Approved: 3/22/94
Date

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY.

The meeting was called to order by Chairperson Jerry Moran at 10:00 a.m. on February 25, 1994 in Room 514-S of the Capitol.

All members were present.

Committee staff present: Mike Heim, Legislative Research Department
Gordon Self, Revisor of Statutes
Darlene Thomas, Committee Secretary

Conferees appearing before the committee:

Senator Tiahrt
Phil Journey
Diana L. Conner
Michael Ballard
Magistrate John Wooley, Wichita
Michael Daly
Gregory Gragg
Jim Clark, Kansas Counties and District Attorneys Association
Loren Younger, Kansas Sheriff's Association
Ron Olin, Kansas Chief's Association
Terry Maple, Kansas Highway Patrol
Paul Shelby, Assistant Judicial Administrator

Others attending: See attached list

SB 525--sexually violent offense

Senator Vancrum gave a brief overview of SB 525 to include the balloon (Attachment No. 1) and answered questions from the Committee.

A motion was made by Senator Vancrum, seconded by Senator Bond to amend SB 525 by adopting the balloon and by making conceptual technical amendments. The motion carried.

A motion was made by Senator Vancrum, seconded by Senator Harris to report SB 525 favorably as amended.

A substitute motion was made by Senator Petty, seconded by Senator Martin to report SB 525 favorably with an additional amendment to be subject to appropriations. Motion failed.

The Committee returned to the original motion by Senator Vancrum, seconded by Senator Harris to report SB 525 favorably as amended. The motion carried.

SB 666--fraudulent representation on employment application
SB 667--inmates sentenced to custody of secretary

Senator Vancrum reported there would be a substantial fiscal note for SB 666. He stated the Department of Corrections felt SB 667 might result in under utilization of work release programs.

No action was taken on SB 666 or SB 667.

SB 788--County law libraries, annual attorney registration fees
SB 790--registration fees of attorneys in certain counties

Senator Harris, Chairman of the Civil Law Subcommittee provided a subcommittee report on SB 788 and SB 790 to increase attorney registration fees and docket fees.

Chairman Moran reminded the Committee a motion was made on February 22, 1994 to merge SB 788 and SB 790 and amend to delete public offenders.

Paul Shelby, Assistant Judicial Administrator said a decision should be made as to whether the attorney taxed was to reside or practice law in the county.

No action was taken on SB 788 and SB 790.

SB 648--licensure to carry certain concealed weapons

Senator Tiahrt testified in support of SB 648, provided written testimony and a balloon (Attachment No. 2). He said he had numerous requests from persons wanting to testify in support of SB 648, however, in lieu of testifying Senator Tiahrt asked them to sign a petition. He said he had a petition with thousands of signatures that he would enter into Senate record.

Phil Journey, criminal defense attorney, Wichita testified in support of SB 648 and provided the Committee with articles he had written and "The 'Assault Weapon' Panic" taken from Independence Institute Paper, Golden, Colorado (Attachment No. 3).

Honorable John B. Wooley, retired magistrate, Wichita, testified in support of SB 648 and provided written testimony (Attachment No. 4).

Diana L. Conner, Wichita testified in support of SB 648 and cited examples of lives being saved as a result of carrying a weapon.

Michael Daly testified in support of SB 648 and provided written testimony (Attachment No. 5).

Michael G. Ballard, Wichita testified in support of SB 648 and provided written testimony (Attachment No. 6).

Gregory Gragg, Wichita testified in opposition to SB 648 and provided written testimony (Attachment No. 7).

Jim Clark, Kansas Counties and District Attorneys Association testified in opposition to SB 648. He said the main concern is the increase in loss of officer safety by the large number of concealed weapons.

Loren Younger, Kansas Sheriff's Association testified in opposition to SB 648. He said the main concern is the training that will be required of those carrying handguns in the state of Kansas.

Chief Ron Olin, Kansas Chief's Association testified in opposition to SB 648. He said the Kansas Chief's Association had three problems with SB 648: 1) criteria--the three year time period for felons; 2) interpretation and enforcement of the bill; 3) no instances of need for carrying a concealed weapon.

Terry Maple, Kansas Highway Patrol provided written testimony in opposition to SB 648 (Attachment No. 8).

The meeting adjourned at 11:00 a.m.

The next meeting is scheduled for February 28, 1994 at 9:00 a.m.

GUEST LIST

COMMITTEE: Senate Judiciary Committee **DATE:** 2/25/04

NAME (Please Print)	ADDRESS	COMPANY/ORGANIZATION
Loren Youngers	Elkhart Ks.	Kansas Sheriffs Ass.
Ron Olin	Lawrence Ks.	Kansas Asso Chiefs of Police
Kathie Sparks	Topeka, Ks.	DOB
Jan Johnson	Topeka	KDOC
Annie Deeem	Topeka	SRS
TAJI WHEELER	TOPEKA	SEN. KARR'S OFC.
Duane Waterworth	Topeka	Division of the Budget.
Dennis L. Conner	Wichita	
K C Thompson	Topeka	None
Phil Journey	Wichita Ks	Ks St. Rifle Assoc, C.T.A.G.A. Air Capitol gun Club,
Augustus Dale Sanders	Berryton, Ks	Self
Paul Shelby	Topeka	OJA
RONALD H. DAVIS	TOPEKA	CAPITAL CITY GUN CLUB U.S. PRACTICAL SHOOTERS ASSN
Christopher L Mulvenon	LAWRENCE	LAWRENCE POLICE DEPT.
John Ely	Topeka,	NONE
Coregory Craig	Prairie Village KS	Self
Steve Tarr	Topeka	KBI
KEITH LANDIS	TOPEKA	CHRISTIAN SCIENCE COMM ON PUBLICATION FOR KS
John B. Worley	Wichita	"
Helen Stephens	Topeka	KPOA
Michael Ballard	Wichita	
Jo Stevens	Pratt	Pratt Leadership 2000
William Koontz	Pratt	Pratt Police Dept

GUEST LIST

COMMITTEE: Senate Judiciary Committee **DATE:** 2/25/94

NAME (Please Print)	ADDRESS	COMPANY/ORGANIZATION
G Denise Metzinger	Platt	SRS
Joe Lunt	311 Main Westmoreland Ks	Lambs Firearms.

#1

STATE OF KANSAS

BOB VANCRUM
SENATOR, ELEVENTH DISTRICT
OVERLAND PARK, LEAWOOD,
STANLEY, STILWELL, IN
JOHNSON COUNTY
9004 W. 104TH STREET
OVERLAND PARK, KANSAS 66212
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TOPEKA

SENATE CHAMBER
STATE CAPITOL
TOPEKA, KANSAS 66612-1504
(913) 296-7361

COMMITTEE ASSIGNMENTS
VICE-CHAIRMAN: ENERGY AND NATURAL RESOURCES
MEMBER: WAYS AND MEANS
JUDICIARY
MEMBER: COMMERCE, LABOR AND REGULATIONS
COMMITTEE, NATIONAL CONFERENCE ON STATE LEGISLATURES
MEMBER: ENVIRONMENTAL TASK FORCE, COUNCIL ON STATE GOVERNMENTS

IN RESPONSE TO THE TESTIMONY FROM THE ASSOCIATION OF COMMUNITY MENTAL HEALTH CENTERS OF KANSAS:

1. SB 525 does not decriminalize sexual offenses, as the Association claims. It provides for civil commitment of sexually violent predators who, under the statute, already are serving criminal sentences for their acts.

The Association rightly says that civil commitment should be used only to commit individuals determined to be dangerous to themselves or others because of their mental illness. The state of Washington, for example, has sought to classify only 3% of its 1500 sex offenders as sexually violent predators. There seems little doubt that this narrow class of the most dangerous sexual offenders presents a danger to others once they have served their time. This being the case, civil commitment and treatment of these individuals is altogether appropriate.

2. The Association's safety concerns are legitimate and protection of those currently in state mental hospitals will be addressed, with the cooperation of SRS, if the bill becomes law.

3. The bill seeks to place no stigma on those with mental illness. Rather, its goal is the treatment of sexually violent predators and the protection of the community. Those found to be sexually violent predators are, by definition, individuals with mental abnormalities or personality disorders and as such, need treatment for mental illness. Indeed, evidence shows that the prognosis for rehabilitating sexually violent offenders in a prison setting is poor.

4. As the association recognized, the treatment of sexually violent offenders will cost money. But SB 525 is not an attempt to "syphon" resources from SRS, nor is it an attempt to use the mental health system as a "dumping ground", for sexually violent predators.

As the Washington state experience shows, this bill targets a very small group of only the most violent offenders. Washington has filed cases under its law in only 28 cases in more than 3 years.

5. Finally, the association claims the bill does not completely solve the problems of treatment and sentencing of sexual offenders. Admittedly, SB 525 is no cure-all. It is but one step - but an important one nonetheless - in a larger effort. The state has neither the financial resources nor the facilities to impose criminal sentences of life imprisonment on sexual offenders, as the association suggests. Practical reasons aside, criminal life sentences present constitutional questions that no doubt would result in years of litigation and more tragedies for families like the Schmidts. The practical reality is that sex offenders eventually return to the community. This bill, which is civil and not criminal in nature, aims to protect the community from the most dangerous sexually violent predators.

Senate Judiciary
2-25-94
Attachment 1-1

#1

Proposed Amendments to SB 525

Session of 1994

SENATE BILL No. 525

By Senators Vancrum, Bogina, Bond, Burke, Corbin, Emert, Feleciano, Frahm, Hardenburger, Harris, Kerr, Langworthy, Lawrence, Martin, Morris, Oleen, Papay, Parkinson, Ramirez, Ranson, Reynolds, Rock, Salisbury, Sallee, Steffes, Tiahrt and Vidricksen

1-19

AN ACT concerning persons who commit sexually violent offenses; relating to such person's civil commitment; evaluation, care and treatment; allegation of sexual motivation in criminal cases.

Be it enacted by the Legislature of the State of Kansas:

Section 1. The legislature finds that a small but extremely dangerous group of sexually violent predators exist who do not have a mental disease or defect that renders them appropriate for involuntary treatment pursuant to the treatment act for mentally ill persons defined in K.S.A. 59-2901 et seq. and amendments thereto, which is intended to provide short-term treatment to individuals with serious mental disorders and then return them to the community. In contrast to persons appropriate for civil commitment under K.S.A. 59-2901 et seq. and amendments thereto, sexually violent predators generally have antisocial personality features which are unamenable to existing mental illness treatment modalities and those features render them likely to engage in sexually violent behavior. The legislature further finds that ~~sex offenders'~~ likelihood of engaging in repeat acts of predatory sexual violence is high. The existing involuntary commitment procedure pursuant to the treatment act for mentally ill persons defined in K.S.A. 59-2901 et seq. and amendments thereto is inadequate to address the risk ~~to reoffend because during confinement these offenders do not have access to potential victims and therefore they will not engage in an overt act during confinement as required by the treatment act for mentally ill persons defined in K.S.A. 59-2901 et seq. and amendments thereto for continued confinement~~. The legislature further finds that the prognosis for ~~curing sexually violent offenders~~ is poor, the treatment needs of this population are very long term and the treatment modalities for this population are very different than the traditional treatment modalities for people appropriate for commitment under the treatment act for mentally ill persons defined in K.S.A. 59-2901

sexually violent predators'

these sexually violent predators pose to society

rehabilitating sexually violent predators in a prison setting

1-19

et seq. and amendments thereto, therefore a civil commitment procedure for the long-term care and treatment of the sexually violent predator is found to be necessary by the legislature.

Sec. 2. As used in this act:

(a) "Sexually violent predator" means any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence.

(b) "Mental abnormality" means a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others.

(c) "Predatory" means acts directed towards strangers or individuals with whom relationships have been established or promoted for the primary purpose of victimization.

(d) "Sexually motivated" means that one of the purposes for which the defendant committed the crime was for the purpose of the defendant's sexual gratification.

(e) "Sexually violent offense" means:

(1) Rape as defined in K.S.A. 21-3502 and amendments thereto;

(2) indecent liberties with a child as defined in K.S.A. 21-3503 and amendments thereto;

(3) aggravated indecent liberties with a child as defined in K.S.A. 21-3504 and amendments thereto;

(4) criminal sodomy as defined in subsection (a)(2) and (a)(3) of K.S.A. 21-3505 and amendments thereto;

(5) aggravated criminal sodomy as defined in K.S.A. 21-3506 and amendments thereto;

(6) indecent solicitation of a child as defined in K.S.A. 21-3510 and amendments thereto;

(7) aggravated indecent solicitation of a child as defined in K.S.A. 21-2511 and amendments thereto;

(8) sexual exploitation of a child as defined in K.S.A. 21-3516 and amendments thereto;

(9) aggravated sexual battery as defined in K.S.A. 21-3518 and amendments thereto;

(10) any conviction for a felony offense in effect at any time prior to the effective date of this act, that is comparable to a sexually violent offense as defined in subparagraphs (1) through (9) or any federal or other state conviction for a felony offense that under the laws of this state would be a sexually violent offense as defined in this section;

(11) an attempt, conspiracy or criminal solicitation, as defined in

K.S.A. 21-3301, 21-3302 and 21-3303, and amendments thereto, of a sexually violent offense as defined in this subsection; or

(12) any act which either at the time of sentencing for the offense or subsequently during civil commitment proceedings pursuant to this act, has been determined beyond a reasonable doubt to have been sexually motivated.

(f) "Agency with jurisdiction" means that agency with the authority to direct the release of a person serving a sentence or term of confinement and includes the department of corrections and the department of social and rehabilitation services.

Sec. 3. (a) When it appears that a person may meet the criteria of a sexually violent predator as defined in section 2, the agency with jurisdiction shall give written notice of such to the prosecuting attorney of the county where that person was charged, three months prior to:

(1) The anticipated release from total confinement of a person who has been convicted of a sexually violent offense;

(2) release of a person who has been charged with a sexually violent offense and who has been determined to be incompetent to stand trial pursuant to K.S.A. 22-3305 and amendments thereto; or

(3) release of a person who has been found not guilty by reason of insanity of a sexually violent offense pursuant to K.S.A. 22-3428 and amendments thereto.

(b) The agency with jurisdiction shall inform the prosecutor of the following:

(1) The person's name, identifying factors, anticipated future residence and offense history; and

(2) documentation of institutional adjustment and any treatment received.

(c) The agency with jurisdiction, its employees ~~and~~ officials, shall be immune from liability for any good-faith conduct under this section.

Sec. 4. When it appears that the person may be a sexually violent predator, the prosecuting attorney of the county where the person was convicted or charged or the attorney general if requested by the prosecuting attorney may file a petition alleging that the person is a sexually violent predator and stating sufficient facts to support such allegation.

Sec. 5. Upon filing of a petition under section 4, the judge shall determine whether probable cause exists, based on the petition, to believe that the person named in the petition is a sexually violent predator. If such determination is made, the judge shall direct that person be taken into custody and the person shall be transferred to

, and individuals contracting or appointed to perform services hereunder presently confined , within 45 days of the date the prosecuting attorney received the written notice by the agency of jurisdiction as provided in subsection (a) of section 3,

an appropriate facility for an evaluation as to whether the person is a sexually violent predator. The evaluation shall be conducted by a person deemed to be professionally qualified to conduct such an examination.

Sec. 6. Within 45 days after the filing of a petition pursuant to section 4, the court shall conduct a trial to determine whether the person is a sexually violent predator. At all stages of the proceedings under this act, any person subject to this act shall be entitled to the assistance of counsel, and if the person is indigent, the court shall appoint counsel to assist such person. Whenever any person is subjected to an examination under this act, such person may retain experts or professional persons to perform an examination of such person's behalf. When the person wishes to be examined by a qualified expert or professional person of such person's own choice, such examiner shall be permitted to have reasonable access to the person for the purpose of such examination, as well as to all relevant medical and psychological records and reports. In the case of a person who is indigent, the court, upon the person's request, shall assist the person in obtaining an expert or professional person to perform an examination or participate in the trial on the person's behalf. The person, the county or district attorney or attorney general, or the judge shall have the right to demand that the trial be before a jury. If no demand is made, the trial shall be before the court.

Such demand for the trial to be before a jury shall be filed, in writing, at least four days prior to trial. Number and selection of jurors shall be determined as provided in K.S.A. 59-2917 and amendments thereto.

Sec. 7. (a) The court or jury shall determine whether, beyond a reasonable doubt, the person is a sexually violent predator. If the court or jury determines that the person is a sexually violent predator, the person shall be committed to the custody of the secretary of social and rehabilitation services in a secure facility for control, care and treatment until such time as the person's mental abnormality or personality disorder has so changed that the person is safe to be at large. Such control, care and treatment shall be provided at a facility operated by the department of social and rehabilitation services. If the court or jury is not satisfied beyond a reasonable doubt that the person is a sexually violent predator, the court shall direct the person's release.

Such determination by a jury that the person is a sexually violent predator shall be by unanimous verdict of such jury.

(b) If the person charged with a sexually violent offense has been found incompetent to stand trial, and is about to be released pursuant to K.S.A. 22-3305 and amendments thereto, and such person's commitment is sought pursuant to subsection (a), the court shall first hear evidence and determine whether the person did commit the act or acts charged. The hearing on this issue must comply with all the procedures specified in this section. In addition, the rules of evidence applicable in criminal cases shall apply, and all constitu-

tional rights available to defendants at criminal trials, other than the right not to be tried while incompetent, shall apply. After hearing evidence on this issue, the court shall make specific findings on whether the person did commit the act or acts charged, the extent to which the person's incompetence or developmental disability affected the outcome of the hearing, including its effect on the person's ability to consult with and assist counsel and to testify on such person's own behalf, the extent to which the evidence could be reconstructed without the assistance of the person and the strength of the prosecution's case. If after the conclusion of the hearing on this issue, the court finds, beyond a reasonable doubt, that the person did commit the act or acts charged, the court shall enter a final order, appealable by the person, on that issue, and may proceed to consider whether the person should be committed pursuant to this section.

Sec. 8. Each person committed under this act shall have a current examination of the person's mental condition made once every year. The person may retain, or if the person is indigent and so requests the court may appoint a qualified professional person to examine such person, and such expert or professional person shall have access to all records concerning the person. The yearly report shall be provided to the court that committed the person under this act. The court shall conduct an annual review of the status of the committed person. Nothing contained in this act shall prohibit the person from otherwise petitioning the court for discharge at this hearing. The secretary of the department of social and rehabilitation services shall provide the committed person with an annual written notice of the person's right to petition the court for release over the secretary's objection. The notice shall contain a waiver of rights. The secretary shall forward the notice and waiver form to the court with the annual report. The committed person shall have a right to have an attorney represent the person at the hearing but the person is not entitled to be present at the hearing. If the court at the hearing determines that probable cause exists to believe that the person's mental abnormality or personality disorder has so changed that the person is safe to be at large and will not engage in acts of sexual violence if discharged, then the court shall set a hearing on the issue. At the hearing, the committed person shall be entitled to be present and entitled to the benefit of all constitutional protections that were afforded the person at the initial commitment proceeding. The county or district attorney or the attorney general if requested by the county shall represent the state and shall have a right to a jury trial and to have the committed person evaluated by experts

chosen by the state. The committed person shall also have the right to have experts evaluate the person on the person's behalf and the court shall appoint an expert if the person is indigent and requests an appointment. The burden of proof at the hearing shall be upon the state to prove beyond a reasonable doubt that the committed person's mental abnormality or personality disorder remains such that the person is not safe to be at large and if released is likely to engage in acts of sexual violence.

Sec. 9. The involuntary detention or commitment of persons under this act shall conform to constitutional requirements for care and treatment.

Sec. 10. If the secretary of the department of social and rehabilitation services determines that the person's mental abnormality or personality disorder has so changed that the person is not likely to commit predatory acts of sexual violence if released, the secretary shall authorize the person to petition the court for release. The petition shall be served upon the court and the county or district attorney. The court, upon receipt of the petition for release, shall order a hearing within ~~45~~ 30 days. The county or district attorney or the attorney general, if requested by the county, shall represent the state, and shall have the right to have the petitioner examined by an expert or professional person of such attorney's choice. The hearing shall be before a jury if demanded by either the petitioner or the county or district attorney or attorney general. The burden of proof shall be upon the county or district attorney or attorney general to show beyond a reasonable doubt that the petitioner's mental abnormality or personality disorder remains such that the petitioner is not safe to be at large and that if discharged is likely to commit predatory acts of sexual violence.

Sec. 11. Nothing in this act shall prohibit a person from filing a petition for discharge pursuant to this act. However, if a person has previously filed a petition for discharge without the secretary of the department of social and rehabilitation services approval and the court determined either upon review of the petition or following a hearing, that the petitioner's petition was frivolous or that the petitioner's condition had not so changed that the person was safe to be at large, then the court shall deny the subsequent petition unless the petition contains facts upon which a court could find the condition of the petitioner had so changed that a hearing was warranted. Upon receipt of a first or subsequent petition from committed persons without the secretary's approval, the court shall endeavor whenever possible to review the petition and determine if the petition is based upon frivolous grounds and if so shall deny the petition without a

hearing.

Sec. 12. The secretary of social and rehabilitation services shall be responsible for all cost relating to the evaluation and treatment of persons committed to the secretary's custody under any provision of this act. Reimbursement may be obtained by the secretary for the cost of care and treatment of persons committed to the secretary's custody pursuant to K.S.A. 1993 Supp. 59-2006 and amendments thereto.

Sec. 13. In addition to any other information required to be released under this act, prior to the release of a person committed under this act, the secretary of the department of social and rehabilitation services shall give written notice of such release to any victim of the person's activities or crime who is alive and whose address is known to the secretary or, if the victim is deceased, to the victim's family, if the family's address is known to the secretary. Failure to notify shall not be a reason for postponement of release. Nothing in this section shall create a cause of action against the state or an employee of the state acting within the scope of the employee's employment as a result of the failure to notify pursuant to this action.

Sec. 14. (a) The county or district attorney shall file a special allegation of sexual motivation within 10 days after arraignment in every criminal case other than sex offenses as defined in article 35 of chapter 21 of the Kansas Statutes Annotated and amendments thereto, when sufficient admissible evidence exists, which, when considered with the most plausible, reasonably foreseeable defense that could be raised under the evidence, would justify a finding of sexual motivation by a reasonable and objective fact finder.

(b) In a criminal case wherein there has been a special allegation, the state shall prove beyond a reasonable doubt that the accused committed the crime with a sexual motivation. The court shall make a finding of fact of whether or not a sexual motivation was present at the time of the commission of the crime, or if a jury trial is had, the jury, if it finds the defendant guilty, also shall find a special verdict as to whether or not the defendant committed the crime with a sexual motivation. This finding shall not be applied to sex offenses as defined in article 35 of chapter 21 of the Kansas Statutes Annotated and amendments thereto.

(c) The county or district attorney shall not withdraw the special allegation of sexual motivation without approval of the court through an order of dismissal of the special allegation. The court shall not dismiss this special allegation unless it finds that such an order is necessary to correct an error in the initial charging decision or unless there are evidentiary problems which make proving the special al-

legation doubtful.

Sec. 15. If any provision of this act or the application thereof to any person or circumstances is held invalid, the invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provisions or application and, to this end, the provisions of this act are severable.

Sec. 16. This act shall take effect and be in force from and after its publication in the statute book.

STATE OF KANSAS

TODD TIAHRT
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TOPEKA

SENATE CHAMBER

COMMITTEE ASSIGNMENTS
VICE CHAIRMAN: ASSESSMENT & TAXATION
MEMBER: EDUCATION
TRANSPORTATION & UTILITIES
JOINT COMMITTEE ON
LEGISLATIVE POST AUDIT

Senate Bill 648 is a Bill that provides for licensure to carry concealed weapons. It also provides requirements and qualifications for people who are requesting a license. The requirements are very practical.

In some parts of the state, our citizens are living in fear. What we intend to do is alleviate some of their fears. It is my hope, that they will feel more secure knowing that they will be able to defend themselves in a myriad of situations involving anything from, armed robbery, assault and burglary, to attempted murder or rape. The fact that a potential assailant would or would not know whether or not a potential victim is carrying a weapon or not, has proven in several different areas of the United States to be an effective deterrent.

Recently I spoke with a well known woman who was robbed in an east Wichita restaurant several weeks ago. She was with her children at the time. When I spoke with her, she urged me to work for passage of this bill because she felt so violated and she was still angry. If she had been carrying a gun she feels she could have stopped her aggressor. Her words to me were, "whatever liberal blood that flowed through my veins concerning gun control, is now gone". Even though she has purchased a gun and is taking gun safety lessons, she can not legally protect herself. Unfortunately, law abiding citizens do not have that means available to them.

I have been surprised at the number of women who have called me in support of this measure. Many have told me that we should permit those who are physically smaller than those who would attack them a means of effectively protecting themselves. This brings to mind another crime that should be considered when debating this bill and that is rape. In 1992 1,043 rapes were committed in Kansas. By approving this legislation, we will be saying that women no longer need to remain so relatively defenseless. They can protect themselves should a compromising situation develop. This bill does have its origins in our fourth amendment of the Kansas Constitution, "the people have the right to bear arms for their defense and security".

There are approximately 7,930 sworn law enforcement officials in Kansas. Less than half are on duty at any one time. Another percentage are not out work the "beat". They're at their desks, working dispatch or attending hearings. Probably only one third of the officers are available at any one time to answer a distress call. There are approximately 2,515,320 citizens. That is one officer, sheriff, or deputy for approximately each 1,000 people. In 1992 there were 133,237 violent crimes reported in Kansas. That is one crime for each 19 people. Many of us are at risk. Also, there are about 60 crimes for every officer. We can't expect the police to be there all the time, so people must be allowed to defend themselves.

This bill is based on a law that is currently in place in Florida. The law went into effect in Florida in 1987. At that time Florida murder rates were 140% of the national average. Since the passage of the bill, statistics showed that the murder rates have significantly dropped to below the national average. These trends that reflect much the same results have been observed in other states which have passed the same type of legislation. These states include, Utah, Georgia, Washington and Oregon.

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Attachment 2-1

One interesting case, involves Kennesaw Georgia, in which the city council passed an ordinance requiring heads of households to keep a firearm in their homes. Amazingly during the 7 months following the passage of the law, residential burglaries dropped by 89%. I think this points out that criminals are predators and if they perceive confrontation, they think twice.

Statistics based on responses from imprisoned male felons were also supportive of this legislation. In a study done by the National Institute of Justice, James Wright and Peter Rossi found that 40% of the prisoners said that "criminals did not attack a potential victim that they suspect may be armed".

Many of you are worried about who may or may not be allowed to obtain a license. This bill is more restrictive than even the Florida law. The bill very clearly states that if a person has been convicted of a crime or released within five years preceding the date of the application for a crime they would not receive the license. Abuse of a controlled substance or alcohol would prevent someone from obtaining a license. Even the local Sheriff has an input as to who can be approved. This is very limited. It is design for law abiding citizens to protect themselves.

There is great popular support for this bill. So far I have been sent many petitions voluntarily by constituents of this state. The residents of Kansas and specifically, some of the residents of our largest metropolitan areas are tired of living in fear as they walk the streets at night. Some don't even venture out after certain hours of the day. This bill would provide protection for those who feel they have been imposed upon by the criminal element of our society. We must ask ourselves if by not passing this, 'Are we preserving the status quo?' Statistics tell us that this legislation will help reduce violent crimes.

Thomas Jefferson once said 'laws that forbid the carrying of arms disarm only those who are neither inclined nor determined to commit crimes. Such laws make things worse for the assaulted and better for the assailant, they serve rather to encourage than prevent homicides for an unarmed man may be attacked with greater confidence than an armed man.'

Basically the bottom line is, that we wish to allow decent citizens the ability to protect themselves. This will make predators think twice before attempting to wrong a common person on the street thereby, decreasing crime in general.

Session of 1994

SENATE BILL No. 648

By Committee on Judiciary

2-2

AN ACT providing for licensure to carry certain concealed weapons; prohibiting certain acts and prescribing penalties for violations; amending K.S.A. 1993 Supp. 21-4201 and repealing the existing section.

Be it enacted by the Legislature of the State of Kansas:

New Section 1. As used in sections 1 through 12:

(a) "Bureau" means the Kansas bureau of investigation.

(b) "Weapon" means handgun, pistol, revolver or tear gas gun.

New Sec. 2. (a) The bureau may issue licenses to carry concealed weapons to persons qualified as provided by this act. Such licenses shall be valid throughout the state for a period of three years from the date of issuance.

(b) The licensee must carry the license or an actual copy thereof, together with valid identification, at all times in which the licensee is in actual possession of a concealed weapon and must display both the license and proper identification upon demand by a law enforcement officer. Violation of the provisions of this subsection shall constitute a class B nonperson misdemeanor.

New Sec. 3. (a) The bureau shall issue a license pursuant to this act if the applicant:

(1) Is a resident of the state and has been a resident for six months or more immediately preceding the filing of the application;

(2) is 21 years or more of age;

(3) does not suffer from a physical infirmity which prevents the safe handling of a weapon or firearm;

(4) is not ineligible to possess a firearm pursuant to K.S.A. 21-4204 and amendments thereto by virtue of having been convicted of a felony;

(5) has not been, during the three years immediately preceding the date on which the application is submitted, committed for the abuse of a controlled substance or found guilty of a crime under provisions of the uniform controlled substances act or a similar law of another state or the District of Columbia relating to controlled substances;

(6) does not chronically and habitually use alcoholic beverages to

related or

or juvenile offense

or Federal court

the extent that the applicant's normal faculties are impaired. It shall be presumed that an applicant chronically and habitually uses alcoholic beverages to the extent that the applicant's normal faculties are impaired if the applicant has been, during the three years immediately preceding the date on which the application is submitted, committed for the abuse of alcohol or has had two or more convictions under K.S.A. 8-1567 and amendments thereto, or under a similar law of any city, county, other state or the District of Columbia;

(7) desires a legal means to carry a concealed weapon or firearm for lawful self-defense;

(8) presents evidence satisfactory to the bureau that the applicant:

(A) Has satisfactorily completed a hunter education or hunter safety course approved by the secretary of wildlife and parks or by a similar agency of another state;

(B) has satisfactorily completed a national rifle association firearms safety or training course;

(C) has satisfactorily completed a firearms safety or training course or class available to the general public and offered by a law enforcement agency, community college, college, university, private or public institution or organization or firearms training school, utilizing instructors certified by the national rifle association or criminal justice standards and training commission;

(D) has satisfactorily completed a law enforcement firearms safety or training course or class offered for security guards, investigators, special deputies or any division or subdivision of law enforcement or security enforcement;

(E) presents evidence of equivalent experience with a firearm through participation in organized shooting competition or military service;

(F) is licensed or has been licensed to carry a firearm in this state or a county or city of this state, unless such license has been revoked for cause; or

(G) has satisfactorily completed a firearms training or safety course or class conducted by a state certified or national rifle association certified firearms instructor; and

(9) has not been adjudged a disabled person under the act for obtaining a guardian or conservator, or both, or under a similar law of another state or the District of Columbia, unless the applicant was ordered restored to capacity three or more years before the date on which the application is submitted; and

(10) has not been an involuntary patient pursuant to the treatment act for mentally ill persons, or pursuant to a similar law of another state or the District of Columbia, unless the applicant pos-

has satisfactorily completed a personal protection course, approved by the KBI, that includes appropriate training, firearms safety and the use of deadly force for lawful self defense.

sesses a certificate from a psychiatrist licensed to practice medicine and surgery in this state that the applicant has not suffered from disability for three or more years immediately preceding the date on which the application is submitted.

(b) The bureau may deny a license if the applicant has been found guilty of one or more crimes of violence within the ~~three~~ five year period immediately preceding the date on which the application is submitted or may revoke a license if the licensee has been found guilty of one or more crimes of violence within the preceding ~~three~~ five years.

(c) A photocopy of a certificate of completion of any of the courses or classes, an affidavit from the instructor, school, club, organization, or group that conducted or taught such course or class attesting to the completion of the course or class by the applicant or a copy of any document which shows completion of the course or class or evidences participation in firearms competition shall constitute satisfactory evidence of qualification under subsection (a)(8).

New Sec. 4. (a) The application for a license pursuant to this act shall be completed, under oath, on a form prescribed by the bureau and shall include:

(1) The name, address, place and date of birth, race and occupation of the applicant;

(2) a statement that the applicant is in compliance with criteria contained within section 3;

(3) a statement that the applicant has been furnished a copy of this act and is knowledgeable of its provisions;

(4) a conspicuous warning that the application is executed under oath and that a false answer to any question, or the submission of any false document by the applicant, subjects the applicant to criminal prosecution under K.S.A. 21-3805 and amendments thereto; and

(5) a statement that the applicant desires a concealed weapon or firearm license as a means of lawful self defense.

(b) The applicant shall submit to the bureau:

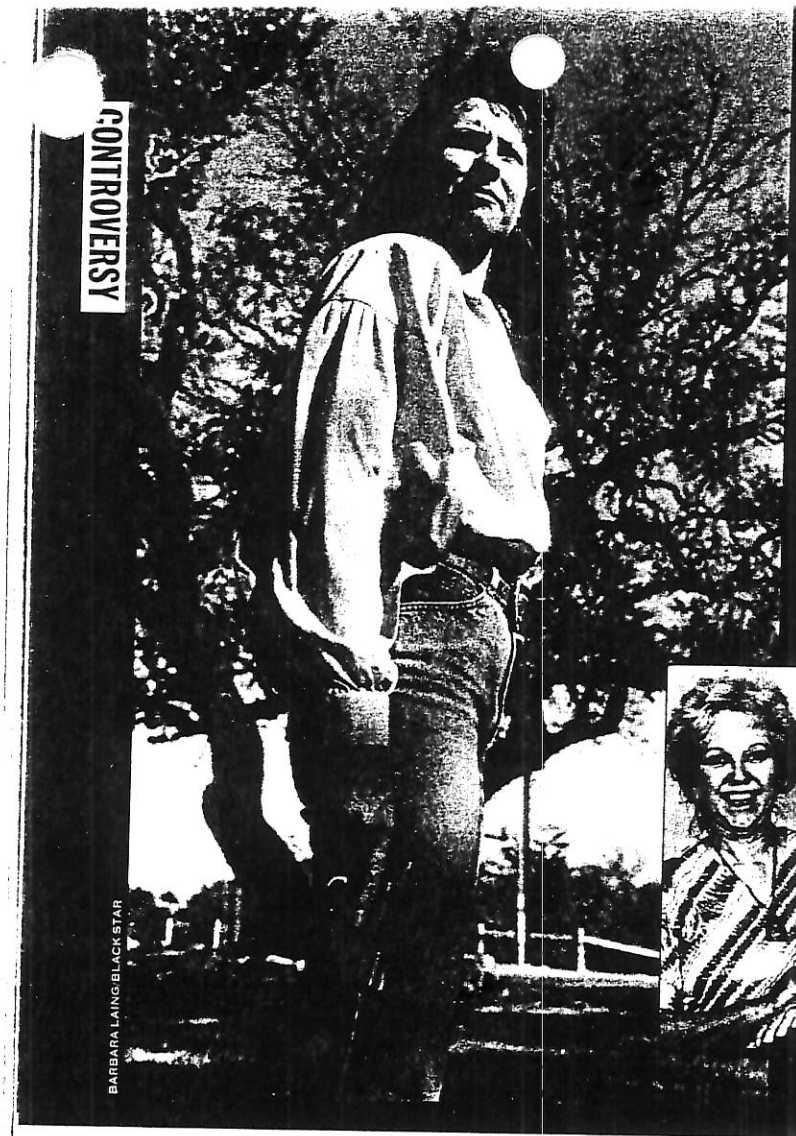
(1) A completed application as described in subsection (a);

(2) a nonrefundable license fee not to exceed $125, if the applicant has not previously been issued a statewide license, or a nonrefundable license fee not to exceed $100, for renewal of a statewide license;

(3) a full set of fingerprints of the applicant administered by a law enforcement agency of this state; and

(4) a photocopy of a certificate or an affidavit or document as described in subsection (c) of section 3.

(c) (1) The bureau, upon receipt of the items listed in subsection



BARBARA LAING/BLACK STAR

ROD AYDELOTTE/SIPA PRESS

"A gun is no guarantee, but it does increase your odds," says Suzanna Gratia, whose parents (inset) were killed in Luby's cafeteria (above). Gratia, who had left her gun in the car, says, "I still feel like I made a stupid decision."

and I knew it hadn't helped [my friend]. I began to think about getting a gun." Quigley was further convinced while researching her book: 11 imprisoned rapists told her that they would not intentionally target an armed female. Nor will she be deterred by studies such as the recent one on residential gunshot deaths in King County, Wash., which found that a gun in the home is 43 times more likely to be used to kill its owner, a spouse, a friend or a child than to kill an intruder. "Half the households in the country have at least one gun," she says, "and most Americans store their guns properly and learn to use them safely."

A Watergate felon considers gun control a bigger scandal

With its rousing military music, *The G. Gordon Liddy Show: Radio Free D.C., the Voice of Freedom* sounds like a call to arms. And that it is: Liddy's syndicated daily talk show attracts about 80,000 callers a month, many of them adoring fans who want advice on what gun to buy next. Liddy, 63, a former FBI special agent who boasts of his prowess with weapons, dismisses gun control as a bureaucratic nuisance. "What's the point of it, other than to inconvenience the honest citizen who follows the rules?" he asks. Of course, Liddy won't be inconvenienced himself. As a convicted felon who spent four years in prison for participating in the Watergate break-in, he cannot legally own a firearm. But he slyly points out that his wife, Frances, 61, keeps her own licensed arsenal in their Fort Washington, Md., home. "She owns 27, and the children keep some of their weapons in our vault too. There are at least 40 in there."

Liddy's radio program, which began in 1992, is carried by 160 stations nationwide. His message to the masses: Gun control is futile. "I can assure you that the guys I met in the nine prisons I served my sentence in did not get their guns at the gun store."

To one grief-stricken woman, guns are the best defense

It is hardly surprising that Suzanna Gratia is passionately involved in the debate over gun control. Two years ago her parents were among 23 people murdered when George Hennard Jr. crashed his pickup truck into a Luby's restaurant in Killeen, Texas, and opened fire. As Suzanna looked on in horror, her father, Al, 72, was shot down as he tried to jump Hennard. Her mother, Ursula, 67, was executed as she cradled her dying husband's head.

But the lesson Suzanna drew from this tragedy was not that guns were too easy to come by. She instead became convinced that if everyone in Luby's had been packing a weapon that day, the massacre never would have happened. "It's hard to describe how incredibly frustrating it was to sit there

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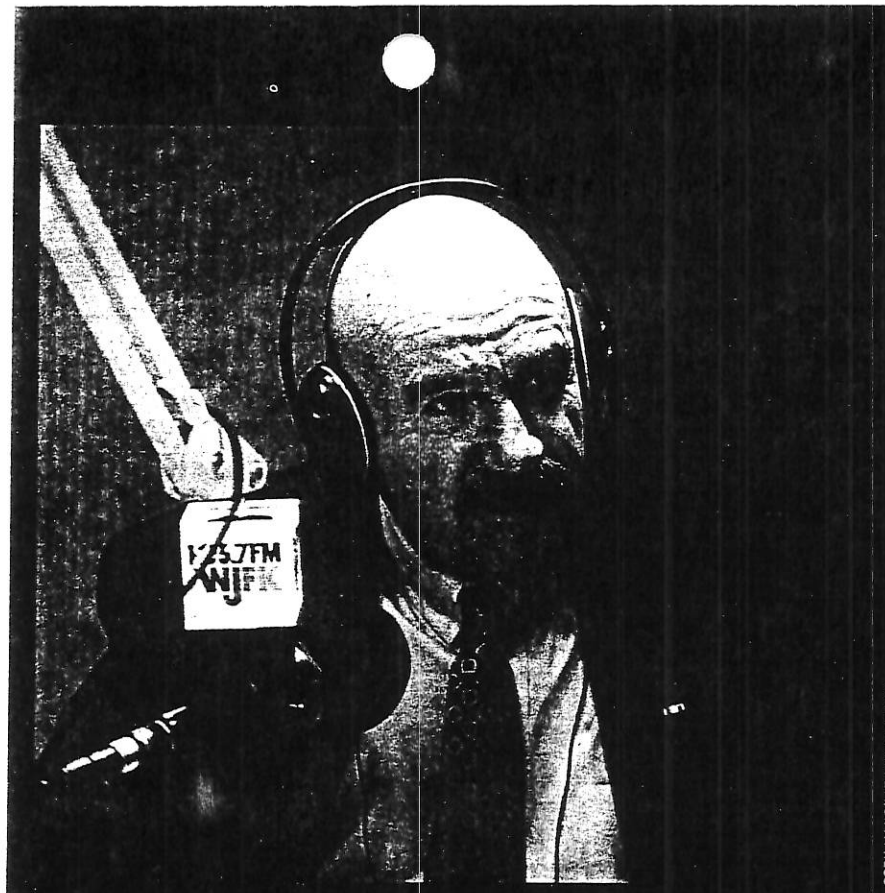


▲ "I think we're headed toward an even more well-armed citizenry," predicts G. Gordon Liddy (emceeing his radio show).

ROBERT TRIPPETT/SIPA PRESS

▲ "I can't protect my family with a mean look or a sock full of quarters," says Ted Nugent (brandishing a Smith & Wesson in 1979).

while this guy walked around shooting people, and there was nothing you could do about it" says Gratia, 34, a chiropractor in Copperas Cove, Texas. "I don't like being a sitting duck."

