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Touro Law Review

Volume 17 | Number 2

Article 7

March 2016

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Recommended Citation

Liotti, Thomas F. and Zeh, Christopher (2016) "The Uneven Playing Field: Ethical Disparities Between the Prosecution and Defense Functions in Criminal Cases," *Touro Law Review*: Vol. 17 : No. 2 , Article 7.
Available at: <https://digitalcommons.tourolaw.edu/lawreview/vol17/iss2/7>

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The Uneven Playing Field: Ethical Disparities Between the Prosecution and Defense Functions in Criminal Cases

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TERRY AND BEYOND: TESTING THE UNDERLYING ASSUMPTION OF REASONABLE SUSPICION

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*"It is, indeed, regrettable that the empirical data on a subject such as this are sparse, but we need not ignore the data which do exist simply because further refinement would be even more helpful."*⁴

INTRODUCTION

In *Terry v. Ohio*,⁵ the United States Supreme Court carved out an exception to the Fourth Amendment's warrant and probable cause requirements. The Court held that a police officer could conduct an investigative stop of a citizen without a warrant and based on a reasonable suspicion that criminal activity was afoot.⁶ The Court also held that same officer, based on a reasonable suspicion that the citizen may be armed and dangerous, could conduct a "pat-down" frisk of the citizen's outer clothing ("stop

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⁴ *Maryland v. Wilson*, 519 U.S. 408, 413 n.2. (1997) (commenting on the need for more data on police victimization).

⁵ 392 U.S. 1 (1968).

⁶ *Id.* at 30.

and frisk").⁷ The Court's conclusion was a result of balancing citizens' interests in being free from unwarranted police intrusions against the interest in police officer protection.⁸ To support the balance in favor of law enforcement safety, the Court found that criminals armed with guns and knives historically harmed police officers.⁹ The Court relied on Uniform Crime Report data from 1960 to 1966 to support its belief that citizens subjected police to great risk of violence.¹⁰ The Court enumerated the number of police officers killed in 1966, the number killed by guns, the number killed by knives, the number assaulted and the number injured in 1966, and the total killed since 1960.¹¹ Thus, when the Court held that "stop and frisks" were permissible, it did so based on the assumption that the dangers presented justified the intrusion.

Since the 1968 decision in *Terry*, the assumption of the danger of policing has become firmly rooted in American culture. The media, politicians, and social scientists perpetuate the notion that policing is a dangerous occupation.¹² The assumption has not been thoroughly examined empirically. In *Terry* and its progeny, the Court has relied on unrefined statistics. These statistics as well as the Court's mode of analysis are insufficient to establish that policing is or is not dangerous. The simple frequency of homicides and assaults does not sufficiently measure risk. It does not give a rate of homicide or assault and there is no measure of "relative risk." One method of clarifying the statistics and improving the assessment of risk is to compare the rate of police victimization to the risk of the general population.

This article will examine the Court's assumption of the inherent danger to police using available homicide data and the relative risk of police homicides to that of the general population based on similar age and gender characteristics.

⁷ *Id.*

⁸ *Id.* at 27.

⁹ *Id.* at 20.

¹⁰ *Id.* at 20, n.4.

¹¹ *Terry*, 320 U.S. at 20, n.4.

¹² See Fridell and Pate, *Death on Patrol: Killings of American Law Enforcement Officers*, in 3 CRITICAL ISSUES IN POLICING: CONTEMPORARY READINGS 580-608 (R. Dunham & G. Alpert eds., Waveland Press 1995); David Lester, *The Murder of Police Officers in American Cities*, 11 CRIM. JUST. & BEHAV. 101 (1984).

HISTORY OF WARRANTLESS SEARCHES

Any legal examination of search and seizure law must necessarily begin with the Fourth Amendment of the United States Constitution.¹³ It is the Constitution that provides the language upon which further judicial refinement can be based.¹⁴ The framers clearly intended the Fourth Amendment to protect “the people” from searches and seizures that were not reasonable. Early interpretations of this Amendment held that the protection it provided was realized by requiring a judicial officer, rather than a police officer, to determine when the right of privacy must reasonably yield to the right to search.

In *Johnson v. United States*,¹⁵ the Supreme Court succinctly stated the importance of the Fourth Amendment’s requirements:

The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.¹⁶

The early decisions by the Court placed a great deal of importance and emphasis on the necessity of obtaining a warrant from a magistrate and the establishment of probable cause. While the early Court did carve out limited exceptions for exigent circumstances, the Court continued to enforce the general rule that

¹³ U.S. CONST. amend. IV., which states in pertinent part:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

Id.

¹⁴ *Id.*

¹⁵ 333 U.S. 10, 13 (1948).

¹⁶ *Id.* at 13-14.

a police officer needed to obtain a warrant or have probable cause before searching a person or his or her belongings.¹⁷ This view continued to be the law of the land until 1968 when the Supreme Court decided the case of *Terry v. Ohio*.¹⁸

In *Terry*, a police officer in plain clothes observed three men pacing in front of a store.¹⁹ Based on the behavior of the three men, the officer suspected that they were about to rob the store.²⁰ The officer approached the three men and, after identifying himself, began to ask them some questions.²¹ After getting no coherent answer from any of the three men, the police officer became more suspicious and eventually patted down the outside of the men's clothing.²² Feeling a pistol under one of the men's coat, the officer seized weapons from two of the three and arrested them.²³

At trial, the defense made a motion to suppress the gun as fruit of a search in violation of the Fourth Amendment.²⁴ The defense argued that neither probable cause nor a search warrant supported the search.²⁵ However, the trial court denied the motion and allowed the gun into evidence.²⁶ Later, in a bench trial, the defendant Terry was convicted of carrying a concealed weapon.²⁷

On appeal, the United States Supreme Court upheld the conviction.²⁸ For the first time the Court did not require probable cause for an officer to make a warrantless search. Instead, the Court held that a search might be conducted if "a reasonable prudent man in the circumstances would be warranted in the belief that his safety or that of others would be in danger."²⁹ The Court

¹⁷ See generally, R.W. Galloway, Jr., *Basic Fourth Amendment Analysis*, 32 SANTA CLARA L. REV. 737, 739, 748-73 (1992).

¹⁸ 392 U.S. at 6.

¹⁹ *Id.*

²⁰ *Id.* at 7.

²¹ *Id.*

²² *Id.*

²³ *Terry*, 392 U.S. at 6-7.

²⁴ *Ohio v. Terry*, 5 Ohio App.2d 122, 127, 214 N.E.2d 114, 118 (Ohio Ct. App. 1966).

²⁵ *Id.*

²⁶ *Id.* at 123.

