition is the extent of cooperation by the citizenry. An experimental buy-back program in Baltimore offered fifty dollars per operable handgun, which was considerably above the average cost of those weapons. The program managed to recover only 8,400 handguns in a period of almost a year. This figure was estimated to represent about one-fourth of the handguns in the city.⁷⁹ The relatively high price offered for the weapons, as compared to the cost of replacing them, may well have induced people simply to replace their old guns with better weapons at government expense. Moreover, there is no reason to believe that the second quarter of the handguns would be as easy to remove from circulation as the first — or the third as the second.

The difficulty and uncertainty of enforcing satisfactorily a prohibition of all handguns has moved various commentators to suggest the enactment of a law which merely requires their registration. Although such a law, according to the polls, has the support of a solid majority of American people,⁸⁰ its advantages are by no means obvious. Indeed, it would seem that without more, such a gun registration law is likely to result in a worse balance of costs and benefits than would a law prohibiting all handgun possession.

Before we can evaluate the costs or benefits of a handgun registration scheme, we must appreciate the fact that the term registration encompasses many different arrangements.⁸¹ A registration arrangement can be as simple as automobile registration, where the gun owner merely would have to file a declaration containing his name and address, the kind of gun he owns, and its

⁷⁸ *Id.* at 174.

⁷⁹ Baltimore News American, Oct. 19, 1974, at 5, col. 1.

⁸⁰ See Harris, *supra* note 43.

⁸¹ MEMORANDUM, *supra* note 12, at 22-43; F. E. Zimring, *supra* note 55.

serial number. Registration, however, can be more complex; it can involve the owner's birth certificate, photograph, and perhaps his fingerprints. A gun registration system could be designed which would be analogous to the driver licensing system. Such a system could require safety instruction, proficiency exams, and even psychological testing.

All of the above licensing and registration requirements are of the permissive category which, upon certain formalities, allows a registered weapon to be possessed by anyone except people in a relatively small proscribed category. A licensing or registration system, however, could also be of the restrictive variety. Either some particular objective reason, such as employment as a security guard, or the approval of the police would be required before an individual could purchase or possess a handgun. Needless to say, each of these means of registration would have its own costs and, as the registration became more complex, would become increasingly expensive for the government to administer and for the citizen to obey.

Even if we used the simplest system, that one analogous to auto registration, we should not anticipate the same ease of administration for gun registration. Automobile registration is easily enforced by the issuance of license plates which are visible to all on the highway; possession of an unregistered gun is private and would require us to enforce the registration law in the same way as a prohibition against gun ownership. And we must remember that no one fears that his automobile registration will be a prelude to the confiscation of his car. With respect to guns, however, the perception of many owners is quite different.⁸²

In any event, if many handgun owners did not register their weapons because of lethargy, fear, principle, parsimony, or ignorance, a gun registration system might become very costly. Proportional to their numbers, the unregistered owners would impose upon us many of the same costs which would stem from a complete prohibition of guns.

The real problem with a law simply requiring the registration of handguns is that it would provide few benefits to balance its costs,⁸³ except in combination with another type of law, which we will discuss shortly. A registration system that is not burdensome will not lower gun possession to any significant extent; indeed, it would not even be intended to do so. Those who possessed guns legally could register them with no trouble. If owners wished to avoid registration, one would expect that they would simply keep their guns without registering them. Those who possessed handguns for criminal purposes would probably not be influenced by any requirement of registration. Moreover, as registration becomes more burdensome, it takes on more of the characteristics of a prohibition — though probably at higher administrative cost.

Many people seem to feel that a major advantage of a registration system is that it would make it easier under some circumstances for the police to identify a firearm and trace it to its owner. There are several problems with this view. As far as the basically law-abiding owner is concerned, his gun

⁸² R. KUKLA, *supra* note 11; NAT'L SHOOTING SPORTS FOUNDATION, INC., *supra* note 11.