Since the shootings, Gratia has appeared before Congress and on talk shows to make her case for relaxing gun laws and allowing "anyone who can vote" to carry a concealed weapon. "She's been incredibly effective," says Texas state representative Ron Wilson. Mention the Brady Bill and Gratia says sarcastically, "I feel much safer now that there is a five-day waiting period." She then points out that both guns Hennard used in the attack were purchased legally. Still, people like Sarah Brady dismiss Gratia's philosophy as dangerously simplistic. "If guns made you safer, we'd be the safest nation on earth," says Brady. "Instead, we're the most violent."

Ironically, Gratia says she used to carry a handgun in her purse in violation of state law, but stopped shortly before the Luby's massacre out of concern that she might lose her license to practice. These days, she defiantly admits, she never goes anywhere without her .38-caliber revolver. "Now I realize," she says, "that breaking the law doesn't matter as much as my life or the lives of my loved ones."

A famed wheeler-dealer finds new life on the gun-show circuit

The first commercial dealers' gun show in Texas—there are now more than 50,000 a year nationwide—took place in San Antonio in 1968. It was staged by promoter Mike Morris, 56, who now organizes 44 shows a year in the state and has found his star attraction to be his very own father-in-law, Billie Sol Estes, 68. "People will drive for miles just to see him," says Morris. Explains Estes: "I'm just a little bit of history." In fact, he is something of a rogue folk hero in the Lone Star State. A former crony of Lyndon Johnson's, he spent 11 years in prison for fraud.

"Gun shows are legal, wholesome places—they're love meets," says the born-again Estes, a recovering alcoholic who hawks $30 copies of his biography, *King of Texas Wheeler-Dealers*, to gun-fair shoppers. "People learn proper safety procedures here. There are educational programs." But according to Dewey Stokes, president of the Fraternal Order of Police, gun shows can also attract an unsavory element. "The overwhelming majority of transactions at these shows are not recorded," he says, "so that criminals, gang members and cults often obtain weapons there." (Over a two-year period, Branch Davidian leader David Koresh purchased about 225 guns and 100,000 rounds of ammunition from a dealer he met at a gun show.) "I tend to judge the quality of a gun show by how far I get into it before I see the first picture of Adolf Hitler," says Jack Killorin, spokesman for the U.S. Bureau of Alcohol, Tobacco and Firearms.

3-2

Assault-weapon ban would be one more act of federal tyranny

By Phillip B. Journey
Special to The Wichita Eagle

Edmund Burke, in 1784, stated, "The people never give their liberties but under some delusion."

The U.S. Congress will soon discuss legislation banning "assault weapons." In the U.S. Senate it is known as S.639 and in the House of Representatives as H.R. 1472. Much confusion in the public's mind centers on the definition of the term "assault weapon." True assault rifles are fully automatic, expelling more than one bullet with one trigger pull. Assault rifles have been heavily regulated since the passage of the National Firearms Act and the Federal Firearms Act in the 1930s. Purchasers have had to present identification, fingerprints, fill out forms, wait for the completion of a background check, in some areas get a letter from local law enforcement. The current federal law covers not only the fully automatic arms, but also all weapons that can be readily transformed into fully automatic weapons. It takes hours of work on expensive machine tools to convert semi-automatic arms to fully automatic and it is a felony to do so.

There are more than 250,000 fully automatic (Class III) firearms lawfully owned in the United States. While this number concerns gun control advocates, it is an undisputed fact that in the sixty years of taxation on this class of weapons, not one has ever been documented as a firearm used in crimes committed by their owners.

The currently proposed legislation deals with semi-automatic firearms. This class of arms is only capable of discharging a single bullet with each pull of the trigger. Some states, such as New Jersey and California, have currently banned many kinds of arms, not only the menacing looking Uzi, but also the .22 target rifle and single-shot shotgun. Eric C. Morgan and David B. Kopel, of the Independence Institute in Golden, Colo., call them "politically incorrect firearms."

The public is intentionally being misled by gun-control proponents and much of the blame lays with the media. The media repeat the false descriptions of semi-automatic firearms as being automatic. Too many in the media have openly taken positions supporting the ban, demonstrating bias and forsaking the public's trust.

Proponents of the national ban on semi-automatics, such as Rep. Dan Glickman and Sen. Nancy Kassebaum, have publicly stated that these are guns of choice for kooks, criminals and drug dealers. Some of the characteristics they point out that distinguish them as "politically incorrect firearms" are pistol grips and bayonet lugs. When was the last time you heard of a drug dealer charging with a bayonet?

Neither true assault rifles nor the semi-automatic "faux assault weapons" are significant factors in crime. There have been tragedies involving semi-automatic, military-style firearms. If these anecdotal tragedies are put in perspective with crime rates in our cities, crimes committed with semi-automatic "faux assault weapons" are not a significant factor in overall crime rates.

Less than .06 percent of all serious crime and less than one-half of one percent of all violent crime in the United States involve semi-automatic, military caliber arms, according to 1991 FBI statistics. The Journal of California Law Enforcement wrote, "In the current hysteria over semi-automatic and military look-alike weapons, that the most common weapon used to murder peace officers was that of the .38 Special and the .357 Magnum revolver."

Top law enforcement officers from large cities have obtained substantial publicity beating the ban-assault-weapons drum. The views of top law-enforcement administrators are diametrically opposed to the rank-and-file officer's views on the issue of banning semi-automatic, military-style rifled arms. The dissenting chorus of the vast majority of rank-and-file officers in the Wichita Police Department are silenced by city rules that allow termination of any officer who expresses his opinion publicly.

In a poll of members of the National Association of the Chiefs of Police, 67 percent opposed semi-automatic firearms bans. In a poll conducted by Law Enforcement Technology magazine, 78.7 percent opposed control of semi-automatic firearms.

The pending legislation will not prevent "faux assault weapons" from getting to criminals. Crips Four Trey gang member Rick (li'l Loc 2), when asked about the effectiveness of the California ban of semi-automatics said, "Well, a gun is illegal ... So what? Everything (gangs) do is illegal." Criminals will benefit from the ban because it will disarm law-abiding citizens. It would also give criminal organizations another source of revenue.

Compliance rates of citizens in states where bans have been passed have ranged between 1 percent to 10 percent. The "new criminals" created by firearms prohibitions will become fearful of law enforcement and therefore are less likely to assist law enforcement. Trenton, N.J., police chief Joseph Constance observed that the ban in his state was a mistake that "created a wall of suspicion between police and citizens."

Former Vice President Hubert Humphrey said, "The right of citizens to bear arms is just one more guarantee against arbitrary government, one more safeguard against the tyranny which now appears remote in America, but which historically has proved to be always possible."

Phillip B. Journey, a Wichita lawyer, is director at large for the Kansas Rifle Association.

3-3

Mike Hutmacher/*The Wichita Eagle*

Gun-control opponent Larry Cushenbery, left above, makes a point during an impromptu debate with Donald Steeiberg, who favors gun control. Their confrontation took place outside the jammed room, below, where the Wichita City Council listened to arguments about a plan to impose a five-day waiting period on handgun buyers and require a $20 permit.

Gun-control foes flaunt their muscle

Mayor 'will have to reckon with us,' leader of opposition says

By Jim Cross
The Wichita Eagle

More people than anyone can remember seeing at a Wichita City Council meeting in 20 years showed up Tuesday to tell the council what they thought about a gun-control proposal.

Gun owners, many of them wearing bright orange caps bearing the motto "I Vote," filled the more than 400 seats in the council chambers.

When the seats were full, they stood along the walls of the room. When police and fire officials barred the doors to keep more people from coming in than the room could hold, the crowd spilled into the lobby. The total was more than 500 and perhaps more than 600.

In the end, after hearing 28 people speak on the subject, the council voted to postpone any action until Jan. 25, a move that sent more than 20 gun-control opponents who had signed up to speak home without being heard.

At 6:30 p.m., a weary Mayor Elma Broadfoot stepped down from the council bench. Had the overwhelming turnout by the opposition changed her mind about supporting a local gun-control law?

"Nope," she said.

But Broadfoot doesn't yet comprehend the full meaning of what unfolded Tuesday, said gun-control opponent Phil Journey, a Wichita lawyer who organized the turnout. Tuesday's meeting, he said, may turn out to have been the beginning of the end of Broadfoot's political career.

"Ms. Broadfoot kicked a sleeping dog when she should have left it alone," Journey said. "These people do not trust her now. And they will not trust her in the future. It's kind of a shame. There are probably some good things she could have accomplished that will be thwarted by this."

So be it, Broadfoot said.

"This is one of the reasons why I never said what I would do after my

See **GUNS**, *Page* **6A**

Water fee advances: Council gives tentative OK to access charges. **6A**

"It's entirely likely that we will be able to form a cohesive political group that will become a very dominant force."
Gun-control foe Phil Journey

"To me, ethically and morally, it is incredible that any element of this proposal should be controversial."
Michael Poague, pastor, Fairmount United Church of Christ

Woman can't be forced to have Caesarean

Judges decide case pitting rights of mother vs. rights of endangered fetus

were not in court Tuesday, have been described as Romanian Pentecostal

The SHARING SEASON

GUNS

Opponents of curbs flex political muscle

From Page 1A

two-year term is up," she said when the meeting was over, gesturing to the empty room that had been crowded all day. "Because I never wanted *that* to influence how I vote."

But after Tuesday's meeting the question of whether the council will approve a law restricting the purchase and sale of handguns is still up in the air.

Broadfoot said she is willing to talk about modifying a proposed ordinance that would require anyone who buys or sells a handgun to purchase a $20 permit, undergo a background check and wait five days to receive the gun.

All she really wants to do, Broadfoot said, is pass an ordinance that is "reasonable and enforceable."

"But I don't honestly know that I have the votes to do it," she conceded when the day was over.

Opponents argued that the proposed ordinance was unconstitutional, unenforceable and unlikely to be effective because criminals would not abide by its restrictions. None of the arguments changed her mind, Broadfoot said.

A police estimate that it could cost $800,000 next year to set up a computerized tracking system will be the biggest factor in how council members wind up voting, she said.

But Broadfoot is not sure whether to take the police cost estimates at face value.

"It seems like that the standard answer around here, whenever we're looking for anything relative to the Police Department, is that it will take more people and more money," she said. "And I'm really getting kind of tired of that answer. I'm not convinced."

But Broadfoot's doubts about what she is hearing from police are nothing compared with gun owners' doubts about what they are hearing from her, Journey said.

Broadfoot isn't up for re-election until April 1995. But Journey said he intends to set up a political machine that outlasts her.

"It's entirely likely that we will be able to form a cohesive political group that will become a very dominant force by the time next year's elections are over," he said.

With what agenda?

"To unelect those that oppose us and elect those that are with us," he said.

U.S. Rep. Dan Glickman, D-Wichita, a gun-control supporter, will be Journey's first political target. Broadfoot may be the second.

"She's going to have to reckon with us," he said.

Broadfoot reckoned with a lot of opposition Tuesday. First, she insisted on an unprecedented one-hour limit on debate. Then she agreed to a second hour of debate later in the afternoon, only to see the room fill once again with gun-control opponents.

Over council member Greg Ferris' strenuous objections, she insisted that for every opponent of gun control who was allowed to speak a member of the group supporting the measure be allowed to speak, too. The rule of alternating speakers kept the debate more balanced. But it meant that many opponents, who greatly outnumbered supporters, never got to speak.

"Today the council took a step toward a reign of tyranny," said Ferris, who was furious about the rule of alternating speakers.

Broadfoot was undaunted: "That's a bunch of political rhetoric as far as I am concerned. ... It's like one of the speakers said: You have not heard anything today that you have not heard for the last 10 years and nothing you probably won't hear for the next 10 years, too."

A speech by Tom Burnett, the new president of the Fraternal Order of Police, was a new element in the debate, though. His lodge, which represents Wichita police officers, "finds itself in opposition to this ordinance," he said.

"The ordinance will not have any impact on criminals' misuse of handguns," he said. "And it will be next to impossible to enforce."

Supporters conceded that a local gun-control law would not stop all crime and violence in Wichita, but said that it would be an important step in a life-and-death struggle for the community's survival.

"The escalation of gun violence and ease with which handguns are purchased threatens to make human beings an endangered species," said Michael Poague, the new pastor of the Fairmount United Church of Christ. "To me, ethically and morally, it is incredible that any element of this proposal should be controversial."

Council OKs idea of new fee for water, sewer hookups

By Jim Cross
The Wichita Eagle

In a meeting Tuesday that lasted from 9 a.m. to 6:30 p.m., the Wichita City Council:

■ Approved in principle a plan to charge a special fee when new homes or businesses hook up to the city's water and sewer systems.

Water department officials said the access fees, which will have to be approved in their final form by another council vote, would help slow annual water and sewer rate increases for most customers by making new customers pay a bigger share of the costs of expanding and upgrading the system. Under the plan the council approved Tuesday, water rates will increase 6 percent in 1994 and again in 1995 and then 7 percent in 1996. Sewer rates would rise 8 percent each of those years.

■ Tentatively set a public hearing on a proposal to ban smoking in public places for the council's meeting of Jan. 25.

■ Approved a request from Evcon Industries to issue up to $8 million in industrial revenue bonds that carry a 100 percent tax abatement for 5 years. The company pledged to hire 150 workers next year.

■ Voted to set up a tax increment district in the Old Town. The move will allow part of the property taxes paid by the businesses in Old Town to be spent on public improvements in that area. It will not, however, increase the amount of taxes they pay.

Trust vs. Control:

WHY CCWS DETER CRIME

Facts show that carrying concealed weapons reduces crime . . .

BY PHILLIP B. JOURNEY

The author is an attorney in Whitchita, Kansas, and highly involved in defending our Second Amendment rights. He is a spokesman for the Air-Capital Gun Club, a member of the legislative committee of the Kansas State Rifle Association, a NRA life member, and the recipient of the 1992 NRA/ILA Local Activists of the Year Award. He is also a candidate for the NRA Board of Directors--The editors.

AS government bureaucrats and the media waive the gun control banner, we should consider the words of Thomas Jefferson, who said, "Men, by their constitutions, are naturally divided into two parties: those who fear and distrust the people, (and) those who identify themselves with the people, have confidence in them, cherish them and consider them as the most honest and safe...depository of the public interest."

Trust is the real issue when it comes to dealing with gun control laws. Those who favor gun control do not trust law-abiding citizens enough to own the means to protect themselves and their families.

One law that demonstrates trust in law-abiding citizens, and has clearly reduced crime in states such as Florida, is a system which requires the government to issue carry concealed permits to private citizens. States such as Florida, Washington, Utah, Virginia, Georgia, Oregon, West Virginia, Pennsylvania, Idaho and Montana have all instituted carry concealed permit systems.

In October of 1992, a homicidal maniac armed with several handguns entered Lubby's Cafe in Killeen, Texas, and methodically murdered twenty-two people and then committed suicide. No resistance was offered from the scores of people in the restaurant, including Dr. Suzanna Gratia. She was unable to prevent the death of her parents because she complied with Texas law prohibiting the carrying of concealed firearms on one's person. Despite the emotional trauma involved seeing her parents murdered, she has courageously testified before the Texas state legislature and other state legislatures in favor of carry concealed legislation.

In an editorial in the *San Antonio Light*, on April 22, 1992, she wrote, "State law (Texas) prohibits the concealed carrying of firearms, denying me or someone else the right to have a gun that day to protect ourselves and our loved ones from the rampages of a mad-man. That's flat out wrong."

"In cities where police response times to requests for help can be as long as thirty minutes to one hour on a bad night and ten minutes on the best night, each of us should realize that we are on our own during that period of time. The average felony might take as little as forty-five seconds to commit.

In each of the states where laws have been adopted mandating the issuance of carry concealed permits upon proof of qualification, no pattern of any increase in gun related crimes by permit holders has materialized. In a study done by David B. Kopel and Clayton E. Cramer of the Independence Institute in Golden, Colorado, they concluded that "states considering carry reform can enact such laws knowing that reform will not endanger public safety and sometimes, carry reform lets citizens save their own lives."

This author has drawn heavily from their issue paper. In that issue paper Kopel and Cramer studied the relationship of a state per capita murder rate as a percentage of the per capita murder rate of the United States as a whole. This comparison determines how homicide rates change due in part to these laws and would negate overall trends from influencing the analysis.

Opponents to carry concealed systems have argued that reform would lead to tragic increases in homicide. While Florida was debating their statute in 1986, editorialist and gun control proponents referred to Florida as "the Gun-shine State." They predicted shoot-outs over traffic accidents and increases in domestic violence homicide rates.

Willis Booth, executive director of the Florida Chiefs Association, stated, "The minute that the bill was passed, we asked our chiefs in the state to be particularly alert for any cases in their jurisdiction that would give us knowledge of the fact that there was some abuse. At this point it would appear the law is working very well."

Under Florida's non-discretionary concealed weapons permit law, it is mandatory that the permit be issued provided the applicant is twenty-one years of age or more, "does not suffer from a physical infirmity which prevents the safe handling of a firearm," has not been convicted of a felony, has not been convicted of a drug charge in the preceding three years, has not been confined for alcohol problems in the preceding three years, has completed a firearms safety class, and has not been committed to a mental hospital in the preceding five years.

Discretion by the government in the

issuance of the permit is allowed when the applicant has been convicted of a misdemeanor crime of violence or was on probation for a crime of violence within the preceding three years. The requirement that the permit be issued limiting the discretion of the government is a very important characteristic in the Florida law. In other jurisdictions that have permissive carry concealed permit systems, some require that need be shown or the issuance of the permit is based upon the arbitrary decision of a government or law enforcement bureaucrat.

Per capita statewide homicide rates as a percentage of the national per capita homicide rate in Florida, between 1975 and 1986, ranged from 118 percent to a high 157 percent of the national homicide rate. After the introduction of a mandatory carry concealed permit system in Florida, the murder rate dropped precipitously to below the national average in 1991. This is the lowest rate compared with the national average in the time periods examined.

In the state of Washington, where the carry concealed law was adopted in 1961, murder rates have never risen above the 70th percentile of the national per capita homicide rate. That high point was reached in 1988 and then dropped back to normal levels from 1989 to the present date.

Utah adopted a permit system in 1986. Homicide rates as a percentage of national per capita murder rate reached a high of just over 50 percent in 1976 and 1979. After adoption of the law in 1986, Utah murder rates never rose above the 40th percentile.

In Virginia, a carry concealed permit system was adopted in 1988. The first year showed a dramatic decrease in the murder rate percentage. It is unfortunate that Virginia is next to the District of Columbia, where some of D.C.'s crime problems have made it across the state border and murder rates have gone back up in 1990 and 1991 in Virginia, but are still below the national average.

By changing the Georgia Attorney General's interpretation of the law in Georgia, issuance of permits became more available to the average citizen and murder rates have declined in the two years since then, from 140 percent of the national average to about 130 percent of the national average. But as the reinterpretation has been so short and may be temporary, the results in Georgia are inconclusive.

In Oregon the carry concealed law was adopted in 1989. From a high in 1986, the percentage murder rate relative to the national average was just under 80 percent and declined through 1987, 1988 and 1989, the year of adoption, but dropped substantially more in 1990 and rose again from 40 percent to 48 percent in 1991 of the national average.

In Portland, Oregon, the largest metropolitan area in the state, the homicide rate fell dramatically during the first six month period after the law went into effect. This drop in the homicide rate clearly demonstrates that the publicity can be a deterrent to crime.

In Pennsylvania, where the law was adopted in 1989, there was no obvious difference after the adoption of the new permit law. However, the murder rate in Philadelphia was lower in 1991 than in the year of the adoption of the law in 1989. Clearly, while murder rates have not dropped, the adoption of the law did not make Pennsylvania a more dangerous state.

The rate of homicides in states such as West Virginia, Idaho and Montana vary dramatically from year to year. The statistical sample sizes of these states are so small that it is difficult to draw sound conclusions. One or two perpetrators of crime can wildly affect the annual murder rate for each state for any given year.

In Idaho, murder rates varied widely from year to year as the state is very small in terms of population, but a general trend down from the year of adoption, in 1990, to 1991 was from 28 percent of the national average to below 20 percent.

Montana recently adopted the law in 1991 and there are no statistics available other than in the year of adoption. The murder rate in 1991 was the lowest since 1975.

Publicized local programs on firearms and self-defense have a deterrent effect on crime rates. From October 1966 to March 1967 the Orlando, Florida, Police Department trained 2,500 women to use guns in response to a substantial increase in the rate of rape. In 1967 the rate of rapes in Orlando decreased 88 percent.

In Kansas City, metropolitan police in response to business concerns about armed robberies, instituted a publicized training program. Armed robberies in Kansas City ceased to rise and decreased by 13 percent in surrounding areas of the city after increasing the five years prior to the training program.

In Kennesaw, Georg[illegible] suburb of Atlanta, the city council passed an ordinance requiring the heads of households to keep a firearm in their homes. During the seven months following the passage of the law, residential burglaries dropped 89 percent.

The National Institute of Justice commissioned a study by Mr. James Wright and Mr. Peter Rossi on adult male imprisoned felons. Wright and Rossi found 40 percent of the prisoners studied said that criminals did not attack a potential victim they suspected to be armed. Thirty-four percent of the criminals said they had been shot at, wounded by, or captured by an armed victim.

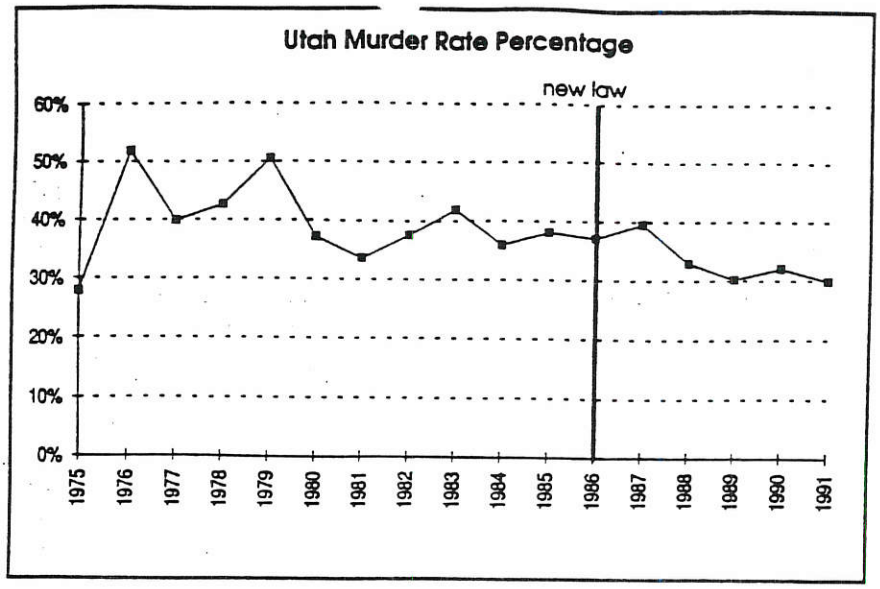
Gun control proponents and lobbying organizations, such as Handgun Control, Inc., claim that they wish to get firearms out of the "wrong hands." When anti-gun lobbyists say this they claim the "wrong hands" are criminals, the mentally ill, drug addicts and other classes of persons prohibited from possessing firearms by both federal and state law.

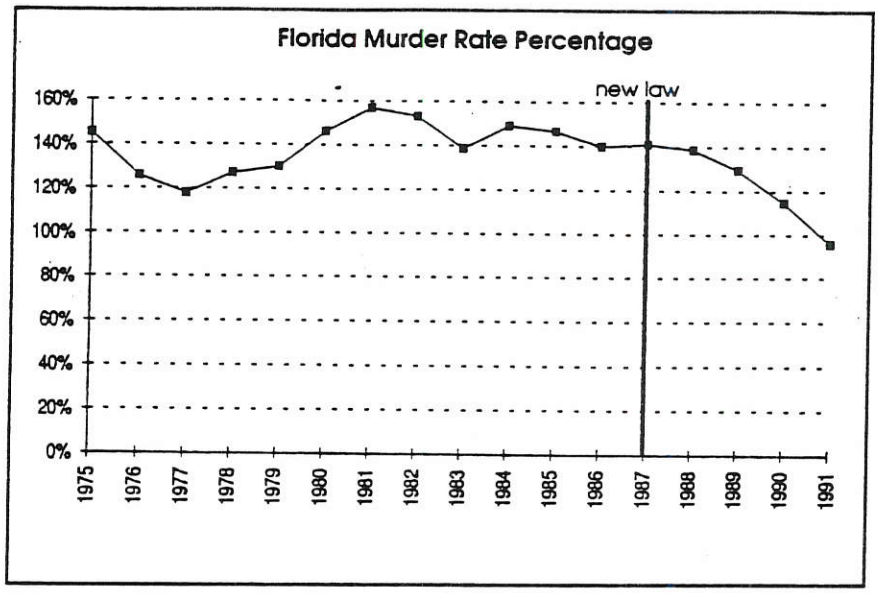
While they claim that they do not intend to remove firearms from the hands of law-abiding citizens, the statements and positions taken by these groups contradict their propaganda. They continually use anecdotal tragedies in emotional settings rather than hard statistical evidence in drawing their conclusions. They continually exploit the emotional response to such tragedies and justify their proposals by saying, "If it saves just one life it is worthwhile."

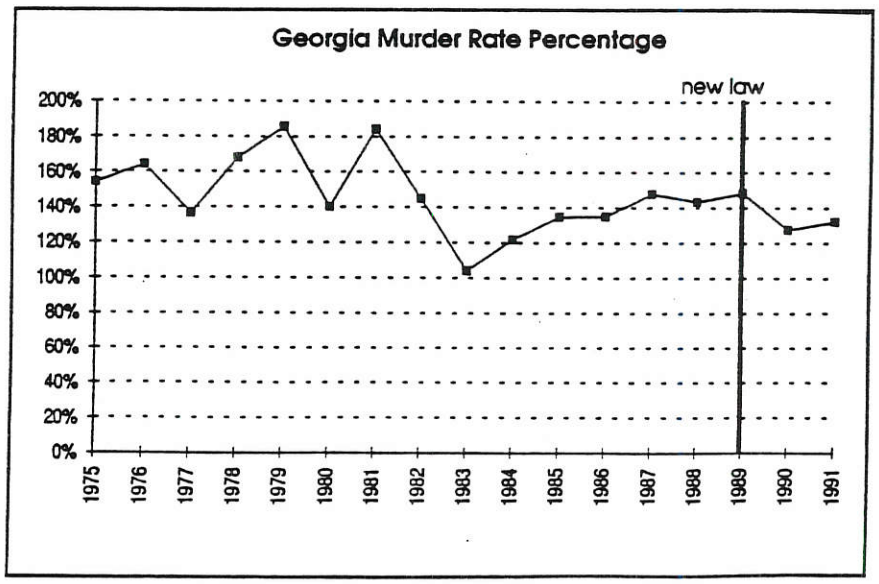
Time and time again private citizens with carry concealed permits have thwarted potentially murderous rampages by effectively using their firearms in self-defense. A 33-year old Miami cab driver was among the first to apply for a carry concealed permit license under Florida's law. Only a few months after receiving his license he became involved in a shooting.

He shot and killed an armed robber after the criminal pointed a firearm at him, demanded money and told the cab driver that he was going to kill him. That 29-year old ex-convict had prior convictions for attempting to kill police officers. The cab driver mortally wounded his attacker with a Colt .45 semi-automatic hand gun. While Florida's criminal justice system failed to protect this citizen, the carry concealed law made it possible for the cab driver to protect himself.

On December 17, 1991, in Ann[illegible]







ton, Alabama, a restaurant patr .d his lawfully carried Colt .45 semi-automatic hand gun to stop two armed robbers in the restaurant as they were ordering all of the customers into the walk-in freezer. Suzanna Gratia has testified that had she had her .38 in her purse instead of in her car, as Texas law required, she could have foiled the murderer in Lubby's Cafe. She also testified that she had ample opportunity to do so when the man reloaded his firearm with a new magazine.

Carry concealed laws clearly pass the "save one life" test. But gun control lobbyists and proponents oppose carry concealed reform in every state where it has been proposed. It is important that if these laws are proposed in your state or locality the statute be scrutinized and a determination made as to whether the law provides for permissive or mandatory issuance of the permit. Permissive systems are open to bureaucratic abuse while mandatory issuance systems require the permit be issued to qualified applicants and that civil suits may be instituted to compel the issuances of those permits.

National carry concealed weapon permit systems have been proposed as legislation in Congress and would have the advantage of simplifying interstate travel while in possession of a firearm for personal protection. Each state should be required to honor other states' permits just as they do driver's licenses.

It is important that in this legislation, criminal sanctions be imposed upon federal bureaucrats who attempt to create registration systems based upon applications and/or permits. Issuance of these permits by state officials can help decentralize those records. Constitutional authority for national carry concealed legislation can be supported by arguments using other sections of the *U.S. Constitution* and the *Bill of Rights* separate and distinct from the Second Amendment.

In summary, perhaps Thomas Jefferson said it best, "Laws that forbid the carrying of arms...disarm only those who are neither inclined nor determined to commit crimes...Such laws make things worse for the assaulted and better for the assailants, they serve rather to encourage than prevent homicides for an unarmed man may be attacked with greater confidence than an armed man." So tell your elected officials, "Hey, trust me or I won't trust you with my vote."●

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Op-Ed Page

Let Kansans carry concealed guns

By Phillip B. Journey
Special to The Wichita Eagle

Men, by their Constitutions, are naturally divided into two parties: those who fear and distrust the people, (and) those who identify themselves with the people, have confidence in them, cherish them and consider them as the most honest and safe ... depository of the public interest.

— Thomas Jefferson

Jill Karla Schwarz

The answers to the violent crime problems in our state and communities offered by community leaders range from a reasonable increase in the capacity of the criminal justice system to the gun-control proponent's restrictive measures. The triad of suppression, intervention and prevention are both short- and long-term proposals.

Some short-term answers to our immediate problems have been put forth in the community forum as rational approaches, such as increasing the number of police officers and the criminal justice system capacity. Another alternative, which has clearly reduced crime in states such as Florida, is a permit system that would allow private citizens to carry concealed weapons.

In a city where response times can be as long as 20 or 30 minutes, and on a good night as short as 12, even with the addition of the full complement requested by Police Chief Rick Stone of more than 200 uniformed police officers, response times will still be substantially longer than the time it takes to commit a crime.

States such as Florida, Washington, Utah, Virginia, Georgia, Oregon, West Virginia, Pennsylvania, Idaho, and Montana, have all instituted permissive carry concealed permit laws. In each of these states, no pattern of any increase in gun-related crimes by permit holders materialized. In states where statistical evidence could be soundly derived, such as Florida, the evidence is conclusive that overall homicide rates fell. Homicide rates, as a percentage of the national per capita rate, ranged from 118-157 percent of the national average per capita murder rate in the years between 1975 and 1986 in Florida. After the introduction of a mandatory carry-concealed permit system in Florida, the murder rate dropped precipitously to below the national average in 1991, the lowest rate compared with the national average in the study's time periods examined.

The most intensive period of study was for three months in Dade County (Miami), Fla. Of the 8,150 permit holders in that county, two were revoked for misusing firearms. In one case, a woman carried a purse containing a handgun into an airport; she had forgotten that it was in the purse. In the other, a man unlawfully attempted to carry his handgun into a court building. During that same period of time, police recorded an incident where a man with a carry permit thwarted a robbery.

In a study by Clayton E. Cramer and David B. Koppel of the Independence Institute in Golden, Colo., they concluded that "states considering carry reform can enact such laws knowing that reform will not endanger public safety and sometimes, carry reform lets citizens save their own lives." How many times have we heard a gun-control advocate say that if their measure just saves one life, it is a worthwhile measure to adopt?

Carry-concealed permits clearly meet this test but gun-control proponents consistently and vehemently oppose these laws. They do not trust the people. Willis Booth, executive director of the Florida Chiefs Association, stated, "The minute that the bill was passed, we asked our chiefs in the state to be particularly alert for any cases in their jurisdiction that would give us knowledge of the fact that there was some abuse. At this point it would appear the law is working very well."

From October 1966 to March 1967 the Orlando, Fla., Police Department trained 2,500 women to use guns in response to a substantial increase in the rate of rape. In 1967 the rate of rapes in Orlando decreased 88 percent. In Kansas City, metropolitan police in response to business concerns about armed robberies, instituted a publicized training program. Armed robberies in Kansas City ceased to rise and decreased by 13 percent in surrounding areas of the city after increasing the five years prior to the training program. In Kennasaw, Ga., a suburb of Atlanta, the city council passed an ordinance requiring heads of households to keep a firearm in their homes. During the seven months following the passage of the law, residential burglaries dropped 89 percent.

In a study done by Mr. James Wright and Mr. Peter Rossi of adult male imprisoned felons, at the request of the National Institute of Justice, 60 percent of the prisoners studied said that criminals would not attack a potential victim they knew to be armed.

This next session of the Legislature is the time for mandatory licensing of carry-concealed permits as a short-term solution to the criminal justice problems facing us all today. While we certainly do not advocate mandatory firearms ownership, we stand solidly behind your right to choose to own one.

Phillip B. Journey, a Wichita lawyer, is director at large for the Kansas State Rifle Association.

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Second Amendment guards rights

By Phillip B. Journey
Special to The Wichita Eagle

Today, this country celebrates the 200th anniversary of the ratification of the Constitution's Bill of Rights. It includes some of greatest concepts ever conceived such as freedom of press, speech, religion and assembly. It limits the government's inclination to deny individuals fair hearings and unreasonably search citizens or their possessions. The linchpin of these rights of man is the Second Amendment to the Constitution. It states, "A well regulated militia, being necessary for the security of a free state, the right of the People to keep and bear arms, shall not be infringed." George Mason at the Constitutional Convention faulted the Constitution because there was no declaration of the natural rights of a free people. During the debate regarding the Second Amendment he said, "Who are the militia? They consist now of the whole people."

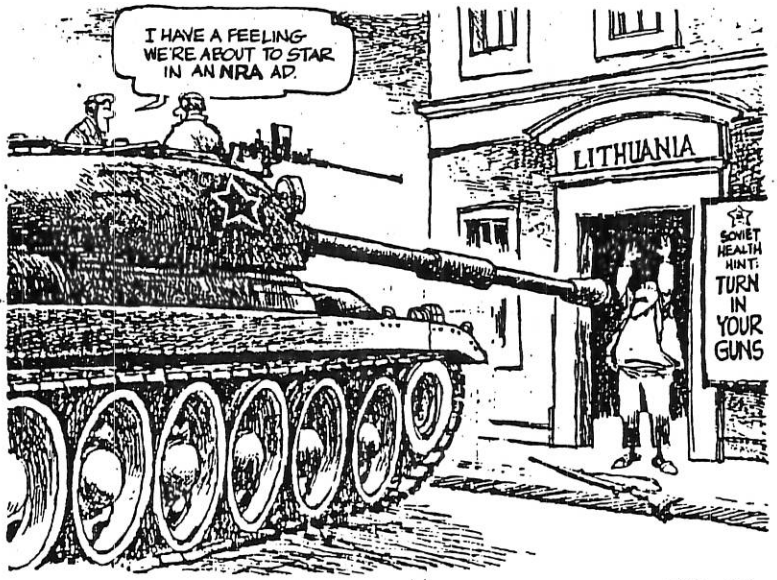
Under both federal and Kansas statutes the unorganized militia is the population of the state except for a few judicial officials. That body of the people is known as "the Kansas military reserve" which is distinguished from the National Guard. The 10th Amendment in the Bill of Rights states, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States are reserved to the States respectively, or to the People." There is a clear distinction between the "People" and the "States." It is the "People" who have an inallenable right to keep and bear arms not the "States."

Thomas Jefferson, author of the Declaration of Independence, wrote in the Virginia Constitution, "No freeman shall be disbarred the use of arms." In 1814 Jefferson wrote, "We cannot be defended but by making every citizen a soldier, as the Greeks and Romans who had no standing armies." A true peace dividend could be yielded if the United States adopted a militia system similar to that in Switzerland or Israel.

Trained in arms

Established under the Civilian Marksmanship Act of 1903, the director of civilian marksmanship (DCM) is tasked with the mission to train individuals subject to military service in the use of rifled arms. The legislation was enacted as a direct result of the poor skills and training of the American recruit in the Spanish-American War. Things have not changed much. While Desert Shield proved the value of exotic weapons systems, the individual soldier was sorely lacking in rifle skills.

More than 100 Iraqi terrorist cells operated in Saudi Arabia. U.S. military orders were that no guards except MPs at U.S. bases were allowed to carry loaded small arms. We are lucky that the tragedy of the Marine barracks in Lebanon was not recreated. Accidental discharges of firearms occurred on a daily basis due to unsafe handling. Officers in front-line units were issued holsters but no pistols. The fear was that a U.S. soldier would accidentally shoot a Saudi national.



Jeff MacNelly

The $5.6 million spent on the DCM annually offers a substantial return on the investment to the military. Three thousand marksmen and women were recruited in 1989 at the cost of $1,866 each. We currently spend about $9,000 per recruit who has little experience with small arms. A study commissioned by the Department of Defense found that the value of the DCM and its effectiveness are substantial. Soldiers with prior small-arms training were more likely to accept combat assignments, fire their weapons accurately and survive the battlefield environment. They were also more likely to re-enlist. The DCM should be expanded not decimated.

Court on guns

Your right to keep and bear arms is being maligned and subverted in every conceivable way.

A national five-day waiting period for handgun purchases failed to pass Congress for the fourth time. Sponsored by Rep. Dan Glickman, D-Kan., the Brady Bill would not have prevented any of the mass murders that have been in the news in the last five years or the shooting of James Brady for whom it is named. Currently, several bills pending in Congress are clear violations of the Second Amendment. H.R. 1770 bans the possession of handguns. S. 51 bans three types of handgun ammunition. H.R. 19 bans all magazines with a capacity over seven rounds. Rep. Charles Schumer, D-N.Y., is drafting a bill that creates a national centralized computer registration of firearms. H.R. 19 requires the registration of semi-automatic firearms. H.R. 282 requires the registration of all handguns. Should any of these become law they will be challenged in the courts and declared unconstitutional.

The line of cases in the U.S. Supreme Court are uninterrupted. The right to keep and bear arms is an inallenable right of the individual. In U.S. vs. Cruikshank (1876) the Supreme Court found that the individual right to keep and bear arms pre-existed the Constitution and is not dependent upon it for its existence. In U.S. vs. Miller (1939) the Supreme Court held that, "In the absence [of the presentation of] any evidence tending to show that possession of or use of a 'shotgun having a barrel of less than eighteen inches in length' at this time has some reasonable relationship to the preservation of efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument." Firearms that have a reasonable relationship to the militia are protected under the Constitution. This protection can logically be extended to semi-automatic military style rifles, shotguns and handguns.

The most recent Supreme Court opinion is U.S. vs. Verdugo-Urguidez (1990). In that case Chief Justice Rehnquist wrote, "'the people' seems to have been a term of art employed in select parts of the Constitution ... 'the people' are protected by the Fourth Amendment, and by the First and Second Amendments ... 'the people' refers to a class of persons who are part of a national community ..."

The constitutions of 43 states, including Kansas, recognize the individual's right to keep and bear arms. Syndicated columnists who advocate gun control, such as Michael Kinsley and George Will, are intellectually honest enough to recognize the overwhelming evidence of the individual's right to own the firearm he or she chooses. The rights to life, liberty and the pursuit of happiness are worth less than the paper they are written on without the means to defend those inallenable rights.

Phillip B. Journey, a Wichita attorney, is spokesman for the Air Capital Gun Club and a member of the legislative committee of the Kansas State Rifle Association.

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Poly Tech AK47/S

Poly Tech AKS-762 Folding Stock Rifle

Similar to the AKS-762 Wood Stock rifle except has side-folding skeleton stock. Semi-auto version of the Chinese Type 56-2 assault rifle. No bayonet mount.

Price: **$449.95**

POLY TECH AK-47/S AUTO RIFLE

Caliber: 7.62x39, 30-shot magazine; optional 5-, 20- 40-shot box magazines, 75-round drum magazine available.
Barrel: 16⅜".
Weight: 8.2 lbs. **Length:** 34⅜" over-all.
Stock: Oil-finished Chiu wood.
Sights: Protected post front, leaf rear graduated to 800 meters.
Features: Semi-auto version of the original AK-47. Receiver is machined from bar stock. Chrome lined barrel, chromed gas piston; phosphated bolt and bolt carrier. Spring-loaded firing pin. Comes with three 30-shot magazines, cleaning kit, web sling, oil bottle and an original AK-47-pattern bayonet. Imported from China by Poly Technologies, Inc.
Price: **$579.95**

Valmet Hunter

VALMET HUNTER AUTO RIFLE

Caliber: 223, 15-, 30-shot magazines; 243, 9-shot magazine; 308, 5- 9- and 20-shot magazines.
Barrel: 20½".
Weight: 8 lbs. **Length:** 42" over-all.
Stock: American walnut butt and fore-end. Checkered palm-swell p.g. and fore-end.
Sights: Blade front, open flip-type rear.
Features: Uses semi-auto Kalashnikov-type gas-operated action with rotating bolt. Stock is adjustable for length via spacers. Optional cleaning kit, sling, ejection buffer, scope mount. Introduced 1986. Imported from Finland by Valmet.
Price: **$795.00**

INDEPENDENCE ISSUE PAPER

No. 14-93 | Independence Institute • 14142 Denver West Parkway #101 • Golden, CO 80401 • (303) 279-6536

June 18, 1993

Concealed Handgun Permits for Licensed, Trained Citizens: A Policy that is Saving Lives

By Clayton E. Cramer & David B. Kopel

What would happen if the vast majority of adults qualified, or with a small amount of training could qualify, for a concealed handgun permit? In the last few years, several states have adopted laws guaranteeing that persons who are legally allowed to possess a handgun in their own home shall also be eligible for a license to carry a concealed handgun for protection. The laws require that eligible persons must, after passing a background check (and sometimes a firearms safety class) be granted the license if they apply. If the application is rejected, the burden of proof is on the non-issuing sheriff, police chief, or judge, to show that an applicant is a danger to public safety.