²⁷ *Terry*, 392 U.S. at 8.

²⁸ *Id.* at 31.

²⁹ *Id.* at 26.

went on to explain that searches would be permissible if founded on “specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant that intrusion.”³⁰

In its reasoning, the Court balanced the interest of the individual with the interests of the government.³¹ In considering the governmental interest, the Court stated:

We are now concerned with more than the governmental interest in investigating crime; in addition, there is more immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him.³²

Thus, in balancing the interest of the individual and the government, the Court considered the danger inherent in policing. In other words, the Court had to estimate how dangerous “policing” was, and determines how much impact it should have on the balancing test. In arriving at this estimation, the Court found great risk in the routine activities of the police.³³ The Court stated, “American criminals have a long tradition of armed violence, and every year in this country many law enforcement officers are killed in the line of duty, and thousands more are wounded. Virtually all of these deaths and a substantial portion of the injuries are inflicted with guns and knives.”³⁴

In support of this statement, the Court cited Uniform Crime Report (“UCR”) data for 1966. In footnote 21, the Court stated:

Fifty-seven law enforcement officers were killed in the line of duty in this country in 1966, bringing the total to 335 for the seven-year period beginning with 1960. Also in 1966, there were 23,851 assaults on police officers, 9,113 of which resulted in injuries to the policemen. Fifty-five of the 57 officers killed in 1966 died from gunshot wounds, 41 of them inflicted by handguns easily secreted about the person. The remaining two murders were perpetrated by knives.³⁵

³⁰ *Id.* at 21.

³¹ *Id.* at 20-21.

³² *Id.* at 20.

³³ *Terry*, 392 U.S. at 24.

³⁴ *Id.*

³⁵ *Id.* at 24, n.21.

Thus, when the Court held that “stop and frisk” searches (now called “*Terry* stops”) would be permitted, they did so based on the assumption that the dangers involved in policing justified the intrusion. In doing so, the Court accepted “reasonable suspicion” as the new threshold for a constitutional search.³⁶

In *Michigan v. Long*³⁷ the Court extended *Terry* to include a search of the interior of an automobile.³⁸ In doing so, the Court made numerous references to their concern for the safety of police officers.³⁹ The majority presented its concern for officer safety when it stated:

Finally, we have also expressly recognized that suspects may injure police officers and others by virtue of their access to weapons, even though they may not themselves be armed. . . . Our past cases indicate then that protection of police and others can justify searches when police have a reasonable belief that the suspect poses a danger, that roadside encounters between police and suspects are especially hazardous, and that danger may arise from the possible presence of weapons in the area surrounding the suspect.⁴⁰

In *Terry*, the Court had applied the reasonable suspicion standard to on-the-street encounters with citizens.⁴¹ In *Long*, the Court extended the reasonable suspicion standard to motor vehicle stops.⁴² Seven years later, in *Maryland v. Buie*,⁴³ the scope of reasonable suspicion was expanded once again and applied to

³⁶ *Id.* at 27.

³⁷ 463 U.S. 1032 (1983).

³⁸ *Id.* at 1051.

³⁹ *Id.* at 1034 (reasserting the *Terry* standard when stating that police can justify prospective searches when the police suspect that the person presents a potential danger). *Id.* at 1052 (noting that the Michigan Supreme Court has held that despite the fact that suspect was under police control it is not sufficient to render police officers protective measures unreasonable). *Id.* at 1048 (traffic stops are particularly dangerous to police officers); *See also* Bristow, *Police Officer Shootings – A Tactical Evaluation*, 54 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 93 (1963).

⁴⁰ 463 U.S. at 1048.

⁴¹ 392 U.S. at 30.

⁴² 463 U.S. at 1049.

⁴³ 494 U.S. 325 (1990).

searches of a private dwelling. This created a lesser standard of proof needed to justify an extended “protective sweep.”⁴⁴ The issue of the officer’s safety emerged again throughout the decision.⁴⁵ The *Buie* decision had applied reasonable suspicion to the search of a person’s home, where the expectation of privacy could not have been greater.⁴⁶

Although *Terry* and its progeny were limited to a search for weapons, later decisions expanded the scope. For example, after *Minnesota v. Dickerson*⁴⁷ police officers were no longer limited to seize only items discovered during their search that they reasonably suspected were contraband, even though the items may have posed no threat, providing that the initial search was justified on the grounds of *Terry*.⁴⁸

The Court continued this “police safety” justification for contracting the scope of the Fourth Amendment in *Pennsylvania v. Mimms*.⁴⁹ In *Mimms*, the Court held that pursuant to a traffic stop a police officer may order a driver out of a car, even if there is no reason to believe that the driver poses a danger to the officer.⁵⁰ While the Court agreed that this was a seizure, though only a *de minimis* intrusion, it found that the seizure was justified.⁵¹ Thus, the Court abandoned the long held rule that the inquiry into danger was individualized, rather than general. Additionally, it no longer required an articulable reason to suspect criminal activity or the potential for violence to justify asking the driver to step out, and subsequently leading to a “stop and frisk” search.⁵² The Court explained this departure by stating, “[w]e think it too plain for

⁴⁴ See Mark A. Cuthbertson, Comment, *Maryland v. Buie: The Supreme Court’s Protective Sweep Doctrine Runs Rings Around the Arrestee*, 56 ALB. L. REV. 159, 164-65 (1992).

⁴⁵ *Buie*, 494 U.S. at 327-37.

⁴⁶ See, e.g., *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concluding in a concurring opinion that a person has a reasonable expectation of privacy in their home).

⁴⁷ 508 U.S. 366 (1993).

⁴⁸ *Id.* at 373 (finding that a search of a jacket pocket exceeded the bounds of *Terry* since the officer knew that the bulge was not a weapon, but suspected that it was a crack pipe).

⁴⁹ 434 U.S. 106 (1977).

⁵⁰ *Id.* at 111.

⁵¹ *Id.*

⁵² *Id.* at 108.

argument that the State's proffered justification – the safety of the officer – is both legitimate and weighty.”⁵³

Most recently, in *Maryland v. Wilson*,⁵⁴ the Court held that police making a traffic stop may order a *passenger* to get out of the car as well.⁵⁵ In their reasoning, the Court continued to emphasize the level of danger in policing. The Court noted that “traffic stops may be dangerous encounters,” and thus justified this intrusion upon the passenger's autonomy.⁵⁶ Once again, the Court permitted this seizure of a person, even though there was no reason to believe that the passenger was in any way dangerous or engaged in criminal activity.

