

ESSAY

WHY THE FBI'S JUSTIFIABLE HOMICIDE STATISTICS ARE A MISLEADING MEASURE OF DEFENSIVE GUN USE

Clayton E. Cramer*

I. THE FBI'S JUSTIFIABLE HOMICIDE STATISTICS

Advocates for tighter gun regulation argue that justifiable homicides by private citizens with firearms are extremely rare. Compared to criminal homicides with guns, these are so rare that the defensive use of guns is not justified by the enormously larger number of criminal misuses.¹ This would be an interesting argument if the FBI's justifiable homicide statistics included all defensive killings by civilians, but it does not. The FBI's manual on reporting data to the Uniform Crime Reports (UCR) system is very clear as to what deaths may be reported as "justifiable homicides":

Justifiable homicide, by definition, occurs in conjunction with other offenses. Therefore, the crime being committed when the justifiable homicide took place must be reported as a separate offense. Reporting agencies should take care to ensure that they do not classify a killing as justifiable or excusable solely on the claims of self-defense or on the action of a *coroner, prosecutor, grand jury, or court.*²

* Adjunct History Faculty, College of Western Idaho. Mr. Cramer is the author of *CONCEALED WEAPON LAWS OF THE EARLY REPUBLIC: DUELING, SOUTHERN VIOLENCE, AND MORAL REFORM* (1999) (cited by Justice Breyer in *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3132 (2010) (Breyer, J., dissenting)), *ARMED AMERICA: THE REMARKABLE STORY OF HOW AND WHY GUNS BECAME AS AMERICAN AS APPLE PIE* (2006), and co-author of, among other articles, Clayton E. Cramer & Joseph Edward Olson, *What Did "Bear Arms" Mean in the Second Amendment?*, 6 *GEO. J.L. & PUB. POL'Y* 511 (2008) (cited by Justice Scalia in *District of Columbia v. Heller*, 554 U.S. 570, 588 (2008)), and Clayton E. Cramer, Nicholas J. Johnson & George A. Mocsary, *"This Right is Not Allowed by Governments that Are Afraid of the People": The Public Meaning of the Second Amendment When the Fourteenth Amendment Was Ratified*, 17 *GEO. MASON L. REV.* 823 (2010) (cited by Justice Alito in *McDonald*, 130 S. Ct. at 3039 n.21, 3041 n.25, 3043). Mr. Cramer's website is CLAYTON CRAMER'S WEB PAGE, <http://www.claytoncramer.com> (last visited Aug. 20, 2013). Funding for this research was provided by Firearms Policy Coalition and the Calguns Foundation.

1. *Firearm Justifiable Homicides and Non-Fatal Self-Defense Gun Use*, VIOLENCE POLICY CENTER (June 2015), <http://www.vpc.org/studies/justifiable15.pdf>.

2. *Uniform Crime Reporting Handbook*, UNIFORM CRIME REPORTS 1, 17–18 (2004), https://www.fbi.gov/about-https://www.fbi.gov/aboutus/cjis/ucr/additional-us/cjis/ucr/additional-publications/ucr_handbook.pdf/at_download/file (emphasis added).

What other civilian killings with firearms are there besides those “in conjunction with other offenses”? While statutory definitions vary from state to state, California’s definitions provide a useful example. Homicide is considered justifiable:

When resisting any attempt to murder any person, or to commit a felony, or to do some great bodily injury upon any person

...

When committed in defense of habitation, property, or person, against one who manifestly intends or endeavors, by violence or surprise, to commit a felony, or against one who manifestly intends and endeavors, in a violent, riotous or tumultuous manner, to enter the habitation of another for the purpose of offering violence to any person therein . . .

When committed in the lawful defense of such person, or of a wife or husband, parent, child, master, mistress, or servant of such person, when there is reasonable ground to apprehend a design to commit a felony or to do some great bodily injury, and imminent danger of such design being accomplished; but such person, or the person in whose behalf the defense was made, if he was the assailant or engaged in mutual combat, must really and in good faith have endeavored to decline any further struggle before the homicide was committed . . .