This Issue Paper examines how these laws have been written to satisfy concerns about public safety, without compromising the right of law-abiding citizens to defend themselves. The Paper also investigates the concern that more permits will lead to more needless killings—. In conclusion, the Paper finds that concealed carry laws can be enacted by states with little fear that such laws would compromise public safety. To the (questionable) extent that gun laws should be made at the federal rather than the state level, carry law reform may also deserve consideration.

In Brief...

- *In recent years, several states have adopted laws requiring that citizens who pass a background check and a safety class must be granted a permit to carry a concealed firearm for protection, if they apply.*
- *Critics of carry reform have predicted that blood will flow in the streets as hot-tempered citizens shoot each other in trivial disputes.*
- *Analysis of murder rates in carry reform states shows that fears of the gun control lobby have been wildly exaggerated. Comparing trends in carry reform states with national trends, the authors show that carry reform states often enjoy a decline in the murder rate.*
- *In Florida, for example, a murder rate that was 36% above the national average is now 4% below.*
- *Accordingly, states considering carry reform can enact such laws knowing that reform will not endanger public safety. And at least sometimes, carry reform lets citizens save their own lives by protecting themselves against criminal attack.*
- *Gun control advocates support many laws "if it saves one life." Since carry reform can save many lives, if gun control advocates are sincere about wanting reasonable controls rather than prohibition, they should support reform.*

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A Short History of Concealed Handgun Permits

Laws prohibiting concealed carry of handguns without a permit are, in most of the United States, relatively recent. While some statutes from before the Civil War did address concealed carrying, they did so by outlawing it entirely, rather than by setting up a system whereby concealed carry would be lawful only with a permit. These antebellum statutes usually had no exemptions for sheriffs or other peace officers, even when on duty.[1] During the 1920s and 1930s many states adopted "A Uniform Act to Regulate the Sale and Possession of Firearms," a model law adopted by the National Conference of Commissioners on Uniform State Laws, and supported by the National Rifle Association; the law prohibited unlicensed concealed carry.

Recognizing that there were circumstances when at least some civilians would have a legitimate need for concealed carry of a handgun, most states adopted provisions allowing either a sheriff, police chief, or judge, to issue concealed handgun permits. Significantly, such statutes were entirely discretionary; while the law might specify certain minimum standards for obtaining a permit, the decision whether such a permit should be issued was entirely arbitrary.[2]

"In some parts of the United States, concealed handgun permit statutes were passed for frankly racist reasons, as a method of prohibiting Blacks from carrying arms. 'The statute was never intended to be applied to the white population and in practice has never been so applied,' in the words of a Florida Supreme Court Justice."

In some parts of the United States, concealed handgun permit statutes were passed for frankly racist reasons, as a method of prohibiting Blacks from carrying arms. "The statute was never intended to be applied to the white population and in practice has never been so applied," in the words of a Florida Supreme Court Justice.[3] While the motivations behind California's concealed handgun statute are not as clearly understood, the effect has been similar. California's legislative research organization studied the issue in 1986, and concluded: "The overwhelming majority of permit holders are white males."[4] In light of the race and gender of the victims of murder and rape, the most serious violent crimes, the discrimination is especially hard to justify.[5]

Not every state adopted the Uniform Act. Some states had already enacted their own statutes.[6] Vermont adopted *no* statute prohibiting concealed carry of handguns, at least partly because of the Vermont Supreme Court's expansive reading of the Vermont

Constitution's protections in *State* v. *Rosenthal* (1903).[7] Today, Vermont still has no laws prohibiting or regulating concealed carry, except "with the intent or avowed purpose of injuring a fellow man..."[8]

The New Breed Of Concealed Handgun Permit Laws

Washington

Washington State adopted the Uniform Act in 1935. In 1961, Washington State took an interesting departure from the discretionary permit system, and required that if the applicant for a concealed weapon permit was allowed to possess a handgun under Washington law, the permit *had* to be issued.[9] At first glance, Washington's new policy appears quite remarkable, but a little reflection on the nature of concealed weapons suggests the state's decision reflected a realistic understanding of handgun ownership.

The only circumstances under which a concealed handgun is likely to come to the attention of the police are that either the weapon was drawn (either criminally or in self-defense), or that the person carrying it was searched by the police for some other, presumably criminal reason. A person allowed to *possess* a concealable firearm in his or her home, cannot, practically speaking, be prevented from *carrying* it concealed outside the home. As a New York court interpreting New York state's handgun licensing law observed, "If he has it in his possession, he can readily stick it in his pocket when he goes abroad.[10]

"If large numbers of handgun owners choose to ignore a concealed weapon law, the state has only three ways of reacting to the flouting of the statute: repeal the law, restrict handgun ownership at home, or make concealed weapon permits available to nearly anyone who is allowed to own a handgun."

If large numbers of handgun owners choose to ignore a concealed weapon law, the state has only three ways of reacting to the flouting of the statute: repeal the law, restrict handgun ownership at home, or make concealed weapon permits available to nearly anyone who is allowed to own a handgun. Whereas New York decided to license the possession of a handgun at home very restrictively, Washington state decided to make permits easy to get, and thus keep handgun ownership safe and legal.

Washington's statute is astonishingly forceful:

> THE JUDGE OF A COURT OF RECORD, THE CHIEF OF POLICE OF A MUNICIPALITY, OR THE SHERIFF OF A COUNTY, SHALL WITHIN THIRTY DAYS AFTER THE FILING OF AN APPLICATION OF ANY PERSON ISSUE A LICENSE TO SUCH PERSON TO CARRY A PISTOL CONCEALED ON HIS PERSON WITHIN THIS STATE FOR FOUR YEARS FROM DATE OF ISSUE, FOR THE PURPOSES OF PROTECTION OR WHILE ENGAGED IN BUSINESS, SPORT OR WHILE TRAVELING.[11]

The statute goes on to list the conditions that would cause, "Such citizen's constitutional right to bear arms" to be denied, namely the applicant being: under 21 years old, subject to a court order or injunction regarding firearms, out on bail pending trial or appeal, awaiting sentencing for a crime of violence, or subject to an outstanding arrest warrant for a misdemeanor or felony.

The same statute includes provisions for filing a civil suit against any agency that wrongfully refuses to issue a license, or modifies the requirements of the law. Most astonishing of all, RCW § 9.41.070 allows non-residents to obtain such permits—though the state has up to 60 days to perform a background check on non-residents and on residents who have moved into Washington in the last 90 days.[12]

In 1983, two important changes were made: the licenses would be valid for a 4 year term (previously they had only been valid for 2 years); and license applicants who were improperly denied, and who sued an issuing agency for wrongful denial, would be automatically awarded attorneys' fees.

For many years, Washington State remained an aberration with its non-discretionary permit process. While permits were easy to get in many other states, and some courts were prepared to hold that a concealed weapon permit was, in some sense, a right guaranteed by the state constitution,[13] the language of other state statutes still left substantial discretion to the government to deny a permit.[14]

All this started to change in 1986, when the new wave of non-discretionary concealed handgun permit laws started to appear.

Utah

Utah's new statute at first glance seems highly discretionary:

> THE DEPARTMENT OF PUBLIC SAFETY OR ITS DESIGNATED AGENT, UPON PROOF THAT THE PERSON APPLYING IS OF GOOD CHARACTER, AND UPON THE SHOWING OF CAUSE SHALL ISSUE TO THE PERSON, WITHIN 60 DAYS AFTER RECEIVING AN APPLICATION, A PERMIT TO CARRY A CONCEALED

FIREARM. THE PERMIT IS VALID THROUGHOUT THE STATE, WITHOUT RESTRICTION, FOR TWO YEARS.[15]

In the absence of a definition of "good character," the statute has potential for abuse of discretion. But the next section provides the definition:

AN APPLICANT SATISFACTORILY DEMONSTRATES GOOD CHARACTER IF HE:

(A) IS 21 YEARS OF AGE OR OLDER;
(B) HAS NOT BEEN CONVICTED OF A FELONY;
(C) HAS NOT BEEN CONVICTED OF ANY CRIME OF VIOLENCE;
(D) HAS NOT BEEN CONVICTED OF ANY OFFENSES INVOLVING THE USE OF ALCOHOL;
(E) HAS NOT BEEN CONVICTED OF ANY OFFENSE INVOLVING THE UNLAWFUL USE OF NARCOTICS OR OTHER CONTROLLED SUBSTANCES;
(F) HAS NOT BEEN CONVICTED OF ANY OFFENSES INVOLVING MORAL TURPITUDE; AND
(G) HAS NOT BEEN ADJUDICATED BY A COURT OF A STATE OR OF THE UNITED STATES AS MENTALLY INCOMPETENT, UNLESS THE ADJUDICATION HAS BEEN WITHDRAWN OR REVERSED.[16]

Additional sections of the law require the applicant to submit letters of character reference, photographs, fingerprints, a five-year employment and residence history, and "evidence of weapons familiarity."[17] The change from the previous statute to the new one pointedly replaced the word "may" with "shall," thereby showing that the Utah Legislature did not intend for the "showing of cause" provision to be used as a way to avoid issuing of permits.

A board of review was established (in the event an application was rejected), consisting of "a member from law enforcement and at least two citizens, one of whom represents sporting interests." The board is not to exceed five members, and receives no compensation.[18] Clearly, the intent is to make sure that most decent people would be able to get a permit. No application fee is specified in the statute.

Florida

In 1987, Florida adopted a non-discretionary concealed weapon permit law that guaranteed issuance of a concealed weapon permit to any resident of the state or consular security official who: is 21 or older; "Does not suffer from a physical infirmity which prevents the safe handling of a weapon or firearm"; has not been convicted of a felony; has not been convicted of a drug charge in the preceding three years; has not been confined for alcohol problems in the preceding three years; has completed any of a

number of firearms safety classes; and has not been committed to a mental hospital in the preceding five years.

The only area of discretion was that a license could be denied if an applicant had been convicted of any misdemeanor crime of violence, or was on probation for such a crime, within the preceding three years.[19] Judges were required to take the firearms safety class, but were otherwise exempted from the rest of the list of requirements.[20]

"The Florida media was sometime hysterical, predicting that the law would increase lawlessness and death. Opposing legislators warned that Florida would become 'the GUNshine state.'"

Coverage of the Florida reform in *The Economist* (a British newsweekly) typified most of the American national media's coverage. The magazine asserted that after taking a few hours of training, "Anyone who wants to carry a pistol may now do so." Apparently, the provisions about drug abuse, felony convictions, mental hospital commitment, and misdemeanor convictions, excluded no one, in *The Economist*'s eyes.[21] The Florida media were sometime hysterical, predicting that the law would increase lawlessness and death. Opposing legislators warned that Florida would become "the GUNshine state."

Virginia

In 1988, Virginia's concealed weapon statute was modified. While the changes were not quite as explicit as the Washington or Florida statutes—and indeed, the statute continues to be modified, to deal with judges who resist issuing of permits—the intent is clear:

> THE COURT, AFTER CONSULTING THE LAW-ENFORCEMENT AUTHORITIES OF THE COUNTY OR CITY AND RECEIVING A REPORT FROM THE CENTRAL CRIMINAL RECORDS EXCHANGE, SHALL ISSUE SUCH PERMIT IF THE APPLICANT IS OF GOOD CHARACTER, HAS DEMONSTRATED A NEED TO CARRY SUCH CONCEALED WEAPON, WHICH NEED MAY INCLUDE BUT IS NOT LIMITED TO LAWFUL DEFENSE AND SECURITY, IS PHYSICALLY AND MENTALLY COMPETENT TO CARRY SUCH WEAPON AND IS NOT PROHIBITED BY LAW FROM RECEIVING, POSSESSING, OR TRANSPORTING SUCH WEAPON.[22]

Because some judges have refused to renew permits, the law was again amended in 1992 to require judges to renew permits "unless there is good cause shown for refusing to reissue a permit."[23] Unlike the other non-discretionary permit laws that have

been passed, there is no maximum time specified for an application to be processed.

Georgia

Georgia's concealed weapon permit law before 1989 was somewhat ambiguous. While one part of the concealed weapon statute states, "The judge of the probate court of each county *may*... issue a license..."[24][emphasis added], a later portion specifies:

> NOT LATER THAN 60 DAYS AFTER THE DATE OF THE APPLICATION THE JUDGE OF THE PROBATE COURT *SHALL* ISSUE THE APPLICANT A LICENSE TO CARRY ANY PISTOL OR REVOLVER IF NO FACTS ESTABLISHING INELIGIBILITY HAVE BEEN REPORTED AND IF THE JUDGE DETERMINES THE APPLICANT HAS MET ALL THE QUALIFICATIONS, IS OF GOOD MORAL CHARACTER, AND HAS COMPLIED WITH ALL THE REQUIREMENTS CONTAINED HEREIN.[25] [emphasis added]

Other portions of the statute specify that licenses shall not be issued to anyone under 21,[26] a fugitive from justice, or anyone awaiting court proceedings for a felony or "forcible misdemeanor."[27] Also prohibited is anyone placed under supervision by a court within the last ten years for a "forcible felony," or the last five years for a "forcible misdemeanor or a nonforcible felony,"[28] or hospitalized for alcohol or drug treatment in the last five years.[29] Anyone convicted of any sort of manufacturing, distribution, or possession charge involving a controlled substance is also ineligible.[30] The maximum fee for processing was set at $30.00.[31]

But was the issuance of a permit discretionary or not? The use of "may" in one place suggested that it was discretionary. Yet the language "shall issue" seems non-discretionary. The Georgia Attorney General resolved the question in 1989, when he issued an opinion holding that the judge: "has no discretion to exercise, but must issue permit unless provided with information indicating disqualification of applicant."[32]

Pennsylvania

Pennsylvania took action in 1989. While not as explicit as Florida's law, or as forcefully worded as Washington's, the Pennsylvania reform put some teeth in the Pennsylvania Constitution's right to keep and bear arms provision. The requirements include that the applicant: be 21 or over; have no drug convictions, no convictions for crimes of violence, no prior mental hospital commitments; not be addicted to "marijuana or a stimulant, depressant or narcotic drug"; not be "a habitual drunkard," convicted of a felony, awaiting trial for a felony, an illegal alien; not be dishonorably discharged from the U.S. military, or a fugitive from justice. Non-residents are eligible for a concealed weapon permit on the same basis as residents, except that the statute requires that they

must currently possess an equivalent permit in their home state, provided such permits exist.

Some discretionary authority remains, however. A sheriff can refuse a permit to "an individual whose character and reputation is such that the individual would be likely to act in a manner dangerous to public safety." While the phrase is not defined anywhere in the statute, the law does state:

> A LICENSE TO CARRY A FIREARM SHALL BE FOR THE PURPOSE OF CARRYING A FIREARM CONCEALED ON OR ABOUT ONE'S PERSON OR IN A VEHICLE AND SHALL BE ISSUED IF, AFTER AN INVESTIGATION NOT TO EXCEED 45 DAYS, IT APPEARS THAT THE APPLICANT IS AN INDIVIDUAL CONCERNING WHOM NO GOOD CAUSE EXISTS TO DENY THE LICENSE.[33]

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

One unique feature of the Pennsylvania law is that in "a city of the first class" (Philadelphia),[34] the chief of police retained the authority to deny a permit unless:

> [T]HE APPLICANT HAS GOOD REASON TO FEAR AN INJURY TO THE APPLICANT'S PERSON OR PROPERTY OR HAS OTHER PROPER REASON FOR CARRYING A FIREARM AND THAT THE APPLICANT IS A SUITABLE INDIVIDUAL TO BE LICENSED.[35]

"Suitable individual to be licensed" could mean, in practice, "politician or other person with political influence." Nonetheless, permits issued elsewhere in Pennsylvania are valid in Philadelphia.[36]

Oregon

In 1989, Oregon also adopted a non-discretionary policy for issuance of handgun permits. The requirements were similar, though not identical to those we have already seen: over 21; resident of the county where the application is made; no outstanding arrest warrants; "not free on any form of pretrial release"; demonstrated competence through any of a number of firearm safety classes; no felony convictions; no misdemeanor convictions or mental hospital commitments in the preceding four years; and not prohibited by a court from owning a firearm for mental illness.[37]

An escape clause similar to Pennsylvania's is contained in the Oregon statutes, allowing the sheriff to deny a permit:

> [I]F THE SHERIFF HAS REASONABLE GROUNDS TO BELIEVE THAT THE APPLICANT HAS BEEN OR IS REASONABLY LIKELY TO BE A DANGER TO SELF OR OTHERS, OR TO THE COMMUNITY AT LARGE, AS A RESULT OF THE APPLICANT'S MENTAL OR PSYCHOLOGICAL STATE, AS DEMONSTRATED BY PAST PATTERN OF BEHAVIOR OR PARTICIPATION IN INCIDENTS INVOLVING UNLAWFUL VIOLENCE OR THREATS OF UNLAWFUL VIOLENCE.[38]

The escape clause handles the case where the applicant has a history of wandering the streets shouting threats at Martians or pink elephants, or getting into bar fights, but has so far managed to avoid conviction or mental hospital commitment. Yet the language is sufficiently narrowly drawn that a sheriff would need a "pattern" of behavior to refuse a permit. If the sheriff simply refused an applicant based on a single such incident, it would doubtless lead to appeal to the courts, where the sheriff would be liable for the filing fees, if the applicant were to win his appeal.[39]

A unique provision requires the Oregon State Police to determine if any other states had substantially comparable requirements for issuance of a permit. If any such comparable state laws were found, permits from that state would be recognized as valid in Oregon.[40] To date, no laws of sister states have been recognized as substantially comparable.

West Virginia

West Virginia's non-discretionary permit system was adopted as the result of the voters adding a right to keep and bear arms provision to the state constitution in 1986.[41] A person charged with carrying a concealed weapon in violation of a state statute had challenged the statute on the grounds that it violated the West Virginia Constitution's right to keep and bear arms, because the law gave too much discretion to local government to deny permits. The West Virginia Supreme Court agreed.[42]

"...the West Virginia Supreme Court made it clear that while a judge could determine whether the applicant's purpose was actually 'defense of self, family, home or state, or other lawful purpose,' if the evidence showed such to be the case, the judge was obligated to issue a permit."

In response, the West Virginia legislature wrote a new concealed weapon permit law that required U.S. citizenship, residence in the county where application was made, age 18 or over, not being a drug addict, having no conviction of a felony or violent crime involving a deadly weapon, being "physically and mentally

competent to carry such a weapon," and at least for first time applicants, completion of one of a number of firearms safety classes.[43]

The courts showed some recalcitrance in applying the new law, and applicants who were denied permits appealed. In *Application of Metheney* (W.Va. 1990), the West Virginia Supreme Court made it clear that while a judge could determine whether the applicant's purpose was actually "defense of self, family, home or state, or other lawful purpose," if the evidence showed such to be the case, the judge was obligated to issue a permit.[44]

Idaho

Idaho's change to a non-discretionary permit system is more complex than most. As originally adopted in 1990, the language of the first paragraph was nearly identical to Washington's statute, even to the extent of asserting, "The citizen's constitutional right to bear arms shall not be denied him, unless..."[45] Like the Washington statute, it originally provided for permits for both residents and non-residents. (The provision for non-resident permits was removed, effective July 1, 1991.)[46] An amendment effective April 2, 1991, adjusted the formula used for allocating the license fee to the various parts of the government.

"In spite of the long list of prohibited persons, and a few provisions clearly designed to deny permits to dangerous person who, for whatever reason, have not yet been convicted of a crime, the net effect of the new breed of concealed handgun permit laws is to make the vast majority of adults into potential concealed handgun carriers."

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

There is *some* discretion in the Idaho statute—but in such a limited way that it provides no real obstacle to those over 21. While the first part of the statute declares

those under 21 are ineligible for a permit, a later part provides that a sheriff *may* issue a license to carry concealed to an applicant between 18 and 21 if the sheriff feels that good cause exists. For an applicant over 21, who is not in one of the prohibited categories listed above, the only discretionary authority available to the sheriff is that, "the sheriff may require the applicant to demonstrate familiarity with a firearm by any of the following, provided the applicant may select which one..." The list of available firearms safety classes is sufficiently broad, including any NRA firearms safety, training, or hunter education course, that even if a sheriff exercises his discretion in requiring one of these courses, it provides little obstacle to obtaining a permit.[47]

Montana

In 1991, Montana adopted a statute similar to Idaho's. Where the old Montana law gave judges discretionary authority to issue concealed weapon permits as they saw fit, the new statute was unambiguous and non-discretionary:

> A COUNTY SHERIFF SHALL, WITHIN 60 DAYS AFTER THE FILING OF AN APPLICATION, ISSUE A PERMIT TO CARRY A CONCEALED WEAPON TO THE APPLICANT.[48]

Unlike the Idaho statute, an applicant must be a resident for at least six months, at least 18 years old, and have a state-issued picture identification card of some sort. The prohibited categories are similar to the other states: those ineligible under state or federal law to possess a firearm; those convicted of a felony; outstanding arrest warrant; drug addict (including such determinations in civil proceedings); "mentally ill, mentally defective, or mentally disabled"; dishonorably discharged from the U.S. military; or convicted in the last five years[49] of violating Montana's statutes that prohibit carrying a concealed weapon under the influence, or in a prohibited place, such as a government building, bank, or bar.[50]

The same escape clause exists as in the Idaho and Oregon statutes, to allow a sheriff to deny a permit to an applicant based on "reasonable cause" for concern about "the peace and good order of the community..." Where the Idaho statute allows the sheriff to require proof of firearms competence at his discretion, the Montana statute requires completion of any of a number of firearms safety courses, though it is much more careful to avoid naming the NRA, instead referring to "[A]n organization that uses instructors certified by a national firearms association." The Montana statute also refers to the carrying of concealed weapons as "this privilege," not as a right.[51]

Summary of New Laws

In spite of the long list of prohibited persons, and a few provisions clearly designed to deny permits to dangerous person who, for whatever reason, have not yet been convicted of a crime, the net effect of the new breed of concealed handgun permit laws is to make the vast majority of adults into potential concealed handgun carriers. While most residents of these states are unlikely to ever apply for a concealed weapon permit, the choice is up to them. Although the number of applicants for permits has not usually been huge, these laws have the potential to put a *lot* of handguns on the streets legally. What happened to the crime rates when these laws took effect? How many permits were issued? How many serious problems developed because of the laws? The next section answers these questions.

What Effect Did The New Laws Have?

Were Permits Actually Issued?

In Florida, from October 1, 1987, when the new law went into effect, to June 30, 1992, 131,529 applications were received. A total of 785 applications were denied (467 for criminal history, 318 for incomplete application), and 126,913 licenses were issued. Several thousand applications were either in process, denied and under appeal, suspended, or withdrawn by the applicant. A total of 208 licenses were revoked. Unfortunately, no detailed breakdown of the crimes that caused licenses to be revoked is available.[52]

In West Virginia, the Department of Public Safety maintains information on concealed weapon permits, but the filing system "is manual at this time, therefore, it would be virtually impossible to compile the data requested."[53] In the case of Washington, Oregon, and Virginia, there is no centralized data base of concealed weapon permits. Each sheriff would have to be contacted in Oregon, each sheriff and police chief in Washington, and each of 123 circuit courts in Virginia, in order to determine how many permits are currently issued.[54]

Methodology for Judging Effects of the Laws

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

The expectation of carry advocates is consistent with research performed for the National Institute of Justice. When professors James D. Wright and Peter Rossi interviewed and polled felony prisoners in ten state correctional systems 56% of the prisoners said that a criminal would not attack a potential victim who was known to be armed. Thirty-nine percent of the felons had personally decided not to commit a crime because they thought the victim might have a gun, and 8% said the experience had occurred "many times." Criminals in states with higher civilian gun ownership rates worried the most about armed victims.[55]

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

Does it make sense simply to compare the murder rates of each of these states to the national average, after the new laws have taken effect? No, because many of the states that adopted non-discretionary permit laws have always been low murder rate states, and any comparison that fails to look to see how much murder rates *changed* because of these laws, will give a artificially rosy analysis of the effects of carry reform.

We could examine whether the murder rates declined after the new laws took effect, but this would be misleading as well, because many of the new laws took effect between 1986 and 1990, when the murder rates for the entire country were on the rise.

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

Why look at the year the law was passed? First of all, in some cases the law took effect part-way through the year, as it did in Florida. Secondly, the deterrent effect of such laws *should* be related to public discussion of these new laws. Thus, we may even see some benefit before the law takes effect, as it increases predator fears that the next victim may be armed.

What Happened To Murder Rates?

As the accompanying graphs show, the worst nightmare of the gun control lobby was not realized. To begin with, it is important to notice that in most of the states studied, the general rise and fall of murder rates before the new laws took effect, roughly approximated the rate in the rest of the country. This suggests that, in general, the causes of changes in murder rates are *largely* determined nationally.

There are a number of hypotheses for this. Two popular ones are that the state of the economy plays a major role in causing murder, or that the mass media's portrayal of violence plays some significant role in promoting violence among the population.[56] Another factor is the rise and fall of the population of young males, from which most violent criminals come.[57] In 1991, 51% of murderers whose age was known, were under 25. As the proportion of the American population under age 25 rises in the next several years, murder rates would also be expected to rise.

It is also important to recognize the dramatic effects that a small number of murderers can have in some of the smaller states from year to year. The murder rates of West Virginia, Idaho, and Montana, are all dramatically variable from year to year, because the populations are small, and one serious criminal can dramatically raise the murder rate one year, followed by a dramatic drop when he is caught or moves on. As a result, the experience of the larger states is considerably more useful for judging the effects of the non-discretionary issuance laws. As we will see in our first case, Washington, the lone sociopath can make a big difference.

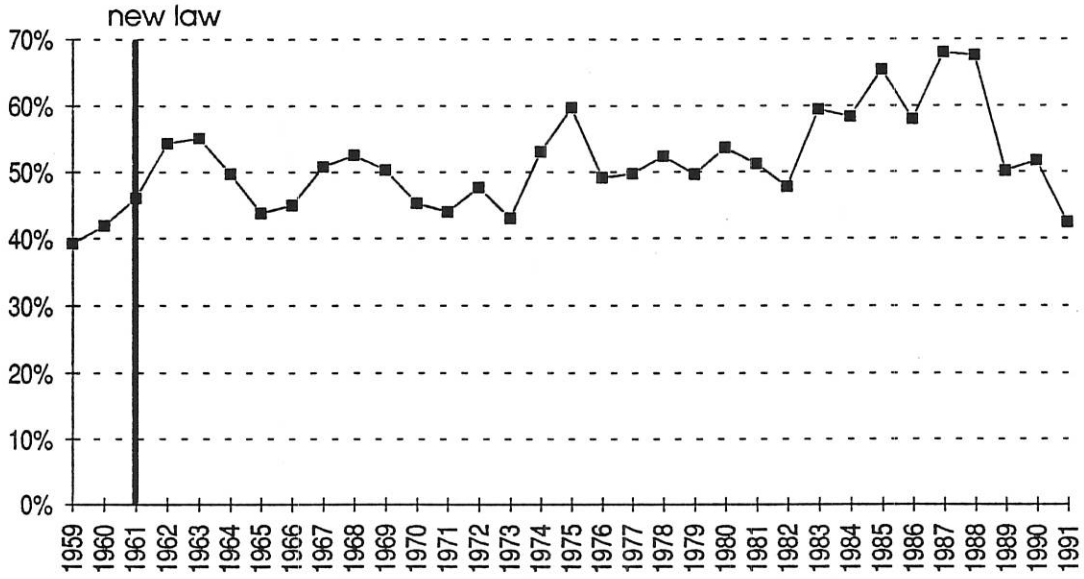
Washington

In Washington, the effects of the law (for good or bad), are subtle. As the accompanying graph shows, after the passage of the non-discretionary issuance law, murder rates rose and fell, largely in line with the rate for the rest of the U.S. In the two years before the new law took effect, Washington's murder rate was a bit less than half of the rate for the rest of the U.S. Throughout the period from 1961 through 1982, the Washington murder percentage rates stayed between 44% and 60% of the rest of America. While U.S. murder rates dropped in the early 1980s, Washington murder percentage rates continued to rise, reaching a peak of 68% of the U.S. rate in 1988, before dropping back to more normal levels in the last three years. Was this the result of all those Washingtonians carrying concealed handguns?

"... after the passage of the non-discretionary issuance law, murder rates rose and fell, largely in line with the rate for the rest of the U.S."

Probably not. At least part of the increase during this period can be attributed to the actions of one sociopath, the Green River Killer, who murdered 48 Washington women during the years 1982-84.[58] This one person was responsible for *at least* 8% of all murders in Washington State in those three years. (We say, *at least,* because many of the Green River Killer's victims were runaways, prostitutes, and other people who might not be noticed missing).

Washington Murder Rate Percentage



3-26

Similarly, Ted Bundy murdered at least 10 women in Washington State in 1974,[59] causing more than 5% of the murders that year. But we must be careful that we do not let these aberrations explain too much; the Green River Killer's activities stopped in 1984, for no known reason, while the murder rate percentages in Washington State remained unusually high until 1989, when they suddenly plunged to levels typical of the period before 1982.

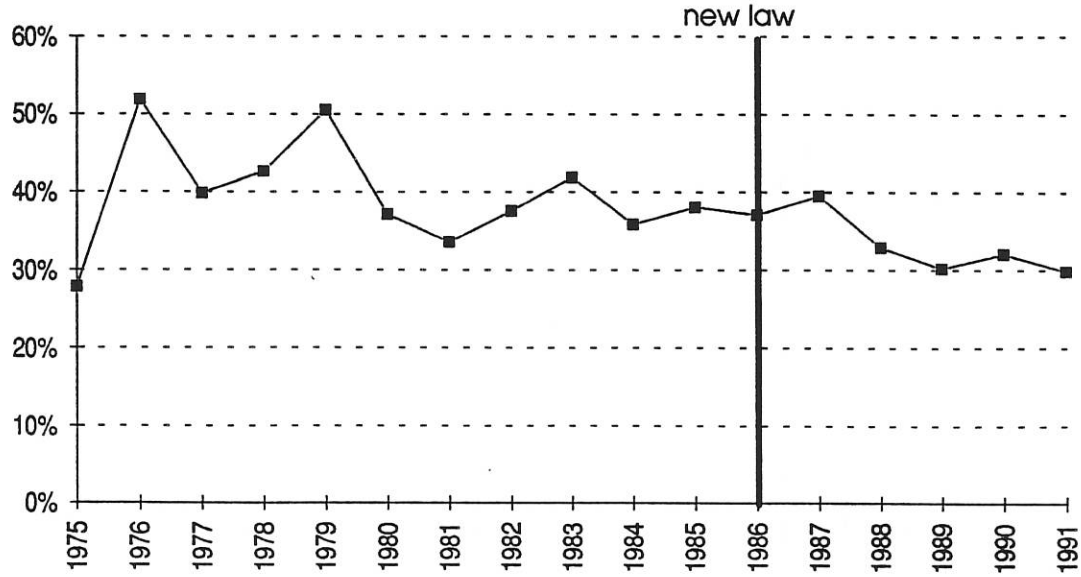
Utah

In Utah, the murder rate, which had roughly followed the murder rate in the rest of the U.S. up and down, started to diverge dramatically after the passage of their new concealed weapon permit law in 1986. In the period 1976-1985, Utah murder rates varied from 34% to 52% of the rate for the rest of the country. After the new law was passed, the murder rate dropped to from 30% to 39% of the rate in the rest of America.

> ***"After the new law was passed, the murder rate dropped to from 30% to 39% of the rate in the rest of America."***

The change became most apparent in the late 1980s, when murder rates were rising in the rest of America, and declining in Utah. If the reduced murder rates in Utah had only been for a year or two, in a state with less than 60 murders a year, we might attribute it to simple luck that the murder rate declined. After five years, the pattern seems to be well-established, and the result more than just random variation.

Utah Murder Rate Percentage



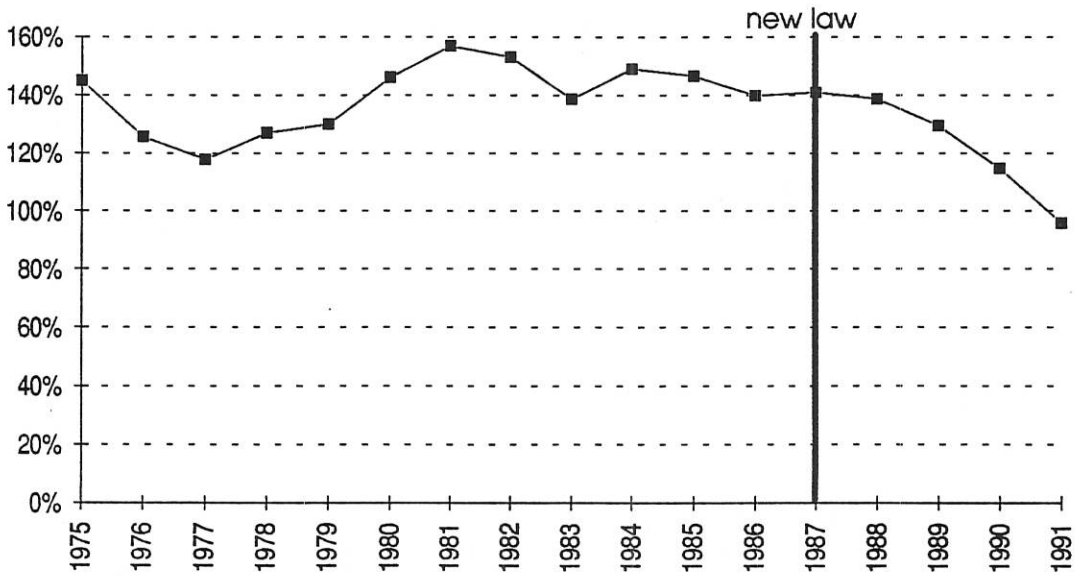
Florida

Florida shows the most dramatic change. As the graph details, Florida's murder rate throughout the period 1975-1986 was between 118% and 157% of the murder rate elsewhere in America. After passage of Florida's law, the murder rate began declining, rapidly, dramatically, and regularly, at a time when the rest of the U.S. was experiencing an increase in murder rates. Floridans are now less likely to be murdered than people elsewhere in America.

"After passage of Florida's law, the murder rate began declining, rapidly, dramatically, and regularly, at a time when the rest of the U.S. was experiencing an increase in murder rates. Floridans are now less likely to be murdered than people elsewhere in America."

An intensive three-month study of the 8,150 carry permit holders in Dade County (Miami) found only two instances of permit-holders misusing their guns: a woman carried a purse containing a handgun into an airport (she had forgotten the gun was in the purse); and a man unlawfully attempted to carry his handgun into a court building. In that same three-month period, the police recorded one incident where a man with a carry permit thwarted a robbery.[60] The number of crimes deterred or thwarted that did not come to the attention of the police is of course impossible to quantify.

Florida Murder Rate Percentage



3-28

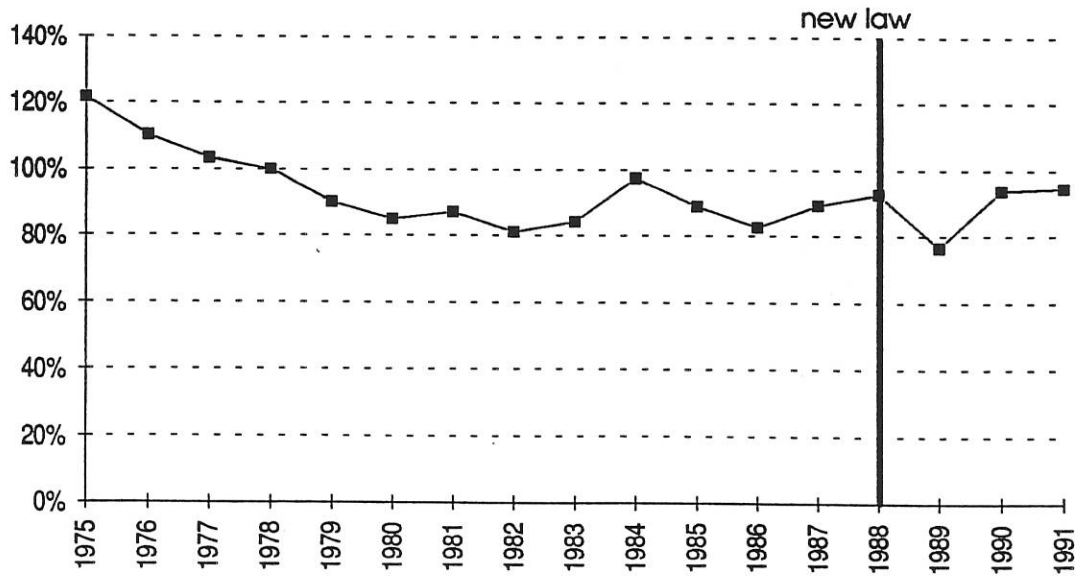
Representative Ron Silver, the leading opponent of Florida's carry reform, graciously admitted in November 1990, "There are lots of people, including myself, who thought things would be a lot worse as far as that particular situation [carry reform] is concerned. I'm happy to say they're not." John Fuller, general counsel for the Florida Sheriffs Association, stated "I haven't seen where we have had any instance of persons with permits causing violent crimes, and I'm constantly on the lookout."

Virginia

Virginia was the only state to change its concealed weapon permit law in 1988. The first year after the change showed a dramatic decline in murder rate percentages, followed by a return to murder rate percentages typical of the period before the law. Virginia, however, has the misfortune to border Washington, DC, and some of this failure may represent spillover of rapidly increasing crime from the District of Columbia (where handgun possession is illegal). Moreover, the Virginia Legislature has had to revise its statutes several times to make it clear that judges really *are* supposed to issue permits. The need for repeated revision suggests that while the law required issuance of permits, many judges effectively nullified it, by using discretionary authority not granted them.

"The first year after the change showed a dramatic decline in murder rate percentages, followed by a return to murder rate percentages typical of the period before the law."

Virginia Murder Rate Percentage



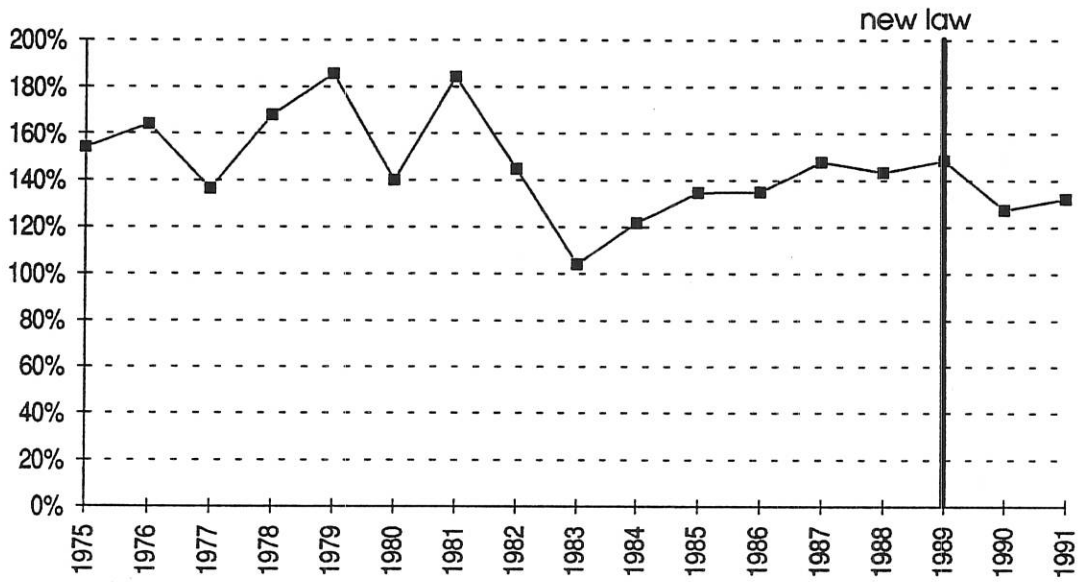
Georgia

> ***"The Georgia murder rate remained relatively stable in the years 1989-1991, while the rest of the U.S. experienced an increase in murder rates."***

Four states either changed their laws or their interpretation of their concealed weapon permit laws in 1989: Georgia (by the Attorney General's liberal interpretation of an ambiguously worded statute); and West Virginia, Oregon, and Pennsylvania (by legislative changes to the existing concealed weapon statutes). In Georgia, the effect was inconclusive. The Georgia murder rate remained relatively stable in the years 1989-1991, while the rest of the U.S. experienced an increase in murder rates. This *might* indicate that the new interpretation of the law acted in a positive way to reduce murder, relative to where it might have gone.

But we must not draw this conclusion too hastily, because examination of Georgia murder rates for the years 1975-1988 shows a rather dramatic and unobvious variation in the relationship between Georgia and U.S. murder rates. A few more years may provide an opportunity to more clearly evaluate how effective the change in the law was in Georgia. The more cautious conclusion we can draw is that it did no harm.