⁸³ Zimring, *Firearms and Federal Law: The Gun Control Act of 1968*, 4 J. LEGAL STUDIES 150 (1975); F. E. Zimring, *supra* note 55; M. Borish, Gun Registration (June 1, 1977) (student paper, Stanford Law School "Criminology Seminar").

crime is most likely to be the shooting of a relative or acquaintance in the heat of passion. In these cases, the police usually find both the gun and its owner quite easily. With respect to the criminal gun owner, the problem is far more difficult, but a registration system is not of much help. First, automobiles are sufficiently large that they can be and are built with a number of serial numbers in secret locations. The same cannot be done with handguns, and it is not difficult to remove the serial numbers on weapons. Secondly, guns whose possessors are unknown and which can be connected to a crime seldom fall into police hands. If weapons could be more easily traced, they would presumably be hidden or destroyed and would fall into police hands even less often. Finally, competent criminals would exert considerable efforts to obtain firearms which could not be traced to their crimes.

Of course, it would be helpful in tracking down criminals to have a registry of the bullets fired by each gun, since police do find bullets they cannot trace — often in homicide and robbery victims. The problem is that any method of registering guns by the particular markings on the bullets they fire would be hopelessly impractical. The markings change with the age of the gun and, in any event, we have no method of indexing the markings in the way we do fingerprints. Hence, we would have no means of finding the few relevant patterns among the vast number which would be registered.

Instead of attempting to deal with the huge reservoir of guns or even only of handguns, a more cost-effective means of gun control might be the application of what is called the *vice model*,⁸⁴ which forbids the sale of firearms. The major advantage of such a law would be the avoidance of the large social costs inherent in turning millions of otherwise law-abiding citizens into criminals. At the same time, an effective prohibition on sale would, over time, gradually reduce the number of guns in private possession.

At first glance, criminalizing the selling of guns might appear logically inconsistent with our failing to punish the buying as well. In fact, this is not the case. In drafting laws, we often draw the line between legal and illegal conduct so that the maximum reduction in the proscribed behavior can be gained at minimum social cost.⁸⁵ A frequent result is that laws aimed solely at suppressing sales are more cost-effective in reducing the possession and use of a substance than are laws which attempt to suppress possession directly.

There are several reasons for this result. First, there are fewer sellers than buyers; this would permit a concentration of law enforcement efforts where they would do the most good. Second, juries are likely to be more sympathetic to a “mere” user, who may be ill-advised, than to a businessman making a profit from the weaknesses of others. States which have decriminalized small-scale marijuana possession and other “non-victim” crimes have relied on this technique. Offenses treated under the *vice model* range from gambling, where the person who takes illegal bets is guilty of a crime while the person who places them is not, to the offense of selling new automobiles not equipped with seat belts, where the seller, rather than the buyer, is guilty of an offense.

Although it is true that a simple prohibition on sales or transfers of guns would probably be more efficient than a broader prohibition which also

⁸⁴ J. KAPLAN, *MARIJUANA*, *supra* note 2, at 315-30.

⁸⁵ *Id.* at 132.

forbade their use or possession, even prohibitions on sales will be ineffective if the demand for the product and the resistance to the law are too great. We must remember that Prohibition itself never criminalized the possession or use of alcohol; Prohibition merely forbade the manufacture and sale of alcohol. As a result, we will examine a prohibition upon the sale of guns as if it encompassed only handguns, on the theory that the same factors that would make a complete prohibition on handguns more cost-effective than one on all guns would also apply to application of the vice model.

Here, however, we encounter an important difference between guns and drugs, one which makes the criminalization of gun sales less effective. In theory, drugs could be handled to the complete satisfaction of the prohibitionist simply (or not so simply) by cutting off the sources of supply. After all, the average user of any of the illegal drugs rarely has on hand more than enough to tide him over a few weeks. Guns, however, are not perishable, consumable items. A gun in private possession is presumably dangerous for its entire useful life, a period not only of years but of decades. As a result, the enormous reservoir of firearms in private possession will greatly lower the effect of even an enforceable prohibition on handgun sales in reducing the social cost of the use of such weapons.

The best analogy to drugs would be prohibiting the sale of ammunition, which is moderately perishable, rather than the sale of guns.⁸⁶ The problem here, however, is technical in nature. First, handgun ammunition is basically the same as long gun ammunition so any attempt to control handguns by this method would involve the more difficult, costly and stubborn problem of long gun regulation as well.⁸⁷ Secondly, serviceable ammunition is simpler to make than any of the illegal drugs being manufactured in the laboratories all over the United States. The difficulty of manufacturing ammunition lies somewhat closer to distilling liquor than to making PCP or amphetamines. In other words, the likelihood is that by forbidding the sale or manufacture of handgun ammunition, we would be adding yet another major substance-abuse problem to our already crowded inventory.