When necessarily committed in attempting, by lawful ways and means, to apprehend any person for any felony committed, or in lawfully suppressing any riot, or in lawfully keeping and preserving the peace.³

This would seem to include all offenses that would be reported in conjunction with such a killing by a private citizen. Or does it? California law also has a category of “excusable homicide” which includes both killings “committed by accident and misfortune, or in doing any other lawful act by lawful means, with usual and ordinary caution, and without any unlawful intent” and a surprisingly catch-all category: “When committed by accident and misfortune, in the heat of passion, upon any sudden and sufficient provocation, or upon a sudden combat, when no undue advantage is taken, nor any dangerous weapon used, and when the killing is not done in a cruel or unusual manner.”⁴

3. CAL. PENAL CODE § 197 (West 2016).

4. CAL. PENAL CODE § 195 (West 2016). Similar language is used in many other state definitions of excusable homicide. See OKLA. STAT. ANN. tit. 21, § 731 (West 2016); N.M. STAT. ANN. § 30-2-5 (West 2016); IDAHO CODE ANN. § 18-4012 (West 2016). For historical origins of the distinction, see N.Y. Crim. Code § XV, in THOMAS F. GORDON, GAZETTEER OF THE STATE OF NEW YORK: COMPREHENDING ITS COLONIAL HISTORY 293 (1836); REV. MO. STATUTES, art. II, § 5

In many cases, such “sudden combat” might not be a reportable offense under the UCR program. It is clear why law enforcement agencies might well be uncertain how to categorize a homicide committed under such circumstances. In many cases, excusable homicide does not fit the FBI’s very narrow definition of justifiable homicide.

If the only data available were the FBI’s justifiable homicide table, it would be an interesting problem to determine if the FBI’s definition understates actual defensive killings. If you want to know how many civilians kill criminals each year, you need to look at not only justifiable homicides, but also the “sudden combat” excusable homicides. Let us call this combination of civilian justifiable homicides (CJHs) and the “sudden combat” excusable homicides “civilian legal defensive homicides” (CLDHs).

There is no data available for the United States as a whole that tells us the yearly number of CLDHs. But there have been several studies of different cities and counties that tell us how many CLDHs there are, relative to the number of murders and manslaughters. The noted criminologist Gary Kleck has concluded, based on these studies, that the number of CLDHs *with guns* per year is typically 7.1% to 12.9% of the murder rate (at least five times the FBI’s “justifiable homicide with a gun” figures).⁵

There is another problem with the FBI’s figures for justifiable homicide that significantly *understates* CLDHs, and significantly *overstates* murders. If the police investigate a homicide and ask the district attorney to charge someone with murder or manslaughter, that is reported as a murder or manslaughter to the UCR program. But district attorneys often investigate a case, find evidence that the killing was, in fact, justifiable or excusable homicide, and drop the charges.

A person who is tried for murder will sometimes be found innocent because the killing was done in self-defense. This is very often the case in spousal abuse situations where a woman defends herself or her children from a current or estranged husband.⁶

(1835). For the historical origins of the distinction, see JOYCELYN M. POLLOCK, *CRIMINAL LAW* 161 (10th ed. 2013) (“The distinction between justifiable and excusable homicide was important at early common law, because excusable homicide resulted in forfeiture of goods. However, the distinction is less important today, because neither entails any criminal responsibility. Today, the two terms are often used synonymously.”).

5. GARY KLECK, *POINT BLANK: GUNS AND VIOLENCE IN AMERICA* 112 (1991) (“For a variety of reasons the FBI S[upplemental] H[omicide] R[eports] totals for CJHs represent only a minority of all civilian legal defensive homicides (CLDHs).” Discussing detailed study of Detroit homicides 1969 to 1980: “[W]hile 344 cases of civilian homicides were labeled justifiable, another 741 were labeled excusable . . .”).