Georgia Murder Rate Percentage

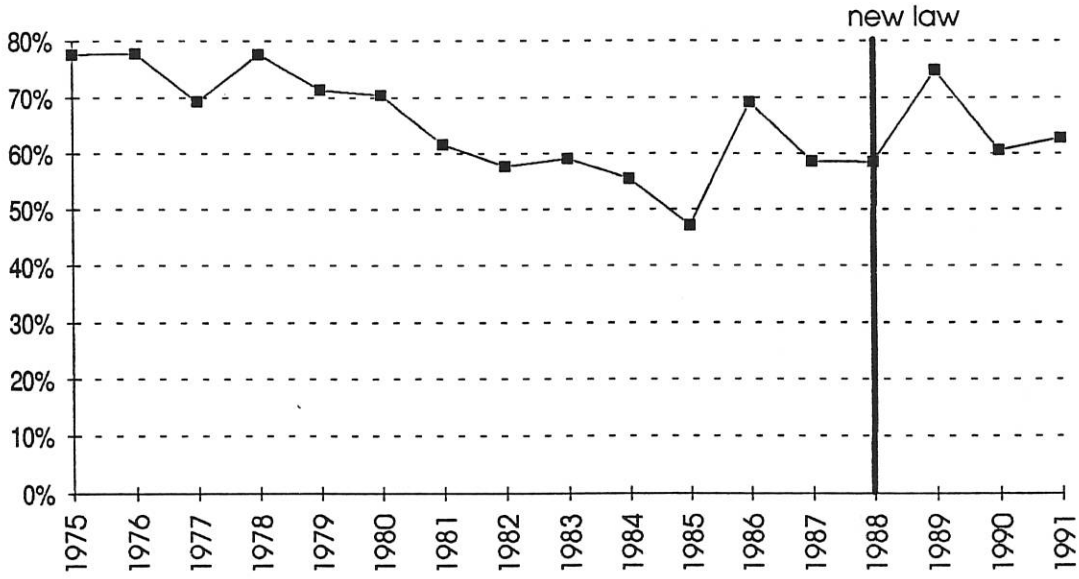


West Virginia

In West Virginia, a small state where even a single criminal can make an enormous difference in a state's murder rate, the results are inconclusive. The year the new law was passed, there was a dramatic increase in West Virginia murder rates, followed by declines. However, the number of murders in 1989 was 121; in 1990, 102; in 1991, 111. Like Utah, this state so small that even the actions of one sociopath can dramatically alter a particular year's murder totals.

"In West Virginia, a small state where even a single criminal can make an enormous difference in a state's murder rate, the results are inconclusive."

West Virginia Murder Rate Percentage



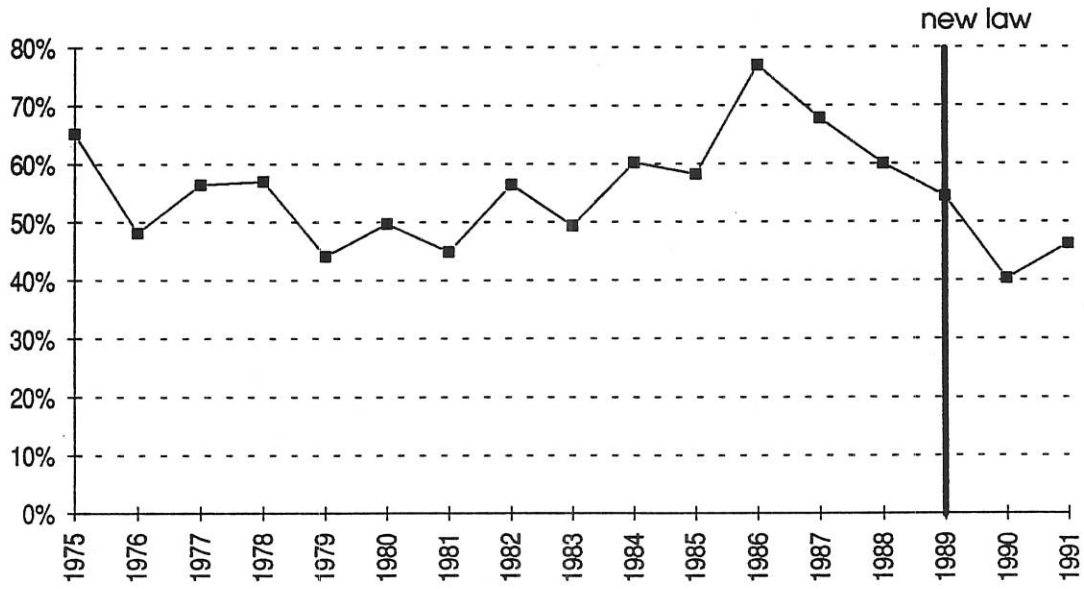
Oregon

In Oregon, murder rates were already on the decline, both relative to the U.S. rate, and compared to the 1986 peak, when the new law was passed. As a result, it would be difficult to put the entire responsibility on the new law for the continuing sharp decline in murder in 1990. In addition, murder rates in 1991 rebounded slightly, though still not to the levels in effect before the new law took effect.

In Portland, the homicide rate fell precipitously the first six months after the new law went into effect, although it is not certain that the decline was a result of the law.

"...murder rates were already on the decline, both relative to the U.S. rate, and compared to the 1986 peak, when the new law was passed. As a result, it would be difficult to put the entire responsibility on the new law for the continuing sharp decline in murder in 1990."

Oregon Murder Rate Percentage



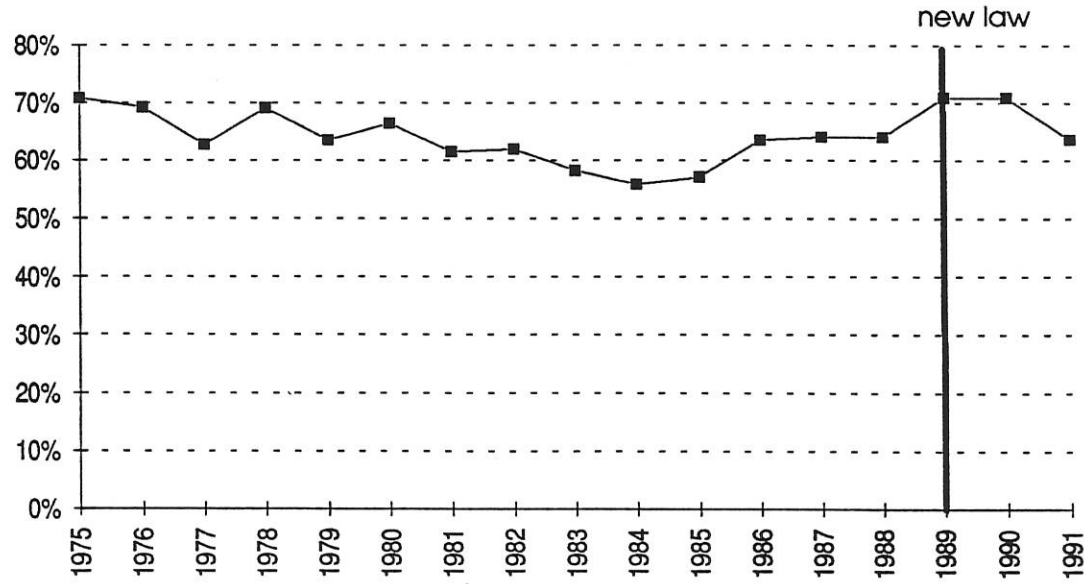
Pennsylvania

Pennsylvania is especially interesting, primarily because Philadelphia is expressly exempted from the requirement to issue concealed weapon permits (though permits issued elsewhere in the state are good in Philadelphia). The graph for Pennsylvania shows no obvious difference after adoption of the new permit law. For two years (1989 and 1990) the murder rate rose; in 1991, the murder rate declined.

"...no obvious difference after adoption of the new permit law. "

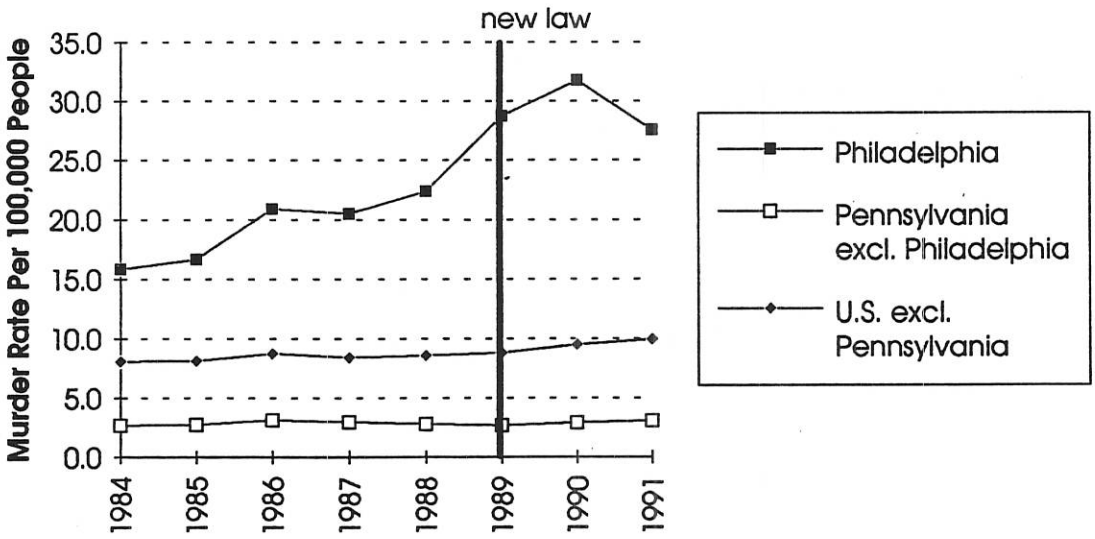
But when we plot murder rates for Philadelphia by itself, or for the rest of the state, the results are puzzling. For Philadelphia, there was a small rise in murder rates in 1990, followed by a decline in 1991 to below the 1989 level. For the rest of the state, there was a slight decline in 1989, and slight increases in 1990 and 1991, roughly paralleling what happened to murder rates in the U.S. outside of Pennsylvania. Since murder rates in the rest of Pennsylvania are very low, and the need to carry a concealed weapon is doubtless rare, the concealed weapon permit law may not have made much practical difference in those areas.

Pennsylvania Murder Rate Percentage



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

Pennsylvania & Philadelphia Murder Rates, 1984-1991



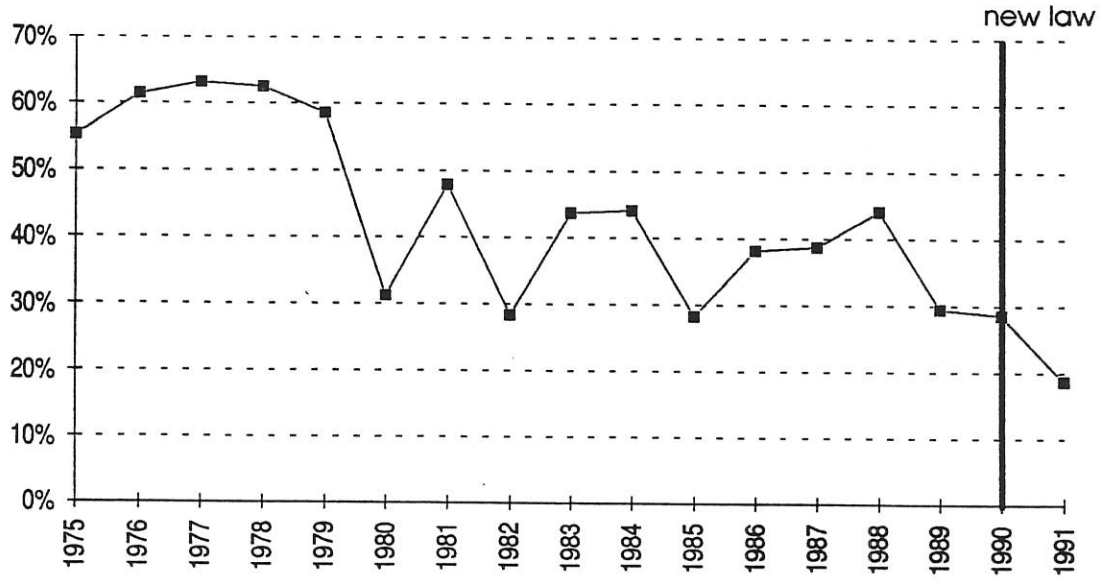
Idaho

Idaho's murder rate is subject to rather remarkable variations from year to year, as is typical of states with small populations. In the late 1970s, the Idaho murder rate was as high as 63% of the rate for the rest of the nation. In the period 1980-1989, under the old, discretionary concealed handgun permit law, Idaho's murder percentage rate had declined, staying in the range 28% to 48%. In the two years since, the murder rate has continued to decline, now reaching 19% of the U.S. murder rate in 1991. Another statistical fluke of the low population?

"The first year murder decline, in 1990, could just be another result of the small population causing a random fall in murder rates...But when the murder percentage rate fell again in 1991, it certainly could cause one to suspect that progress is being made."

It is hard to say. The first year murder decline, in 1990, could just be another result of the small population causing a random fall in murder rates, as the previous years show. But when the murder percentage rate fell again in 1991, it certainly could cause one to suspect that progress is being made. A few years may give us more persuasive evidence.

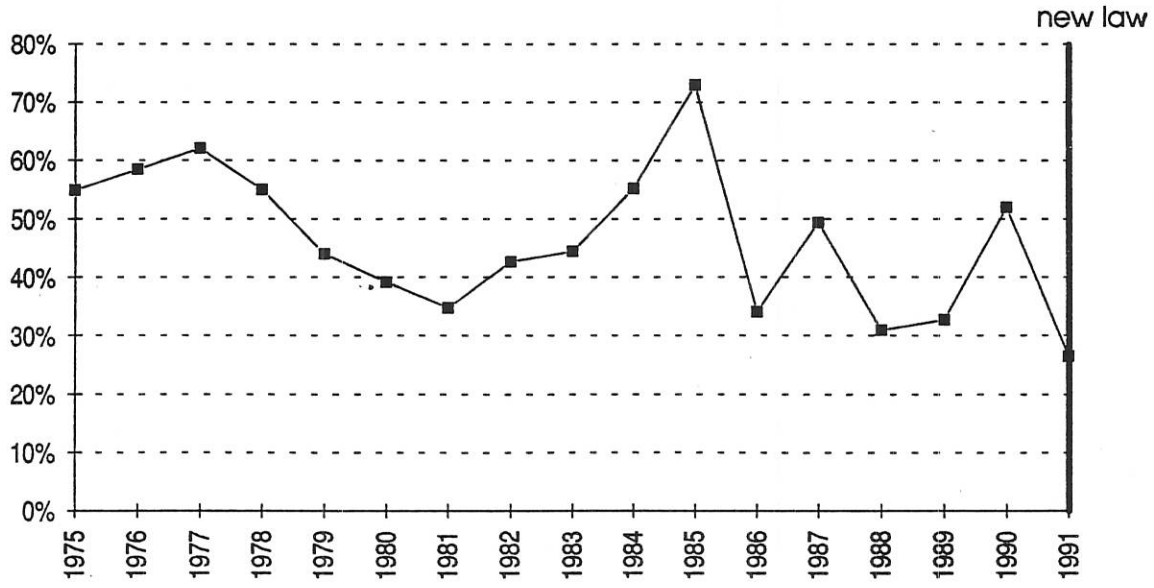
Idaho Murder Rate Percentage



Montana

Montana's new law was adopted in 1991. Like Idaho, Montana has a very "notchy" murder percentage rate, and for the same reason as Idaho—very few people. Therefore, we should not attach too much significance to the apparent first year's murder reduction, especially since it followed 1990, a year with an unusually high murder rate percentage. But it is interesting that the 1991 Montana murder rate percentage is the lowest since 1975. Only time will provide us evidence as to the effectiveness of the Montana concealed handgun permit law.

"...we should not attach too much significance to the apparent first year's murder reduction, especially since it followed 1990, a year with an unusually high murder rate percentage. But it is interesting that the 1991 Montana murder rate percentage is the lowest since 1975."



Conclusions

Are there any conclusions to be drawn here? In a very high murder rate state like Florida, carry reform appears to have done a great deal of good, and saved many lives. Utah also seems to have benefitted from the new law, though the evidence is considerably weaker, perhaps because the murder rate was so low that raising the number of armed civilians did not make a major difference. In Virginia, where some judges subverted the clear intent of the legislature, the reform law appears to have not been effective. In Georgia, where the change resulted from an Attorney General's reinterpretation of the law, the evidence suggests that carry reform *may* have reduced murder rates. In West Virginia, the results are inconclusive. In Oregon, the new law took effect with murder rates already in decline, and it is impossible to determine how much the new law contributed. In Pennsylvania, legal reform *may* have done some good in Philadelphia, and apparently done no harm outside of Philadelphia. In Idaho and Montana, the new laws do appear to have helped, based on preliminary results.

"In a very high murder rate state like Florida, carry reform appears to have done a great deal of good, and saved many lives...In neither large or small states do we see evidence of obvious long-term increases in murder rates after passage of these laws."

In several of the states, the positive results would seem to have been very dramatic the year of adoption, with results tapering off afterwards. This may be a result of publicity about the law discouraging the predators, or the result of publicity encouraging a short burst of law-abiding citizens applying for permits.

In neither large or small states do we see evidence of obvious long-term increases in murder rates after passage of these laws.

Why change the laws if they are not *clearly* going to reduce murder rates? Conversely, if carry reform does not do any harm, why not allow law-abiding citizens, who have passed a background check for criminal behavior, mental illness, and drug abuse, to have the means to defend themselves most effectively? If there is no clear threat to the public safety, and if examples like Florida and Utah suggest that in some instances, carry reform has the potential to contribute to public safety, why not allow law-abiding citizens to make their own choice about carrying?

At least in some cases, concealed carry laws could save lives. In October 1991

in Killeen, Texas, a psychopath named George Hennard rammed his pickup truck through the plate glass window of a Luby's cafeteria. Using a pair of ordinary pistols, he murdered 23 people in 10 minutes, stopping only when the police arrived.

Dr. Suzanna Gratia, a cafeteria patron, had a gun in her car, but, in conformity to Texas law, the gun was not carried on her person; Texas, despite its Wild West image, has the most severe law in the country against carrying firearms. Carry reform legislation had almost passed the legislature, but had been stopped in House Calendars Committee by the gun control lobby.

"Twenty-three people died in Killeen, where carrying a gun for self-defense was illegal. Twenty lives were saved, and only the two criminals died in Anniston, where self-defense permits are legal. "

A few months later, Dr. Gratia later testified to the Missouri legislature that if she had been carrying her gun, she could have shot at Hennard:

> I know what a lot of people think, they think, "Oh, my God, then you would have had a gunfight and then more people would have been killed"' Unhunh, no. I was down on the floor; this guy is standing up; everybody else is down on the floor. I had a perfect shot at him. It would have been clear. I had a place to prop my hand. The guy was not even aware of what we were doing. I'm not saying that I could have saved anybody in there, but I would have had a chance.[61]

Hennard reloaded five times, and had to throw away one pistol because it jammed, so there was plenty of opportunity for someone to fire at him.

Even if Dr. Gratia hadn't killed or wounded Hennard, he would have had to dodge hostile gunfire, and wouldn't have been able methodically to finish off his victims as they lay wounded on the floor. The hypothetical risks of a stray bullet from Dr. Gratia would have been rather small compared to the actual risks of Hennard not facing any resistance. But because of the restrictive Texas law, Dr. Gratia was not carrying a gun, and couldn't take a shot at Hennard. Instead, she watched him murder both her parents.

Two months later, a pair of criminals with stolen pistols herded 20 customers and employees into the walk-in refrigerator of a Shoney's restaurant in Anniston, Alabama. Hiding under a table in the restaurant was Thomas Glenn Terry, armed with the .45 semi-automatic pistol he carried legally under Alabama law. One of the robbers discovered Terry, but Terry killed him with five shots in the chest. The second robber,

who had been holding the manager hostage, shot at Terry and grazed him. Terry returned fire, and critically wounded the robber.[62]

Twenty-three people died in Killeen, where carrying a gun for self-defense was illegal. Twenty lives were saved, and only the two criminals died in Anniston, where self-defense permits are legal.

Does the Gun Control Lobby Mean What it Says?

The supporters of restrictive gun control proposals usually insist that they only wish to keep guns out of the "wrong hands," as Handgun Control, Inc.'s letterhead proclaims. By "the wrong hands" they claim to mean criminals, the mentally ill, and drug addicts, rather than "law-abiding citizens." Nearly all gun owners agree with the objective; they just disagree about the most effective mechanisms for achieving the goal. Non-discretionary concealed weapon permit laws provide an example of the sort of background check that many gun owners would readily agree to, in exchange for a concealed handgun permit. If the forces demanding a state and national background checks for purchasing a handgun are serious about their goals, they should endorse concealed carry reform. The gun control lobbies support all sorts of bills as being worthwhile "if it saves just one life." Concealed carry reform clearly passes the "save-one-life" test. Nevertheless, the gun control lobbies have opposed concealed carry reform in every state where it has been proposed.

"A law written much like Washington State's, clear and unambiguous as to who may obtain a permit, and clearly excluding people who are threats to public safety, ought to satisfy gun control advocates whose goal is keeping handgun out of the wrong hands, rather than banning handguns entirely."

At the state or federal level, a law written much like Washington State's, clear and unambiguous as to who may obtain a permit, and clearly excluding people who are threats to public safety, ought to satisfy gun control advocates whose goal is keeping handgun out of the wrong hands, rather than banning handguns entirely.

Consistent with general principles of federalism, carry reform laws might best be adopted by the individual states, rather than imposed by the federal government. As the fact that concealed carry reform protects

rather than endangers public safety becomes clearer with the experience of various states, the more fearful states will have the option of copying or refining the successful carry reforms of the earlier experimenters.

A national concealed weapon permit would, however, have the advantage of facilitating interstate travel, by simplifying the status of a person who travels from state to state with a firearm for protection. The supporters of a national background check have no problem with the federal government imposing on the states a handgun purchase background check or waiting period. Accordingly, it would be highly inconsistent for gun control advocates to claim that a national carry permit law, using a "Brady Bill" type background check, would violate states' rights.

"The gun control lobbies support all sorts of bills as being worthwhile 'if it saves just one life.' Concealed carry reform clearly passes the 'save-one-life' test."

National carry reform would prevent situations such as one which recently occurred in New Jersey. A North Carolina man, licensed in his home state to carry a firearm, was driving through New Jersey when he was stopped and his car subjected to a possibly illegal search. The New Jersey police arrested the man and confiscated his gun, based on the theory that anyone who sets foot (or tire) in New Jersey for even a moment may not possess any firearm unless the person has a New Jersey gun permit.[63]

National carry reform legislation could, however, be an imposition on those states that have no concealed weapon statute, such as Vermont, or states whose carry statutes only apply in cities and towns, such as Idaho. Accordingly, a federal reform statute could require states to issue permits, but need not prevent states from allowing citizens to carry in their own states without a permit. Alternatively, as a starting point, each state could be required to honor every other state's concealed weapon permit, just as drivers licenses are recognized by all states.

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

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

As a legal matter, would a law requiring states to issue carry permits to licensed, trained citizens after a background check violate principles of federalism? Probably not.

First of all, under section five of the 14th Amendment, Congress has the power to enact laws which require states to respect fundamental civil rights.[64] Accordingly, Congress would have power to pass remedial legislation regarding states whose carry laws infringe the right "to keep *and bear* arms" which is recognized by the Second Amendment, as well as the separate right to own and carry handguns for self-defense which recent scholarship suggests is contained within the Ninth Amendment.[65] Since Congress has repeatedly determined that the Second Amendment guarantees an individual right,[66] Congressional use of the 14th Amendment to enforce the Second Amendment would pose few Constitutional problems.

In addition, Article IV of the Constitution guarantees: "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states," and Congress is empowered to enforce the guarantee.[67] Precedent suggests that the right to carry a firearm for protection is within the scope of the "privileges and immunities" clause.[68]

Whether or not concealed carry reform becomes an important issue before Congress, the issue will clearly continue to arise before state legislatures. As the evidence detailed above suggests, concealed carry reform does not turn otherwise law-abiding citizens into hot-tempered murderous psychopaths. To the contrary, concealed carry reform is often associated with saving lives.

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DAVID B. KOPEL is Director of the Firearms Research Project at the Independence Institute, and editor of the Institute's papers dealing with firearms issues. His book *The Samurai, the Mountie, and the Cowboy: Should America Adopt the Gun Controls of Other Democracies?* (Buffalo, NY: Prometheus Books, 1992) was chosen to receive the Comparative Criminology Book Award by the American Society of Criminology's Division of Comparative International Criminology.

RESEARCH ASSISTANCE for this Issue Paper was provided by Charles R. Hardy.

Endnotes

1. *State* v. *Reid*, 1 Ala. 612 (1840). See generally Clayton E. Cramer, *For The Defense Of Themselves And The State: The Original Intent & Judicial Interpretation of the Right To Keep And Bear Arms* (forthcoming, 1993), 143-147. Even the most restrictive state laws, however, included an exemption for travelers.

2. Gregory J. Petesch, ed., *Montana Code Annotated*, (Helena, MT, Montana Legislative Council: 1990), 371. Also, Assembly Office of Research, *Smoking Gun: The Case For Concealed Weapon Permit Reform*, (Sacramento, State of California: 1986), 6-8. See also Cramer, 172-178, 263-264, and Don B. Kates, Jr., "History of Handgun Prohibition", in Don B. Kates, Jr., ed., *Restricting Handguns: The Liberal Skeptics Speak Out*, (North River Press: 1979), for details of the late arrival of concealed handgun statutes in the North and West.

3. *Watson* v. *Stone*, 4 So.2d 700, 703 (Fla. 1941).

4. Assembly Office of Research, *Smoking Gun: The Case For Concealed Weapon Permit Reform*, (Sacramento, State Of California: 1986), 2.

5. According to the FBI, 49.6% of murder victims in 1991 were Black. FBI, *Uniform Crime Reports for the United States 1991* (Wash., 1992), p. 16 table 2.4.

6. At least one state, California, replaced an existing statute with the Uniform Act. See *Statutes of California Passed At The Extra Session of the Forty-First Legislature*, (San Francisco, Bancroft-Whitney: 1916) p. 221, to see the differences and similarities between the 1917 California concealed handgun statute, and the Uniform Act adopted by California in 1923.

7. *State* v. *Rosenthal*, 75 Vt. 295, 55 Atl. 610 (1903).

8. Vermont Statutes §4003.

9. Wash. RCW 9.41.070 (1991).

10. *People Ex Rel. Darling* v. *Warden of City Prison*, 139 N.Y.S. 277, 154 App. Div. 413, 423, 29 N.Y.Cr. 74 (1913).

11. Wash. RCW 9.41.070 (1991).

12. Wash. RCW 9.41.070 (1991).

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

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

15. Utah Code Annotated, §76-10-513(1) (1990).

16. Utah Code Annotated, §76-10-513(2) (1990).

17. Utah Code Annotated, §76-10-513(4) (1990).

18. Utah Code Annotated, §76-10-513(7) (1990).

19. Florida Statutes §790.06 (1987).

20. Florida Statutes §790.061 (1987).

21. "Come armed", *The Economist*, October 10, 1987, 31.

22. Virginia Code Annotated, §18.2-308 (1988).

23. Virginia Code Annotated, §18.2-308 (1992).

24. Georgia Criminal Code Annotated, §26-2904(a) (1991).

25. Georgia Criminal Code Annotated, §26-2904(d) (1991).

26. Georgia Criminal Code Annotated, §26-2904(a)(1) (1991).

27. Georgia Criminal Code Annotated, §26-2904(a)(2) (1991).

28. Georgia Criminal Code Annotated, §26-2904(a)(3) (1991).

29. Georgia Criminal Code Annotated, §26-2904(a)(4) (1991).

30. Georgia Criminal Code Annotated, §26-2904(a)(5) (1991).

31. Georgia Criminal Code Annotated, §26-2904(c)(2) (1991).

32. Op. Atty. Gen. U89-21 (August 25, 1989); Georgia Criminal Code Annotated, §26-2904, Compiler's notes (1991).

33. Penn. Crimes Code §6109 (1989).

34. Penn. Stat. Ann. 53§101 (1974) defines the classes of cities based on population. Only Philadelphia currently qualifies as a "city of the first class," by having a population above one million; the next closest city, Pittsburgh, is declining in population.

35. Penn. Crimes Code §6109(e)(2) (1989).

36. Penn. Crimes Code §6109(a) (1989).

37. Oregon Revised Statutes §166.291 (1990).

38. Oregon Revised Statutes §166.293 (1990).

39. Oregon Revised Statutes §166.274 (1990).

40. Oregon Revised Statutes §166.292 (1990).

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

42. *City of Princeton* v. *Buckner*, 377 S.E.2d 139, 144 (W.Va. 1988).

43. West Virginia Code Annotated, §61-7-4 (1992).

44. *Application of Metheney*, 391 S.E.2d 635, 638 (W.Va. 1990); West Virginia Code Annotated, §61-7-4 (1992).

45. Idaho Code Annotated, §18-3302 (1991).

46. Idaho Code Annotated, §18-3302, Compiler's notes (1991).

47. Idaho Code Annotated, §18-3302 (1991).

48. Montana Code §45-8-321 (1991).

49. Montana Code §45-8-321 (1991).

50. Montana Code §45-8-327, §45-8-328 (1991).

51. Montana Code §45-8-321 (1991).

52. Florida Dept. of State, "Concealed Weapons/Firearms License Statistical Report For Period 10/01/87 - 06/30/92".

53. T. A. Barrick, West Virginia Dept. of Public Safety, letter, August 26, 1992 to author Cramer.[Unless otherwise noted, all citations to correspondence with the author refer to Mr. Cramer.]

54. Charles E. Pritchard, Oregon Dept. of Justice, letter, September 8, 1992 to author. David E. Walsh, Washington Attorney General's Office, letter, August 25, 1992 to author. Gary R. Tabor, Thurston County (Washington) Prosecuting Attorney's office, letter, September 4, 1992 to author. Mary F. Perry, King County (Washington) Prosecuting Attorney's office, letter, September 8, 1992 to author. John B. Russell, Jr., Commonwealth of Virginia, Office of the Attorney General, letter, October 14, 1992 to author.

55. James Wright and Peter Rossi, *Armed and Considered Dangerous: A Survey of Felons and Their Firearms* (New York: Aldine, 1986)

56. There are a number of studies of the effects of violence in the electronic media in promoting violence. Wendy Wood, Frank Y. Wong, and J. Gregory Chachere, "Effects of Media Violence on Viewers' Aggression in Unconstrained Social Interaction", *Psychological Bulletin*, 109:3 [May 1991], 371-383, is one the more detailed recent attempts to analyze existing statistical studies of the effects of television and film violence on children. An example of a more narrow study that suggests the link is so weak as to be undetectable is Mary B. Harris, "Television Viewing, Aggression, and Ethnicity", *Psychological Reports*, 70:1 [February 1992], 137-138.

57. Bureau of Justice Statistics, *Report to the Nation on Crime and Justice*, 2nd ed., (Washington, DC, Government Printing Office: 1988), 42, provides information on the relationship between violent crime arrests and offender age.

58. Andrea Sachs & Joni H. Blackman, "Stalking the Green River Killer", *Time*, July 31, 1989, 57.

59. Stephen G. Michaud and Hugh Aynesworth, *The Only Living Witness*, (New York, Linden Press: 1983). While Ted Bundy's bloody path of murders perpetrated with clubs and bare hands also led through Utah and Florida, the effects on murder rates in those states were less dramatic. In Utah, he did not kill as many people; in Florida, the murders were diluted in Florida's much larger population.

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

60. Gary Kleck, *Point Blank: Guns and Violence in America* (Hawthorne, New York: Aldine de Gruyter, 1991), p. 413.

61. Dr. Suzanna Gratia, transcript of testimony regarding HB-1720.

62. One of the lengthier accounts of the incident appears in Steve Joynt, "Restaurant Customer Kills Would-Be Robber," (Birmingham) *Post-Herald*, Dec. 19, 1991.

63. Tom Joyce, "Price of Freedom: North Carolina Man Gives up Gun He Can Carry at Home," *Gloucester County Times*, Apr. 6, 1993. The man accepted a plea bargain in which he escaped prison by being placed on probation, making regular visits to a New Jersey probation officer, and forfeiting his handgun. The man had

allegedly been speeding when he was stopped on the New Jersey Turnpike; the officer making the traffic stop asked the man if he had any weapons in the car, and the man told the truth that he did. The federal Tenth Circuit Court of Appeals (which does not have jurisdiction over New Jersey) has ruled that similar questioning by the Utah police at traffic stops is unconstitutional.

64. The 14th Amendment states in part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny any person within its jurisdiction the equal protection of the laws...The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

65. Nicholas J. Johnson, "Beyond the Second Amendment: An Individual Right to Arms Viewed Through the Ninth Amendment," 24 RUTGERS LAW JOURNAL 1 (1992).

66. When introducing the Second Amendment and other guarantees in the Bill of Rights, Congressman James Madison explained that the amendments "relate first to private rights." James Madison, *Papers*, vol. 12 (1979), pp. 193-94. The major popular analysis of the Second Amendment, which Madison praised, explained that in the Second Amendment, "the people are confirmed...in their right to keep and bear their private arms" Madison, pp. 239-40, 257; Tench Coxe, *Federal Gazette*, June 18, 1789, p. 2, col. 1. In 1982, the Senate Subcommittee on the Constitution investigated historical evidence, and unanimously concluded that the Second Amendment guaranteed an individual right to arms which was made enforceable against the states by the 14th Amendment. Senate Subcommittee on the Constitution, *The Right to Keep and Bear Arms* 11 (1982) (unanimous report). In 1986, Congress enacted the Firearm Owners' Protection Act, whose preamble stated: "The Congress finds that -- (1) the rights of citizens -- (A) to keep and bear arms under the second amendment to the United States Constitution [and fourth, fifth, ninth, and tenth amendment rights]" required additional protection, which Congress was enacting. In enacting the Property Requisition Act of 1941 to meet defense needs for the global conflict, Congress specifically forbade the requisitioning or registration of firearms. In enacting the 14th Amendment, Congress made frequent references to its desire to prevent state governments from interfering with the right to freedmen to keep and bear arms. See Stephen P. Halbrook, *Congress Interprets the Second Amendment: Declarations of a Coequal Branch on the Individual Right to Keep and Bear Arms*, 1 SOUTHERN REV. OF LAW & PUBLIC POLICY (no.2, 1993)(forthcoming).

67. U.S. Const., Art. IV, §2, clause 1.

68. In the notorious (but never over-ruled) *Dred Scott* decision, Justice Taney attempted to point out the "absurdity" of the idea that a black man had equal rights with a white man under the U.S. Constitution, by listing the results that would stem from such a decision. Blacks would be free to travel wherever they wished, "without pass or passport," would enjoy "full liberty of speech in public and in private", and would be allowed "to hold public meetings upon political affairs, and to keep and carry arms wherever they went." *Dred Scott* v. *Sandford*, 60 U.S. 393, 417 (1857).

It seems clear that Justice Taney found that the rights he listed were covered by the "privileges and immunities" clause of the Constitution, and thus, these protections apply in every state. While Justice Taney chose to recognize these "privileges and immunities" as only applying to whites, because only whites were, or could be citizens, we would recognize today that the rights enumerated by Justice Taney apply to all citizens of the United States.

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ISSUE PAPER

THE "ASSAULT WEAPON" PANIC

POLITICAL CORRECTNESS TAKES AIM AT THE CONSTITUTION

BY

ERIC C. MORGAN

AND

DAVID B. KOPEL

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INDEPENDENCE ISSUE PAPER

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April 10, 1993

THE "ASSAULT WEAPON" PANIC

Political Correctness Takes Aim at the Constitution

By Eric C. Morgan and David B. Kopel

Executive Summary

America's righteous impulse to solve problems through prohibition — banning citizens from possessing some physical object or substance such as alcohol, drugs, gold, or guns — is stirring again as President Clinton and New Jersey Governor Florio lead the charge to outlaw so-called "assault weapons."

Proponents of prohibition claim that a ban will reduce violent crime and drug abuse. It is argued that people will be safer when these guns, allegedly suitable only for the killing ground of wartime combat, are removed from circulation.

A dispassionate sorting of fact from myth by attorneys Eric Morgan and David Kopel, however, reaches the opposite conclusion. Their analysis shows that rhetoric and legislation targeting this particular type of guns (and a virtually indefinable type at that) is but the crime-busting politician's equivalent of the political correctness vogue among leftist academics — a soothing substitute for real distinctions and hard decisions.

The Morgan-Kopel study points out another disturbing similarity between the two strains of fashionable opinion: just as the PC orthodoxy on campus undermines the First Amendment freedom of speech, so the "assault weapon" panic takes aim at the Second Amendment right to be armed for protection against lawlessness and tyranny.

In the course of the most comprehensive and best documented monograph yet produced on the emotionally overheated issue, the authors methodically dispose of all the obvious questions:

What is to be banned? No one can coherently say, Morgan and Kopel demonstrate. With automatic weapons (machine guns) already outlawed, and with American politicians well aware that gun owners would remove them from office if they followed Britain's lead in banning *all* semiautomatic firearms, the various American "assault weapon" bills make arbitrary distinctions-without-a-difference to prohibit certain guns and exempt others, based upon threatening appearance rather than destructive

potential. The model upon which nearly all bills are based, California's prohibition, is proving unenforceable. A Colorado state court recent declared unconstitutional a Denver prohibition based on the California ordinance, in part because the description of guns banned was "void for vagueness."

What will the ban accomplish? It is likely to have negligible impact in disarming lawbreakers or aiding law enforcement. So-called "assault weapons" figure in only about 1% of gun crime. While politically-minded police chiefs often support a ban, polls of police officers show widespread opposition to prohibition. A black market will spring up to subvert the ban in any case.

Why shouldn't legislatures do what public opinion demands? Because, say the authors, public opinion has been fed disinformation by the media and lobby groups. Polling data that seems to suggest broad public support for a semiautomatic firearms ban are derived from ill-informed survey questions which actually discuss *automatic* weapons. Influential national journalists have admitted on advocacy motive on the issue. Gun prohibition activists have spelled out their confusion strategy in writing.

What harm would a ban do, even if it doesn't help much? Morgan and Kopel contend it would erode the federal Bill of Rights and many state Constitutions. The Second Amendment "right of the people to keep and bear arms" pertains, if anything, more directly to militia-type guns than to sporting guns — though the so-called "assault weapons" are useful for both purposes. The Founder's confidence that no future American despot would be able to "enforce unjust laws by the sword, because the whole body the people are armed," clarifies constitutional intent, and holds contemporary relevance in the experience of the United States and other countries. Courts in Colorado and Georgia have stricken "assault weapon" bans because of their violation of the right to arms.

How then can *lawmakers make America's streets safer?* Not by prohibiting certain firearms solely on the basis of a menacing appearance, but by moving against actual crimes and criminals. The paper recommends better enforcement of existing gun laws, more resources for corrections, and a tougher approach to probation and parole. It calls on the entertainment industry to stop glorifying gun violence. It challenges those in positions of leadership, the makers of laws and the shapers of opinion, to set the Constitution ahead of empty symbolic legislation; to exercise genuine leadership rather than politically correct posturing.

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INTRODUCTION

"IT COMES TO PASS THAT NOTHING IS SO FIRMLY BELIEVED AS THAT WHICH WE KNOW LEAST." MICHEL EYQUEN DE MONTAIGNE, *ESSAYS*, BOOK 1, CHAPTER 32.

In the wake of tragic shooting incidents involving semiautomatic rifles and a skillful public relations campaign by Handgun Control, Incorporated, the media have discovered an "assault weapon" crisis in the United States. *Time* magazine subtitled its February 6, 1989 cover story "America's streets become free-fire zones as police, criminals, and terrified citizens wield more and ever deadlier guns."[1] The story included pictures of the coffins of the victims of the Stockton massacre, and a "Calendar of senseless shootings." As a dramatic climax, the article reproduced a photograph of a police officer holding up the "assault rifle" used by Patrick Purdy to fire into the yard of a Stockton, California school.[2] The *Time* reporters set out their agenda of "what should be done" about the "assault weapon" problem: "The Federal Government should ban outright the import or sale of paramilitary weapons to civilians."[3]

California's chief law enforcement officer, Attorney General John Van de Kamp might have been expected to suffer a political death blow from the Stockton shootings; it was the justice system which Van de Kamp supervised that let Patrick Purdy plea bargain repeated violent felonies into misdemeanors, including assault on a peace officer and a robbery in which a grandmother was seriously injured, and it was Van de Kamp's criminal justice system that turned Purdy loose despite Purdy's articulated threats to commit a mass murder with a gun or a bomb and despite his parole board's written warning that he was "a danger to himself and others."[4]

But far from suffering a political setback because of the California justice system's inept handling of Patrick Purdy, Attorney General Van de Kamp made himself a national political figure and jump-started his campaign for Governor by hiring a public relations firm (at taxpayer expense) to make the crusade against "assault weapons" the focus of his public agenda.