Although some of the Court's decisions have pointed toward specific circumstances under which police officers may be placed in danger of lethal violence, there is a continuing theme that policing is dangerous. This is particularly evident in *Mimms* and *Wilson*, where the Court allowed seizures when there were no specific reasons to believe that the officer was in any danger. The Court has made the assumption that life-threatening perils are a regular part of police-citizen encounters.

SOMETHING TO MEASURE AGAINST?

“Risk” is a relative measure. The assumption that police are subject to greater risk of lethal violence necessitates an empirical comparison. One method of measuring relative risk is by simply comparing the likelihood of lethal violence to police against the risk faced by the average American. The rate of homicide victimization in the general population cannot be compared directly to the police population. Without statistical adjustments, the two groups differ in important respects. The comparison should be conducted with a similar or matching group from within the general population. Once the comparative group is identified, then a comparison of victimization rates may be conducted. This will allow for a test of the Court's assumption

⁵³ *Id.* at 110.

⁵⁴ 519 U.S. 408 (1997).

⁵⁵ *Id.* at 415.

⁵⁶ *Id.* at 413.

that the profession of policing places officers at a far greater risk of lethal violence than the general population.

THE LITERATURE ON POLICE HOMICIDE

The homicide victimization of police officers has been a topic of research for criminologists for many years. The wide range of topics receiving attention include demographic characteristics of police victims,⁵⁷ situational characteristics of police victimization,⁵⁸ geographical correlates of victimization,⁵⁹ the application of conflict theory to police killings,⁶⁰ and numerous other areas of criminological interest.⁶¹

⁵⁷ See Sean A. Grennan, *Findings on the Role of Officer Gender in Violent Encounters with Citizens*, 15 J. OF POLICE SCI. & ADMIN. 78 (1987); R. Reviere and V. Young, *Mortality of Police Officers: Comparisons by Length of Time on the Force*, 13 AM. J. OF POLICE 51 (1994); David Konstantin, *Homicides of American Law Enforcement Officers 1978-1980*, 1 JUST. Q. 29 (1984); Terry Edwards, *Felonious Killings of State Police and Highway Patrol Officers: A Descriptive and Comparative Evaluation*, 14 AM. J. OF POLICE 89 (1994).

⁵⁸ Joel Garner and Elizabeth Clemmer, *Danger to Police in Domestic Disturbances – A New Look*, in RESEARCH IN BRIEF (National Institute of Justice ed., 1986); Albert P. Cardarelli, *An Analysis of Police Killed by Criminal Action: 1961-1963*, 59 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 447 (1968); Robert Little, *Cop Killing: A Descriptive Analysis of the Problem*, 7 POLICE STUD. 68 (1984); Charles Moorman et al., *A Decade of Peace Officers Murdered in California: The 1980's*, 24 J. OF CAL. L. ENFORCEMENT 1 (1990); Larry Roberts, *An Analysis of Fatal Assaults Upon Law Enforcement Officers Which Occurred in the United States From 1972 Through 1978* (1981) (unpublished Ph.D. dissertation, University of Southern Mississippi) (on file with author); John Stratton et al., *Police in a Violent Society*, 54 FBI L. ENFORCEMENT BULL. 1 (1985); Lawrence W. Sherman et al., *Police Murder in Drug-Related Situations, 1972-88*, in CRIME CONTROL INSTITUTE, CRIME CONTROL REPORTS NO. 7 (1989).

⁵⁹ Max Boylen and Robert Little, *Fatal Assaults on United States Law Enforcement Officers*, 63 POLICE J. 61 (1990); David Lester, *Predicting Murder Rates of Police Officers in Urban Areas*, 7 POLICE L. Q. 20 (1978); Lester, *supra* note 12.

⁶⁰ Mitchell B. Chamlin, *Conflict Theory and Police Killings*, 10 DEVIANT BEHAV. 353 (1989).

⁶¹ Laura A. Wilson and C. Kenneth Meyer, *Violence at the Street Level: Police Casualties and Fatalities*, 64 POLICE J. 28 (1990); Freidrich Wenz, *Death Anxiety Among Law Enforcement Officers*, 7 J. OF POLICE SCI. & ADMIN. 230 (1979); Francis Cullen et al., *Paradox in Policing: A Note on Perceptions of Danger*, 11 J. OF POLICE SCI. & ADMIN. 457 (1983); James C. Hackler and

Despite the extensive research on police homicide victimization, comparative studies of relative risk are scant. The few studies that exist come to divergent conclusions. Two notable commentaries on homicide rates include “the homicide rate for police is more than double that for the general population”⁶² and “most people reacting to this study’s findings have been surprised at how low the death toll is [for police officers].”⁶³ Other than the preceding two seemingly contradictory comments on police homicide victimization rates, little else can be found in the criminological and criminal justice literature on the comparative homicide victimization rates for police officers. The research that does exist in the area of comparative homicide victimization rates for police officers either fails to offer a comprehensive nationwide look at homicide rates, fails to include police officers only, is not current, or does not isolate homicide as a sole source of victimization.⁶⁴ The gap in the homicide literature impedes the Court’s ability to make meaningful comparisons of police victimization rates.

RESEARCH QUESTION

Prior research on the relative risk of police officer homicide as compared to the general population may be misleading.⁶⁵

Christian T. L. Janssen, *Police Killings in Perspective*, 27 CAN. J. OF CRIMINOLOGY 227 (1985); SAMUEL G. CHAPMAN, COPS, KILLERS AND STAYING ALIVE: THE MURDER OF POLICE OFFICERS IN AMERICA (1986); William Wilbanks, *Cops Killed and Cop-Killers: An Historical Perspective*, 13 AM. J. OF POLICE 31 (1994); L. DYKSTRA, ILLINOIS LAW ENFORCEMENT OFFICERS ASSAULTED OR KILLED: 1972-1982 (1984); FEDERAL BUREAU OF INVESTIGATION, KILLED IN THE LINE OF DUTY: A STUDY OF SELECTED FELONIOUS KILLINGS OF LAW ENFORCEMENT OFFICERS (1992); David Lester, *A Study of Civilian-caused Murders of Police Officers*, 6 INT’L J. OF CRIMINOLOGY & PENOLOGY 373 (1978); M. MARGARITA, CRIMINAL VIOLENCE AGAINST POLICE (1980); Ruth D. Peterson and William C. Bailey, *Structural Influences on the Killing of Police: A Comparison with General Homicides*, 5 JUST. Q. 207 (1988).

⁶² Garner and Clemmer, *supra* note 58.

⁶³ Sherman et. al., *supra* note 58.