To examine further the effect of a sales prohibition on the social cost of handgun ownership, we must look more carefully at two kinds of handgun owners: the basically law-abiding owner and the criminal who acquires his gun with the intention of using it in illegal activity. The law-abiding owner, even though he may not be willing to give up or register his handgun, may draw the line at acquiring one illegally. Moreover, it is quite possible that he will not know an illegal seller and will be unwilling to go to the trouble of finding one. The criminal gun-owner, on the other hand, presumably will have a greater incentive to obtain a handgun and will be more likely to know an illegal seller.

It is difficult to speculate on what an illegal handgun supply industry would look like if sales were forbidden. It is by no means clear that it would look like our illegal drug industry since the demand, and hence the economies of scale, would seem to be far greater in the case of drugs than guns. The non-criminal handgun buyer would presumably be a one-time purchaser. Even if the

⁸⁶ MEMORANDUM, *supra* note 12, at 28.

⁸⁷ *Id.* at 29 n.40.

robber had to dispose of his weapon more often, illegal sellers would probably lack the repeat business that characterizes a drug connection.

That is not to say that an illegal market would not spring up to serve the law-abiding handgun owner. Even without the economies of scale or the repeat business of the illegal drug industry, enough people living on the fringes of legality might accommodate acquaintances and provide large numbers of guns to non-criminal users. We can, of course, predict that a prohibition on gun sales would raise the price of guns since the seller will demand additional profit to compensate him for his risk of detection.

We cannot tell at this point how common handgun purchases would be under such conditions. This depends on two factors: 1) whether large numbers of potential purchasers see their need for handgun protection as great enough to justify purchasing from illegal sellers and 2) whether an illegal market can operate under the constraints of whatever law enforcement can be brought to bear on the situation.

So far as the latter is concerned, our experience with drugs indicates that, if the demand exists, there will be many who, despite the efforts of law enforcement, will step in to supply the need. If Al Capone could rationalize his bootlegging empire, he might say:

I'm a businessman. I've made my money by supplying a popular demand. If I break the law my customers are as guilty as I am. When I sell liquor it's bootlegging. When my patrons serve it on silver trays on Lake Shore Drive it's hospitality. The country wanted booze and I've organized it. Why should I be called a public enemy?⁸⁸

There will be many who can justify selling guns to respectable people even if such sale is illegal. Moreover, if they cannot justify it satisfactorily, experience indicates that they will do it anyway.

Nor is it clear that salesmen would be unable to find the guns to sell. Even if the illegal gun market would not in itself support many full-time criminals, illegal wholesaling and smuggling might be quite profitable activities. We must remember that marijuana, which at least on a per volume basis is less valuable than handguns, is quite profitably smuggled into the United States in enormous quantities. At the retail level, we cannot even predict how many people would seek to accommodate friends and earn a small profit by selling handguns illegally.

There are several serious costs to any partially successful effort to stop the sale of handguns. Though on a smaller scale, many of these drawbacks parallel the costs of attempting to prevent handgun ownership directly. The chances are that there will be a considerable number of illegal handgun sales, including sales by those who are in the business of handgun supply and sales by handgun owners who wish to sell their guns rather than give them away or destroy them. It is very likely that an attempt to interdict what may be a considerable demand for guns will consume a good deal of investigatory time and prosecutorial and judicial resources, although this would not be as expensive as attempting to administer sanctions directed at the user himself.

If the citizenry would be sympathetic to such prosecutions, enforcement

⁸⁸ A. SINCLAIR, *PROHIBITION, ERA OF EXCESS* 220 (1964).

expenses might be worthwhile. Unfortunately, however, it is possible that once we have made the sale of all handguns illegal, those who sell them will appear to some otherwise law-abiding citizens as Robin Hoods, violating the unpopular laws for the greater good. It does not take a very significant minority of the population to deadlock juries and cause the legal system a considerable amount of difficulty and expense.

The means that the police would have to use to enforce such laws are already familiar to us because of their use in the drug area.⁸⁹ Preventing a sale between a willing buyer and a willing seller requires intrusive techniques. Indeed, even to inadequately enforce such laws the police must use informants, undercover agents, methods which border on entrapment, searches and seizures, wiretapping, and a whole panoply of enforcement techniques which not only often transcend the borders of constitutionality but which, even where they are legally permissible, tend to bring the police into disrepute. Use of such means against relatively small numbers of serious criminals may be worth this kind of cost. However, where the police are asked to enforce laws by such methods against large numbers of people who have public support, the consequences can be more serious.