The "assault weapon" issue worked for former Attorney General Van de Kamp, as it has worked for former Drug "Czar" William Bennett, for the fundraisers at Handgun Control, Inc., and for many other political figures.[5] But did the "assault weapon" law work for California? Would it work for the United States? Do such laws make a jurisdiction at least a little safer — or more dangerous? Many "assault weapon" bills have been hastily drafted (and even enacted) without careful consideration of the public safety questions underlying the issue.[6]

This Issue Paper contends that legislation of the "anti-assault weapon" genre is based on illogical, cosmetic distinctions between guns; that such legislation is unnecessary because the banned guns are rarely used in crime; and that such legislation

will be ineffective or counterproductive. Second, this Issue Paper will argue that, even if legislatures choose to enact such unwise proposals, the results of their efforts will be illegal because the prohibitions are unconstitutional. For many of the same reasons that the bans are unconstitutional, they are also immoral, because the bans invert the fundamental relationship between the people and the government on which the United States was founded. Lastly, this Issue Paper will propose solutions to the problems associated with the rare criminal misuse of semiautomatic firearms.

I. "I KNOW IT WHEN I SEE IT" OR WHAT IS AN "ASSAULT WEAPON"?

Current legislation includes incorrect and misleading definitions of the "assault weapons" that it targets. Indeed, definitional problems in the legislation are so serious that they would result in the failure to remove any particularly dangerous class of weapons from the public sphere.

Definitional problems are not normally at the core of the gun control debate. A "plastic gun" has been defined by Congress as any gun with less than a certain minimum amount of metal. A "machine gun" is often considered any gun which fires over and over with just a single squeeze of the trigger. But what is an "assault weapon"? No legislative body in this country has yet found a logically consistent definition.

A. Types of "Assault Weapon" Definitions: Gun Names vs. Gun Characteristics

One way to define "assault weapon" is simply to state that "assault weapon" means a list of named guns. Senator Dennis DeConcini of Arizona proposed such an approach in his "Anti-Drug Assault Weapons Limitation Act of 1989" (Senate Bill 747). The bill would have banned 17 types of guns by name, and no other.[7] (Media reports which claimed that the bill only banned 9 guns were apparently confused by the fact that the bill had 9 categories, which listed 17 guns.) California has enacted similar legislation, which identified approximately 60 illegal "assault weapons" by model name.[8] Likewise, Maryland in 1989 enacted legislation placing two dozen named "assault weapons" under the waiting period that had heretofore only applied to handguns.

The advantage of a bill that bans guns by name only is that the bill can be presented as not threatening the huge majority of gun owners who do not own such guns. The DeConcini ban-by-name approach passed the Senate in 1990; although Senator DeConcini did not re-introduce his bill in 1991, Senator Biden attached the DeConcini language to the Biden-Thurmond crime bill which passed the Senate in the summer of 1991. (The DeConcini language was removed from the crime bill by the Conference Committee, since the House of Representatives had rejected an "assault weapon" prohibition.)

One disadvantage of the name-only approach is that is necessarily omits many other guns which are functionally identical to the guns named. The name-only bills usually have a provision for adding additional guns to the bill; the DeConcini bill would have allowed the Secretary of the Treasury to propose that the Congress add additional guns to the ban. In addition, the Secretary of the Treasury could simply declare that a particular gun model was the same gun (or essentially the same) as a gun on the

DeConcini list. The California statute allows guns to be added if the state Attorney General wins from a court a declaratory judgement adding a particular gun to the list. (There is no provision for Californians to receive notice of the judicial decision making the possession of a new type of gun illegal.)

Under the DeConcini, California, and Maryland approach, gun owners may be told that no government administrator has the authority to unilaterally add a gun to the "assault weapon" list. Nevertheless, Maryland police have unilaterally added 50 guns to their own list of "assault weapons," and told gun stores to apply the waiting period to those extra guns. Gun store owners, not wishing to offend the police, have complied.[9]

"Most of the 60 'semiautomatic assault weapons' that California banned in 1989 are not semiautomatic, or do not really exist, are called by the wrong name, or are defined so vaguely as to be incomprehensible."

A second disadvantage of the ban-by-name bills is that virtually all of them are derivative of the California statute, and California Attorney General Lungren (who played no role in the enactment of the California law) has determined that many of the California definitions are unenforceable.[10] Most of the 60 "semiautomatic assault weapons" that California banned in 1989 are not semiautomatic, or do not really exist, or are called by the wrong name, or are defined so vaguely as to be incomprehensible.[11] In 1991, California enacted remedial legislation; although the bill was presented to the legislature as a mere technical correction, the scope of banned firearms was substantially expanded. (Other than California, none of the many jurisdictions which banned guns by using the California list have enacted subsequent corrections.)

The attempt to correct the flawed California list made the confusion even worse. About 65,000 guns have been registered under the law (which allows current owners to retain their guns if they register them); and about half of the registrations are invalid, according to an Associated Press review of registration studies conducted for the Department of Justice. (One study found 33,464 invalid registrations; another study put the figure at 23,406.) In many cases, the California Department of Justice accepted registration fees for guns which were not covered by the law, because the Department's employees could not understand what guns were covered.[12] To make matters worse, from the Department's viewpoint, a civil rights law suit was filed in early 1993 demanding a refund of the improperly collected $20 registration fees. Unfortunately, Attorney General

Lungren's Department of Justice has already spent the registration fees it wrongfully collected, and has no source of funds to return the money.

That so many problems would result from California's list was no surprise to the firearms experts at the California Attorney General's office. As Steve Helsley, the assistant director of the California Justice Department's investigation and enforcement branch explained, "We can effectively control all semi-automatic weapons or leave them all alone. What I don't think we can accomplish is proper implementation of a vague and ambiguous law."[13]

After Denver, Colorado enacted a semiautomatic prohibition closely modelled after the original California law, the Attorney General of Colorado sued to have the law declared unconstitutional. A Colorado trial court voided the Denver gun ban, ruling that the law not only infringed the right to bear arms, but was also void for vagueness. [14]

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Handgun Control, Inc., the lobby that created the California gun ban, at first opposed any correction to the California list, and suggested that the solution to the vagueness problem identified by the California Attorney General was simply to arrest gun owners and make the gun owners prove which gun definitions are legally inadequate.[15] Later, when a technical corrections bill was written that significantly expanded the number of guns banned, Handgun Control, Inc. supported the revision.

The opposite of the ban-by-name approach is the regulation of all guns which fit a certain neutral definition. For example, the State of Colorado provides enhanced punishment for violent crimes committed with an "assault weapon," and defines an assault weapon as a centerfire semiautomatic rifle to which a magazine holding 20 or more rounds is actually attached.[16]

The generic approach has been rarely used in the United States, since the legislation would not outlaw any guns *per se*, but only guns into which a large magazine was inserted. The gun control lobbies will not accept legislation that does not completely outlaw certain guns, regardless of whether they have a large capacity magazine. An alternative approach would be to outlaw any semiautomatic which *could* accept a large capacity magazine. The alternative generic approach would encompass a huge number of firearms, and if the generic legislation applied to anyone other than criminals, the

political opposition would be overwhelming. A ban on all semiautomatics was, however, introduced in Congress in 1993,[17] and was enacted by Dayton, Ohio in January 1993.[18]

> ***"Semiautomatic firearms require that the shooter pull the trigger for each shot fired."***

Other nations have enacted generic definitions which apply to guns owned by ordinary citizens, and not just to criminal misusers of guns. Britain, for example, has outlawed and confiscated almost all semiautomatic shotguns and centerfire rifles. The prohibition also applies to pump-action guns, since, as British legislators correctly noted, pump-action guns have an effective rate of fire just as rapid as semi-automatics.[19]

The Australian state of Victoria has implemented similar legislation, applicable to centerfire semi-automatics only.[20] Australia's largest state, New South Wales, passed a bill like Victoria's, but repealed the law after the ruling party was defeated in landslide attributable to what all observers considered a massive show of force by Australian gun owners.[21] (In Britain and Australia, the gun bans have been generally disobeyed by the affected gun owners.)

Regardless of the political viability of a generic ban, a generic ban is the most logical legislative approach, since it treats equally all guns that have the same characteristics. Current American laws regulating machine guns and "plastic guns" are examples of the generic approach to regulation by class, rather than by name.

The most common type of "assault weapon" legislation, however, is neither the ban-by-name nor the generic method, but rather a mixture of the two. New Jersey's "assault weapon" law bans a list of named guns, and allows the New Jersey Attorney General unilaterally to add guns to the list. Likewise, various federal "assault weapon" bills sponsored by Senator Howard Metzenbaum, Representative Charles Schumer, Representative William Hughes, and Representative Fortney "Pete" Stark would allow the Secretary of the Treasury to add guns to the list of named illegal guns.[22]

Such bills often face rough going politically. The bills allow additional guns to be banned which are functionally similar to the listed guns which are banned. Because *all* semiautomatics are functionally identical, many gun owners worry that anti-gun administrators could gradually outlaw all semi-automatics.

While Britain and Australia believe that "a semiautomatic is a semiautomatic,"

and apply the same controls to all semiautomatics, the American gun control movement claims that there is a distinction between semiautomatics which are "assault weapons" and semiautomatics with are "sporting guns." To evaluate the viability of the anti-gun lobby's distinction, this Issue Paper now turns to the particular features that make up an "assault weapon."

B. Semiautomatic vs. Full Automatic

Semiautomatic firearms require that the shooter pull the trigger for each shot fired. After each shot, the gasses produced by the ignition of a cartridge cycle the action and chamber another cartridge. When the shooter pulls the trigger again, the same "self-loading" occurs, and the firearm is again ready for firing.[23] Semiautomatic rifles became prevalent in the early 1900s, and until the Second World War were usually chambered for large cartridges that were effective at long ranges but generated tremendous recoil. They were sometimes used as military weapons.[24]

> ***"All of the legislation involving 'assault weapons' has dealt with semiautomatics that have a military look, but which cannot fire automatically. None of the legislation has involved true assault rifles, which are automatics, and which are already strictly regulated."***

Fully automatic weapons, often called "machine guns," employ the same sort of self-loading action as semiautomatic weapons, but they do not require a pull of the trigger for each shot. Machine guns will discharge every round in the magazine as long as the trigger is depressed.

Current "assault weapon" legislation applies only to semiautomatics, and not to automatics.[25]

C. Evolution and Technical Definition of the Assault Rifle

During the Second World War, strategists envisioned a new type of rifle that would have the advantages of both semiautomatic and fully automatic designs. Firearms engineers realized that such a weapon would have to use an intermediate-powered

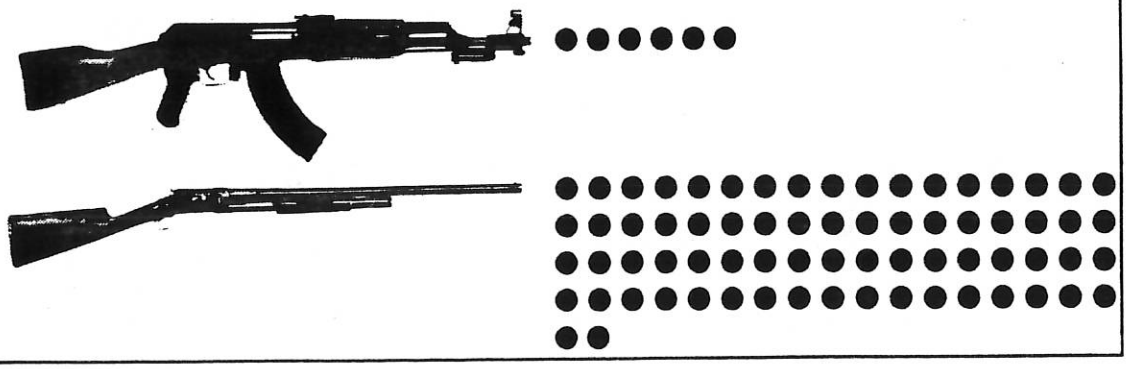
cartridge that would have longer effective ranges than the traditional submachinegun cartridge but would still generate controllable levels of recoil.[26] The Germans won the race to introduce this new "assault rifle." In 1942, as Soviet troops surrounded the crack unit *Kampfgruppe Scherer*, German aircraft dropped in crates of the new *Maschinen Karabiner* 42 (MKb42).[27] These rifles chambered the mid-size 7.92 x 33 millimeter cartridge and had a selector switch that allowed soldiers to use them either as fully automatic or semiautomatic weapons.[28] The *Kampfgruppe* shot its way out of the trap with the new MKb42s, and military experts around the world began to note the merits of selective fire assault rifles.[29]

In 1947, the Soviet Union accepted Colonel Mikhail Kalashnikov's design for an assault rifle. The *Avtomat Kalashnikova* of 1947 (AK-47) chambered the intermediate-powered 7.62 x 39 millimeter cartridge. This weapon, at the flip of a selector switch, operated in either a fully automatic or semiautomatic mode.[30] Many other nations, including the United States, produced assault rifles that also employed intermediate-powered cartridges and had selective fire capability.[31]

Thus, as the United States Defense Department's Defense Intelligence Agency book *Small Arms Identification and Operation Guide* explains, "assault rifles" are "short, compact, selective-fire weapons that fire a cartridge intermediate in power between submachinegun and rifle cartridges."[32]

Which Gun Fires More Rapidly?

In just three seconds, an old-fashioned pump action hunting shotgun can fire 6 shells, each shell containing 12 pellets of "00 Buckshot." Each of the .33 calibre pellets is as deadly as a handgun bullet — and 72 of them can be unleased in seconds. In contrast, a semi-automatic "assault rifle" could fire at most five or six bullets in the same time period.



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The official definition fits the historical role of the assault rifle. The assault rifle is compact, so that it can be easily carried in a battlefield, including during an assault. The assault rifle fires an intermediate power cartridge, so that the recoil can be controlled, and accuracy maintained. (Therefore, a "high-caliber assault rifle" is an oxymoron.) And an assault rifle has selective fire. By flipping a selector switch, the shooter can fire either automatically or semiautomatically.

> ***"...former Attorney General Richard Thornburgh told the Senate Judiciary Committee that the Committee's 'assault weapon' legislation had nothing to do with the function of the banned guns, but instead seemed to focus on whether the gun had a black plastic stock."***

Weapons capable of fully automatic fire, including assault rifles, have been regulated heavily in the United States since the National Firearms Act of 1934. Possession of such a gun requires a $200 federal transfer tax and an FBI background check. As of May 1986, production of new automatics (including assault rifles) for the civilian market became completely illegal. (The lower federal courts have disagreed about the Constitutionality of the post-1986 ban, and the Supreme Court has declined to review the issue.)[33]

D. Semiautomatics which look like Automatics

Many firearms manufacturers have offered for civilian sale semiautomatic-only rifles which look like military assault rifles.[34] These civilian rifles are, unlike actual assault rifles, incapable of automatic fire. For example, the AK-47 is an assault rifle formerly used by the Soviet military (which now uses the AKM-74). Only a few hundred AK-47 firearms have been imported into the United States. The AKS rifle is a Chinese semiautomatic rifle which looks like the AK-47, but cannot fire automatically. Tens of thousands of AKS firearms have been imported into the United States and sold to civilians.[35] Similarly, the semiautomatic Colt AR-15 Sporter rifle, of which many tens of thousands have been sold, looks like the automatic U.S. Army M-16 assault rifle.[36] This Issue Paper, borrowing a term coined by the editorial board of the *Denver Post*, refers to these semiautomatics as "politically incorrect rifles." Although guns like the AKS and the AR-15 Sporter are functionally similar to all other semiautomatics, their menacing military appearance makes them a special target for gun prohibition.

Other firearms manufacturers make guns which do not look like any assault rifle, but which do have an ominous military appearance. Such guns typically have black

plastic components, in contrast to the brown wood components found on more familiar firearms. The Calico M-900 carbine is an example of a gun which, although related in design to no military firearm, has a military appearance. The TEC-9 handgun, while resembling no military guns, has futuristic styling, and it too is considered an "assault weapon."

All of the legislation involving "assault weapons" has dealt with semiautomatics that have a military look, but which cannot fire automatically. Hardly any of the legislation has involved true assault rifles, which are automatics, and which are already strictly regulated.

While the Defense Intelligence Agency's term of art "assault rifle" has a precise and technical meaning, the phrase "assault weapon" invented by the anti-gun lobby has no clear meaning. No gun that is an "assault rifle" (by Defense Intelligence Agency definition) is an "assault weapon" (by Handgun Control, Inc. definition) because all "assault rifles" are automatic, and no "assault weapons" are automatic. "Assault rifles" are used by the military, whereas no "assault weapon" is used by the military. "Assault rifles" are all rifles, whereas "assault weapons" are claimed to include semiautomatic rifles, semiautomatic shotguns, revolver-action shotguns, semiautomatic handguns, and semiautomatic airguns.[37] In truth, a "semiautomatic assault weapon" is a logical impossibility, akin to a "four-wheel tricycle."

In this Issue Paper, the term "assault rifle" is generally used without quotation marks, since it has a precise and commonly-accepted definition. The term "assault weapon" is always used in quotation marks, since there is no definition other than "an amorphous subset of guns which are incorrectly considered to be military firearms."

In sum, the types of weapons targeted by current legislation are not assault rifles at all; the prohibited "assault weapons" are only capable of semiautomatic fire. This definitional problem is more than a semantic quibble because it can limit any possibility that the so-called "assault weapon" legislation will alleviate the problems targeted in its passage. Legislating against semiautomatic firearms that happen to look like military weapons does not draw any meaningful distinctions between those firearms that are banned as "assault weapons" and those that are not.[38] The attempt to single out some semiautomatics as uniquely dangerous is not based on significant functional characteristics of those guns, as the next section details.

Assault Rifles vs. "Assault Weapons"		
	Assault Rifles	"Assault Weapons"
Source of Definition?	Defense Intelligence Agency	Gun prohibition lobbies
Squeezing the trigger once fires:	Every cartridge in the magazine	One cartridge
Military Use?	Military combat rifles	Not used by any military force
Type of action?	Automatic or semiautomatic, depending on setting of selector switch	Semiautomatic only
To fire in automatic mode:	Flip the selector switch	Find a skilled gunsmith willing to spend hours performing a felonious conversion
Is the gun a machine gun?	Yes	In appearance but not in function
Legal status?	Civilians may possess only with a federal license that requires an FBI background check.	Legal in most jurisdictions except New Jersey and California.
Type of ammunition?	Intermediate power	Intermediate power

E. Features that Semiautomatic "Assault Weapons" Share with other Semiautomatics and other Firearms

Little functional difference exists between military look-alike semiautomatic firearms and semiautomatic firearms of a more traditional design. When the "assault weapon" furor first erupted, the Bureau of Alcohol, Tobacco and Firearms explained to Congress:

> The AK-47 is a select fire weapon capable of firing 600 rounds per minute on full automatic and 40 rounds per minute on semiautomatic. The AKS and AK-47 are similar in appearance. The AK-47 is an NFA [National Firearms Act of 1934] type weapon, having been manufactured as a machine gun. The AKS is difficult to convert, requiring additional parts and some machinery . . . *The AKS is a semiautomatic that, except for its deadly military appearance, is no different from other semiautomatic rifles. As a matter of fact, the identical firearm with a sport stock is available and, in appearance, no different than other so-called sporting weapons.*[39] (emphasis added).

This section examines the features which gun prohibitionists claim distinguish semiautomatic "assault weapons" from other semiautomatics, and from other firearms.

1. The Guns have the same Ammunition Capacity as other Guns.

A bill introduced by Senator Howard Metzenbaum's tried to use the capability to accept large-capacity ammunition magazines in distinguishing between acceptable semiautomatics and "assault weapons."[40] However, a distinction based on the ability of a weapon to accept a large magazine is pointless because any weapon capable of accepting a box magazine can utilize a magazine of indeterminate capacity.[41]

The only meaningful way to ban a gun based on its potential large ammunition capacity would be to outlaw all guns which can accept detachable magazines. Such a ban is a political impossibility in the United States.

A more logical approach to controlling ammunition capacity would be to regulate or outlaw magazines that hold more than a certain number of rounds, as former President Bush proposed. The main objection to magazine prohibition is that there would be little if any practical gain in public safety. Since changing a magazine requires only about 1.5 seconds, criminals could fire three 10 round magazines in essentially the same time they could fire two 15 round magazines.

2. The Guns have the Same Rate of Fire as other Guns.

The rate of fire on a semiautomatic is determined by how fast the shooter can squeeze the trigger. Thus, all semiautomatics have the same effective rate of fire. It is incorrect to claim that the semiautomatics dubbed "assault weapons" have a different rate of fire from semiautomatics which the anti-gun lobby considers "sporting guns."

Moreover, common hunting shotguns that are not even semiautomatic are potentially more lethal than semiautomatics.[42] The Winchester Model Twelve pump action shotgun can fire six "00 buckshot" shells, containing large, .33 caliber shotgun pellets, in three seconds.[43] Since each "buckshot" shell contains twelve of these .33 caliber pellets, the non-semiautomatic Winchester shotgun can fire seventy-two potentially lethal projectiles in three seconds.[44] The Remington Model 1100 12-gauge shotgun is a popular semiautomatic duck hunting gun,[45] and it can dispatch 72 buckshot pellets in two and one half seconds.[46] The rate of fire of a semiautomatic Kalashnikov like the AKS is forty shots per minute.[47] Either the Model 12 or the Model 1100 shotguns, neither of which is currently considered an "assault weapon," is potentially more dangerous than the proscribed weapons that have a more evil-looking "military" styling.[48]

> ***"According to the Bureau of Alcohol, Tobacco and Firearms, all so-called 'assault weapons' are 'difficult to convert to automatic fire.'"***

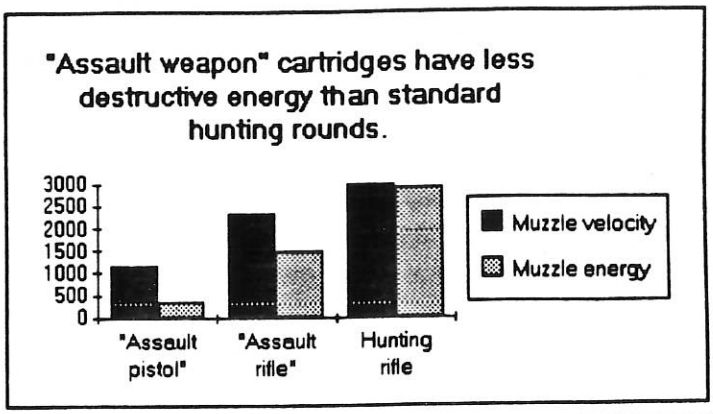
3. The Guns are Difficult to Convert to Full Automatic.

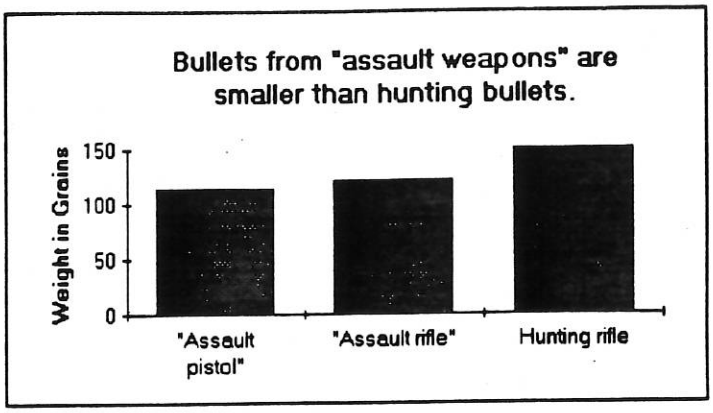
According to the Bureau of Alcohol, Tobacco and Firearms, all so-called "assault weapons" are "difficult to convert to automatic fire."[49] The conversion requires several hours work by a skilled gunsmith willing to commit a major felony. Expert police testimony to the California Legislature said the guns "are not easily and readily convertible."[50]

4. The Guns Fire Cartridges that are Less Lethal than other Guns Do.

As detailed above, real assault rifle ammunition is "intermediate" in power between handgun ammunition (such as for a Colt .45) and full battle rifle ammunition (such as for a Browning Automatic Rifle). Ammunition for the politically incorrect semiautomatic rifles that look like assault rifles is the same.[51] The politically incorrect semiautomatic rifles do not fire the deadlier, high-power ammunition used by guns designed especially for big-game hunting. The graph on this page illustrates how "assault

weapon" bullets are actually smaller than bullets for big-game hunting.





Although some prohibitionists have claimed "assault weapons" fire a high-velocity bullet which produces unusually large gaping wounds, there is no scientific support for this theory.[52] The AKS rifle (a Kalashnikov variant) achieves 1,445 foot-pounds of kinetic energy per second. (The number is derivative of bullet weight and velocity.) In contrast, the 30-'06 hunting rifle creates 2,820 foot-pounds of energy.[53] Even Handgun Control's videotape about "assault weapons" rejects the science fiction velocity theory.[54]

Ironically, the intermediate bullets used in real assault rifles have actually been designed *not* to kill. The theory is that wounding an enemy soldier uses up more of his side's resources (to haul him off the battlefield and then care for him) than does killing an enemy.

Col. Martin L. Fackler, M.D., former Director of the United States Army Wound Ballistics Lab (the only research center in the world which studies wound ballistics) states:

> Military bullets are designed to limit tissue disruption — to wound rather than kill. The full-metal-jacketed bullet is actually more effective for most warfare; it removes the one hit and those needed to care for him ...newspaper descriptions comparing their effects with a grenade exploding in the abdomen...must cause the thinking individual to ask: ...how is it possible that 29 children and one teacher out of 35 hit in the Stockton schoolyard survived...? If producers of assault rifles had advertised their effects as depicted by the media, they would be liable to

prosecution under truth-in-advertising laws.[55]

5. The Guns are, Appearances Notwithstanding, not Military Weapons

Although the anti-gun lobby asserts that so-called "assault weapons" are "weapons of war," the claim is false. Because the guns are all semiautomatic, and incapable of automatic fire, they are not used by any army in the world.[56]

6. The Guns are Commonly Owned.

American civilians have owned semiautomatics since the 1890s, and currently an estimated twenty to thirty million own the firearms covered by the broader definitions of "assault weapon."[57] Americans own approximately 3.3 million politically incorrect semiautomatic rifles with a military appearance.[58]

F. Features that Distinguish Some "Assault Weapons"

Is there anything other than appearance that distinguishes so-called "assault weapons" from other guns? Yes. Particularly in regards to the politically incorrect semiautomatic rifles (those which look like automatic assault rifles), there are a number of features which make them superior for defensive uses.

1. The Guns are Reliable, Rugged, and Simple

First, these rifles have a greater immunity to weather conditions and abuse than more traditional hunting rifles.[59] A semiautomatic AKS can be dropped in the mud, dragged through brush, and can withstand the rigors of extremely cold or hot climes.[60] Although the guns are not military arms, they do share many common components with the automatic assault rifles that they resemble. As a result, they share the imperviousness to rough conditions and to lack of cleaning that the military guns enjoy.

The ruggedness stems in part from the fact that the guns have fewer moving parts than specialized sports guns, and are hence easier for persons who are not firearms hobbyists to maintain in a safe condition.

The simplicity of design and ease of use of the gun (nothing except a revolver is easier to load and shoot) also makes the gun well-suited for self-defense for persons who are not gun aficionados. The ease of use is, however, no advantage from the viewpoint of gun prohibitionists. Councilwoman Cathy Reynolds, sponsor of Denver's gun prohibition, complained that the guns "are very easy to use."[61]

2. The Guns are Very Accurate

Enhanced accuracy makes semiautomatics (especially the politically incorrect rifles) the best self-defense guns in many situations. The firing of any gun produces recoil ("kick"). Recoil makes it more difficult to aim and control a shot. Guns with lesser recoil are easier to fire safely, and better-suited for self-defense. People without a great deal of upper body strength — such as some women, the elderly, or the frail — may find a low-recoil gun to be the only kind they can use successfully for self-defense.

In a semiautomatic, the energy from the gun-powder explosion is directed forward (rather than backwards towards the shooter). The energy is used to load the next cartridge into the firing chamber, ready for a new trigger squeeze. As a result, semiautomatics have lower recoil than other guns, and are therefore quite appropriate for use in situations where accuracy is crucial for safety, such as self-defense in an urban environment.

In addition, some of the politically incorrect semiautomatic rifles have a pistol grip in front of the trigger guard. The pistol grip helps stabilize the firearm, to keep the barrel from rising after the first shot, and thereby stay on target for a follow-up shot.

3. The Guns can Use Accessories that Enhance Self-Defense

The politically incorrect semiautomatic rifles do have the capability of easily using certain accessories which enhance their defensive capabilities. Because the accessories are not mainly designed to enhance sport shooting, gun prohibitionists contend that the accessories, and hence the guns that use them, are illegitimate.

While a gunsmith can attach a muzzle brake to any gun, the politically incorrect rifles (like true military assault rifles) may have a threaded barrel for easy attachment of the brake. A muzzle brake reduces the gun's recoil and makes it easier to control. Another common accessory is the flash suppressor, which reduces the flash of light from a rifle shot. Reduced flash decreases shooter's blindness — the momentary blindness caused by the sudden flash of light. Additionally, reduced flash means that a person shooting at an attacker at night will less markedly reveal his own position. The value of concealed night fire in civil defense is obvious; and the value of reducing shooter's blindness is both civil and self-defense contexts is also clear.

Some of the politically incorrect rifles are configured to allow easy attachment of night sights. While it is generally illegal to hunt at night, it is always legal to defend home, person, and property at night.

Guns with folding stocks are sometimes singled out for harsh treatment. For example, the New Jersey legislature's "assault weapon" ban outlaws only models of the Ruger Mini-14 which have a folding stock. A folding stock makes a gun shorter, and hence more maneuverable in a confined setting such as a home, and hence harder for an attacker to take away.[62] Maneuverability and retainability are of little value in duck blinds and skeet ranges — the places where the gun prohibition lobby is currently willing to concede the legitimacy of gun use. Maneuverability and retainability can make the difference between life and death in a home under attack by a burglar, and it is in the home, not in duck blinds, where the Constitution more clearly guarantees the right to bear arms.

> ***"Some of the politically incorrect rifles are configured to allow easy attachment of night sights. While it is generally illegal to hunt at night, it is always legal to defend home, person, and property at night."***

Under legislation sponsored by Representative William Hughes in 1990, any gun which could accept a bayonet could be considered an illegal "assault weapon." Bayonets are obviously of no sporting utility, although they could be marginally useful in the personal and civil defense contexts that are at the core of the Second Amendment.[63] The major problem with the bayonet-ban, however, is that *any* rifle can accept a bayonet, thanks to after-market bayonet adapters. Moreover, it might be wondered how many, if any, crimes have ever been committed by criminals charging their victim with a bayonet.

4. The Guns are Especially Suitable for Resisting Gangs or Criminals under the Influence of Drugs.

The sum of all the features described above makes many of the politically incorrect semiautomatic rifles well-suited for defense against many types of crime. Other "assault weapons," too, may have special defensive utility. For example, the broadest definition of "assault weapon" encompasses a semiautomatic firearm with a detachable or large-capacity magazine. Gulf Coast pleasure boaters have been stocking up on such guns, including Uzi pistols. Why? Because drug smugglers sometimes pull alongside pleasure boats, murder all the passengers, use the boat to transport a load of drugs to the

mainland, and then abandon the boat. The drug runners do their killing with rapid-fire guns stolen from the military, or bought on the same international black market that supplies cocaine by the pound.

Boat owners who hope to survive an encounter with the smugglers must arm themselves with reliable weapons capable of firing accurately at several attackers in succession.

Anyone who reasonably fears attack by a gang could reasonably conclude that a semiautomatic rifle or pistol is the most effective device to protect his or her family from murder.

During the Los Angeles riots of May 1992, Korean merchants carrying "assault rifles" defend their families and their neighborhoods, during a period of civil chaos. Unfortunately, Police Chief Daryl Gates seemed to treat the Koreans who were using firearms to safeguard life and property as greater enemies than were the rioters who were killing and looting.

"During the Los Angeles riots of May 1992, Korean merchants carrying 'assault rifles' protected their families and their neighborhoods, during a period of civil chaos."

In rural areas, farmers who may confront a bear attacking their livestock also carry semiautomatics. Bears do not fall down after being shot just once. In urban areas, criminals under the influence of drugs are often not stopped by one shot, and sometimes not stopped by several shots. The capacity to keep firing at an attacker until the attacker stops may determine if the victim lives or dies.

That the guns to be prohibited may sometimes be the best firearms for self-defense does not matter to some advocates of prohibition. As New York City Mayor David Dinkins responded to self-defense arguments: "I'm telling you this nonsense that the Constitution entitles us to a weapon to defend ourselves is not an appropriate response to [gun prohibition] legislation."[64] Mayor Dinkins, whose 24 hour-a-day government bodyguards don tuxedos for the Mayor's black-tie evening social functions, need not concern himself with the "nonsense" of personally owning a gun for self-defense. Most Americans are not so fortunate.

G. Summary: The Difference between Guns and Pornography

Said Los Angeles County Sheriff Sherman Block, "Semiautomatic assault weapons in their present legal incarnations are not inherently more deadly than their more conventional hunting-style cousins."[65] The same idea was expressed when former Attorney General Richard Thornburgh told the Senate Judiciary Committee that the Committee's "assault weapon" legislation had nothing to do with the function of the banned guns, but instead seemed to focus on whether the gun had a black plastic stock. Current legislation that attempts to ban these improperly defined classes of "assault weapons" will not remove any unusually dangerous weapons from the public sphere.

How could legislatures expend so much energy on outlawing guns which, except for appearances, are no more dangerous than many other guns?

The answer is that most of the legislators who wrote and voted the gun bans have never actually studied the functional characteristics of "assault weapons." Gun bans are not drafted by technical experts who compare guns at a firing range. Instead, the California gun list (which is the source of the list in most other gun-banning jurisdictions) was derived by flipping through a picture book of guns, and picking out the guns which looked most menacing.[66] When one of the sponsors of the California gun ban was challenged about what an "assault weapon" really was, the Senator replied that he knew one when he saw one.

The Senator's reply echoed former Supreme Court Justice Potter Stewart's claim about pornography, "I know it when I see it." Pornography, however, *is* the picture; the social harm said to be caused from pornography depends on the nature of the picture and its effect on the viewer. Whether the picture is real or is a computer simulation is irrelevant.

In contrast, "assault weapons" are not pictures of guns. "Assault weapons" are guns. A picture cannot convey the gun's rate of fire or many other features that make a particular gun unique. Indeed, relying on pictures of guns rather than on functional tests of guns can lead to embarrassing results. California, for example, outlawed an "semiautomatic assault weapon" dubbed the "Encom CM-55" shotgun. In a picture book, the CM-55 shotgun appears particularly "military," since it has large pistol grip and a ventilated barrel. But despite appearances, the CM-55 is not an "assault weapon," or even a semiautomatic. The CM-55 is a single-shot weapon. Its ammunition capacity is one shot. After firing the one shot, the CM-55 must be manually reloaded. But because of the CM-55's threatening appearance, the gun became an illegal "assault weapon" in California.[67]

The problem with the CM-55 symbolizes the problem with the whole "assault weapon" issue. The guns which are banned are not functionally more dangerous than guns which are not banned. "Assault weapon" bans are based on pictures and appearances rather than reality.

Assault Rifles vs. "Assault Weapons," Part 2

1. Assault Rifles.

The two rifles pictured below fit the Defense Intelligence Agency Definition of assault rifle. The guns can fire automatically, and are used by military forces. The guns are not the subject of "assault weapon" legislation.

Soviet AK-47 assault rifle

U.S. Army M-16 assault rifle

2. "Assault Weapons"

The firearms below and on the next page are "assault weapons," as defined by legislation supported by the gun control lobbies. None of these firearms can fire automatically, and none of them is used by any military force anywhere in the world.

Crossman BB gun

Remington 7400 rifle

Norinco AK-56s rifle

Browning DA shotgun ("assault weapon" if folding stock attached)

"Assault Weapons" (continued)

M1 carbine

Ruger 10/22 rifle

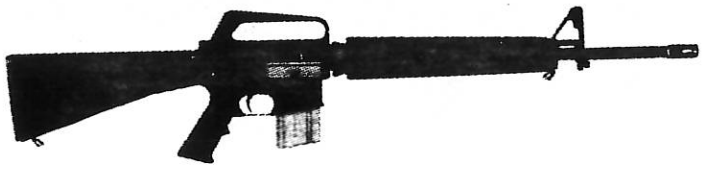
Heckler & Koch HK91 rifle

Ruger Mini-14 rifle

Smith & Wesson model 745

Colt .32 pistol (1903)

Mitchell Arms American Eagle P-'08



Colt AR-15A2 rifle

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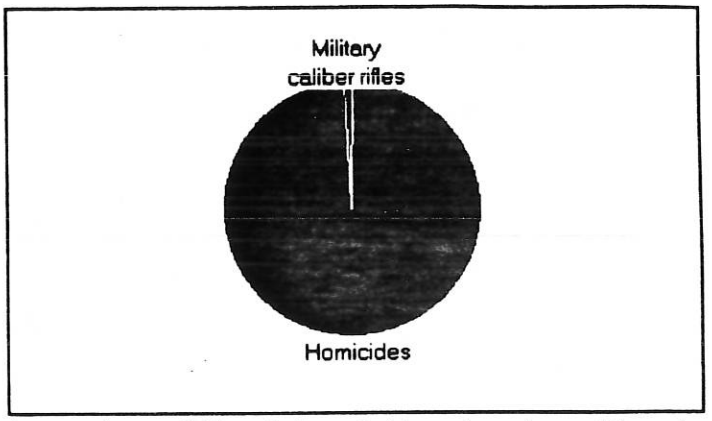
384

II. SO-CALLED "ASSAULT WEAPONS" ARE RARELY USED IN CRIME.

Senator DeConcini, in introducing S. 747, asserted that "assault weapons" were the "weapons of choice" of gangs and drug dealers, and suggested that his bill would reduce the "carnage" created by individuals engaged in the illegal drug trade.[68] Indeed, the stated purpose of S. 747 was to "reduce the number of deaths and injuries attributable to assault-type semi-automatic firearms abuse by drug traffickers and violent criminals."[69] With a similar flourish, the California legislature passed the "Roberti-Roos Assault Weapons Control Act of 1989," a more extensive ban than S. 747, after finding that rapid-fire assault weapons are "a threat to the health, safety, and security of all citizens of this state."[70]



Less than 1% of homicides involve rifles in military calibers.

While such attempts to address drug and crime problems are often well-meaning, little evidence exists that assault weapon statutes are necessary to protect the public from drug-related violence or other criminal activity. Semiautomatic firearms, though sometimes sinister in appearance, are simply not the "weapons of choice" of criminals and drug dealers.

A. "Assault Weapons" are used in only about 1% of Gun Crime

The following statistics summarize the findings of official governmental statistical surveys. Since different governments reported data for different years, or reported different types of data (e.g. homicides vs. gun seizures), the raw figures reported from each jurisdiction are sometimes not directly comparable.

Akron. Of the 689 guns seized by the Akron police in 1992, fewer than 1% were "assault weapons."[71] The 1% figure represents a decline from 1988, when about 2%of seized guns were "assault weapons."[72]

Baltimore County. During the first 9 months of 1990, out of 644 weapons logged in to the Baltimore County Police Property Room, only 2 were "assault weapons." Out of 305 murders in the City of Baltimore in 1990, only 7 (2.3%) involved rifles and

shotguns of any kind, much less politically incorrect semiautomatic rifles or shotguns.[73]

Bexar County, Texas (including San Antonio). From 1987 to 1992, "assault weapons" were used in 0.2% of homicides and 0.0% of suicides. From 1985 to 1992, they constituted 0.1% of guns seized by the police, according to Vincent DiMaio, the county's Chief Medical Examiner.[74]

California. In 1990, "assault weapons" comprised 1.3% of weapons involved in violent crime (homicide, aggravated assault, and armed robbery), according to a report prepared by the California Department of Justice, and based on data from police firearms laboratories throughout the state.[75]

Chicago. From 1985 through 1989, only one homicide was perpetrated with a military caliber rifle.[76] Of the 17,144 guns seized by the Chicago police in 1988, 175 were "military style weapons."[77]

Chicago suburbs. From 1980 to 1989, "assault weapons" totaled 1.6% of seized drug-related guns.[78]

Denver. A gun-by-gun examination of the firearms in Denver police custody as of March 1991 found 14 "assault weapons" (by Denver's broad definition) among the 1,752 crime guns. Only one of those guns had been used in a crime of violence (an aggravated assault).[79]

Florida. Florida Department of Law Enforcement *Uniform Crime Reports* for 1989 indicate that rifles of all types accounted for 2.6% of the weapons used in Florida homicides.[80] The Florida Assault Weapons Commission found that "assault weapons" were used in 17 of 7,500 gun crimes for the years 1986-1989.[81]

Los Angeles. Of the 4,000 or more guns seized by police during 1988, only three percent would fall under even an expansive definition of "assault weapon."[82]

Maryland. The experience of law enforcement officials in Maryland does not reveal a problem with so-called "assault weapons," according to the Carroll County State's Attorney."[83] In 1989-90, there was only one death involving a politically incorrect semiautomatic rifle in all 24 counties of the State of Maryland.[84]

Massachusetts. Of 161 fatal shootings in Massachusetts in 1988, 3 involved "semiautomatic assault rifles."[85] From 1985 to 1991, the guns were involved in 0.7% of all shootings.[86]

Miami. The Miami police seized 11,283 firearms from January 1, 1989 to September 15, 1991. Of these, 445 (3.3%) were on the broad list of "assault weapons" in the 1991 bill sponsored by U.S. Representatives Stark and Green.