⁶⁴ KATHRYN RIEDMILLER ET AL., CALIFORNIA DEPARTMENT OF HEALTH SERVICES, CALIFORNIA OCCUPATIONAL MORTALITY 1979-81 (1987).

⁶⁵ Garner and Clemmer, *supra* note 58.

Studies that have found police at more than twice the risk of homicide failed to make a comparison to the general population with similar age and sex characteristics.⁶⁶ Victimization, as noted in the literature, is not evenly distributed throughout the population.⁶⁷ There are differences in the demographic composition of the general population and the police population that should be considered in comparing victimization rates.

Two variables that are strong predictors of the likelihood of homicide victimization are sex and age. Since the majority of police are male and age restrictions apply in almost all police departments, it is necessary to control for these factors in making a comparison. How each variable is controlled will be discussed at length in the methodology section.

METHODOLOGY

All of the data sources used are pre-published and most, with the exception of the Strawbridge study,⁶⁸ are commonly used in the social sciences. Of specific concern to this research, prior to making the comparisons, are validity threats to the data from two sources: (1) the data collection itself and (2) integrating the data sources for comparison.

DATA SOURCES

The data sources used were the Uniform Crime Reports⁶⁹ ("UCR"), the Supplementary Homicide Reports⁷⁰ ("SHR"), Law Enforcement Officers Killed and Assaulted⁷¹ ("LEOKA"), United

⁶⁶ Garner and Clemmer, *supra* note 58. This may have changed in the ten years since this work was published, but disproportionality still exists.

⁶⁷ Leonard Savitz, *Official Statistics*, in LEONARD SAVITZ AND NORMAN JOHNSTON, *CONTEMPORARY CRIMINOLOGY* 12 (1982).

⁶⁸ P. STRAWBRIDGE AND D. STRAWBRIDGE, *A NETWORKING GUIDE TO RECRUITMENT, SELECTION AND PROBATIONARY TRAINING OF POLICE OFFICERS IN MAJOR METROPOLITAN POLICE DEPARTMENTS OF THE UNITED STATES OF AMERICA* (1990).

⁶⁹ U.S. DEP'T OF JUSTICE, *UNIFORM CRIME REPORTS FOR THE UNITED STATES*.

⁷⁰ U.S. DEP'T OF JUSTICE, *SUPPLEMENTARY HOMICIDE REPORTS*.

⁷¹ U.S. DEP'T OF JUSTICE, *LAW ENFORCEMENT OFFICERS KILLED AND ASSAULTED*.

States Census as it appears in the Statistical Abstract of the United States⁷² (“STATAB”), and a study conducted in the late nineteen-eighties which surveyed the seventy-two largest police departments in the United States.⁷³ Each of these data sources will be examined for validity threats and for compatibility with other data sources used.

POPULATION AND POLICE: GENDER DISTRIBUTION

Accounting for gender distributions in the two populations required using different data sources. The STATAB was used for the general population. The UCR was used to calculate the gender distribution to police. Figures 1 and 2 illustrate the large gender differences in the police and general populations.⁷⁴

Figures 1 and 2 in the Appendix clearly demonstrate that the two populations are quite different in gender distribution. The police population is less than ten percent female in all years from 1986 through 1995, while the general population is more than fifty- percent female during this same time period. A well-known fact in criminology is that females are less likely to be the victim of almost any type of violent crime.⁷⁵ This fact is quite evident in the case of homicide. Figure 3 demonstrates these pronounced gender differences in the homicide victimization rates of the general population.⁷⁶

Figure 3 supports the need to control for gender. The male rate of homicide victimization is approximately three times greater than the female victimization rate in each of the years examined. The necessity to control for gender could not be made clearer based upon the gender distributions of the two populations.⁷⁷

⁷² U.S. DEP'T OF COMMERCE, STATICAL ABSTRACT OF THE UNITED STATES.

⁷³ STRAWBRIDGE, *supra* note 68.

⁷⁴ See Appendix, Figures 1 and 2, *infra* at 460 and 461.

⁷⁵ Rape is the only violent offense where females are more often victims than males.

⁷⁶ See Appendix, Figure 3, *infra* at 462.

⁷⁷ It would be interesting to note the differences between the female homicide rate in the general population and that of female police officers, but such a study will be reserved for a future analysis.

POPULATION AND POLICE: AGE DISTRIBUTION

Obviously, children, infants and senior citizens are less likely to become homicide victims.⁷⁸ Although seniors, children and infants become victims of homicide, the rate of victimization is hardly comparable to that of young and middle age adult males. To compensate for the age disparity between the male population and male police officers, an estimate of the police age range was necessary. The age distribution, unlike all the other police data, was not provided in the UCR. The Strawbridge study was the only source from which an age estimate could be derived. The Strawbridge study examined the seventy-two largest police departments in the United States. These police departments were asked to provide answers to numerous questions – many demographic – about their departments. Age specific questions included (1) the average age at which police began service and (2) the average number of years a police officer served. A third question not directly related to age, but relevant to some extent, was number of years of service before officers were eligible to collect their pensions.⁷⁹

Unfortunately, the Strawbridge study relied on the accuracy of self reported information from the respondent police departments and thus may not be a reliable measure. Questions concerning the accuracy of the data include the fact that many departments reported age in whole numbers while others reported whole numbers with decimals. How each department determined the ages of police officers in their departments is unknown. It is possible that a police department relied on nothing more than guessing, thus the scope of this potential validity threat is unknown. Absent another source from which to estimate the age distribution of police officers, the Strawbridge study remained the only source from which an age estimate could be drawn.

⁷⁸ See SHR in CRIME IN THE UNITED STATES, sec. 1. Tables break down the age of the victim in five-year aggregates.

⁷⁹ This may be an irrelevant question because many police officers retire long before their required amount of service and receive full or near full benefits during “buy outs.” Police officers may also retire early by applying credit for military service to their pension or disability.

Difficulties in calculating the age estimate were compounded further when it was found that some departments supplied no information concerning age, and others answered only some of the questions. This made a formal estimation of the age distribution of police officers very difficult. A fourth variable was created for those departments that answered the two questions of average age that officers began police service and the average length of service. Adding the age at which service began to the average years of service created the variable, this became the "average exit age." Creating an average exit age was possible for slightly more than fifty percent of the police departments. This left very few options from which to make a precise measurement of the age range, so the data were simply estimated for an age range that would capture the majority of police officers. The age range was determined to be between twenty and fifty-four.⁸⁰

The next step was to control for age in the general population of males from Figure 1 to allow a comparative match with the police age range estimate of twenty to fifty-four. The isolation of males age twenty to fifty-four in the general population was drawn from the STATAB. The homicide victimization rate in the population of males age twenty to fifty-four was the final population that was compared to male police officers.