Probably the most serious difficulty with criminalizing the entire market for handguns is that it may force us to make choices between control over the supply of guns to the large number of non-criminal users, a small percentage of whom nonetheless in the heat of a passion will use them to kill, and control over the supply of guns to the much lower number of criminal gun users who are more likely to use their guns in robberies and in a significant number of related homicides. To understand this potential problem, let us examine an alternative policy — a complete firearms prohibition applicable only to those whom we think are especially likely to use guns in criminal ventures.

It should first be noted that such a policy would eliminate any attempt to use the criminal law to keep handguns from the law-abiding. In a sense, then, we would accept the some 10,000 deaths arising out of the use of handguns in crimes of passion⁹⁰ as we have accepted the 50,000 deaths a year due to automobile accidents.⁹¹ We would then concentrate our resources on keeping guns away from criminals, particularly from those who commit some 400,000 robberies.⁹²

In a way, this is a more difficult task since on a per person basis it is harder to affect the gun market for criminals. Guns can be diverted from the legitimate market serving the majority of legal gun buyers, stolen from the large reservoir of non-criminal guns, or clandestinely manufactured or smuggled in from abroad. Nonetheless, despite the obvious obstacles, it may be that some reduction can be achieved in the availability of guns to criminals. If so, this is an area where any reduction might be both noticeable and welcome. The argument, then, is that even though criminals are much more likely than law-abiding citizens to have access to illegal sellers of guns, not all

⁸⁹ M. MOORE, *BUY AND BUST: THE EFFECTIVE REGULATION OF AN ILLICIT MARKET IN HEROIN* (1977); Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027 (1974).

⁹⁰ F.B.I. 1974, *supra* note 13, at 19.

⁹¹ U.S. DEP'T OF COMMERCE, *STATISTICAL ABSTRACT OF THE UNITED STATES* 78 (1978).

⁹² F.B.I. 1977, *supra* note 13, at 17.

of those who commit gun robberies are that well connected. It might be that the law could make obtaining a gun so expensive, time-consuming, and risky that many would-be criminals would not make an attempt. A great many episodic criminals take relatively little trouble to plan or prepare for their crimes. With respect to these, our law might accomplish something by diverting them to less dangerous activities or encouraging them to give up the idea of committing crimes.

If we began to direct our law enforcement efforts toward making guns less available to criminals, we could take advantage of their relatively small numbers compared to the rest of the gun-owning population and of the fact that they would lack significant public support for their gun possession. As a result, we may attempt not only to prohibit the sale of handguns to them but to restrict long guns as well, a move that would probably be impractical if extended to the entire population. This is, in fact, quite important since it is likely that with little effort, long guns could be cut down into handguns serviceable for criminal purposes.⁹³ Moreover, the much smaller number of individuals subject to the criminal law would allow us to criminalize their possession as well as their purchase of firearms.

The basic problem in designing such a law is that to make realistic predictions as to its effect in various circumstances would require more knowledge about the categories of individuals who should not have access to firearms and about the likely shape of the illegal market that may attempt to serve them. Since we are denied perfect predictive ability, we cannot simply attempt to deny firearms to those who are going to use them in robberies. The first question, then, is, how can we operationally define the group of individuals to whom we wish to deny firearms so as to maximize the excess of benefits over costs in our effort? It would seem that those already convicted of a crime should be our first target. Though it could be argued that we should base our standard on arrest rather than conviction, there is a strong reluctance to make any disabilities dependent on anything so unsupervised and discretionary as police arrest powers. Moreover, conviction of a crime is already too broad a disability. Even though we have found that criminals are often unspecialized and that robbers exhibit considerable versatility, we could probably use a more precise predictor of robbery than conviction of any crime. Perhaps conviction of a misdemeanor involving assault or of any felony would be a start. And we might also wish to have a statute of limitations restricting the disability to perhaps ten years from the conviction or release from imprisonment.

Probably more important is the second major category of individuals we would like to keep away from guns — juveniles. There are several reasons for this. First, we have a tradition of attempting to deny youth access to dangerous activities, ranging from automobile driving to alcohol consumption. Second, juveniles represent an especially crime-prone group; the average age for burglary arrests is sixteen, for robbery and rape, eighteen, and for murder, twenty.⁹⁴ Finally, we regard a juvenile as having less of a

⁹³ Kates, *supra* note 73, at 122.