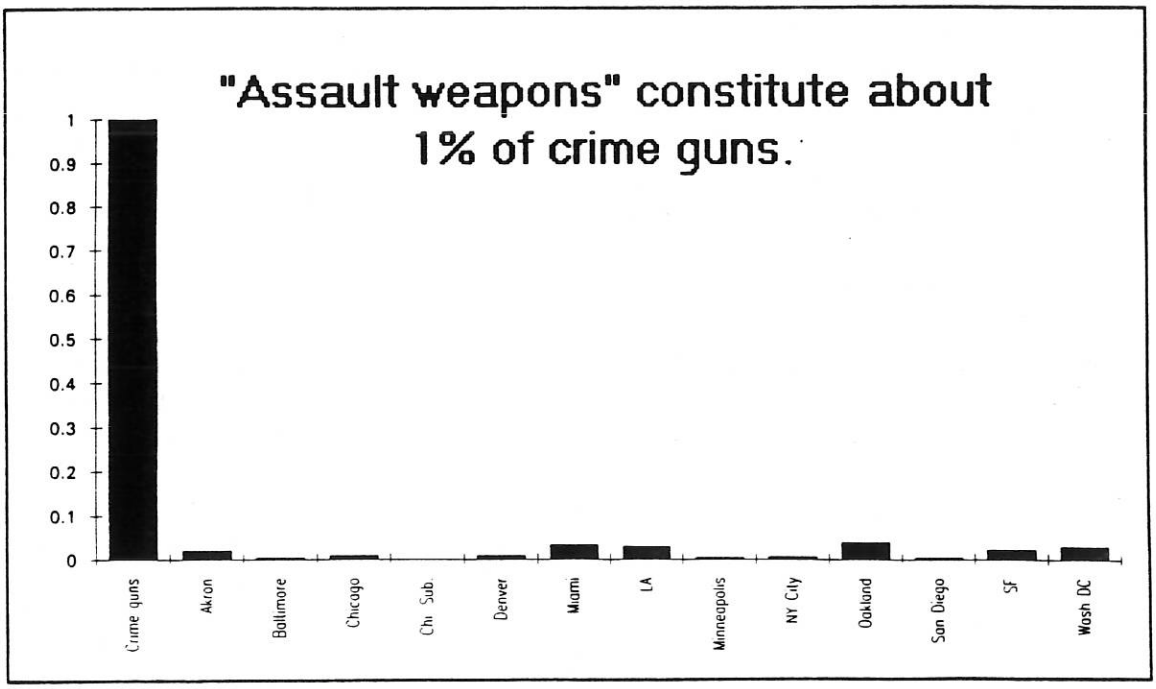
Minneapolis. From April 1, 1987 to April 1, 1989, the Minneapolis police property room received 2,200 firearms. Of the 2,200 guns, 8 were "semiautomatic assault rifles."[87]

New Jersey. According to the Deputy Chief Joseph Constance of the Trenton New Jersey Police Department, in 1989, there was not a single murder involving any rifle, much less a "semiautomatic assault rifle," in the State of New Jersey.[88] No person in New Jersey was killed with an "assault weapon" in 1988.[89]

New York City. Of 16,000 guns seized by New York City police in 1988, only 80 were "assault-type" rifles.[90]

Oakland. "Assault weapons" were 3.9% of guns seized in 1990,[91] and were used in 3.7% of homicides in 1991.[92]

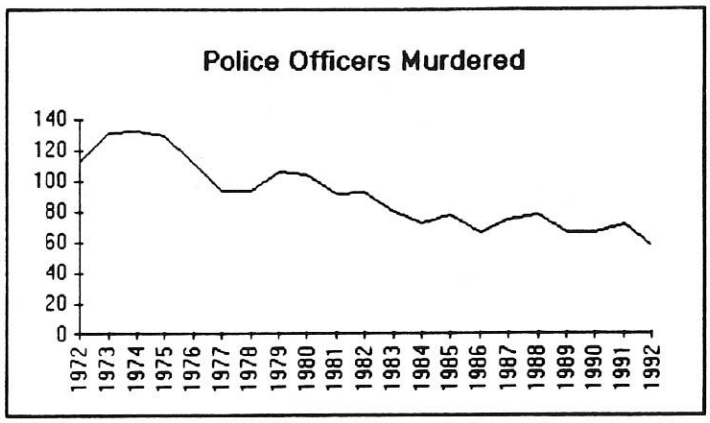
San Diego. Of the 3,000 firearms seized by the San Diego police in 1988-90, only 9 are "assault weapons" under the California definition.[93]



San Francisco. Only 2.2% of the firearms confiscated in 1988 were military-style semiautomatics.[94]

Washington, D.C. The *Washington Post* writes: "law enforcement officials say that the guns have not been a factor in the area's murder epidemic." "Assault weapons" were 3% of guns seized in 1990.[95]

National statistics. Less than four percent of all homicides in the United States involve rifles of any type. No more than 8/10th of 1% of homicides are perpetrated with rifles using military calibers. (And not all rifles using such calibers are usually considered "assault weapons.") Overall, the number of persons killed with rifles of any type in 1990 was lower than the number in any year in the 1980s.[96] Thus, Senator Joseph Biden's pronouncements that "assault weapons" are the cause of America's rising homicide rate are not well-founded.



While gun prohibitionists claim that police murders are at "record" levels, the numbers are actually the lowest in decades.

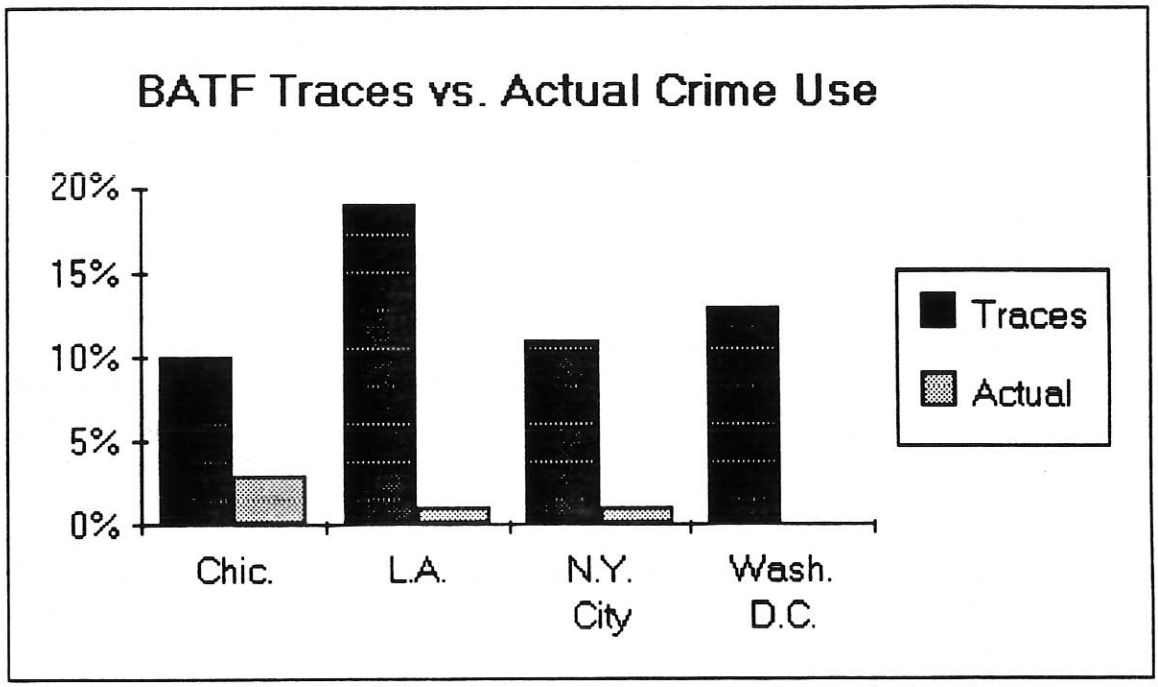
Although persons reading *Newsweek* might infer that police officers by the score are being murdered by "assault weapons," police officer deaths in the line of duty are at the lowest level in decades, as the graph details.[97] The percentage of police homicides perpetrated with "assault weapons" is about 3%, a figure that has stayed constant throughout the last decade. The *Journal of California Law Enforcement* wrote: *"It is interesting to note, in the current hysteria over semi-automatic and military look-alike weapons, that the most common weapon used to murder peace officers was that of the .38 Special and the .357 Magnum revolver."* The *Journal* found that "Calibers which correspond to military-style shoulder weapons" accounted for 8% of firearms used to murder police officers in California.[98]

And despite the impression conveyed by some television programs that shoot-outs between police and criminals involve steadily escalating amounts of fire-power, according to the New York City police department study of shootings at police in 1989, the average number of shots fired by at the police per encounter was 2.55, and this number represented a decline from previous years.[99]

B. The Shoddy Evidence used to Claim an "Epidemic" of "Assault Weapon" Crime

Against the mass of police statistics, the anti-gun lobbies have offered two types of evidence. The first is unsubstantiated claims from law enforcement administrators such as former Drug Enforcement Agency head John Lawn that "assault weapons" are the weapon of choice of drug dealers or other criminals. Unsupported by statistical evidence, and coming from administrators with a clear political agenda, the unsubstantiated claims cannot be considered more persuasive than actual police statistics.

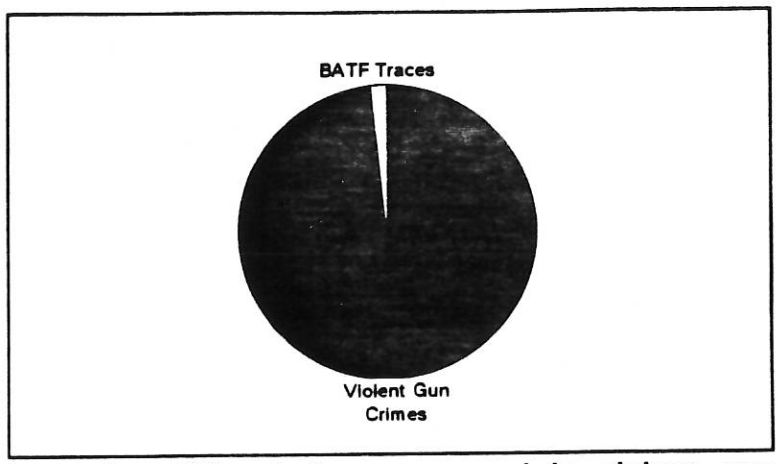
Gun prohibition advocates also cite a study done by two reporters from the Cox newspaper chain.[100] The reporters examined records of gun traces conducted by the Bureau of Alcohol, Tobacco and Firearms and found that for drug offenses, "assault weapons" were involved in approximately 12% of the traces. Although the Cox study is (if valid) further proof that "assault weapons" are hardly the "weapon of choice" of drug criminals, the study did lend some support to the prohibition forces, in that "assault weapons" (narrowly defined) are less than 12% of the firearms stock; if the guns amount to 12% of all drug guns, then the "assault weapons" would be disproportionately involved in drug crime.[101]



The small sample of BATF traces vastly over-estimated the frequency of "assault weapon" use in crime, according to police data.

Extrapolating from the trace data, the Cox Newspaper reporters asserted that "assault weapons" were used in 10% of all firearms crime, and that since "assault weapons" were (by Cox's estimate) 0.5% of the total gun supply, "assault weapons" are "20 times more likely to be used in a crime than a conventional firearm." While the figure has been widely repeated, and remains one of the enduring factoids of the gun control debate, it is not supported by the BATF trace data. Notably, the Bureau of Alcohol, Tobacco and Firearms is not persuaded with the Cox assertions. As the Bureau wrote: "[C]oncluding that assault weapons are used in 1 of 10 firearms related crimes is tenuous at best since our traces and/or the UCR [Uniform Crime Reports] may not truly be representative of all crimes."[102]

Whose position about the BATF traces is more likely correct: the Cox newspapers assertion that BATF traces prove that "assault weapons" are widely used in crime, or BATF's position that the traces do not prove any such thing?



Less than 2% of the guns used in violent gun crime are traced by the federal BATF.

Police reports from major cities support the BATF viewpoint. As detailed above, the police statistics for the major cities report far less prevalence of "assault weapons" than the Cox report claimed to find. For example, the percentage of "assault weapons" reported by Cox newspapers, based on the BATF traces, was 10% for Chicago, 19% for Los Angeles, 11% for New York City, and 13% for Washington. In each of those cities, police departments conducted complete counts of all guns which had been seized from criminals (not just the guns for which the police department requested a BATF trace). According to the actual police department counts of crime guns in each city, the percentage of assault weapons were only 3% for Chicago, 1% for Los Angeles, 1% for New York City, and 0% for Washington, D.C.[103] Thus, when the BATF trace sample was compared with the comprehensive police gun seizure data, *BATF traces over-stated the percentage of assault weapons used in crime by over 1,000% for Los Angeles, New York, and Washington.*

Cox's problem may be that BATF traces are not an accurate indicator of which

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guns are used in crime. In an average year, there are about 360,000 violent crimes committed with firearms. Of those 360,000 crimes, the federal Bureau of Alcohol, Tobacco and Firearms (BATF) is asked to trace about 5,600 crime guns (less than 2% of total crime guns).[104]

It was statistically likely that there would be a difference between the 2% of guns traced and crime guns as a whole. The 2% of guns selected for a trace request are not a random sample, but rather a select group chosen by local police departments. According to basic statistics theory, a non-random sample of 2% is very unlikely to accurately represent the larger whole. A non-random sample becomes statistically valid only when 60% to 70% of the total relevant population is sampled. But the BATF traces, of course, are a non-random sample of only 2% of gun crimes. As the Congressional Research Service explains:

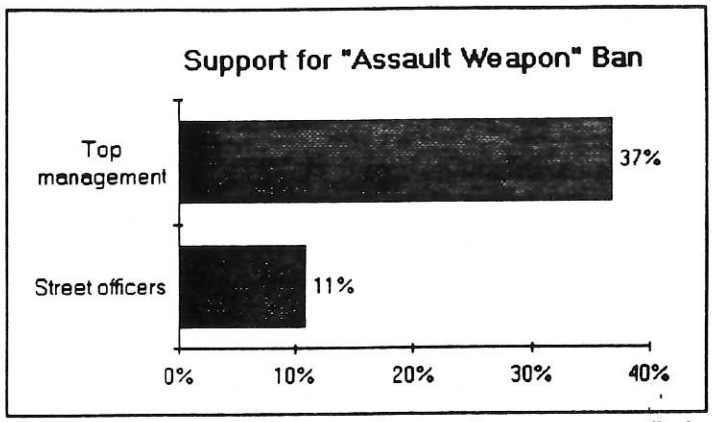
> the firearms selected for tracing do not constitute a random sample and cannot be considered representative of the larger universe of all firearms used by criminals, or any subset of that universe. As a result, data from the tracing system may not be appropriate for drawing inferences such as which makes or models of firearms are used for illicit purposes.[105]

In addition, there are a number of possible reasons why "assault weapons" would be more likely be selected for a trace request than other guns. Most "assault weapons" were manufactured relatively recently, and newer guns are easier to trace. Moreover, many "assault weapons" have an unusual appearance, which might pique curiosity (and hence a trace request) more than an old-fashioned, common crime gun such as Smith & Wesson .38 Special. The vast publicity surrounding "assault weapons" may also have increased police interest in the guns, and hence the likelihood that traces would be requested.[106]

C. Polls of Ordinary Police Officers Show Strong Opposition to Gun Prohibition

Although police statistics are the most reliable source of information about actual criminal use of "assault weapons," another potential source of information is police officers.

To a person who acquired all his information from publications like *Newsweek*, it would be clear that the police unanimously (and desperately) want "assault weapon" prohibition. And in fact, most major city police chiefs do support some kind of restrictive legislation. But even though many media consider the viewpoints of big-city chiefs to represent the viewpoint of all law enforcement, chiefs do not speak for rank-and-file officers any more than Lee Iacocca speaks for all auto workers.

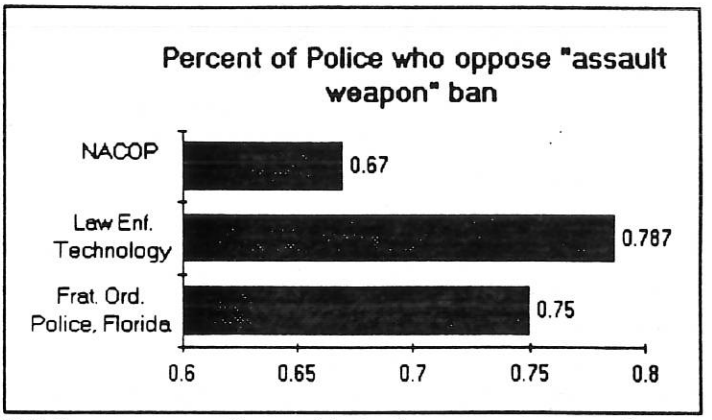


Support for outlawing "assault weapons" is greater among top police administrators than among the rank and file.

Police firearms examiners (who catalogue and study all crime guns seized by their department) tell a very different story from the politically-minded chiefs. All seven of the firearms examiners in Dade County (Miami), Florida have stated that the use of "assault weapons" in shootings in the county has been *declining* throughout the last decade.[107] According to George R. Wilson, the chief of the firearms section of the Washington, D.C., Metropolitan Police, drug dealers most commonly use sophisticated nine millimeter pistols.[108] Lieutenant Reginald Smith, a spokesman for the District's police department stated, that "assault weapons" were seen by his department "occasionally, but it's rare. The vast majority of weapons we see are revolvers or pistols."[109] Detective Jimmy L. Trahin of the Los Angeles Police Department's Firearms/Forensics Ballistics Unit testified before Congress that he did not consider "assault weapons" to be the weapons of choice of L.A. criminals.[110] (V.G. Gunises, whose SEY YES organization in South Central Los Angeles works to help former gang members, pointed out that most Los Angeles gang killings involve handguns.[111]) Lieutenant James Moran, the commander of the New York City Police Department Ballistics Unit, told reporters that NYPD experience was quite different from some press claims: "A rifle is not what is usually used by the criminals. They'll have handguns or sawed off shotguns. . . . These drug dealers are more inclined to use the 9 mm pistol than go to a cumbersome AK-47 rifle."[112]

One reason that the firearms examiners have not been heard in the prohibition debate is the some politicians have deliberately avoided asking them for their opinion. An internal memorandum from the California Attorney General's office revealed that as the Roberti-Roos "assault weapon" prohibition was being rushed through the California legislature, Senator Roberti and Attorney General Van de Kamp made a conscious decision: *"Information on assault weapons would not be sought from forensic laboratories as it was unlikely to support the theses on which the legislation would be based."*[113]

Some police chiefs have attempted to suppress dissenting voices in their department. For example, in San Jose, former police chief Joseph McNamara wrote fund-raising letters for Handgun Control, Inc., on official city stationary, and claimed to represent what "every police officer" believed. In 1989, one of McNamara's officers, a firearms instructor named Leroy Pyle, was subpoenaed by the California legislature and legally required to testify before that body. Officer Pyle did so, on his own time, and out of uniform. The next day, Pyle was suspended from duty, and McNamara attempted to fire him.[114] In Cincinnati, Lieutenant Harry Thomas has been harassed for speaking out (on his own time and out of uniform) against the gun prohibition policies favored by the police hierarchy.



While many police chiefs have supported gun prohibition, polls of other officers reveal strong opposition to banning "assault weapons."

To counter the statements of pro-rights rank-and-file officers such as the firearms examiners or Leroy Pyle, anti-gun lobbyists often point to the Fraternal Order of Police. The FOP is the largest rank-and-file police organization in the country; its head, Dewey Stokes, supports "assault weapon" control, and Stokes was recently re-elected to his position despite a challenge from a pro-gun officer.[115]

The anti-gun lobby's respect for the views of the FOP appears, however, to be a sometimes thing. In New Jersey, the state chapter of the FOP opposed Governor Florio's severe "assault weapon" ban (which even applied to BB guns). National FOP President Dewey Stokes backed up the New Jersey chapter, because the New Jersey ban was so extreme. Nevertheless, the anti-gun lobby pushed for (and won) the draconian

New Jersey ban, claiming all the while to be responding to the cries for help from law enforcement.

While the largest rank-and-file police organization, the FOP supports "assault weapon" control (at least for controls less severe than New Jersey's), the second-largest rank-and-file organization, the American Federation of Police, opposes such controls. Unfortunately, neither organization has polled its membership on the subject. (FOP head Stokes has been repeatedly asked to conduct a poll, and has refused.)

What limited polling of law enforcement has been done does not support the claims of Handgun Control, Inc., that all the police want "assault weapon" prohibition. The Florida chapter of the Fraternal Order of Police polled its membership, and found 75% opposed to an "assault weapon" ban. The most recent major poll of police opinion was carried out by *Law Enforcement Technology* magazine in March 1991. The results were reported in the July/August 1991 issue: "75% do not favor gun control legislation...with street officers opposing it by as much as 85%." In particular, 78.7% opposed a ban on "assault weapons." (About 37% of top management supported a ban, and about 11% of street officers.)[116]

Every spring the National Association of Chiefs of Police (NACOP) conducts a nationwide survey of command-rank police officers (not just top management or chiefs). The survey includes all command-rank officers, including those who do not belong to NACOP. Sixty-seven percent said that they believed a citizen should have the right to purchase any type of firearm for sport or self-defense.[117]

Neither the *Law Enforcement Technology* nor the NACOP surveys may be statistically precise, since the surveys were compiled from respondents who voluntarily mailed in a reply. But at the very least, the surveys indicate that the gun prohibition lobby's claim to have the near-unanimous support of the law enforcement community is false.

In sum, while "assault weapons" may appear menacing, local and national crime statistics do not indicate that the so-called "assault rifles" are a serious crime or drug problem.

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D. The Ineffectiveness and Counterproductive Results of "Assault Weapon" Legislation

Even if legislators are unalterably convinced that there is an "assault weapon" crisis, statutory prohibitions will not effectively limit criminal misuse of the guns. Many legislators will concede that gun prohibition will do very little to affect criminals; still, some legislators support prohibition based on the need "to do something," and hope that the legislation might have a small positive impact. To the contrary, "assault weapon" prohibition makes the streets more dangerous, by enriching organized crime, by disarming citizens, and by alienating citizens from the police.

1. Criminal Misuse Will Not Be Affected, except that Organized Crime will gain a new Source of Revenue

Testimony before Congress revealed that most "assault weapons" in the hands of criminals were obtained through illegal channels.[118] The testimony is consistent with the National Institute of Justice's research findings based on studies of felons in state prisons. The NIJ study, authored by sociologists James D. Wright and Peter Rossi found that only seven percent of "handgun predators" had obtained their most recent handgun from a gun store. (The figures included purchases by legal surrogates, rather than directly by the criminal.) Wright and Rossi, who had begun their research as firm proponents of gun control, concluded that no set of controls on retail purchases, and probably not even full scale gun prohibition, would reduce criminal use of guns. Wright and Rossi suggested that law-makers concerned about gun crime directly target the black market in criminal guns, and leave the legitimate retail market alone.[119] Not surprisingly, Wright believes that the consequences of current "assault weapon" legislation on street violence are likely to be ineffective.[120] He warns that gun controls aimed at ordinary citizens are less likely to reduce the pool of criminal guns than to provide organized crime with lucrative new business.[121]

The supply of semiautomatic weapons in the United States is already more than sufficient to supply the market for stolen guns. Even if by some miracle the government managed to confiscate all the legally and illegally-owned semiautomatics, criminal re-supply would be easy. A competent backyard mechanic can build a fully automatic rifle. (In a full automatic, bullets continue to fire as long as the trigger stays squeezed.) Indeed, Afghan peasants, using tools considerably inferior to those in the Sears catalogue, have built fully automatic rifles capable of firing the Soviet AK-47 cartridge.[122] Illegal home production of handguns is already common; a Bureau of Alcohol, Tobacco, and Firearms study found that one-fifth of the guns seized by the police in Washington, D.C., were homemade.[123] If organized crime can perform the complex laboratory chemistry necessary to produce cocaine, there is little reason to

believe that organized crime cannot perform the simpler mechanical task of manufacturing illegal guns of any description.

When asked about the effects of the recent Los Angeles ban on certain types of "assault weapons," Crips Four Trey gang member Rick (Li'l Loc 2) Hardson stated, "Well, a gun is illegal...So what?...Everything [gangs] do is illegal."[124] Social workers who work with gang members and some L.A. police officers also seem to doubt the effectiveness of the recent Los Angeles ban.[125] "Assault weapon" legislation benefits gangs, partly because it disarms their potential victims, but more importantly because it gives them another illegal commodity to deal.

Handgun prohibition has failed in Washington, D.C. and Chicago to affect criminal misuse of handguns. National prohibition of new machine guns in 1986 has failed to stem the availability of machine guns to criminals. Why will controls or bans on semiautomatics succeed when similar controls on handguns and automatics have failed? Given the current social context of firearms misuse, it seems unlikely that "assault weapon" legislation will curb criminal misuse of proscribed firearms or reduce homicide.[126] In California, the homicide rate rose from 10.4% in 1988 to 11.9% in 1990, after California had adopted an "assault weapon" ban and made long guns subject to a 15 day waiting period; the rise in the California homicide rate has been steeper than the rise in the rest of the United States. In Boston, the homicide rate rose 46% the year after the city enacted its "assault weapon" prohibition.

2. The Persecution and Alienation of Law-Abiding Citizens

The firearms at issue in the "assault weapon" debate will be those of the only group whose conduct will be affected — those of previously law abiding citizens.[127]

Perhaps no law in American history has been more universally ignored than "assault weapon" prohibitions. Legislative orders that "assault weapon" owners register or surrender their guns have achieved approximately 10% compliance in California. In other jurisdictions, such as Denver, Boston, and Cleveland, the compliance rate has been approximately 1%.

To the gun prohibition lobby and its allies, the disobedience is good reason for filling the jails with recalcitrant gun owners.

Not everyone agrees. As the late Stanford law professor John Kaplan observed, "When guns are outlawed, all those who have guns will be outlaws."[128] Prof. Kaplan explained that when a law criminalizes behavior that its practitioners do not believe improper, the new outlaws lose respect for society and the law.

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The "new criminals" created by the prohibition on guns which had been lawfully acquired will of course become more fearful of the police, and less likely to get involved in reporting crime or assisting the police. According to Chief Joseph Constance, of the Trenton, New Jersey Police Department, the New Jersey laws criminalizing possession of "assault weapons" were "mistakes" which "created a wall of suspicion between police and the citizens." Chief Constance successfully urged the Maryland legislature to avoid New Jersey's mistakes: "Please don't turn the citizens, your neighbors, into suspects, who understandably will become resentful and distrustful of law enforcement."[129]

> ***" Legislative orders that 'assault weapon' owners register or surrender their guns have achieved approximately 10% compliance in California. In other jurisdictions, such as Denver, Boston, and Cleveland, the compliance rate is approximately 1%."***

The law enforcement community already has its hands full catching the existing criminals. Is it a good social policy to create three million more by fiat? If a citizen decides to hold onto his $900 target rifle which the City Council has commanded him to surrender without compensation, will he continue to respect other laws enacted by the Council? Will he be more or less likely to call 911, "get involved," and take the risk that a police officer may stop by his home to ask questions? Are the potential public safety gains (if any) of "assault weapon" prohibition worth depriving law enforcement of the cooperation of three million or more previously law-abiding citizens and their families?

Even if legislators consider the smallest reduction in the number of "assault weapons" in civilian hands to be worth any cost, anti-gun legislation is counterproductive. Ironically, proposals to ban "assault weapons" have encouraged consumers to buy military-style semiautomatic firearms.[130] The press hype surrounding so-called "assault weapons" and the threat of future bans has generated a greater demand for the weapons as well as large price increases.[131] In fact, the number of some types of "assault weapons" in the hands of the public may have as much as doubled in the last five years, thanks to media hype.

Assault Rifles vs. "Assault Weapons," Part 3

When a criminal out on parole stole an automatic, registered, licensed machine gun and shot several people, gun control advocates claimed that the incident proved the need to license and register firearms which were not automatics.

Commerce City Beacon, April 12, 1989, Page 7

Gun ban is wrong reaction to Thompson tragedy

By: David Kopel

Sheriff Patrick Sullivan of Arapahoe County performed with extraordinary bravery during the March 23 hostage shootout with psycopath Eugene Thompson. But if Colorado's criminal justice authorities had done their jobs properly, Eugene Thompson would have been in jail long before the day he began his rape and murder spree.

On February 12, Littleton police caught Thompson and his accomplices perpetrating a residential burglary. The gang was caught in possession of several weapons, including a highly illegal sawed-off shot gun. After booking Thompson for the burglary, the police let him go.

Yet the young man was already on probation in Jefferson County for crimes committed in previous years, and because he had just flunked out of the Cenikor drug treatment program, his probation could have been immediately revoked.

The Littleton police apparently did inform the probation department about Thompson's arrest. But the system moved so slowly that a month after the Littleton arrest, Thompson was again arrested, this time for burglarizing 71 commercial storage lockers in Douglas County. Once more, the arrest was reported to probation. But the probation revocation hearing was still not scheduled until March 20 -- five weeks after Thompson was caught committing a burglary with the deadliest weapon in any criminal arsenal, a sawed-off shotgun. (Weapons expert Tony Lesce explains that a rifle or handgun, even a semi-automatic, fires only a single bullet, while a shotgun fires 9-12 pellets at once, each of which causes as much injury as one bullet).

If Eugene Thompson's probation had been revoked after he was caught at the first armed burglary, his victims Beverly and Janice Swartz would still be alive.

Colorado needs to fix its creaky justice system. If a criminal is already on probation for one felony, and is caught committing a violent felony with a deadly weapon, probation revocation should take place within 48 hours, not within a couple of months. Reforming our complex probation system will be difficult and expensive. But it is the necessary step we must take to keep the next Eugene Thompson off the streets.

However, instead of starting the hard work of probation reform, some metro police chiefs are trying to stampede the legislature and the city councils into simplistic and unworkable gun control schemes. The chiefs' arguments, however, are contradicted by the facts of the Eugene Thompson case.

For example, the chiefs want to restrict the ownership of semi-automatic firearms. Yet the murder weapon that Eugene Thompson used last month-- a MAC-11 -- was not even a semi-automatic. It was a full automatic, a gun that has been strictly regulated by federal law since 1934. Besides, Eugene Thompson stole the gun during one of his burglaries -- more proof that criminals will get guns regardless of what laws apply to honest citizens.

Sheriff Sullivan has attempted to evade this fact by arguing that Thompson, using a false I.D., could have walked into a gun store and bought the exact same gun over the counter. But that's wrong. Buying an automatic MAC-11 requires a federal background investigation, FBI fingerprinting, hundreds of dollars in fees and taxes, and a letter of permission from the local police chief. Buyers of full automatics are lucky if they get their gun in three months.

Sullivan wants this same cumbersome scheme to apply to people who already own semi-automatics. Yet if these severe controls couldn't stop Eugene Thompson from getting a full automatic, how could they prevent another criminal from getting a semi-automatic. The Arapahoe lawman also cites the large magazine capacity of the MAC-11 and notes that Thompson fired 27 shots during his crime spree without ever reloading. If Thompson has only a six-shot revolver, argues Sullivan, that would have been the end of it. This is technically correct, but only if you assume that Thompson was incapable of reloading a revolver, a task an experienced criminal can accomplish in about five seconds.

We are told that "weapons of war" have no place in our society, because they are not useful for hunting. Actually, some so called weapons of war, like the AR-15 or the Ruger M-14 Rancher, are used by hunters because of their ruggedness and reliability in adverse weather. The MAC-11, it's true, is of little use to hunters. But the Colorado Constitution doesn't protect a right to hunt anyway. What it guarantees is the right of every "person to keep and bear arms in defense of his home, person, or property."

Semi-automatics are often necessary for self-defense, as the leaders of the National Association of Chiefs of Police and the American Federation of Police recently acknowledged in testimony before the U.S. Senate. Semi-autos are particulary necessary, said the police leaders, when victims are being attacked by gangs of violent criminals -- like the robbery gang Eugene Thompson led.

Until we reform our justice system and get drug-crazed murderers like Eugene Thompson off the streets for good, some Coloradans will prudently want to have semi--automatic fire arms available for self-defense. That's Colorado common sense, and that's the Constitution.

David Kopel, a Denver lawyer and nationally published analyst on gun control, wrote this article for the Golden-based Independence Institute.

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III. THE MANUFACTURE OF MISINFORMATION, OR YOU *CAN* FOOL MOST OF THE PEOPLE MOST OF THE TIME

Almost everyone favors strict controls on "assault weapons." Most people think of "assault weapons" as automatics which are used by the military, rather than as guns that fire just one shot with one trigger squeeze. The effort to ban semiautomatics by calling them "assault weapons" is a fraudulent packaging campaign that would land its sponsors in jail if they were selling toothpaste instead of legislation.

A. Polls Reveal the Public Confusion of Ordinary Citizens about the Difference Between Automatics and Semiautomatics.

Proponents of "assault weapon" prohibition have justified current legislation by referring to the results of national polls.[132] Public opinion polls do seem to indicate that Americans favor restrictions on "assault weapons."[133] In the weeks following the Stockton schoolyard shootings, a Gallup poll of 1,000 adults showed that seventy-two percent believed that "assault weapons" should be outlawed.[134] In April 1989, an NBC/Wall Street Journal poll found that seventy-four percent of Americans believed that "the federal government should ban the sale assault rifles in the United States."[135]

The fact is, however, that Congress has *already* banned manufacture of assault rifles for the civilian market. Manufacture of genuine assault rifles (which by definition are automatic) have been illegal since 1986.

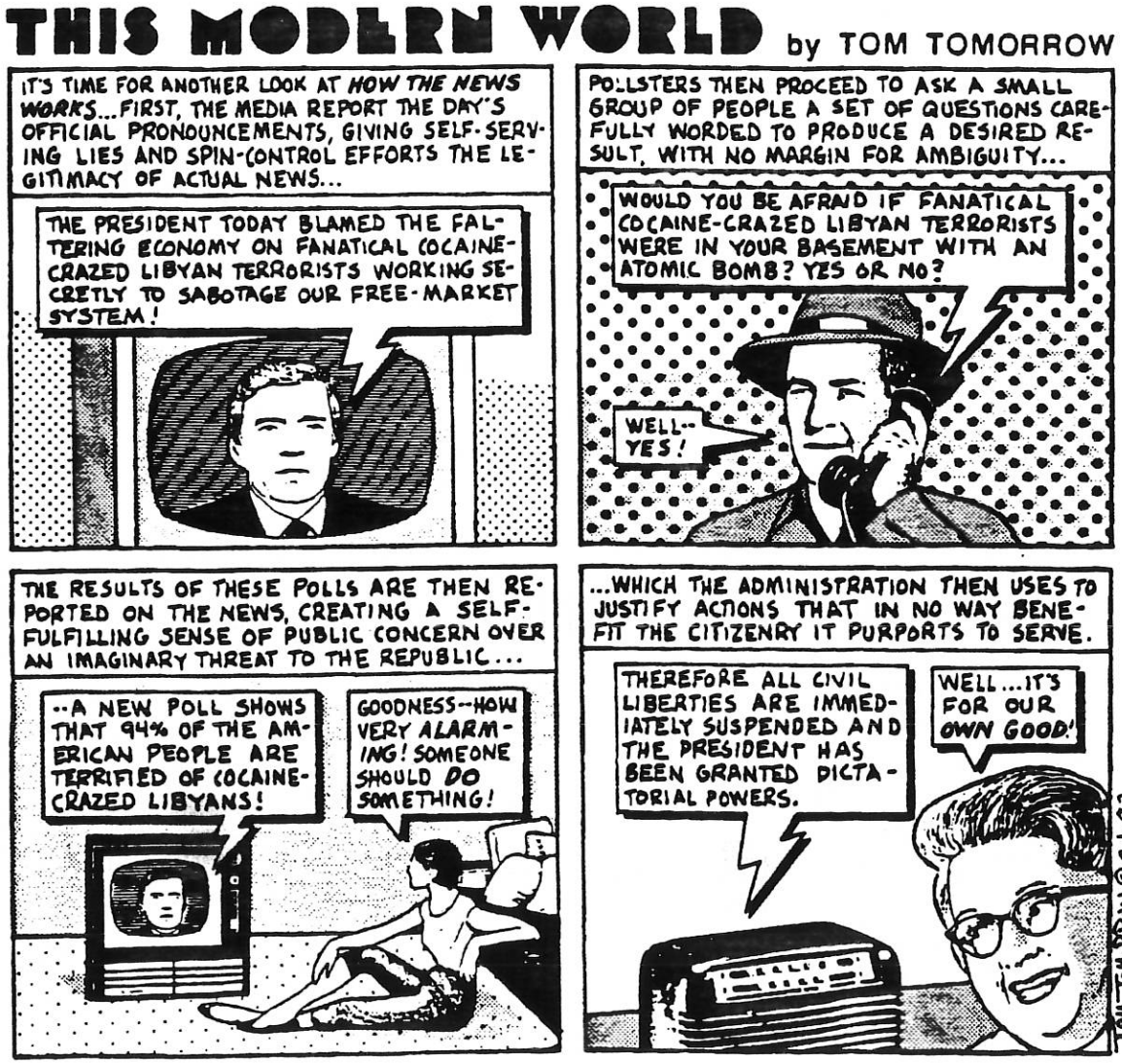
It seems entirely possible that many respondents thought that they were answering a question about rapid-fire military guns, which the semiautomatics are not. For example, Gallup asked about banning "assault guns, such as the AK-47."[136]

The Texas Poll was used by Handgun Control, Inc. to assert that even bedrock America wanted controls on "assault weapons." What the Texas poll actually showed was the pollsters' ignorance of the actual guns at issue in the "assault weapon" debate. The Texas Poll asked if sale of "assault weapons remains legal, should there be a mandatory seven-day waiting period to purchase a high-caliber, fast-firing assault rifle."[137] Ever since 1934, there has been not a "seven-day waiting period," but a six month transfer application period. Thus, the Texas Poll found 89% of Texans in favor of something far less strict than the federal law which had been in existence since 1934. Yet the Texas Poll was used to promote control on semiautomatics — which the question had not even asked about.

Further, the Texas Poll described the guns as "high caliber." Most people's

common sense would suggest that large calibers are more deadly, and some medical research supports this intuition.[138]

Thus, it would be expected that persons asked a question about controls on "high caliber" guns in particular would be more supportive than they might be about gun control in general. The results from the "high caliber" gun question were touted in legislatures to promote laws that did not regulate high caliber guns, but instead applied to intermediate caliber guns.[139] Almost all polls dealing with "assault weapons" suffer from similar flaws.



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B. Some Journalists Are Confused, while Others have Abandoned Neutral Reporting

Pollsters and respondents are not the only persons who have been confused. Many journalists seem lost too. *Time* magazine's February 6, 1989 cover story provides an excellent example of the problem. The story includes a chart entitled "Street Favorites: Assault Weapons Available Over the Counter."[140] The first entry is the "AK-47" and readers are told that the AK-47 is "Soviet designed, adopted by armed forces in many nations."[141] The technical description of the AK-47 is true, but the gun is not "available over the counter." It is subject to the rigorous controls on machine guns that have been in place since 1934.[142] If *Time* meant to refer to semiautomatics such as the AKS which look like the AK-47, those guns are not Soviet-designed, and have not been "adopted by armed forces in many nations" (or any nations) because they do not have fully-automatic capability.[143]

While *Time*'s early 1989 errors may have resulted from simple ignorance, the magazine in the summer of that year announced that the time had passed for neutral reporting of the gun control issue, and that *Time*'s mission was actively to promote gun control.[144]

Bill Peters, news correspondent for KABC-TV and KABC radio, Los Angeles, told the U.S. Senate: "Normally, this is a battle the media would stay out of — except to report the news. But this battle is too critical...[T]oday it is our [the media's] responsibility — using all the powerful means we have at our disposal...both to inform the public of the dangers to society posed by military assault rifles and to help build support for getting rid of them." Mr. Peters explained how his ABC-owned stations promoted gun prohibition: "Every time there is an incident using a semiautomatic assault rifle in the city of Los Angeles, we report it on the news and we ask people to write to the State legislature to ban these weapons."[145] As the police data discussed above (see page 28) demonstrated, "assault weapons" constitute only 1% of Los Angeles crime guns; "semi-automatic assault rifles" would amount to an even smaller percentage. But with stations such as KABC putting every crime with an "assault rifle" on television, while ignoring much more frequent types of gun crime — such as shootings with old-fashioned revolvers — Mr. Peters and KABC helped generate public hysteria, and created the false impression that "assault rifles" were commonly used in crime.[146]

Many other journalists, perhaps a little less frank than those at *Time* and KABC, have also made it their mission to agitate for gun control.

C. The Gun Prohibition Lobby Has Carefully Exploited and Created Public Confusion.

Not everyone is confused. In the fall of 1988, Josh Sugarmann, formerly of the National Coalition to Ban Handguns, and presently head of his own organization, the Violence Policy Center, authored a strategy memo for the gun prohibition movement. One of the most technically knowledgeable persons in the gun prohibition movement, Sugarmann had earlier earned distinction as the father of the "plastic gun" controversy.

In the 1988 memo, Sugarmann observed that the handgun-ban issue was considered old news by the media, and there was little realistic possibility of enacting handgun bans in the immediate future. In contrast, suggested Sugarmann, the "assault weapon" issue could allow the gun prohibition movement to open a massive attack on a new front. Sugarmann noted that public misunderstanding over the nature of semiautomatics would play directly into the hands of the gun prohibition movement. The strategy memo explained:

> The semiautomatic weapons' menacing looks, coupled with the public's confusion over fully automatic machine guns versus semiautomatic assault weapons — anything that looks like a machine gun is assumed to be a machine gun — can only increase that chance of public support for restrictions on these weapons.[147]

As several Senators noted, attaching the label "assault weapon" to certain semiautomatic firearms was a brilliant stroke.[148] Many members of Congress, like Rep. Gary Ackerman of New York, fell into this carefully laid trap. In a House debate, Ackerman actually asked whether hunters needed "a Mac 10 machine gun with 30 round banana clips of armor piercing bullets to bag a quail?"[149] Actually, armor piercing bullets for handguns are not available for sale to the public (and have not been for over 20 years), and the current "assault weapon" legislation has nothing to do with machineguns (which are already heavily regulated).