POPULATION AND POLICE: HOMICIDE RATES

The two male populations having been made equivalent for age and gender, the next step was to modify the homicide victimization rates for each population so the two rates were comparable. For this the SHR and LEOKA were used. Validity questions are also addressed.

POPULATION HOMICIDE RATE

The UCR and SHR which both appear in the same publication have very different measures of homicide. The UCR provides an estimated total number of homicide victimizations in

⁸⁰ A similar figure was used for determining the age of police officers in Canada. Hackler and Janssen, *supra* note 61, at 230 (using twenty to forty-nine as the police age range in making a similar comparison).

the United States for a given year. The estimate is based upon the number of Return A Counts⁸¹ and for those Return A Counts that are missing or submitted late. The estimate is based upon the previous year's homicide rate and current trends.⁸²

The SHR does not estimate. It publishes the data submitted by police agencies. If an SHR is not submitted by the investigating agency for a known homicide, then the homicide is omitted from the published SHR statistics. No attempt is made to compensate for the missing SHRs. A file of SHRs submitted beyond the deadline is maintained by the UCR, but the statistics are never published.⁸³

The importance of the SHR's accuracy is that the UCR estimate does not supply demographic characteristics of victim, offender or situational and contextual information concerning the homicide as the SHR does. The resulting question is how many SHRs are not submitted for known homicides? Figure 4 illustrates the disparity between the SHRs submitted and the UCR estimate for the years 1983 through 1992.⁸⁴

The differences between the UCR homicide estimate and the SHR in total reported homicides averages approximately ten percent per year. This means that approximately one in every ten homicides known to the police is not captured in the SHR though this varies considerably from year to year. Researchers to date have not taken this threat to the statistic's validity seriously.⁸⁵ Estimating for the missing SHRs is difficult because much of the information is compiled too late to classify in the SHR. Some researchers suggest that the missing homicides are probably dissimilar to those reported in a timely fashion, because the victim and the offender are more likely to be strangers.⁸⁶

⁸¹ Return A Counts are confirmed homicides reported to the UCR by May of the following year.

⁸² Marc Reidel, *Nationwide Homicide Data Sets: An Evaluation of the Uniform Crime Reports and the National Center for Health Statistics Data*, in MEASURING CRIME: LARGE SCALE, LONG-RANGE EFFORTS at 177-80 (Layton, Baunch and Roberg eds., 1990).

⁸³ This was based on several discussions with UCR statisticians.

⁸⁴ See Appendix, Figure 4, *infra* at 463.

⁸⁵ Michael G. Maxfield, *Circumstances in Supplementary Homicide Reports: Variety and Validity*, 27:4 CRIMINOLOGY 671, 686 (1989).

⁸⁶ Reidel, *supra* note 80; Maxfield, *supra* note 82.

This places the researcher in a difficult position: either accept the fact that ten percent of the data is missing and thus under-represent victimizations, or estimate the missing SHRs based on the SHRs submitted, which are by their very nature assumed to be different from those reported.⁸⁷ In either case, the result is a biased estimate. For this research, the published data were used. It seemed more appropriate to utilize information known to be accurate, rather than to estimate missing cases from an unknown population of victims believed to be different from the known population. The research continues with the population homicide victimization rate estimate somewhere in the range of ten percent below its actual rate.

MIXING THE UCR/SHR AND THE STATAB: MORE VALIDITY PROBLEMS

Using the STATAB for the total population, gender distribution and age distribution causes difficulties in making comparisons. This difficulty arises because the sources of victimization data, the UCR/SHR, do not account for the entire United States population⁸⁸ while the STATAB does. Since all police departments were not part of the UCR reporting system, and the characteristics and rates of victimization in these missing departments jurisdictions remain unknown, the base population in the STATAB is larger than the base population from which victimization data is drawn. Since the characteristics of these missing jurisdictions from the UCR are unknown, it is difficult to draw inferences about the victimization rates. The individual rates could differ from the overall victimization rate of the United States. However, census disparities may offset this problem by undercounting the United States population.⁸⁹

⁸⁷ Savitz, *supra* note 67.

⁸⁸ CRIME IN THE UNITED STATES at 1 (1992).

⁸⁹ See RICHARD E. BARRETT, USING THE 1990 U.S. CENSUS FOR RESEARCH (1994).

LEOKA

The homicide of a police officer comes to the attention of LEOKA from three sources.⁹⁰ This reporting process results in a measurement of homicide victimization that is unparalleled in criminology. Both the small number of victims and the three methods of reporting provide an excellent measure of victimization. The validity of LEOKA in terms of under-reporting, as evidenced by the SHR data, is not a major concern. Over-reporting, however, poses a potential validity threat. The primary validity concerns reflect LEOKA's comparability to the SHR data.

The validity problems of LEOKA are worth addressing. The first involves what LEOKA measures. LEOKA specifically measures felonious killings of police officers in the line of duty.⁹¹ This measurement criterion raises two issues. What is a felonious killing and does the definition match that of murder and non-negligent manslaughter as used by the SHR? Further, what is a line of duty killing and how many are not line of duty deaths?

No published sources provide a definition for a "felonious killing." The summaries and descriptions of each officer's killing in the line of duty, however, enable the inference that the definition includes negligent manslaughter. The title "feloniously killed" also appears to give a similar indication because negligent manslaughter is a felony. Including negligent manslaughter in the calculation may inflate the number of police officers killed. Since only a few civilians become the victims of negligent manslaughter,⁹² any error would favor a finding that police have

⁹⁰ FEDERAL BUREAU OF INVESTIGATION, LAW ENFORCEMENT OFFICERS KILLED AND ASSAULTED 1 (1991).

⁹¹ See *supra* note 87.

⁹² There is no data available on negligent manslaughter in the federal UCR. Several states offer data on negligent manslaughter, for example, New York and Colorado, but it was impossible to gain information on nationwide statistics for negligent manslaughter. For example, in New York State in 1995 there were 1,656 reported murders, non-negligent manslaughters, and negligent manslaughters. Of the 1,656 felonious killings, only 105 were negligent manslaughters. Negligent manslaughters reflect approximately 6.3% of felonious killings. If the police statistics were inflated by 6.3%, this would create a larger disparity between the police and population statistics which are being compared. See 1995 CRIME AND JUSTICE ANNUAL REPORT at 2 (Part 1 Tally of Offenses).

higher victimization rates than the general population. Any disparity, however, would be slight.