⁹⁴ F.B.I. 1975, *supra* note 13, at 196-97.

legitimate need for a handgun to protect his home and family. Hence, the law would have considerable public support.

It might be, too, that the law should discriminate in this regard between rural and urban youths. In rural areas, gun ownership is a different kind of tradition, and the range of legal uses for guns is significantly greater than in our cities. It might be that similar rules should apply to all juveniles so far as handguns are concerned, but that juveniles living outside urban areas should be allowed greater latitude with respect to long guns.

Once we have defined the prohibited classes, which presumably would also include the mentally ill, alcoholics and drug addicts, we still would have to face the issue of enforcement. It is one thing to designate specific classes as unable to possess or purchase guns; it is quite another thing to prevent their purchases. Presumably, there would be several ways for disqualified individuals to purchase firearms. First, they might purchase from legitimate gun retailers. Sellers might sell guns to members of a prohibited class either because they don't realize their disqualifications or because the sellers wished the extra profit from illegal sales. Second, some purchases may be made in a completely illegal market, typically in stolen guns but perhaps also in smuggled or even illegally manufactured weapons. Finally, those disqualified from gun ownership might be able to purchase guns from the large number of legal owners.

Nonetheless, our experience with alcohol and various abusable prescription drugs indicates that the law can make it more difficult for members of prohibited classes to obtain such substances from legitimate dealers. Indeed, with respect to the medical drugs, most of the supply for users who lack legal prescriptions is purchased not from pharmacists but from illegal sellers in a completely illegal retail market. Since gun sales, especially to members of the groups denied the right to purchase such weapons, would probably be regarded as a considerably more serious matter than alcohol or drug sales, the law might be more effective in this area.

A major determinant of the effectiveness of any effort to restrict the access of prohibited classes to firearms would be the amount of trouble we were willing to require that legitimate gun dealers undertake to restrict sales to eligible buyers. We can require them to check identification to make it less likely that they will sell to juveniles. It is much more difficult to require them not to sell to those with criminal convictions. The problem there is that we have no central registry of records of convictions since the famous FBI "rap sheets" are much more complete with respect to arrests. Setting up such a registry might be a worthwhile investment of resources, but there would be additional implications as to rights of privacy. Finally, the definitions we use are so inherently ambiguous that preventing sales to alcoholics, drug addicts, or the mentally ill might be so difficult as not to be worth much effort.

It is likely that the imposition of a short waiting period between gun purchase and delivery might have several major advantages. However, we must balance these benefits against the inconvenience to the large number of legitimate purchasers and realize that the more burdensome the requirements, the higher the number of those who, at any given level of enforcement, will not comply. Despite this potential effect, a waiting period for checking the eligibility of the purchaser would not only screen out some

illegal purchasers but, when combined with penalties for false statements of eligibility or identity, might deter significant numbers of other ineligible purchasers from any attempts by raising considerably their risk of apprehension. In addition, such a waiting period might have another benefit which is unrelated to enforcing the laws against prohibited sales. By increasing the difficulty of purchasing a gun for those not in a prohibited category, the waiting period might lower the number of guns purchased on impulse or in the heat of passion, thereby preventing the sales of those guns most likely to be used in homicides.

The illegal market for guns is obviously a very serious law enforcement problem and is different in many ways from the effort to enforce requirements upon legal dealers. Since it involves an effort to suppress a consensual traffic, it raises problems similar to those encountered in attempting to suppress the traffic in stolen goods, "hard" drugs, illegal loans, commercial sex and murder for hire. Nonetheless, in all of these cases we have a feeling that the law has some worthwhile effect, often a considerable one as compared with no law at all, and that in most of them the effort is worth its costs. Here, where the number of law violators would be small compared to that which we would expect if we criminalized firearm sales to a large percentage of the citizenry, the drain on law enforcement resources would not be as great. Insofar as we would be attempting to deny firearms to what would seem to be an especially dangerous group, we would be using these resources in a worthy cause. Although law enforcement could not be expected to suppress this traffic completely, one would expect it to be able to shrink the illegal market sufficiently so that at least some would-be purchasers would have a good deal of difficulty finding illegal sellers or convincing them that they could be trusted enough to be allowed to purchase illegal weapons.