Before proponents of "assault weapon" prohibition conclude that public opinion supports their bill, they might ask themselves if this support is more than just confusion over what an "assault weapon" is. If the public is confused, much of the blame lies with journalists who conceive their duty as producing agitprop for the gun prohibition lobby.[150]

IV. THE MANY SPORTING USES FOR FIREARMS LABELED "ASSAULT WEAPONS" — AND WHY MOST SUCH USES ARE IRRELEVANT

Supporters of "assault weapon" legislation assert that they are not impinging on the right to bear arms because "assault weapons" are not "sporting guns." In fact, many "assault weapons" are well-suited for target shooting and other sports.

The fact that some "assault weapons" are related in design history to military firearms does not mean that they are unsuitable for field sports. After all, firearms styled after military weapons have been the favorites of sportsmen throughout United States history and semiautomatic rifles that look like military rifles are no exception.[151]

That most "assault weapons" are well-suited for sports, however, has little to do with why society should encourage their ownership.

A. Hunting

Proponents of laws against semiautomatics enjoy making the strawman argument that no-one requires a 30 round magazine to go big-game or bird hunting. The fact that 30 round magazines are not necessary for big game hunting, however, has nothing to do with whether guns that can use small or large magazines (e.g. most semiautomatics) are good for hunting.

It is also true that politically incorrect semiautomatic rifles are not as accurate at long distances as traditional bolt-action hunting guns. The longer barrel length and tighter chambering of the bolt action guns gives them greater long-ranger accuracy (especially for a single shot) than is enjoyed by most semiautomatics. (The semiautomatics' pistol grips and low recoil improve accuracy for repeated shots at shorter ranges, as discussed above at page 16; but the bolt action's advantages become more important for single shots at longer distances.)

" The fact that 30 round magazines are not useful for big game hunting, however, has nothing to do with whether guns that can use small or large magazines (e.g. most semiautomatics) are good for hunting."

One other disadvantage of "assault weapons" as big-game hunting guns is that they generally fire intermediate-sized cartridges, and not the large cartridges necessary to kill large animals such as

moose or elk from far away. Thus, it is not surprising that most hunting guides (who tend to specialize in big game) do not place semiautomatic "assault weapons" at the top of their recommendation list for hunting rifles.

Nevertheless, many hunters do prefer to use a Kalashnikov or Colt AR-15 Sporter rifle.

First of all, the intermediate caliber cartridge used in most "assault weapons" is adequate for game no larger than deer at reasonable distances.[152] Significantly, the ruggedness and durability of "assault weapons" makes them well-suited for the rough outdoor conditions of hunting.[153]

Further, the low-recoil semiautomatic mechanism and pistol grip make an accurate second shot easier. That is why a Finnish company has designed a Kalashnikov especially for hunting, the Valmet Hunter, which is especially prized for its quick follow-up shots. Similarly, Rugers and Colts are particularly popular as ranch or varmint-control rifles.[154] The destructive power of a single cartridge is low enough for the guns to be usable on rodents, and the greater accuracy of the follow-up shots makes the guns more effective.

B. Competitive Target Shooting

Some politically incorrect rifles, such as the Colt AR-15 Sporter and the HK-91 are among the best-built rifles that a citizen can purchase. With sterling accuracy (at shorter distances), they are valuable target rifles.[155]

For competitive target-shooting, the military design background of some "assault weapons" makes them the most preferred of all firearms. The apex of the world of target shooting is the national target matches held every year Camp Perry, Ohio, under the supervision of the federal government's Civilian Marksmanship Program.[156]

In fact, the Colt AR-15 Sporter and its ancestors, loaded with 20 or 30 round magazines, have long been *required*

> ***"Before the 'assault weapon' controversy erupted, the firearms experts with the California Department of Justice had privately warned that 'assault weapon' legislation would devastate the world of target competition."***

weapons in some Civilian Marksmanship competitions.[157] Most of the other politically incorrect rifles outlawed by the gun bans are usable in other Civilian Marksmanship events, and are highly prized competition target guns.[158] Before the "assault weapon" controversy erupted, the firearms experts with the California Department of Justice had privately warned that "assault weapon" legislation would devastate the world of target competition.[159]

That the federal government has for many decades encouraged civilians to purchase and practice with firearms like the Colt indicates that the assertions of gun prohibitionists that such firearms have "no legitimate use" is false. Few gun uses could more legitimate that government-sponsored target competition.

C. The Irrelevance of Sports

Persons who claim that the Second Amendment protects only "sporting guns" implicitly assert that protection of recreational hunting and target shooting was seen by the authors of the Bill of Rights as some particularly important activity to a free society. The framers, as the "sporting gun" theory goes, apparently intended to exalt sports equipment used in recreational hunting to a level of protection not enjoyed by equipment for any other sport. It is true that the framers did see hunting as an activity better suited for building good character than other sports.[160] Nevertheless, it is difficult to believe that the Framers would follow an amendment guaranteeing speech, assembly, and the free exercise of religion with an amendment protecting sporting goods.

> ***"Only if all killing were wrong would a gun made for killing be illegitimate."***

Moreover, to the extent that there is a real conflict between public safety and sports equipment, public safety should win. Except for shooting in Director of Civilian Marksmanship programs, which have been created to enhance civil preparedness, recreational use of "assault weapons" does not directly enhance public safety.[161] Hence, if "assault weapons" posed a substantial threat to public safety, control would be in order because protecting many people from death is more important than enjoying sports. (As the government statistics discussed in the previous section indicate, "assault weapons" are rarely used in crime.)

Reflecting a sports-based theory of gun ownership, "assault weapon" prohibitionists claim that these guns have no purpose except to kill. As a factual matter, the claims are incorrect. The guns, as detailed in this section, are frequently used for

sports. But even if the gun prohibitionists' claim were correct, it would do nothing to militate for a ban on the guns.

Only if all killing were wrong would a gun made for killing be illegitimate.[162] American law clearly guarantees the natural right to self-defense, including the right to take an aggressor's life if necessary. Semiautomatics do not deserve Constitutional protection because they are sometimes used for hunting. Rather, they deserve protection because they are militia guns — because they are made for personal and national defense, as the next section elaborates.

V. "ASSAULT WEAPON" LEGISLATION IS UNCONSTITUTIONAL

The Second Amendment of the United States Constitution states: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."[163]

Supporters of "assault weapon" prohibition argue that the Second Amendment only grants to states a right to maintain a militia. Under this theory, the "right of the people to keep and bear arms" is infringed by laws which disarm states, but not laws which disarm people. The "right of the people" is said to be a "collective right," which (like "collective property" in Communist nations) can never be possessed by any individual because it belongs to everyone at once.

In contrast, the theory which has been accepted six times by the Supreme Court,[164] is compelled by the text of the Second Amendment itself,[165] is held by approximately 89% of the American people,[166] is supported by the large majority of scholarship,[167] and which comports with original intent[168] is the individual rights theory. Under this theory, the "right of the people" to bear arms recognizes a right of individual people to own guns.[169] The discussion below attempts to show how the framers' objective of protecting the states' "well-regulated militias" was carried out by the recognition of "the right of the people to keep and bear arms."

> ***"The history and evolution of the Second Amendment clearly shows that weapons of war — and not sports equipment — are at the heart of the right to bear arms."***

This Issue Paper has thus far presented two contrasting views of semiautomatic "assault weapons." This Paper has argued that so-called "assault weapons" are no more deadly or dangerous than other semiautomatics and other guns. If this Paper's contention is correct, then an "assault weapon" ban would violate the right to bear arms because it would ban certain guns which are not logically different from other guns. The ban would also violate the equal protection clause of the Fourteenth Amendment, which requires that legislative classifications be rational, and based on real differences, rather than on hysteria or misinformation.

In contrast, gun prohibition advocates suggest that the semiautomatics which they call "assault weapons" are true "weapons of war" and not "sporting weapons." If the prohibitionists' theory is correct, then "assault weapon" prohibition is again

unconstitutional, for the historical and judicial record shows that the core aim of the Second Amendment was to ensure that weapons of war would be in the hands of ordinary American citizens. The history and evolution of the Second Amendment clearly shows that weapons of war — and not sports equipment — are at the heart of the right to bear arms.

A. The History of the Second Amendment Reveals an Intent to Protect Private Ownership of Arms for Resistance to Tyranny and Other Anti-Personnel Uses

In 1982, the Senate Subcommittee on the Constitution evaluated the historical record, and unanimously concluded that the Second Amendment recognizes an individual right to bear arms. The Subcommittee noted that when James Madison drafted the Second Amendment, he "did not write upon a blank tablet."[170] The British history that predated the Bill of Rights affirmed not only an individual right, but also a duty, to own firearms.[171] Britain's great expositor of the common law, Sir William Blackstone, called the right to bear arms the "fifth auxiliary right of the subject," which would allow citizens to vindicate all the other rights.[172] He explained the right as an instrument to permit violent revolution: "in cases of national oppression, the nation has very justifiably risen as one man, to vindicate the original contract subsisting between the king and his people."[173] The duties for which the British right to bear arms was intended — national defense against unjust rulers, national defense against foreign governments, and local defense against crime — obviously required the use of anti-personnel weapons, and not sports equipment.

1. The Colonial Background

The English colonies in America quickly established an individual right and duty to bear arms that paralleled the developments in England.[174] In 1658, the Virginia House of Burgesses required every householder to have a functioning firearm.[175] The legislatures in Virginia and the other colonies did not require persons to have guns so that those persons could enjoy a rich sporting life. Instead, the purpose was to have a citizenry which could be called to militia duty to fight in numerous Indian wars.[176] Additionally, in both Great Britain and America, citizens were required to participate in anti-crime patrols such as night watch and to obey the commands of sheriffs to pursue fleeing felons. Lastly, as a practical matter, citizens had to possess arms for their own personal protection from Indians or criminals, since public safety agencies were few and far between.

The weapons that were most useful for these colonial purposes were weapons of war, and not guns designed for sports (although in practice there was no distinction, and almost all guns served multiple purposes).

2. The American Revolution

Colonial recognition of the right and duty to bear arms helped precipitate the break with England. When the number of British soldiers increased in the colonies, colonists asserted their right to own firearms in order to defend their liberties. As the *New York Journal Supplement* proclaimed in 1769, "It is a natural right which the people have reserved for themselves, confirmed by their Bill of Rights, to keep arms for their own defense."

The outbreak of hostilities came at Lexington and Concord, when the British commander from Boston was informed that the Americans owned cannon, and the British marched on Concord to seize the American armory there.[177] (It was also a dispute over weapons of war — and not sporting guns — that sparked the Texan Revolution against Mexico. When Mexican dictator Santa Ana's forces attempted to confiscate a small cannon from settlers in Gonzales, the settlers raised a flag that said "Come and Take It," and the Texas Revolution began.[178])

> ***"The guns with which the American militia helped win the American Revolution were weapons of war. Particularly effective was the long-range Kentucky Rifle, which enabled American sharpshooters to snipe at British officers."***

The Revolutionary War strengthened the colonists' beliefs about the importance of an individual right to bear arms.[179] The militia arose wherever the British deployed. Thus, the American side developed a tactical mobility to match the British mobility at sea. As historian Daniel Boorstin put it, "The American center was everywhere and nowhere — in each man himself."[180] With every American a militiaman, the British could triumph only by occupying the entire United States, and that task was far beyond their manpower resources. The Americans never really defeated the British; the war could have continued long past Yorktown. After seven years of winning most of the battles but getting no closer to winning the war, the British simply gave up.

The guns with which the American militia helped win the American Revolution

were weapons of war. Particularly effective was the long-range Kentucky Rifle, which enabled American sharpshooters to snipe at British officers.

3. Ratification of the Constitution

After the successful revolution, the maintenance of a citizen militia was a primary concern of the framers of the Constitution.[181] General Washington's Inspector General, Baron Von Steuben, proposed a "select militia" of 21,000 that would be given government issue arms and special government training.[182] When the proposed Constitution was presented for debate, anti-Federalists complained that it would allow for the withering of the citizen militia in favor of the virtual standing army of a "select militia."[183] Richard Henry Lee, in his widely-read *Letters from the Federal Farmer to the Republican,* warned ratifiers that a select militia had the same potential to deprive civil liberties as a standing army, for if "one fifth or one eighth part of the people capable of bearing arms should be made into a select militia," the select militia would rule over the "defenseless" rest of the population. Therefore, wrote Lee, "the Constitution ought to secure a genuine, and guard against a select militia...to preserve liberty, it is essential that the whole body of the people always possess arms and be taught alike, especially when young, how to use them."[184]

Federalists promoting the new Constitution allayed fears of select militias and Congress' broad powers to "raise armies" under Article I, section 8. They reasoned that Americans would have nothing to fear from federal power since American citizens were universally armed.[185] Noah Webster, in the first major Federalist pamphlet, attempted to calm Pennsylvania anti-Federalists:

> Before a standing army can rule, the people must be disarmed; as they are in almost every kingdom in Europe. The supreme power in America cannot enforce unjust laws by the sword; because the whole body of the people are armed, and constitute a force superior to any bands of regular troops that can be, on any pretence, raised in the United States.[186]

The *Federalist Papers* looked to the state militias, comprised of the armed populace, as the ultimate check on government. As James Madison put it, "the ultimate authority...resides in the people alone." Madison predicted that no federal government could become tyrannical, because if it did, there would be "plans of resistance" and an "appeal to trial by force." A federal standing army would surely lose that appeal, because it "would be opposed by a militia amounting to near half a million citizens with arms in their hands." Exalting "the advantage of being armed, which the Americans possess over almost every other nation," Madison contrasted the American government with the European dictatorships, which "are afraid to trust the people with arms."[187]

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Alexander Hamilton explained that "If the representatives of the people betray their constituents, there is then no recourse left but in the exertion of that original right of self-defense which is paramount to all positive forms of government..."[188] Hamilton reassured skeptical anti-Federalists that no standing army, however large, could oppress the people, for the federal soldiers would be opposed by state militias consisting of "a large body of citizens, little if at all inferior to them in discipline and the use of arms, who stand ready to defend their rights and those of their fellow citizens."[189]

James Madison's friend Tench Coxe offered similar assurances that no federal government could overwhelm an armed people:

> The powers of the sword are in the hands of the yeomanry of America from sixteen to sixty. The militia of these free commonwealths, entitled and accustomed to their arms, when compared with any possible army, must be tremendous and irresistible. Who are the militia? Are they not ourselves...Congress have no power to disarm the militia. Their swords, and every other terrible implement of the soldier, are the birth-right of an American...[T]he unlimited power of the sword is not in the hands of either the federal or state governments, but, where I trust in God it will ever remain, in the hands of the people.[190]

Nevertheless, many delegates to the state conventions that ratified the Constitution expressed discontent over the Federalists' assurances about existing protection of the right to possess arms.[191] New Hampshire provided the key ninth vote that ratified the Constitution only after receiving assurance that a Bill of Rights would be drafted with a protection for the right of individuals to own firearms.[192] The New Hampshire delegates suggested that the new Bill of Rights provision be worded as follows: "Congress shall never disarm any citizen unless such as are or have been in Actual Rebellion."[193]

At the Virginia convention, Patrick Henry had stated, "Guard with jealous attention the public liberty. Suspect every one who approaches that jewel. Unfortunately, nothing will preserve it but downright force. Whenever you give up that force, you are ruined...The great object is that every man be armed...Everyone who is able may have a gun."[194] During the ratification process five state conventions demanded protection of the right of citizens to bear arms, more than demanded protection of free speech.[195] The sentiment of the Patrick Henry and the other state convention delegates was not fear that the federal government might regulate sports equipment too severely.

4. The Second Amendment

The first Congress delegated the duty of writing a Bill of Rights to James

Madison. Madison obtained copies of state proposals and attempted to combine them in a succinct passage that all state delegates would accept.[196] The original intent of the Second Amendment remained consistent with the intentions of the states that demanded it.

Madison's use of the phrase "well-regulated militia" was not a code word for the National Guard (which did not exist). The phrase was not esoteric, but had a commonly-accepted meaning. Before independence was even declared, Massachusetts patriot Josiah Quincy had referred to "a well-regulated militia composed of the freeholder, citizen and husbandman, who take up their arms to preserve their property as individuals, and their rights as freemen."[197] "Who are the Militia?" asked George Mason of Virginia. He answered his own question: "They consist now of the whole people."[198] The same Congress that passed the Bill of Rights, including the Second Amendment and its militia language, also passed the Militia Act of 1792. That act enrolled all able-bodied white males in the militia and required them to own arms.

Although the requirement to arm no longer exists, the definition of the militia has stayed the same; section 311(a) of title 10 of the United States Code declares, "The militia of the United States consists of all able-bodied males at least 17 years of age and ...under 45 years of age." The next section of the code distinguishes the organized militia (the National Guard) from the "unorganized militia." The modern federal National Guard was specifically raised under Congress's power to "raise and support armies," not its power to "Provide for organizing, arming and disciplining the Militia."[199]

> ***" The weapons that would be most suited to overthrow a dictatorial federal government would, of course, be weapons of war, and not sports equipment."***

James Madison wrote the Second Amendment in order to prevent the right to bear arms from vesting only in "select militias," including modern state national guard units. The Second Amendment was written to secure an individual right to bear arms that provided an ultimate check on government and any of its "select" militias.[200]

The core of the Second Amendment therefore was that state militias — comprised of individual citizens bringing their own guns to duty — would have the power to overthrow a tyrannical federal government and its standing army. The weapons that would be most suited to overthrow a dictatorial federal government would, of course, be weapons of war, and not sports equipment.

To persons accustomed to think of the "right to bear arms" as a privilege to own sporting goods, it must seem incredible that the authors of the Second Amendment meant to ensure that the American people would always own weapons of war. But that is precisely what the historical record demonstrates.

This original intent of the Second Amendment has nothing to do with sports, and only a little to do with personal defense against criminals. The text of the Second Amendment itself highlights the implausibility of the claim that the Amendment refers to sporting equipment rather than to devices made for injuring or killing other persons. "Arms," says *Webster's Dictionary* are "a means (as a weapon) of offense or defense; *esp* FIREARM."[201] Sporting equipment that is not a means of offense or defense is not within the category of "arms," and hence cannot be what the "right to bear arms" refers to. The Second Amendment guarantees a popular militia in order to provide for "the security of a free state" — ensuring that there will always be a force capable of overthrowing a domestic tyrant, or of resisting an invasion by a foreign one. The weapons best suited for this purpose are not weapons particularly suited for duck hunting; the weapons at the heart of the Second Amendment are weapons of war.

B. The Supreme Court has Ruled that Military-Type Guns are the Arms which are Covered by the Second Amendment.

Under some theories of Constitutional interpretation, the language, common understanding, and intent of Constitutional provisions may be ignored by courts based on a judge's personal determinations of appropriate social policy. For example, when a lower federal court upheld Morton Grove's handgun prohibition, the court declared that the intent of the Second Amendment was "irrelevant."[202]

The United States Supreme Court, however, has never claimed that original intent is "irrelevant," and the thrust of the most recent Supreme Court jurisprudence is to place the greatest emphasis upon the people's intent and the text of the Constitution. The leading (and only) Supreme Court case dealing with which weapons are protected by the Second Amendment falls squarely within the tradition of textual analysis and original intent.

In the 1939 case *United States* v. *Miller*,[203] Jack Miller was charged under section 11 of the 1934 "National Firearms Act" with the unlawful transportation of an unregistered "sawed-off" shotgun in interstate commerce.[204] The federal district court quashed the indictment on the grounds that section 11 of the National Firearms Act violated the Second Amendment.[205] The prosecutor appealed directly to the Supreme

Court, and the Court produced its most thorough analysis of the meaning of the Second Amendment.[206] Instead of defining the militia as a select group such as the national guard, the Court unanimously defined "militia" as "all males physically able of acting in concert for the common defense."[207] The Court went on to note that these militiamen were expected "to appear bearing arms supplied by themselves."[208]

Even though the Court recognized an individual right to bear arms, the justices still had to decide what types of "arms" individuals had a right to bear. The Court suggested that militia arms would consist of "the kind in common use at the time"[209] that had "some reasonable relationship to the preservation or efficiency of a well-regulated militia."[210] Since the defendant had not briefed this issue (he had disappeared while free pending appeal), the Court was presented with no evidence that a sawed-off shotgun had any value to the militia. The Court wrote:

> In the absence of any evidence tending to show that possession or use of a "shotgun having a barrel of less than eighteen inches in length" at this time has some reasonable relationship to the preservation or efficiency of a well-regulated militia, we cannot say that the second amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.[211]

Although the Court held that this particular case did not present a violation of the Second Amendment, the unanimous opinion recognized an individual right to bear arms which were "part of the ordinary military equipment" or which "could contribute to the common defense" — weapons of war. For the anti-gun lobbies to mouth their epithet "weapons of war" is to concede that semiautomatics are protected arms under the Supreme Court's *Miller* test.

C. State and Local Gun Prohibition May Violate the Fourteenth Amendment.

Concluding that the Second Amendment protects the right of American people to own arms which have a reasonable relationship to the maintenance of a well-regulated militia — that is, weapons of war — does not prove that all "assault weapon" prohibitions are necessarily unconstitutional. The Second Amendment, like the rest of the Bill of Rights, was historically seen as only a limit on federal power, and not a

restraint on state or local governments. Thus, the Second Amendment, standing alone, would only prevent federal "assault weapon" prohibitions or other infringement.

The individual rights recognized in the Bill of Rights have only become enforceable against state and local governments through the 14th Amendment, which forbids states (and localities, which are subdivisions of states) to violate fundamental human rights.

In the 1876 case *United States* v. *Cruikshank*, the Supreme Court ruled the right peaceably to assemble and the right to bear arms were not protected against state interference by the Fourteenth Amendment's requirement that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."[212] The Court reasoned that the clause only applied to "privileges or immunities" that arose from citizenship in the United States (such as the right to interstate travel). The Court said that peaceable assembly and bearing arms were not rights which arose as a result of American citizenship; rather, they were fundamental human rights which were found "wherever civilization exists." The First and Second Amendments, the Court said, had not granted a right to assemble or a right to bear arms, but had merely recognized the existence of those rights.[213]

When California's "assault weapon" prohibition was challenged as violating the Second Amendment, the federal trial court, relying on *Cruikshank*, ruled that the Second Amendment could not be violated by state-level gun control, since the Second Amendment only restricts the federal government.[214] The decision was later upheld by the 9th Circuit Court of Appeals.[215]

While *Cruikshank* has never been formally overruled, the California federal courts' reliance on it was dubious. *Cruikshank* dates from an era when the Supreme Court refused to hold any of the freedoms recognized in the Bill of Rights enforceable against the states. In the 20th century, the Supreme Court, while never explicitly overruling the 19th century "privileges and immunities" decisions, has relied on another provision of the 14th Amendment to make the Bill of Rights enforceable against the states.

The 14th Amendment forbids any state to deprive a person of "life, liberty, or property without due process of law." The Court has interpreted this phrase to mean that there can be no state deprivations of life, liberty, or property which violate certain rights recognized by the Bill of Rights. Thus, in *DeJonge* v. *Oregon*, the Court held that the First Amendment right to peaceably assemble was made applicable against the states by the Fourteenth Amendment's "due process" clause. In *Moore* v. *East Cleveland*, the Court stated, in dicta, that the right to bear arms was also enforceable against the states

via the 14th Amendment's due process clause.[216] *Moore* v. *East Cleveland* more closely followed the intent of the framers of the 14th Amendment than did the *Cruikshank* case, since the historical record shows that the right to bear arms was one of the rights which the framers were most intent on making applicable against state governments.[217]

A distinct Constitutional provision, not discussed by the *Fresno* court, provides an additional reason to doubt the Constitutionality of state (or local) gun prohibitions. Article I, section 8 of the Constitution grants the Congress the authority to call forth the militia into national service. Hence, state gun prohibitions deprive the federal government of its ability to summon a militia. In *Presser v. Illinois*,[218] the Supreme Court stated:

> It is undoubtedly true that all citizens capable of bearing arms constitute the reserved military force or reserve militia of the United States as well as of the states, and in view of this prerogative of the general government, as well as of its general powers, the States cannot, even laying the constitutional provision in question [the Second Amendment] out of view, prohibit the people from keeping and bearing arms . . . .[219]

Because the *Fresno* courts ignored the clear language of *Presser*, and did not follow the modern Supreme Court's approach to the 14th Amendment, the case does not appear to be particularly well-reasoned. Whatever the decision's merits, the case is relevant only in the handful of states, including California, which do not have a right to bear arms in their own state Constitution, and which must rely solely on the Second Amendment for protection of citizens' right to bear arms.

D. State Court Decisions Also Suggest that Semiautomatics are within the Scope of the Right to Bear Arms

To the extent that state Supreme Courts have confronted the issue of what types of arms are protected by the state Constitutional right to bear arms, the decisions militate against the Constitutionality of "assault weapon" prohibition.

In 1846, the Georgia Supreme Court found that, even in the absence of an explicit right to bear arms in the state Constitution, the Georgia legislature had no power to interfere with the right of Georgia citizens to "keep and bear arms of every description."[220] In 1990, a Georgia court struck down the city of Atlanta's ban on "assault weapons," on the grounds that the ban conflicted with the Georgia Constitution's right to bear arms, and that the state legislature had implicitly forbidden local governments to enact gun prohibition laws.[221]

After the Civil War, courts addressed the implications of a developing weapons technology. The decades immediately after the Civil War were particularly significant for evaluating the "assault weapon" issue, because it was in these decades that courts confronted rapid-fire, high-capacity firearms.

The Civil War was by far America's bloodiest war; no war in American history remotely approaches the mass destruction and widespread death of that terrible conflict. The war witnessed the widespread use of the first type of repeating firearm (the revolver, invented several years before by Col. Samuel Colt) and the Gatling Gun, a hand-cranked ancestor of machine guns. In the two decades following the war, the high-capacity, rapid-fire rifle (such as the Spencer, Winchester, and Henry models) became ubiquitous. The courts in the post-war years were more personally aware of the killing potential of rapid-fire, high-capacity weapons than any American courts have been before or since.

In the 1871 case *Andrews v. State*,[222] the Tennessee Supreme Court held that, although the Tennessee Constitution did not protect "every thing that may be useful for offense or defense," the Constitution did protect "the rifle of all descriptions, the shotgun, the musket, and repeater."[223] In 1876, the Arkansas Supreme Court stated that protected "arms" included "the usual arms of the citizen of the country."[224] The court agreed with the Tennessee court's listing of these arms and noted the addition of the "army and navy repeaters, which, in recent warfare, have very generally superseded the old-fashioned holster, used as a weapon in the battles of our forefathers."[225] These early cases — which were cited by the U.S. Supreme Court in *Miller* — found that personal sidearms, including new repeating firearms, fell within the reach of constitutional provisions drafted in times of simpler weapons technology.

"The Oregon Court explained that "the term 'arms' as used by the drafters of the constitution probably was intended to include those weapons used by settlers for both personal and military defense..."

In 1980, the Oregon Supreme Court approached more modern weapons developments in a similar manner. The court noted that since the era of the Civil War, "The development of powerful explosives,...combined with the development of mass produced metal parts, made possible the automatic weapons, explosives, and chemicals of modern warfare."[226] The Oregon Court explained that "the term 'arms' as used by the drafters of the constitution probably was intended to include those weapons used by settlers for both personal and military defense....The term 'arms' would not have

included cannon or other heavy ordnance not kept by militiamen or private citizens."[227] The court concluded that such modern heavy ordnance, used exclusively by the military, would not be considered individual "arms" deserving of constitutional protection.[228] The Attorney General of Oregon has stated that so-called "assault weapons" fall within the scope of arms protected under the Oregon Supreme Court's test. An Oregon trial court, dismissing what it termed the "dicta" in the Oregon Supreme Court's weapons test, held that "assault weapons" are not protected under the Oregon Constitution; the case is currently on appeal.[229]

> ***" To assert that Constitutional protections only extend to the technology in existence in 1791 would be to claim that the First Amendment only protects the right to write with quill pens and not with computers, and that the Fourth Amendment only protects the right to freedom from unreasonable searches in log cabins and not in homes made from high-tech synthetics."***

Several cities in Ohio have enacted "assault weapon" bans, and a test case is pending before the Ohio Supreme Court.[230]

The most thorough discussion of the state Constitutional implications of "assault weapons" can be found in the recent decision striking down the city of Denver's prohibition on "assault weapons." Four individual plaintiffs and the Attorney General of Colorado had jointly challenged Denver's prohibition as violating numerous provisions of the Colorado Constitution.[231] For example, Denver's ordinance had asserted that the banned guns were designed primarily for "military or anti-personnel use."[232] The Court, agreeing with the individual plaintiffs and the Attorney General, found that the Colorado Constitution "specifically provides for antipersonnel use of arms for the protection of home, person or property." Accordingly, the Colorado court wrote that the fact that the guns "were originally designed for 'anti-personnel and military use', in and of itself, does not make them more susceptible to restriction than any other weapon."[233]

The court then rejected the city's assertion that the banned semiautomatics had "a rapid rate of fire." To the contrary, the court found, that "all semiautomatics fire one and only one shot per trigger pull and that all semiautomatics can fire no more rapidly than the shooter can repeatedly squeeze the trigger. Therefore, the ban on semiautomatics based on 'rate of fire', without more, is not supportable."[234]

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The court did go on to state that a ban on semi-automatic firearms to which a magazine holding 21 or more rounds was actually attached would be permissible under the state Constitution, because the court believed that there was a "compelling state interest" in controlling such weapons. But, continued the Colorado court, to ban particular semiautomatic firearms simply because a large capacity magazine *could* be attached to them was unconstitutionally overbroad. By the Colorado court's rationale, every "assault weapon" law which has been enacted or proposed is unconstitutional, because such laws outlaw many guns *per se*, rather than regulating only guns which actually have large-capacity magazines attached.

> ***...the Colorado court wrote that the fact that the guns "were originally designed for 'anti-personnel and military use', in and of itself, does not make them more susceptible to restriction than any other weapon."***

The court also found other parts of the Denver gun ban unconstitutional. The prohibition on semiautomatic shotguns with folding stocks was unreasonable; that the folding stock made the gun more easily concealable was not a justification for the gun to be banned, the court said.

Another provision, the generic definition of "assault pistol," which used model language enacted in California and other jurisdictions, was found to be "unconstitutionally vague,"[235] as was a model provision outlawing firearms which had been redesigned from banned firearms.[236] In conclusion, the court found so many provisions of the Denver law — which is very similar to other "assault weapons" laws — to be in violation of the right to arms or to be unconstitutionally vague, that the court was forced to invalidate the law as a whole.

E. As the Technology for Exercising Constitutional Rights Progresses, So Does the Constitution.

Some proponents of "assault weapons" legislation have argued that even if one recognizes an individual right to bear arms, "assault weapons" are not the type of arms that individuals have a right to bear. While conceding that the framers might have intended that citizens have a right to possess the single-shot rifles, shotguns, and pistols of their day, the gun prohibitionists assert that the Second Amendment never intended

to give citizens the right to own modern small arms such as military-style semiautomatics.[237]

It is true that the authors of the Second Amendment never intended to protect the right to own semiautomatics (since such guns did not exist), just as they never intended to protect the right to talk privately on a telephone or to broadcast news on a television (since telephones and televisions did not exist either). To assert that Constitutional protections only extend to the technology in existence in 1791 would be to claim that the First Amendment only protects the right to write with quill pens and not with computers, and that the Fourth Amendment only protects the right to freedom from unreasonable searches in log cabins and not in homes made from high-tech synthetics.

The Constitution does not protect particular physical objects, such as quill pens, muskets, or log cabins. Instead, the Constitution defines a relationship between individuals and the government that is applied to every new technology. For example, in *United States* v. *Katz*, the Court applied the privacy principle underlying the Fourth Amendment to prohibit warrantless eavesdropping on telephone calls made from a public phone booth — even though telephones had not been invented at the time of the Fourth Amendment.[238] Likewise, the principle underlying freedom of the press — that an unfettered press is an important check on secretive and abusive governments — remains the same whether a publisher uses a Franklin press to produce a hundred copies of a pamphlet, or laser printers to produce a hundred thousand.

It is true that an individual who misuses a semiautomatic today can shoot more people than could an individual misusing a musket 150 years ago.[239] Yet if greater harm were sufficient cause to invalidate a right, there would be little left to the Bill of Rights.

Virtually every freedom guaranteed in the Bill of Rights causes some damage to society, such as reputations ruined by libelous newspapers, or criminals freed by procedural requirements. The authors of the Constitution knew that legislatures were inclined to focus too narrowly on short term harms: to think only about society's loss of security from criminals not caught because of search restrictions; and to forget the security gained by privacy and freedom from arbitrary searches. That is precisely why the framers created a Bill of Rights — to put a check on the tendency of legislatures to erode essential rights for short-term gains.

Since the Constitution was adopted, virtually all of the harms that flow from Constitutional rights have grown more severe:

- Today, if an irresponsible reporter betrays vital national secrets, the information may be in the enemy's headquarters in a few minutes, and may be used to kill

American soldiers and allies a few minutes later. Such harm was not possible in an age when information traveled from America to Europe by sailing ship.

- Similarly, an inappropriate leak of information in a superpower crisis could harden negotiating positions, leading at the worst to nuclear war. Previously, a leak might precipitate a war, but could not destroy the planet.

- As Gary Hart learned the hard way, a single act of gutter journalism can wipe out in a week a decades-long career of public service. In the early years of the Constitution, journalists also printed stories of sex and politics, but the slower movement of information kept one tale of indiscretion from growing to such destructive proportions.

- Correspondingly, a show like "60 Minutes" can wrongfully ruin a person's reputation throughout the nation, a feat no single newspaper could have accomplished before.

- In earlier times, strong community ties and traditional values made young people less susceptible to religious charlatans. But today, freedom of religion can kill people, as we learned at Jonestown.

- Criminal enterprises have always existed, but the proliferation of communications and transportation technologies such as telephones and automobiles makes possible the existence of criminal organizations of vastly greater scale — and harm — than before.

The principle underlying the Second Amendment is resistance to federal tyranny. The method of achieving the Second Amendment's goal is for individual citizens to possess arms equal to those possessed by the federal standing army. If the federal standing army possesses muskets, then citizens may own muskets. If the federal standing army owns M16 assault rifles, then citizens may own M16 assault rifles.

Persons who find the argument above to be unpersuasive are not without a remedy. If the Constitutional right to bear arms has become inappropriate for modern society, because the people are so dangerous and government so trustworthy, then a Constitutional amendment to abolish or limit the right may be proposed. (Although given the fact that almost every state has rejected "assault weapon" legislation, it is doubtful that a proposed amendment would be ratified by many states.) But it is not permissible for legislators or courts to flout an existing Constitutional guarantee, even if they personally think it unimportant.[240]

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F. So-called "Assault Weapons" Have Practical Utility for Modern Conditions.

So-called "assault weapons," particularly the politically incorrect semiautomatic rifles, are well-suited for personal defense against criminals.[241] More significantly, from a Second Amendment viewpoint, they are well-suited for community defense against dangers both internal and external.

1. Domestic Disorder

Does anyone "need" an "assault weapon"? The Korean victims of the 1992 Los Angeles riots answered "Yes." When gun prohibitionist Daryl Gates spent the first night of the Los Angeles riots at a fund-raiser to oppose a referendum limiting the Los Angeles police chief's powers, tens of thousands of Los Angeles residents learned the hard way that government cannot always protect people against crime.

Were the Los Angeles riots a bizarre and rare event, in which Americans needed to use semiautomatic firearms to protect their neighborhoods when the police would not or could not? Not in Los Angeles. In May 1988, the Bloods attacked a Los Angeles housing project containing Cambodians. The Cambodians fought back with M1s and Kalashnikovs and drove away the Bloods.[242]

> ***"Does anyone 'need' an 'assault weapon'? The Korean victims of the 1992 Los Angeles riots answered 'Yes.'"***

To defend a neighborhood from Bloods on Piru Street, Los Angeles, "some block clubs had to resort to armed guerilla warfare," reported the *Washington Times*. One block club leader met with Mayor Bradley, with Police Chief Daryl Gates, and with the city attorney (all vocal gun prohibitionists) and achieved nothing. Drug dealers continued to shoot at block club members, but now the block club fired back. After club leader Norris Turner shot and wounded two gang members who had tried to ambush and kill him on the street, Turner threatened to call the media. Police presence increased, and the neighborhood was cleaned up.[243]

The War on Drugs took on a new meaning in September 1989 in Tacoma, Washington, where angry citizens gathered for an anti-crime rally. Spurred by the rally, an off-duty sergeant organized a dozen off-duty Army Rangers and went into free-fire

combat with neighborhood crack dealers. Up to 300 rounds of handgun, shotgun, and semiautomatic rifle fire were exchanged. No fatalities resulted, and Washington Governor Booth Gardner praised the gunmen: "They were very good shots. They weren't shooting to harm. They were shooting to make a point, I think." The police mediated a truce, whereby the drug dealers agreed to stop dealing in the streets, and the neighborhood agreed to put away its guns.[244]

Citizens of the United States have often used personal sidearms to aid law enforcement officials in restoring public order.[245] In 1977, a blizzard in Buffalo, New York, and a flood in Johnstown, Pennsylvania, both prompted local officials to call for citizens to arm themselves and restore the public order.[246] In other situations, as in the aftermath of an earthquake or hurricane, there may not even be any public officials around to urge citizens to protect themselves. In the chaotic frontier circumstances of an area after a natural disaster — or the modern inner city under day-to-day conditions — a reliable, rugged, easy to operate firearm is the type of arm which is most necessary for the protection of life.

2. National Defense

The most recent instance in which people of the United States mobilized "bearing arms supplied by themselves and of the kind in common use at the time" to defend their nation was during World War II.

After Pearl Harbor the citizen militia was called to duty. Nazi submarines were constantly in action off the East Coast. On the West Coast, the Japanese seized several Alaskan islands, and strategists wondered if the Japanese might follow up on their dramatic victories in the Pacific with an invasion of the Alaskan mainland, Hawaii, or California. Hawaii's governor summoned armed citizens to man checkpoints and patrol remote beach areas.[247] Maryland's governor called on "the Maryland Minute Men," consisting mainly of "members of Rod and Gun Clubs, of Trap Shooting Clubs and similar organizations," for "repelling invasion forays, parachute raids, and sabotage uprisings," as well as for patrolling beaches, water supplies, and railroads. Over 15,000 volunteers brought their own weapons to duty.[248] Gun owners in Virginia were also summoned into home service.[249]

> ***" Especially given the absence of widespread military service, individual Americans familiar with using their private weapons provide an important defense resource."***

Americans everywhere armed themselves in case of invasion.[250]

After the National Guard was federalized for overseas duty, "the unorganized militia proved a successful substitute for the National Guard," according to a Defense Department study. Militiamen, providing their own guns, were trained in patrolling, roadblock techniques, and guerrilla warfare.[251] The War Department distributed a manual recommending that citizens keep guerrilla weapons on hand.[252]

Certainly the militia could not defend against intercontinental ballistic missiles, but it could keep order at home after a limited attack. In case of conventional war, the militia could guard against foreign invasion after the army and the National Guard were sent into overseas combat. Especially given the absence of widespread military service, individual Americans familiar with using their private weapons provide an important defense resource.[253] Canada already has an Eskimo militia to protect its northern territories.[254]

It has been half a century since the last invading troops left American soil. No invasion is plausible in the foreseeable future. Is it now possible to state with certainty that America is so omnipotent, and the nuclear umbrella so perfect that America will never again need the militia, and that Americans should jettison their tradition of learning how to use arms that would be useful for civil defense?

3. Resistance to Tyranny

In the unlikely event that the United States were ever subjugated by a foreign or domestic tyrant, could citizens actually resist? Recent history suggests that the answer is "yes."

Of course, ordinary citizens are not going to grab their "Saturday night specials" (or even their "assault weapons") and charge into oncoming columns of tanks. Resistance to tyranny or invasion would be a guerrilla war. In the early years of such a war, before guerrillas would be strong enough to attack the occupying army head on, heavy weapons would be a detriment, impeding the guerrillas' mobility. As a war progresses,

> ***"...the words of the late Vice President Hubert Humphrey: 'The right of citizens to bear arms is just one more guarantee against arbitrary government, one more safeguard against the tyranny which now appears remote in America, but which historically has proved to be always possible.'***

Mao Zedong explained, the guerrillas use ordinary firearms to capture better small arms and eventually heavy equipment.[255]

The Afghan mujahedeen were greatly helped by the belated arrival of Stinger antiaircraft missiles, but they had already fought the Soviets to a draw using a locally made version of the outdated Lee-Enfield rifle.[256] One clear lesson of this century is that a determined guerrilla army can wear down an occupying force until the occupiers lose spirit and depart—just what happened in Ireland in 1920 and Palestine in 1948 (and America in 1783). As one author put it: "Anyone who claims that popular struggles are inevitably doomed to defeat by the military technologies of our century must find it literally incredible that France and the United States suffered defeat in Vietnam...that Portugal was expelled from Angola; and France from Algeria."[257]

If guns were not useful in popular revolution, it would be hard to explain why dictators as diverse as Ferdinand Marcos, Fidel Castro, Idi Amin, and the Bulgarian communists have ordered firearms confiscations upon taking power.[258]

In sum, American citizens can and do use "assault weapons" successfully to protect themselves against domestic chaos when local police forces cannot or will not protect them. In the unlikely event that Americans were threatened by hostile foreign or domestic governments, "assault weapons" would also be useful, and citizen resistance might well prove successful.