6. *Id.* at 114 (“Gillespie . . . reviewed five local studies of homicides in which women killed their husbands or men with whom they lived intimately and concluded that the majority were self-defense killings . . . She estimated that there were as many as 500 such killings each

If a murder turns into a CLDH after the initial report has been taken, there is a strong possibility that this change won't make it into the UCR data. How do we find out how many such cases there are? We have a source of information that is especially interesting because it was originally produced as gun control advocacy. In 1989, *Time* magazine ran an article called "Seven Deadly Days." It included photographs and information about every person killed by a gun in one week in the United States.

To see how typical a selection this was, let us extrapolate the data to annual rates. The week was May 1-7, 1989. Was this a typical week for gun deaths in the United States? Reasonably so. There were 464 gun deaths reported in the article. Of these, 216 were reported as suicide, 14 deaths were CLDHs, 13 deaths were police justifiable homicides, and 22 deaths were accidents.⁷ This leaves 199 murders.

To scale up the May 1-7 gun deaths to determine yearly rates for the United States, we can't just multiply by 52 weeks per year. Murder rates peak in the summer months; May 1989 had 7.8% of 1989's murders.⁸ To scale up the May 1-7 gun deaths to an annual rate, we multiply by $100.0/7.8$ (May's murder percentage), and then multiply by $30/7$ (the fraction of May days that included May 1-7). This gives us the following results (remembering that the "per year" figures on the last line are extrapolations):

year"

7. *Seven Deadly Days*, TIME (July 17, 1989), <http://content.time.com/time/magazine/article/0,9171,958158,00.html>30.

8. *Crime in the United States*, 1991 UNIFORM CRIME REPORTS 1, at 14, <https://www.ncjrs.gov/pdffiles1/Digitization/138839NCJRS.pdf>.

Table 1

	SEVEN DEADLY DAYS	TOTAL GUN DEATHS	SUICIDES	CLDHS	POLICE	ACCIDENTS	MURDERS
Initial Report		464	216	14	13	22	199
Initial Report %s		100.00%	46.55%	3.02%	2.80%	4.74%	42.89%
Per Year (Extrapolation)		25,495	11,868	769	714	1,209	10,934

For the year 1989, the FBI reported 11,832 gun murders, 236 gun civilian justifiable homicides, and 360 gun police justifiable homicides.⁹ The gun murders for the year are surprisingly close to the extrapolation of murders from that week in May.

That the FBI's 1989 figures for civilian justifiable homicides and police justifiable homicides do not match our extrapolations is not all that surprising. Only about half of all police justifiable homicides are actually reported to the FBI;¹⁰ the data above fit well with this fact. The 769 CLDHs are far higher than the FBI's figures for civilian justifiable homicides, but we have already discussed why the FBI's numbers are too low.

Earlier we examined Professor Kleck's estimate that CLDHs with guns should be 7.1% to 12.9% of the total murder rate. For 1989, that would be between 1,346 and 2,445 gun CLDHs—not 769.¹¹ Remember that the *Time* article, like the FBI's reporting, showed the number of civilian defensive uses *initially* reported. A year later, *Time* decided to follow up on the murder cases and see how the courts handled them. Instead of 14 CLDHs, now there were 28—14 of the murders reported were now ruled justifiable or excusable homicides.

9. *Id.* at 17–18, 22.

10. KLECK, *supra* note 5 (“[O]nly about half of police killings get reported as such to the national vital statistics system”).

11. *Crime in the United States*, *supra* note 8, at 18. There were 18,954 murders in 1989.

Table 2

Seven Deadly Days one year later	Total Gun Deaths	Suicides	CLDHs	Police	Accidents	Murders
464	464	216	28	13	22	185
one year later %s	100.00%	46.55%	6.03%	2.80%	4.74%	39.87%
per year	25,495	11,868	1,538	717	1,209	10,165

This number of CLDHs (1538) is at the low end of the range that Professor Kleck's estimates would give.¹² However, at least 43 murder cases had still not gone to trial,¹³ and it was still possible that some of these would be found justifiable or excusable.