The final major source of guns to the prohibited classes would be sales in a second-hand market by those who have purchased guns legitimately. This source of firearms can be divided into two classes. First, we would worry about the legal purchaser acting solely as a front or conduit and acquiring the weapon on behalf of someone he knows is prohibited from purchasing firearms. Although this would involve a violation of the conspiracy laws, it would be difficult to prevent. Perhaps most purchasers would be concerned that a gun they had purchased turned up soon thereafter in the hands of an illegal possessor, especially when the possessor might have reason to tell the police precisely how he acquired the gun.

This problem can be partially solved by regarding it as a facet of controlling sales by legitimate gun dealers. The waiting period on purchases from legitimate dealers might effectively make it more difficult and less profitable for the legal buyer to act as a front for members of the proscribed class, especially if this requirement is combined with a restriction on the number of guns one individual could purchase in a given period.

The problem of resales by legitimate purchasers is even more worrisome. The purchase of second-hand guns from owners who either were ignorant of the buyer's membership in a prohibited class or who simply wanted to sell their guns enough to do so to illegal purchasers might be a major cause of leakage of guns.

Sales from the large reservoir of guns in private possession cause some of

the most difficult problems in designing a system of firearms control. Placing upon all private persons the same responsibilities of checking, delay, and record-keeping that we would expect of gun dealers is likely to be inpracticable except in the context of a gun registration scheme. If all guns were registered to their owners, private sales would have to be entered in the system. It would then become a great deal easier to prevent the transfer of private weapons to prohibited classes. We have already seen, however, the difficulties and costs of attempting to implement a universal registration system for handguns. Because of the ease of cutting down long guns into serviceable handguns, we probably would have to register long guns as well, thus making the effort even more likely to be over-costly.

Fortunately, the great bulk of guns used for illegal purposes is not acquired through purchase from private gun owners.⁹⁵ Rather, guns used in crimes seem either to be stolen guns or to have been purchased new. If it is indeed the case that most criminals do not know non-criminal gun owners well enough to purchase guns from them and that most law-abiding gun owners can be trusted to avoid selling guns to juveniles, it may be unnecessary to incur all the problems of a registration scheme in order to exert control over the resale market.

It is now important to compare a prohibition on the sales of all handguns with an effort to deny all guns to prohibited classes. It is true that the former might be moderately effective in reducing handgun sales to non-criminal users and, in the long run, even successful in lessening the number of handguns in private possession. Moreover, the successful enforcement of such a law might be helpful in lessening the availability of handguns to criminals, although it would be especially hard to keep guns from the most dangerous individuals. On the other hand, a law directed solely at narrowly drawn prohibited classes would be far less costly to implement and might have significant beneficial effects.

One might think that the proper course would be to combine the two kinds of law, criminalizing all sales of handguns while making it illegal for members of the prohibited classes to buy long guns or to possess any firearms. The problem with this combination is that a general prohibition on handgun sales might make it more difficult to enforce the law aimed specifically at the criminal market. In other words, we may have to choose between the two laws.

There are several reasons for this. First, it seems to be a general principle of law enforcement that the larger the illegal market, the more difficult it is for the law to exert control over any part of it. Partly this is because the more rigorous the law against any sale, and the more transactions the law attempts to prevent, the more enforcement resources we will need to require any given level of compliance. Moreover, if past experience in the drug area is a guide, the amount of resources made available would not increase proportionately with the task. As a result, resources would tend to be diluted rather than concentrated on the most important areas of firearms control. Second, as the

⁹⁵ M. H. Moore, *The Supply of Handguns: An Analysis of the Potential and Current Importance of Alternative Sources of Handguns to Criminal Offenders* (May, 1979) (unpublished paper; on file with J. Kaplan at Stanford University).

prohibited class expands to include greater numbers of benign offenders, illegal gun sellers will begin to benefit from an aura of respectability and will come to courts already over-crowded with "gun cases." Finally, as large numbers of illegal gun sellers are drawn into the market by the criminalization of the presently legal sales, some will feel that they have much less to lose by making other kinds of illegal sales as well.

Insofar as one of the most effective means of denying handguns to criminals is requiring legitimate dealers to keep records and perform other bureaucratic tasks, we should recognize that these tasks are far easier to impose on legitimate businessmen than on illegal sellers. The more illegal sellers we create with a partially-enforced prohibition on sales to otherwise law-abiding citizens, the more sellers we free from bureaucratic requirements and make available to sell to ineligible purchasers.