LEOKA also does not provide a definition for “Line of Duty” deaths. A UCR statistician was contacted to determine the scope of deaths committed in the “Line of Duty.” The omission of some homicides while “off duty” would under-represent the statistic. The UCR statistician reported that the felonious killing of an off-duty police officer that was acting in any official police capacity would be considered a line-of-duty death. “Any official capacity” included an off-duty officer reaching for his firearm or giving directions to a motorist. The definition provided was broad, and it could encompass almost any homicide victimization. Many police officers and departments consider their officers to be on-duty twenty-four hours per day. In addition, the simple fact that the police investigate the homicide victimization of their own, or in cooperation with another law enforcement agency of common alliance, it seems unlikely that many police officer homicides would be considered not in-the-line-of-duty and omitted from LEOKA statistics.⁹³

LEOKA, unlike the SHR, includes the homicides of police officers on assignment outside of the United States and in United States territories. The SHR does not include the homicides of civilians in either United States territories or outside of the nation. Although a state-by-state breakdown of homicides includes Puerto Rico, when all the state homicide victimization rates are added together, it is revealed that Puerto Rico is not included in the Nationwide homicide estimate nor in the SHR. This compromises the research because homicides of policemen are measured in a broader geographical area than that of the civilian population. To control for this limitation, those police officers who were the victim of a homicide either on assignment outside of the United States or victimized in a United States territory were excluded from the analysis. How this effects the overall number of police officers who fell victim to a homicide is shown in Figure 5.⁹⁴

⁹³ One consideration is that police officers' families receive benefits for line-of-duty deaths, which may be an important and influential factor in the categorization of an officer death.

⁹⁴ See Appendix, Figure 5, *infra* at 464.

Since policing and homicide victimization remains male-dominated, the next step was to remove female police officer homicide victimization from the police total. Homicide summaries for each female victim were then compared to all police officers killed outside of the United States to prevent “double counting” or “double exclusion” from occurring. Only one such circumstance was found in this research, where the murder occurred in Puerto Rico.

The final homicide victimization rates per 100,000 police officers used in the final comparison are reported in Figure 6. This calculated number represents all male police officers feloniously killed in the “Line of Duty” in the United States.

ANSWERING THE RESEARCH QUESTION

Answering the research question required one simple step: compare the two rates of victimization in one table and observe the differences. Figure 6 shows the comparison of the homicide victimization rates for the male police officers and male civilians age twenty to fifty-four from 1986 through 1995.⁹⁵

FINDINGS

The findings for the ten years studied are clear. In none of the ten years did male police officers have a higher rate of homicide victimization than males age twenty to fifty-four in the general population. In some years the difference was quite small, e.g., 0.1% in 1987. In others the difference was significant. In 1991 the male civilian homicide victimization rate was 0.1% short of double the police homicide victimization rate, and in 1992 the male civilian homicide victimization rate more than doubled that of the police. Although in more recent years the disparity has lessened, these findings are clear contradictions of the views expressed by the Court.

⁹⁵ See Appendix, Figure 6, *infra* at 465.

LIMITATIONS

There are three significant limitations to this research and its findings. First, homicide is only a single indicator of “danger” to the police. It is possible that other indicators, such as assaults, may actually have increased over this same time period. Assault also may be a more accurate measure of “danger” than homicide. However, assault was not included in this research due to the methodological difficulties surrounding the collection of that data.

Second, it may be argued that this analysis might not adequately quantify risk. Since the Court focuses on the danger related to the police-citizen encounter, a workplace analysis, focusing on those occupations with the greatest exposure to the public, may be more appropriate. To assess the relative risk of “workplace” violence, the assessment should measure a worker’s exposure to risk by employment.⁹⁶ In essence, a comparison of the rate of police homicides (by the number of police employed) to other service-oriented occupation homicides (by the number of employees) would measure this risk.⁹⁷ This type of analysis should be pursued in the future to fine-tune the relative risk of lethal (and non-lethal) violence to the police.

Third, this study does not examine data pre- and post-*Terry*. Thus, this examination does not test the assumption about officer safety without the current protections afforded police officers by the Court. Such an analysis would allow for an examination of the impact of *Terry* (and its progeny) on police officer safety. This study would improve our understanding of police danger as well as the effectiveness of the protections permitted by the Court.

CONCLUSION

Based on this analysis, male police officers are not placed at risk of homicide victimization, either on or off duty, beyond that

⁹⁶ JOHN W. RUSER, BUREAU OF LABOR STATISTICS, A RELATIVE RISK ANALYSIS OF WORKPLACE FATALITIES, FATAL WORKPLACE INJURIES IN 1993: A COLLECTION OF DATA AND ANALYSIS 18 (1995) (comparing the most dangerous industries with the average risk of fatality).

⁹⁷ RUSER, *supra* note 91, at 22.

which male citizens in a similar age grouping face daily. The victimization rates between the two groups are very similar, and in fact it appears reasonable to conclude that police officers have a lower risk of homicide victimization than do the aggregate of males in a similar age grouping. This finding contradicts the assumption in *Terry* and its progeny that police face greater risk than the general population. Despite the admitted limitations to this research, it appears that the Supreme Court may be overzealous in its protection of police officers. The Court's legal analyses may result in unwarranted intrusion upon the liberty interest of individuals based upon an erroneous assumption that policing is dangerous.