II. OTHER OUTCOMES

The Violence Policy Center's study assumes that the proper measure of citizen defensive gun use is dead criminals. In fact, a better measure is crimes prevented.

But how do you measure that?

For a number of years, I and several associates gathered news reports and law enforcement agency reports of citizens who were found to have used guns in lawful self-defense.¹⁴ For the years 2003–2011, we found more than 4000 incidents where police, prosecutors, juries, or judges had determined that the citizen's use of a gun was lawful self-defense. We have previously published a detailed analysis of the data for 2003–2011.¹⁵ I recently resumed updating this blog with new incidents. As of this writing, there are more than 4300 incidents recorded for the years 2003–2011 and part of 2015, in which citizens used guns to protect themselves from home invasions, rapes, robberies, animal attacks, carjacking and some truly unexpected and perhaps unexpected threats. These incidents by no means comprise a comprehensive list; rather, these are only ones that were considered newsworthy by either a news organization or law enforcement agency.

It seems likely that many more incidents were not reported either to law enforcement or to journalists. In some cases, the incidents, while frightening at 2:00 AM, might have seemed less frightening in daylight. In other cases, persons defending themselves may have had good reasons for not wanting police to ask why they had a gun. One category of these incidents involved convicted felons defending themselves from criminal attack, and who would not want the police to arrest them for being a felon in possession of a firearm.¹⁶

12. GARY KLECK, POINT BLANK: GUNS AND VIOLENCE IN AMERICA 112 (1993).

13. *Death by Gun: One Year Later*, TIME, May 14, 1990, at 34.

14. Clayton E. Cramer, CIVILIAN GUN SELF-DEFENSE BLOG (Dec. 16, 2015), <http://gunselfdefense.blogspot.com/>; see also Tamara F. Lawson, *A Fresh Cut in an Old Wound—A Critical Analysis of the Trayvon Martin Killing: The Public Outcry, The Prosecutor's Discretion, and the Stand Your ground Law*, 23 U. FLA. J.L. & PUB. POL'Y 271, 301 (2012) (stating that in self-defense cases, individuals sometimes can't perceive a threat with its corresponding level of danger).

15. Clayton E. Cramer & David Burnett, *Tough Targets: When Criminals Face Armed Resistance from Citizens* (2012), CATO INSTITUTE, <http://object.cato.org/sites/cato.org/files/pubs/pdf/WP-Tough-Targets.pdf>.

16. *Id.*

How many crimes were prevented by armed citizens during 2003–2011 when the citizen justifiable homicide count seldom exceeded 300? Likely in the thousands, judging by incidents considered newsworthy and that we found. Many like the following involved dead criminals:

BIRMINGHAM, Ala. —Authorities have determined that a woman who shot and killed her accused abductor and rapist acted in self-defense.

The incident was reported at 6 p.m. Nov. 3 in the 2800 block of Pebble Creek Parkway in Forestdale. Adamsville police were asked to help [and] located a 26-year-old woman who had been reported abducted earlier in the day.

The woman was found in the parking lot. Jeremy Arnold Ford, 25, was found dead in an apartment. He had suffered an apparent gunshot wound.

Investigators said the woman had been abducted at gunpoint, raped, driven to locations the suspect wanted to visit, then forced to drive back to Ford's apartment, where she was once again sexually assaulted. They say the victim shot Ford with his own gun.¹⁷

III. CONCLUSION

The FBI's justifiable homicide statistics are so incomplete as to be misleading. Even if they included the large number of citizen gun defensive uses where a criminal is killed, they would not be a meaningful basis for doing a cost-benefit analysis of allowing private ownership of guns because crimes prevented matter more than criminals killed.

17. Amber Roberson, *Shooting of Accused Rapist in Adamsville Ruled Self-Defense*, WVTV (Dec. 16, 2015, 12:36 PM), <http://www.wvtn13.com/news/shooting-of-accused-rapist-in-adamsville-ruled-selfdefense/36994300>.