We have seen this precise result in the drug area. It has been argued that marijuana would be easier to control in a context where the drug was available to all adults than under present laws prohibiting all sales. In addition, it has been pointed out that the illegal sale of more dangerous drugs has been encouraged by the criminalization of marijuana: "[B]y making the sale of marijuana illegal we have given a monopoly of a very popular product to drug pushers. Because they will be severely punished if they are caught selling marijuana, they have little to lose by selling more dangerous drugs as well."⁹⁶

The issues in designing an optimal means of reducing the toll taken by firearms in our society are even more complex than has been indicated. We have yet to take full account of the fact that ours is a federal system and that the possibilities of successful gun control may vary from place to place in the nation. It would seem, indeed, that the need for firearms control is greatest in our cities, while the resistance to such efforts is greatest in our rural areas. One response to this would be a federal law varying in its requirements from place to place, depending on the population density. However, the political climate throughout the nation is a function of far more than the population density, and local customs might make a severe law unenforceable in large areas despite any demographic characteristic indicating the contrary.

Perhaps a more satisfactory arrangement would be to use federal law to do two quite different things. First, it would set minimum standards, such as a prohibition on sale to specific classes, and implement controls on legal sellers. Or, if further thought or research indicates that much of the foregoing is unduly pessimistic, it would impose a prohibition on the sale of all handguns.

The second purpose of a federal law would be to prevent traffic within one jurisdiction from undercutting the more stringent regulations of another. In this task, it would make great sense to require a gun purchaser to give an address with his identification and to prohibit sale to a resident of an area which itself forbids the sale or possession of such a weapon. Again, a short waiting period might discourage individual purchasers from travelling some distance to obtain firearms declared illegal in their home areas, and rules discouraging multiple gun purchases would make it more difficult for the entrepreneur gun runner.

⁹⁶ Kaplan, *Official Views on Marijuana*, 179 SCIENCE 168 (1973).

Such a system would allow local political conditions to determine, within significant limits, local policy upon firearms control. Those states or localities which feel that they can afford the costs of a complete gun prohibition may enact one; those which feel that only handguns should be prohibited or wish to require gun registration could act accordingly. It might be that with the cooperation of the national authorities, differing areas could enforce varieties of such laws at costs which would not exceed their benefits.

It cannot be overemphasized that the more precise the function the law is expected to perform, the greater the problem encountered in its drafting. A flat prohibition can be written in a few sentences, while a regulatory scheme will go on for many pages, creating many opportunities for evasion and exempting as many activities as possible in order to lower the costs of enforcement. Such an activity requires full knowledge of the gun market, of the legitimate interests of gun owners, of the technology of firearms and of the various means of record-keeping and enforcement. Finally, and perhaps most important in considering any law, we must know not only what it will cost for what we are getting, but also how much we will have to spend. To say that these problems have received insufficient public attention would be an understatement.

No matter what public policy we choose, however, firearms will still take a significant toll on our society for some time to come. Indeed, it may even be that the coercion of the law will not be the only important factor in lowering this toll. If a handgun at home is far more likely to injure its owner or his family than to protect them, it might be that gradually more and more people can be made to understand this.

The educational effect of the law, however, is a complex one. In some situations, a prohibition can show that society is serious about a matter and teach through the example of the law. Where the law cannot be sufficiently enforced and violations become widespread and open, the existence of the law may do harm to proper education. In this case, what might be offered as dispassionate factual material may be viewed as merely another effort to enforce an unenforceable law. When education is seen as the handmaiden of the law, it becomes far less persuasive.

Moreover, education might even be successful at lowering the toll taken by guns without lowering the number actually possessed. In many areas of drug control, we are forced to decide whether it is better to teach people not to use a drug or to teach them to use it prudently. It might be that efforts to teach gun safety to those who own guns might be a wise course, even if we believe that the best kind of gun safety would be not to own the gun to begin with.

On the other hand, if the law's reach does not too far exceed its grasp, a major effect of an enforceable law which achieved widespread public support would be gradually to help create a climate where gun possession is less respectable and where those who have guns for protection will talk less about them and be a little ashamed of their behavior. Not only might this lower the costs imposed upon us by firearms but, over time, it might make possible gradual improvements in the kinds of law we could adopt to do more good than harm in this difficult area.