APPENDIX

FIGURE 1.0
POPULATION BY SEX

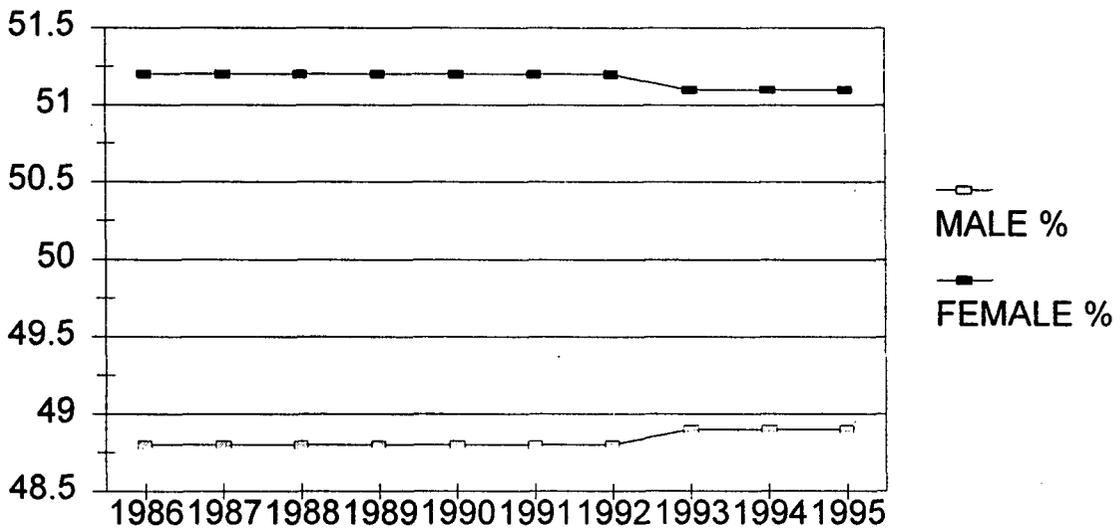


FIGURE 2.0
POLICE BY SEX

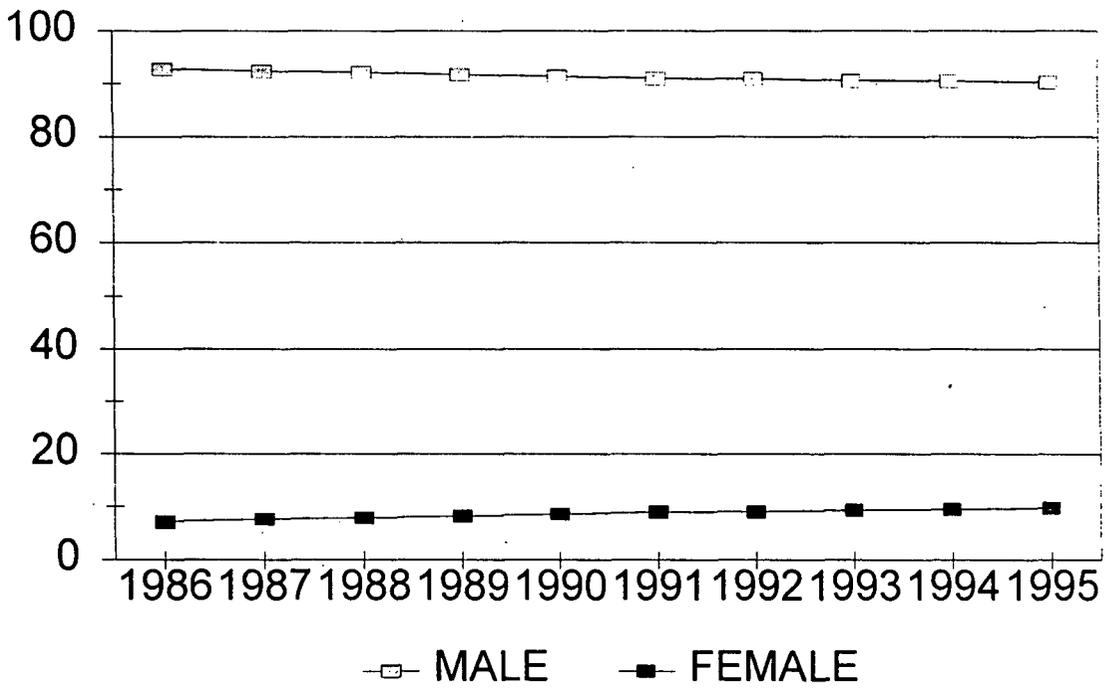


FIGURE 3.0
SEX BY HOMICIDE RATE PER 100,000

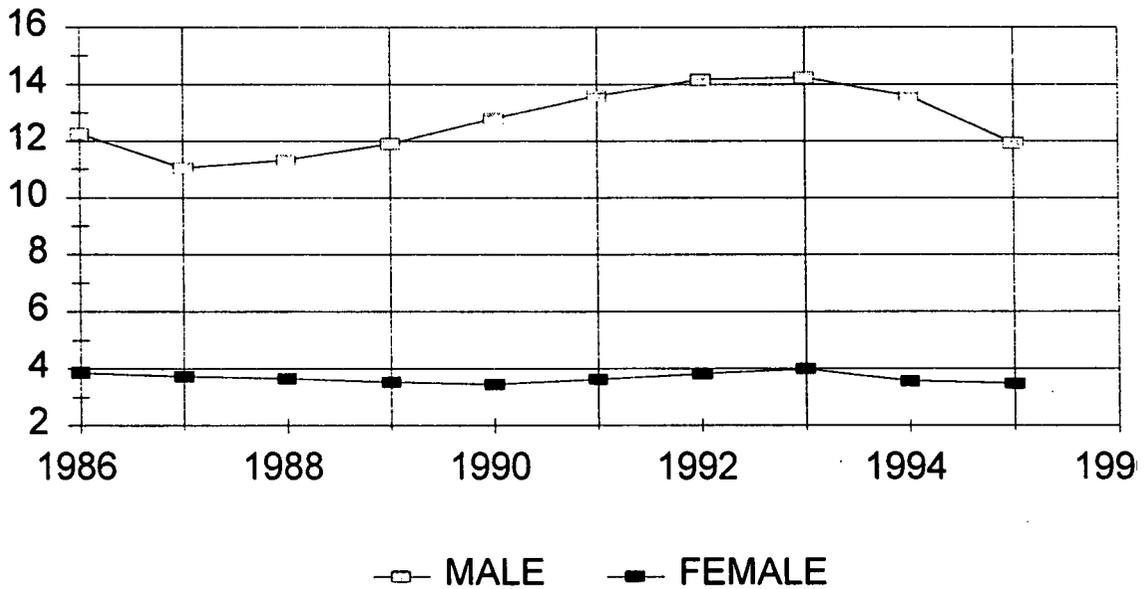


FIGURE 4.0
HOMICIDE ESTIMATE AND SHR

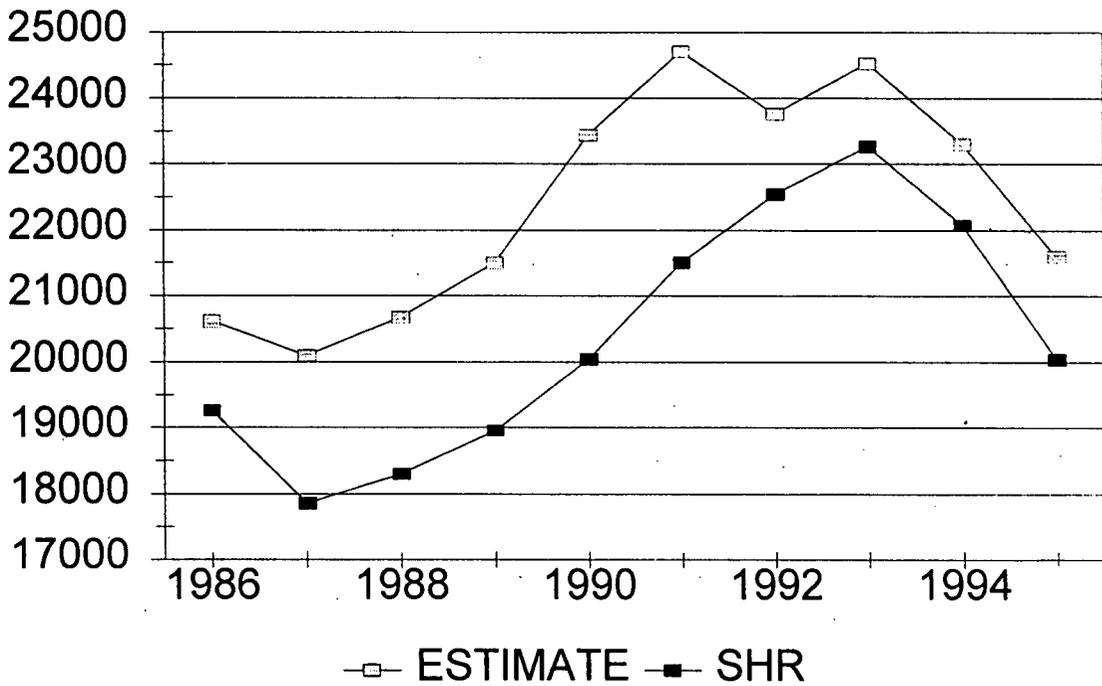


FIGURE 5.0
POLICE KILLED IN AND OUT OF USA

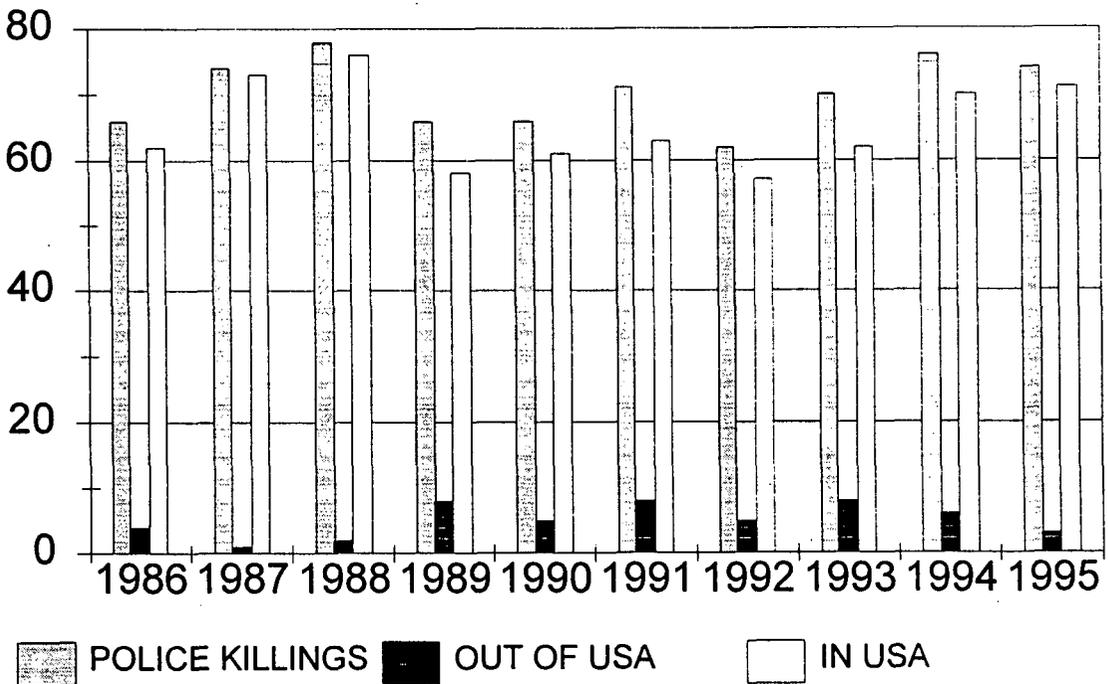
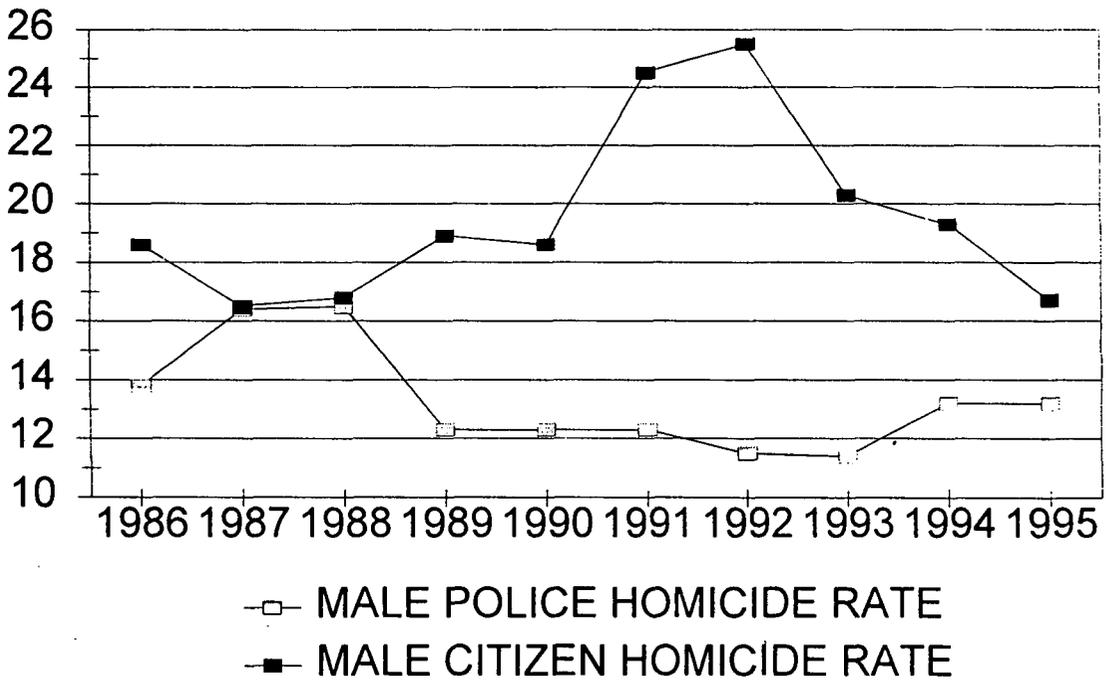


FIGURE 6.0

POLICE/CIVILIAN: HOMICIDE PER 100,000



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