G. The Boundaries of the Constitution

If "military" arms, such as the assault rifles carried by the federal standing army, are precisely what the Constitution protects, it may be asked where the upper boundary lies — at grenade launchers, anti-aircraft rockets, tanks, battleships, or nuclear weapons.

To begin with, the phrase "keep and bear" limits the type of arm to an arm that an individual can carry. Things which an individual cannot bear and fire (like crew-served weapons) would not be within the scope of the Second Amendment. Nor would things which bear the individual, instead of being borne by him or her. Thus, tanks, ships, and the like would be excluded.

In addition, if a hand-carried weapon is not "part of the ordinary military equipment" (as the Supreme Court put it in *Miller*), then the weapon might not have a reasonable relationship to the preservation of a well-regulated militia; hence its ownership would not be protected. Since American soldiers do not carry nuclear weapons, such weapons would not be within the scope of the Second Amendment. Perhaps the Supreme

Court will one day further elaborate the boundaries of the *Miller* test.

Soldiers do carry real assault rifles (namely M16s), and it would therefore seem that such weapons would fit within the *Miller* test. In early 1991, the Supreme Court declined to hear a case involving the prohibition of machineguns produced after 1986.[259] Handgun Control, Inc. immediately announced that the Supreme Court had validated the ban, although the Court had done no such thing. As the Supreme Court itself has stated, a denial of review has no precedential effect and is not a decision on the merits.[260]

As this Issue Paper is written, the Constitutionality of the 1986 federal ban is unclear. In the case the Supreme Court declined to hear, the federal trial court had interpreted the relevant statute as not being a ban, but only a licensing requirement. The trial court had said that if the statute were to be read as a ban, it could be unconstitutional.[261] The 11th Circuit Court of Appeals reversed on the statutory interpretation issue, and did not address the Constitutional question.[262]

> ***" ...are 'assault weapons,' as some police administrators insist, only made for slaughtering the innocent? If so, such killing machines have no place in the hands of domestic law enforcement."***

In any case, the basis on which machine guns may be considered distinguishable from other guns is their capability of rapid, automatic fire. All semiautomatic firearms lack this capability, and according to the Bureau of Alcohol, Tobacco and Firearms, it is quite difficult to convert semiautomatics to automatic.[263] In fact, semiautomatic rifles may fire less rapidly than traditional pump action shotguns,[264] and there is no dispute that traditional pump action shotguns fall within the scope of the right to bear arms.

H. Trust the People or Trust the Government?

The "assault weapon" controversy wears the mask of a crime control issue, but it is in reality a moral issue. Regardless of whether "assault weapons" are a serious crime problem, and regardless of whether prohibitions will reduce criminal use of the guns, such weapons have no legitimate place in a civilized society — or so many gun prohibitionists feel. These prohibitionists do not trust their fellow citizens to possess "assault weapons"; but astonishingly, they do trust the government to possess such guns.

"Government is the great teacher," wrote the late Justice Brandeis. What lessons does government teach when police chiefs insist that "assault weapons" have no reasonable defensive use, and are evil machines for killing many innocent people quickly — but that prohibitions on these killing machines should not apply to the police? Are massacres acceptable if perpetrated by the public sector?[265]

The exemption cannot be logically defended. If "assault weapons" can legitimately be used for police protection of self and others, then a ban on those guns cannot be Constitutionally applied to ordinary citizens, because ordinary citizens have a right to bear arms for personal defense, and like police, face a risk of being attacked by criminals. (And unlike police, ordinary citizens cannot make a radio call for backup that will bring a swarm of police cars in seconds.)

Conversely, are "assault weapons," as some police administrators insist, only made for slaughtering the innocent? If so, such killing machines have no place in the hands of domestic law enforcement.[266] Unlike in less free countries, police in this country do not need highly destructive weapons designed for murdering many innocent people at once.

The arrogance of power manifested by police chiefs such as Daryl Gates in their drive to outlaw semiautomatics for everyone but themselves is reason enough for a free society to reject gun prohibition.[267]

In Maryland, the police staged an illegal warrantless raid on a gun rights group's office the night before a gun control referendum.[268] When pro-Second Amendment protestors picketed at the state capitol, Governor William Donald Schaefer's police photographed them.[269] The police-state tactics in Maryland led one newspaper (which favors gun control as a substantive matter), to note "Just because you're paranoid doesn't mean they're not out to get you." The paper labeled the tactics of Governor Schaefer and his police (including the illegal warrantless raid, the photographing of protesters, and a late night surprise visit to a critic's home) a validation of the paranoid world-view allegedly held by proponents of the right to bear arms.[270] Is the Maryland police hierarchy the kind of government agency that should be trusted to disarm citizens, while it keeps "assault weapons" for itself?

After the Tiananmen Square massacre, the response of the National Rifle Association was to purchase print advertisements suggesting the core purpose of the Second Amendment is resistance to tyranny. The response of Chicago police superintendent LeRoy Martin — a vociferous advocate of gun prohibition — was to accept a paid trip to China from the Communist government. Upon returning, Chief Martin pronounced his admiration for the Chinese system of criminal justice, and

suggested that in the United States zones should be created where the Constitution would be suspended. Is LeRoy Martin the kind of police chief who should be trusted to enforce an "assault weapon" ban, while he keeps such weapons for himself?

Of course even despite the excesses of the drug war, most of the Bill of Rights remains intact. The next set of elections will take place as scheduled, and there is no plausible claim that it would be appropriate to take up arms against the federal government. Can the gun prohibition movement guarantee that this happy state will persist forever?

In 1900, Germany was a democratic, progressive nation. Jews living there enjoyed fuller acceptance in society than they did in Britain, France, or the United States. Thirty-five years later, circumstances had changed. The Holocaust was preceded by the Nazi government's enactment of the strictest gun controls of any industrial nation.[271]

The prospect of a dictatorial American government thirty-five years from now seems almost impossible. What about a hundred years from today? Two hundred? The Bill of Rights attempted to enshrine for all time the principle that the government should not be able to overpower the people. Soon after the 200th anniversary of the Bill of Rights, should that principle be discarded forever? Do government officials like Daryl Gates, William Donald Schaefer, and LeRoy Martin inspire confidence that the government may always be trusted?

Before rejecting the United States Constitution's bedrock principle that the people are more trustworthy than the government, it would be wise to consider the words of the late Vice President Hubert Humphrey: "The right of citizens to bear arms is just one more guarantee against arbitrary government, one more safeguard against the tyranny which now appears remote in America, but which historically has proved to be always possible."[272]

VI. PROPOSALS

The asserted major concern of legislators passing "assault weapon" legislation is the criminal misuse of these firearms. Proposed legislation, to be effective, must directly target this misuse. Among the possible approaches would be to:

- Fund the appointment of at least one Assistant US Attorney in each District to prosecute felon-in-possession cases involving violent offenses under 18 U.S.C. 924 and relevant sections of the Firearms Owners' Protection Act, Public Law 99-308. More consistent enforcement of existing statutes would directly target criminal misuse of all firearms. States and localities could also assign prosecutors to felons perpetrating violent crimes with firearms.[273]

- Fund the creation of new prison facilities dedicated to violent repeat felony offenders. Reallocate existing prison capacity to that same end. Prison facilities must be adequate to insure that those convicted of the violent criminal misuse of firearms actually serve the sentences.

- Reform and streamline probation revocation. If a person already eligible for probation revocation commits a violent armed felony, probation should be revoked immediately. This reform would have prevented a career criminal named Eugene Thompson from perpetrating a murder spree in the suburbs south of Denver in March 1989.[274]

- Create a task force that will exert informal pressure on the entertainment industry to encourage industry officials to reduce the portrayal of criminal misuse of firearms.

Beginning in 1983, prime-time television shows such as *The A Team, Wise Guy, Hardcastle & McCormack, Riptide, 21 Jump Street*, and *Miami Vice* have glamorized criminal misuse of "assault weapons."[275] While direct links between these portrayals and criminal violence may be difficult to establish, at least one study has linked television and movie depictions of "assault weapons" to increased sales of those weapons.[276] Dr. Park Dietz, the specialist in violent behavior who conducted the study, called NBC's *Miami Vice* "the major determinant of assault gun fashion for the 1980s."[277] Research by the University of Washington's Brandon Centerwall has found a cause and effect relation between television violence and homicide.[278]

A task force could draft voluntary guidelines limiting the depiction of the misuse of military-style semiautomatics, and the task force, along with interested citizens' groups, could exert informal pressure on industry officials to conform to these guidelines.

And at the very least, the film/television industry exemption from existing state and local "assault weapon" bans should be removed.[279]

The solutions suggested above will not cure the problem of armed crime. But they will make the problem better, whereas "assault weapon" prohibition will make the problem worse.

VII. CONCLUSION

"Assault weapon" legislation appears to offer several political advantages. This legislation allows proponents to appear "tough on crime and drugs," to garner the applause of the establishment media, and to exploit the political potential latent in the emotion surrounding tragic events such as the Stockton shootings. At the same time, "assault weapon" legislation requires no fiscal outlay.

But "assault weapon" legislation is unconstitutional. Federal Second Amendment and state Constitutional jurisprudence establish an individual right to bear arms such as military-style semiautomatics. While "assault weapon" legislation may not unduly impinge the privilege to hunt ducks, it strikes at the heart of the right to defend home, person and property against criminal individuals and criminal governments.

The "assault weapon" controversy poses a litmus test for continued adherence to the principles on which the United States was founded. Shall citizens retain the power claimed in the Declaration of Independence to "alter or abolish" a despotic government?

The assertion that certain politically incorrect semiautomatic firearms are machineguns, are the weapon of choice of criminals, have a uniquely high ammunition capacity, or cause uniquely destructive wounds are a hoax. The more that legislators examine the facts, the more apparent the gun prohibition lobby's fraud becomes. The "Assault Weapon" Panic deserves a place alongside Senator Joseph McCarthy's "list" of State Department Communists and the Tawana Brawley kidnapping as one of America's greatest political hoaxes.

Despite an "evil" appearance, so-called "assault weapons" are no more dangerous than many non-semiautomatics. According to empirical evidence and police experience, the guns are not the weapons of choice of drug dealers or other criminals. Even if these guns played a significant role in violent crime, sociological evidence suggests that "assault weapon" legislation would not reduce criminal misuse.

To limit the criminal misuse of firearms, legislators must take the more difficult and costly steps of providing sufficient funding to the prosecutors and prisons that directly confront the problems of firearms misuse. While these measures may not seem as simple as passing a severe "assault weapon" prohibition, an effective firearms policy — one that preserves basic Constitutional rights — will be logical, legal, and moral, and well worth the effort.

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ENDNOTES

1. Church, *The Other Arms Race*, TIME, Feb. 6, 1989, at 20.

The citation style for endnotes is the authors' idiosyncratic (and not always consistent) combination of the *Blue Book* of legal citation with the *Chicago Manual of Style*. The authors offer their apologies to any reader displeased by citation inconsistencies.

2. *Id.* at 20, 22-23.

3. *Id.* at 26.

4. In 1987, Purdy was caught shooting at trees in El Dorado National Forest. Resisting arrest, he assaulted a police officer and kicked out the back window of the police cruiser. When Purdy came up for parole after only 45 days, the parole report noted that he had attempted suicide in jail, smeared his jail wall with blood, and had been found in possession of white supremacist literature. The parole report called Purdy "a danger to himself and others."

5. New York City Mayor David Dinkins, for example, responded to public outrage over the subway stabbing of Utah tourist Brian Watkins by demanding a ban on "assault weapons."

6. *See, e.g.*, The Anti-drug, Assault Weapons Limitation Act of 1989. S. Rep. No. 160, 101st. Cong., 1st. Sess. 6-8 (1989) [hereinafter SENATE REPORT] (introduced by Senator DeConcini to reduce semiautomatic firearms abuse by drug traffickers and violent criminals); Roberti-Roos Assault Weapons Control Act of 1989, CAL. PENAL CODE §§ 12275-12290 (West 1990) [hereinafter Roberti-Roos]; MD. ANN. CODE art. 27 §§ 442,481E (1989) (placing greater restrictions on 17 varieties of "assault weapons," and providing punishments for failure to comply or attempts to evade).

On February 7, 1989, only three weeks after the January 17, 1989, Stockton schoolyard incident, Los Angeles passed an "emergency ordinance" that outlawed the sale or possession of assault weapons within city limits. "Assault weapon" was defined as "a weapon with a magazine of twenty rounds or more that is able to fire single rounds rapidly with each pull of the trigger." Owners of these firearms were given 15 days from the effective date of February 8, 1989, to render their guns inoperable or turn them over to police for destruction. L.A. Times, Feb. 8, 1989, at 120, col. 1.

Not all jurisdictions have acted precipitously. For example, Florida created a Florida Commission on Assault Weapons to "combat the unlawful use of assault weapons in the state." 1989 Fla. Sess. Law Serv. 89-306 (West 1989). The Commission's hearings presented the next session of the Florida legislature with a more solid factual foundation for a decision about "assault weapons" than was enjoyed by states like California which rushed to judgement.

7. S. 747 defined an "assault weapon" in section 3 as "(A) Norinco, Mitchell, Poly Technologies Avtomat Kalashnikovs (all models), (B) Action Arms Israeli Military Industries UZI and Galil, (C) Beretta AR-70,(SC-70), (D) Colt AR-15 and CAR-15, (E) Fabrique Nationale FN/FAL, FN/LAR, and FNC, (F) MAC 10 and MAC 11, (G) Steyer AUG, (H) INTRATEC TEC-9, and (I) Street Sweeper and Striker 12." *Senate Report*. at 6. Section 3 further provided that "The Secretary, in consultation with the Attorney General, may, when appropriate, recommend to the Congress the addition or deletion of firearms to be designated as assault weapons." *Id.*

8. Roberti-Roos, *supra* note 6, at § 12276.

9. "Controls on Look-Alike Rifles Upset Gun Groups," *Montgomery Journal*, June 4, 1990, at A1, A7 (police added 54 guns to the "assault weapon" list under the theory that they were identical to the 24 guns named by the legislature; seven of the extra guns named by the police were in the low-powered .22 rimfire category, a caliber not possessed by any gun named by the legislature).

It is not impossible that the Bureau of Alcohol, Tobacco and Firearms, taking a cue from the Maryland police, could declare guns similar to the Colt AR-15 (such as rimfire guns which resemble the AR-15 in appearance) to be encompassed within the DeConcini definition.

10. The warning against enforcement of the "assault weapon" law was sent to California police chiefs, sheriffs, and district attorneys in a bulletin from Attorney General Lungren on June 18, 1991. "Assault Weapons Ban Called Unenforceable," *Los Angeles Times*, June 25, 1991, at A3, A22; Joe Hughes, "Smaller Guns are 'Big Shots' with the Hoods," *San Diego Union*, Aug. 29, 1991.

11. For example, while the California legislature outlawed the "Gilbert Equipment Company Striker 12" shotgun, the Striker 12 is not made by Gilbert Equipment Company. The now-illegal "Calico M-900" pistol does not exist. The attempt to ban Kalashnikov semiautomatic rifles (the original source of the whole furor) failed as the legislature outlawed "Avtomat Kalashnikov" rifles, apparently not realizing that the phrase is Russian for "*automatic* Kalashnikov."

12. David Morris, "State Gun Law Riddled with Problems," *The Press-Enterprise*, March 15, 1993, p. A-3 (Associated Press).

13. S.G. Helsley, Assistant Director Investigation and Enforcement Branch, memorandum to Patrick Kenady, Assistant Attorney General, Feb. 14, 1991, p. 4.

14. *Robertson, et al* v. *Denver*, no. 90CV603, slip opinion, (Feb. 26, 1992, Denver District Court)(Mullins, J.).

15. Luis Tolley, memorandum to Donna Brownsey (assistant to Senator Roberti), "California Assault Weapon Lists," July 17, 1991, at 1 ("We believe that if any gun dealer, manufacturer or gun owners wants to test the law in court, they should be given every opportunity. Arrest them. Put the burden on them to prove the law is too vague.")

16. COLO. REV. STAT. § 16-11-103 (1989) (defining "assault weapon" as "any semiautomatic center fire firearm that is equipped with a detachable magazine with a capacity of twenty or more rounds of ammunition").

17. HR-893, by Rep. Luis V. Guitierrez (Illinois) was introduced on Feb. 17, 1993.

18. Cheryl L. Reed, "City Gun Ban Expands," *Dayton Daily News*, Feb. 24, 1993.

19. Firearms (Amendment) Act 1988.

20. *Gun Law Handbook* (Victoria government, n.d.). Gun owner protests had forced the government to withdraw a ban applicable to rimfires.

21. New South Wales Firearms and Dangerous Weapons (Amendment) Bill, 1985; Warren Owens, "It's Premier Greiner! Labor Routed in 'Worst Ever' Loss," *Sunday Telegraph*, March 20, 1988, at 1.

According to the *Sun-Herald*, "in the country, the controversial new gun laws cost the government

seats." Other newspapers agreed. "Libs Win," *The Sun-Herald*, March 20, 1988, p. 1; James Morrison, "Coalition Takes 15 ALP Seats." *The Australian*, March 21, 1988, p. 2 ("The swing to the Coalition in the country was a backlash from traditional Labor voters over the tough new guns laws..."). Resigning as party head, Barrie Unsworth confessed, "Clearly as leader I must accept the major proportion of the blame for the defeat, particularly in terms of my decision on the gun issue..." Barrie Unsworth, *Labor Leadership* (news release), March 22, 1988. One retiring Labor veteran complained: "I told [Unsworth] he was running a one-man band, especially regarding the gun laws...in this case he was pig-headed and arrogant. He was prepared to go down into the Valley of Death like the Charge of the Light Brigade, taking all his mates with him. Now he's done that. Bloody mates that have worked their guts out and mates of quality." In the steel and coal heartlands of Newcastle, Cassnock, and Swansea, solid Labor districts suffered a swing of over 25% of the vote. "Why Voters Turned Their Backs on ALP," *Sun-Herald*, March 27, 1988, p. 12; Warren Owens, "Coalition Has to Work to Keep Power," *Sunday Telegraph*, March 27, 1988, p. 50.

22. *See* Assault Weapon Control Act of 1989, S. 386, 101st. Cong., 1st Sess., 135 Cong. Rec. §1362 (daily ed. Feb. 8, 1989) (Senator Metzenbaum's bill listing approximately eight brands of firearms considered "assault weapons" and then including in the definition "any other semiautomatic firearm with a fixed magazine capacity exceeding ten rounds... and...any other shotgun with a fixed magazine, cylinder, or drum capacity exceeding six rounds.").

23. *Hearings on H.R. 1154 Before the Subcomm. on Trade of the House Comm. on Ways and Means*, 101st Cong., 1st Sess. 10, 114-15 (1989) [hereinafter *Hearings*].

24. Edward Ezell, a curator at the Smithsonian, provides a detailed history of the development of the assault rifle. One of the motivations for designing the new rifle was that "most standard infantry rifles of the 1939-1945 era were capable of delivering a lethal projectile to ranges greater than twelve hundred meters...and... the recoil forces ("kick") from such weapon/ammunition combinations were generally heavy." E. EZELL, THE AK-47 STORY 98-99 (1986). Ezell notes that rapid fire with these cartridges was virtually unmanageable. *See also* I. HOGG, THE ILLUSTRATED ENCYCLOPEDIA OF FIREARMS 314 (1987) (stating that "the standard military cartridge...was capable of delivering accurate fire to ranges of up to 2000 yards").

25. Automatics sometimes come into play when legislation misnames semiautomatics and ends up designating a semiautomatic. For example, the California and DeConcini bans apply to the "Steyr AUG," an automatic assault rifle from Austria. The authors of the legislation apparently intended to outlaw the semiautomatic "Steyr AUG-SA."

26. Ezell, at 99.

27. *Id.* at 95.

28. *Id.*

29. *Id.*

30. *Id.* at 112.

31. *See id.* at 94-124.

32. Defense Intelligence Agency, *Small Arms Identification and Operation Guide - Eurasian Communist Countries* 105 (Washington: Government Printing Office, 1988).

33. *See* p. 64, *infra*.

34. *See, e.g.*, GUNS & AMMO 1990 ANN. ISSUE [hereinafter GUNS & AMMO]. This issue includes a complete firearms catalog and manufacturer's directory for 1990. The section entitled *Semiautomatic Centerfire* includes 33 semiautomatic rifles with a military appearance.

35. Stockton murderer Patrick Purdy did not use an AK-47. He used a Chinese, semiautomatic gun known as the AKM-56S. *See* 135 CONG REC. S1870 (daily ed., Feb. 28, 1989).

36. The name "AR-15" is technically applied only to automatics. Semiautomatic look-alikes always include an extension of the name, such as "AR-15 Sporter" or "AR-15A2 H-Bar."

37. S. 747 assault weapon categories (A), (B), (C), (D), (E) and (G) included rifles, categories (F) and (H) include pistols, and category (I) includes shotguns.

38. Several senators noted, "The Bureau of Alcohol, Tobacco, and Firearms has no definition of 'assault weapon.' The military definition — a selective fire weapon capable of firing in either an automatic or a semiautomatic mode — is inapplicable to the commercial arena." *See* Senate Report, *supra* note 6, at 16. The senators also stated that the definition was inapplicable because military-style semiautomatics are not distinguishable in function or in dangerousness from other more traditional semiautomatic designs. *Id.* at 17.

Since then, the Bureau of Alcohol, Tobacco and Firearms has coined its own definition of "semiautomatic assault rifle." The definition is a set of criteria which BATF used to bar semiautomatic rifles from import. The barred rifles, BATF said, "generally met" the criteria of: "a. military appearance, b. large magazine capacity, and c. semiautomatic version of a machinegun." *Report and Recommendation of the ATF Working Group on the Importability of Certain Semiautomatic Rifles*, July 6, 1989, at 5.

BATF technical experts had proposed that only a few guns be barred from import, but their decision was overruled by the White House. BATF currently allows imports of the cosmetically altered versions of the banned guns, in which folding stocks have been replaced by fixed wooden stocks and bayonet lugs removed.

39. *Hearings, supra* note 23, at 70. *See also* Milek, *Shooting Bench*, GUNS & AMMO, November 1989, at 16 (stating that, for example, the military-style HK-91 is just a like-chambered variant of the HK-770 Sporter, and that there are no real differences between weapons labeled as "assault weapons" and sporting rifles such as the semiautomatic Remington Model 7400 Sporter).

40. *See supra* note 22.

41. *Hearings, supra* note 23, at 68.

42. *Id.*

43. *Id. See also* Steele, *Guns for Today's Detectives*, Peterson's Handguns, October 1989, at 56, 60 (stating that Federal Witness protection teams have chosen Remington Model 870 pump shotguns because "the shotgun at close range comes closer in achieving total stopping efficiency than anything else").

44. 135 CONG. REC. S1873 (daily ed. Feb. 28, 1989).

45. The late Nelson T. Shields, former co-chair of Handgun Control, Inc. used this shotgun for sport. *Id.*

46. *Id.*

47. *See* Ezell, *supra* note 24, at 164.

48. 135 CONG. REC. S1873-74 (daily ed. Feb. 28, 1989).

49. Statement of Edward D. Conroy, Deputy Associate Director, Law Enforcement, BATF, before U.S. Senate Subcommittee on the Constitution, Feb. 10, 1989, at 1; *N.Y. Times*, Apr. 3, 1989.

50. Detective Jimmy Trahin, Firearms/Forensics Ballistics Unit, LAPD, before Calif. State Assembly, Feb. 13, 1989.

51. *See* Milek, *Shooting Bench*, GUNS & AMMO, November 1989, at 16.

52. The banned pistols are mostly in the .45 or 9mm calibers, and have the same velocity as any other pistol in that caliber. The banned rifles are mostly .308, 7.62 x 39mm, or .223 caliber. Therefore, they have equal or lesser velocity than standard hunting weapons; most hunting weapons fire a larger caliber, and are designed to kill large animals a long distance away, rather than to wound humans a short distance away.

53. "Firearms Market Thrives Despite an Import Ban," *N.Y. Times*, Apr. 3, 1989.

54. Handgun Control, Inc., "The Deadly Distinction" videotape (Interview with Dr. Hermann, Director of Institute for Forensic Sciences. The Uzi bullet is "slightly larger and slightly faster than the .38 special [a medium-sized handgun bullet]. It does not produce a large cavitary destructive wound through the body.")

55. *Wall St. J.*, April 10, 1989, at A13, col. 1 (letter to the editor); *see also* Maddox, *Facts Don't Seem to Matter in Ak-47 Debate*, Charlotte Observer, Oct. 29, 1989, at B1, cols. 2-4 (noting that the objective of combat fire is "to wound rather than kill").

56. The lack of automatic capability is most important in regards to the rifles. The military does use the same semiautomatic handguns that civilians own, such as the Beretta 92 or the Colt 1911. One pistol on most "assault weapon" lists, the Uzi pistol, actually is used by an army (Israel's).

57. 135 CONG. REC. §3015 (daily ed. March 17, 1989). Some civilians own military-look semiautomatic rifles as part of rifle collections or as nostalgic reminders of service in the military. *See, e.g., Commemorative M-16 Offer*, GUNS & AMMO, June 1989, at 7 (offering Vietnam veterans an engraved, semiautomatic version of their service rifle with a frame for wall-mounting). Even such benign commemorative would fall within the sweep of legislation like S. 747 because they could conceivably be taken out of the frame and fired.

58. Institute for Research on Small Arms in International Security, "Assault Rifle Fact Sheet #2: Quantities of Semi-automatic 'Assault Rifles' Owned in the United States" (1989) at 1. The exact estimate was 3,335,610.

59. *See L.A. Times*, Feb. 24, 1989, at V1, col. 1 (several owners and frequent users of Kalashnikovs discuss the attributes of the design and its ready adaptability to field and range use).

The statements about reliability in this section do not of course apply to every single gun that is sometimes denominated an "assault weapon." The TEC-9 pistol, for example, is often criticized for jamming at the wrong moment.

60. *See id.*

61. Cathy Reynolds, *Headlines* (newsletter).

62. Not all the useful defensive accessories are on the "assault weapons" which are rifles. Imagine a parent confronted with a drug and alcohol-crazed burglar. Shooting the burglar might be the only way to save nearby children from violence. But a conventional hunting rifle cartridge would penetrate the criminal, then a wall, and might hit a child. The parent would be better off with a shotgun loaded with light birdshot — to knock the burglar down, but not penetrate a wall.

On the other hand, suppose the burglar's entry had transpired a little differently. The whole family might be huddled in one room, while the burglar kicked and banged at the creaking door. Then the optimal self-defense shot would be a slug from a shotgun — to crash through the thick door and into the burglar.

In short, different home family defense situations require different ammunition. An excellent gun for home defense, then, would be a shotgun for which the shooter could rapidly select different loads. There is such a gun. It is called the Striker 12, because it is a shotgun with an external rotating cylinder. The shooter can quickly dial any of 12 different rounds.

63. *See* part V, *infra*.

64. "Council Panel OKs Ban on Assault Weapons," *New York Post*, July 25, 1991.

65. *L.A. Times*, Feb. 24, 1989, at V, col. 3. Block also stated that Patrick Purdy could have "wreaked equal havoc" in Stockton with a number of other more common semiautomatics, and that "a semiautomatic rifle is a semiautomatic rifle, whether it was designed for military or other purposes, and the reality is that semiautomatic military weapons have been available for many years, certainly since World War II." *Id.*

66. State of Florida, Commission on Assault Weapons, *Report* (May 18, 1990), summary of March 18, 1990 meeting, at 3 (Commission member stating that California "chose those weapons from a book of pictures").

67. California deleted the Encom from the banned list in 1991. The many jurisdictions which copied California's ban have not made similar corrections.

68. 135 CONG. REC. S3634 (daily ed. April 11, 1989). Other witnesses have testified to Congress in 1988 when the Brady Bill was under consideration, that the "Saturday night special" was the weapon of choice of drug dealers. *Hearings, supra* note 23, at 62.

69. SENATE REPORT, *supra* note 6, at 1-2. The title of S. 747 was "The Anti-drug, Assault Weapons Limitation Act of 1989."

70. Roberti-Roos, *supra* note 6, at § 12275.5.

71. "Few Assault Weapons Seized in Akron Last Year," *Beacon Journal*, Jan. 6, 1993 (quoting police Major Leonard Strawderman).

72. Robert Hiles, "Police Gunning to Boost Odds," *Akron Beacon-Journal*, March 13, 1989, p. A9. The article included an interview with Akron patrolman Robert Offret. Offret works in the patrol's property room.

73. Ronald Banks, "Letters to the Editor," *Baltimore Evening Sun*, Feb. 11, 1991.

74. Vincent DeMaio, S. Kalousdian, & J.M. Loeb, "Assault Weapons as a Public Health Hazard" (letter to the editor), *JAMA*, vol. 268 (1992): 3073-74.

75. Torrey D. Johnston, "Report on a Survey of the Use of 'Assault Weapons' in California in 1990" (Office of the Attorney General, California Department of Justice, Sept. 26, 1991). The report, prepared in response to a request by California State Senator Presley, was suppressed by the California Attorney General's Office, which claimed that the report did not exist. A leaked copy was released to the media. Mike McNulty, "The War on Gun Ownership Still Goes On!" *Guns & Ammo*, Dec. 1992: 30-31, 90.

76. Jay Edward Simkin, "Control Criminals, Not Guns," *Wall St. J.*, March 25, 1991.

77. "Chicago Police Back Assault Weapon Ban Approved by Senate," *Southtown Economist*, June 12, 1990.

78. J.G. Mericle, "Weapons Seized During Drug Warrant Executions and Arrests," unpublished report of Metropolitan Area Narcotics Squad, Will and Grundy Counties, Illinois (1989), discussed in Gary Kleck, *Point Blank: Guns and Violence in America* (Hawthorne, New York: Aldine de Gruyter, 1991), chap. 2.

79. Reply Brief of State of Colorado, *Robertson, et al, plaintiffs, State of Colorado, plaintiff-intervenor v. City and County of Denver*, no. 90CV603 (Colorado district court), at 13-15.

80. American Shooting Sports Coalition, Inc., *ASSC Analysis of S. 747 as Revised: DeConcini "Anti-Drug Assault Weapons Limitation Act,"* (Fort Washington, Pennsylvania, 1990), p. 5.

81. "Assault Weapons/Crime Survey In Florida For Years 1986, 1987, 1988, 1989" (1990).

82. SENATE REPORT, *supra* note 6, at 18 (testimony of Detective Jimmy L. Trahin of the Los Angeles Police Department Firearms/Forensics Ballistics Unit). Trahin's calculations were based on S. 386's broader definition of "assault weapon."

83. Letter of Thomas E. Hickman, State's Attorney for Carroll County, Maryland, submitted to the Maryland Senate Judicial Proceedings Committee, February 14, 1991, p. 1-3.

84. *Ibid.*

85. Trooper M. Arnold, Massachusetts State Police, Firearms Identification Section, "Mass State Police Ballistics Records."

86. M. Arnold, Massachusetts State Police, Firearms Identification Section, "Massachusetts State Police Ballistic Records," March 14, 1990 & April 11, 1991.

87. Sgt. W. Reins, Memorandum to Chief J. Laux, April 3, 1989.

88. Testimony of Deputy Chief Joseph Constance of the Trenton New Jersey Police Department, before the Maryland Senate Judicial Proceedings Committee, March 7, 1991, p. 3.

89. "Florio Urges Ban on Assault Rifles, Stresses His Support for Abortion," *Newark Star-Ledger*, July 18, 1989, at 15.

90. Lt. Moran of the New York City Police Ballistics Unit, in *White Plains Reporter-Dispatch*, March 27, 1989 (Associated Press report).

91. R. Zien, Sergeant, Weapons Homicide Section, Oakland Police Dept., *Year End Report 1990: Homicide Section Weapons Unit* (Oakland Police Dept., 1991).

92. Oakland Police Dept., *Supplementary Homicide Reports* (1991).

93. Joe Hughes, "Smaller Guns are 'Big Shots' with the Hoods," *San Diego Union*, Aug. 29, 1991 (report of study by city's firearms examiner).

94. *Hearings, supra* note 23, at 68.

95. G.R. Wilson, Chief, Firearms Section, Metropolitan Police Dept., Jan. 21, 1992, cited in K. Bea, ***CRS Report for Congress — 'Assault Weapons': Military Style Semiautomatic Firearms Facts and Issues,"*** (Washington, D.C.: Congressional Research Service, Library of Congress, May 13, 1992)(rev. ed. June 4, 1992), Table 5, p. 18.

96. *Hearings, supra* note 23, at 73. In 1990, 3.7% of homicides were perpetrated with rifles. FBI, Uniform Crime Reports, CRIME IN THE UNITED STATES 1990 (1991).

97. The graph is based on data compiled by the FBI's Law Enforcement Officers Killed and Assaulted Program. The numbers are published annually, and were supplied to author Kopel in telephone conversation of March 25, 1993 by Ms. L. Behm, an FBI Technical Information Specialist. The 1992 figures are preliminary.

98. "A Decade of Peace Officers Murdered in California: The 1980s," *J. of Calif. Law Enf.*, at 6-7.

99. Kleck, *Point Blank*, pp. 78-79.

100. Jim Stewart & Andrew Alexander, "Assault Guns Muscling in on Front Lines of Crime," *Atlanta Journal-Atlanta Constitution*, May 21, 1989, pp. A1, A8.

101. "Assault weapons" were also involved in 11% of traces relating to the Gun Control Act of 1968 (which criminalizes non-violent behavior such as the sale of a handgun to a person from another state, and imposes various record-keeping requirements on firearms dealers), and in 30% of the very small number of organized crime traces conducted by BATF.

102. Daniel M. Hartnett, Bureau of Alcohol, Tobacco and Firearms, Letter to Rep. Richard T. Schulze, Mar. 31, 1992, p. 2.

103. Kleck, p. 75. To many people, it may seem surprising that the use of "assault weapons" in Washington, D.C. is so low. It should be noted that since Washington, D.C. passed its "assault weapon" liability law in 1990 allowing anyone in Washington (even a criminal) injured by an "assault weapon" to sue the manufacturer, not a single suit has been brought.

104. BATF 1990 report, cited in Gary Kleck, *Point Blank* (New York: Aldine, 1991), p. 75.

105. Congressional Research Service, p. CRS-65.

106. Gun prohibitionists sometimes also note that the percentage of "assault weapons" used in crime has increased (although, as detailed above, the city-by-city police reports do not always support this claim). Since the number of "assault weapons" (narrowly defined) has risen by 500% from 1986 to 1990, it would not be surprising to see an increased percentage appear in crime. The larger a percentage of the overall gun stock that any type of gun represents, the more often it might be expected to appear in crime statistics. The rise in "assault weapons" as a percentage of crime guns is far less than the rise of general ownership of the weapons. The result supports the hypothesis that "assault weapons" are disfavored as crime guns since their bulk makes them difficult to conceal. Joe Hughes, "Smaller Guns are 'Big Shots' with the Hoods," *San Diego Union*, Aug. 29, 1991 (police firearms examiner reports that criminals continue to prefer small, concealable handguns).

107. Florida Assault Weapon Commission Report (Tallahassee: Florida Dept. of State, 1990), at 156-57.

108. *Wall St. J.*, April 7, 1989, at A12, col. 3.

109. *Wash. Post*, March 6, 1989, at B1, col. 6.

110. SENATE REPORT, *supra*, note 6, at 18.

111. *L.A. Times*, Feb. 8, 1989, at I20, col. 4.

112. *N.Y. Times*, Feb. 5, 1989, at E26, col. 5.

113. Memorandum to Patrick Kenady, Assistant Attorney General, February 14, 1991, at 2.

114. The formal pretext for suspending Pyle was that he had appeared (not in uniform) in a video explaining the difference between automatics and semiautomatics, and in that video had stated that he was a San Jose police officer, but had not expressly stated that his views were not the official views of his department. The rather severe discipline meted out to Pyle seemed odd in light of the fact that Chief McNamara himself wrote political fundraising letters for Handgun Control, Inc. on official city stationary.

115. One percent of the approximately 225,000 Fraternal Order of Police members attended the convention, and Stokes won the vote 68% of the attendees. It might be that delegates to the police conventions, like delegates to NRA conventions, or to Democratic or Republican conventions, hold views more extreme than held by the membership as a whole.

116. Two thousand police officers participated in the *Law Enforcement Technology* magazine survey, only a few hundred less than voted at the Fraternal Order of Police convention. Because participation in the *Law Enforcement Technology* poll or attendance at the FOP convention were both affirmative acts of a non-random sample, neither the *Law Enforcement Technology* poll nor the FOP convention vote is necessarily a

statistically valid sample of police opinion.

117. The wording of the question had something of a pro-gun tinge, which may have inflated the pro-gun responses. At the same time, the question was also worded vaguely enough so that respondents could have been responding as to whether they thought machine guns should be legal. Thus, the question might have elicited a "no" response from officers who wanted semiautomatic firearms to be legal, but who also wanted automatic machine guns to be illegal. The actual question was "Do you believe that law abiding citizens should have the right to purchase any type of firearm for sport or self-defense under state laws that now exist?" The survey is reprinted in Timothy Sekerak, editor, "*Issue and Answers* (Bellevue, Washington: Citizens Comm. for the Right to Keep and Bear Arms, 1992), p. 8.

118. SENATE REPORT, *supra* note 6, at 17.

119. James Wright & Peter Rossi, ARMED AND CONSIDERED DANGEROUS: A SURVEY OF FELONS AND THEIR FIREARMS (New York: Aldine de Gruyter, 1986).

120. *Lock and Load for the Gunfight of '89,* U.S. NEWS & WORLD REP., March 27, 1989, at 9 [hereinafter *Gunfight*]. Wright also said, "If criminals can get all the drugs they want, they can get guns, too." *Id.*

121. James Wright, "Second Thoughts About Gun Control," 91 *The Public Interest* (Spring 1988), at 30-31.

122. "Tribesmen in Pakistan Thrive," *New York Times*, November 2, 1987, p. 2; James Wright, Peter Rossi, and Kathleen Daly, *Under the Gun: Weapons, Crime and Violence in America* (Hawthorne, N.Y.: Aldine, 1983), p. 321.

123. Bureau of Alcohol, Tobacco, and Firearms, *Analysis of Operation CUE (Concentrated Urban Enforcement)*, interim report (Washington D.C.: February 15, 1977), pp. 133-34, cited in Paul Blackman and Richard Gardiner, *Flaws in the Current and Proposed Uniform Crime Reporting Programs Regarding Homicide and Weapons Use in Violent Crime*, paper presented at 38th Annual Meeting of the American Society of Criminology; Atlanta, October 29-November 1, 1986.

124. *L.A. Times*, Feb. 8, 1989, at 120, col. 4.

125. *Id.* at cols. 1, 5.

126. *See Gunfight, supra* note 120, at 9.

127. *See* 135 CONG. REC. § 1872 (daily ed. Feb. 28, 1989) (noting that banning the private possession of fully-automatic weapons in 1986 has not prevented criminal misuse of machine guns, but has only burdened those complying with the statute).

128. John Kaplan, "Controlling Firearms," 28 *Cleveland State Law Review* (1979), at 8.

129. Testimony before Maryland Senate, March 7, 1991, regarding SB 267,

130. *See* Lamar, *Gunning for Assault Rifles*, TIME, March 27, 1989, at 39. Wild Sports Enterprises, one of Northern California's largest gun shops, began selling 30 Kalashnikov rifles a day, even when the price was increased from $300 to $1,000 per rifle. Before the press furor began, this same shop only sold one Kalashnikov per week. *Id.*

131. *L.A. Times*, Feb. 24, 1989, at V1, col. 4.

132. *See* SENATE REPORT, *supra* note 6, at 24-28 (including a full five pages of public opinion polls that seem to suggest the public would support S. 747).

133. *Id.*

134. *Id.*

135. *Id.*

136. Gallup Polls, Sept. 10-11, 1990; Feb. 28-Mar. 2, 1989.

137. The Texas Poll, conducted for Hartke-Hanks Communications, Aug. 4-19, 1990.

138. Franklin Zimring, *The Medium is the Message: Firearms Caliber as a Determinant of Death from Assault*, 1 JOURNAL OF LEGAL STUDIES 97 (Jan. 1972). Zimring's research was confined to handgun ammunition.

139. See page 13, *supra*, for "assault weapons" as intermediate caliber guns.

140. Church, *supra* note 1, at 25.

141. *Id.*

142. 18 U.S.C. §922(b)(4), (o)(1) (Supp. V 1987). Since 1954 the AK-47 has also been subject to the restrictions on importation of goods from Communist countries.

143. For a general discussion of the adoption of selective fire assault weapons by modern military forces, see E. Ezell, *supra* note 24.

144. Gloria Hammond, *Time* magazine, form letter to persons complaining about the magazines firearms coverage, August 1, 1989:

> The July 17 cover story is the most recent in a growing number of attempts on the part of TIME editors to keep the gun-availability issue resolutely in view. Such an editorial closing of the ranks represents the exception rather than the rule in the history of the magazine, which has always endeavored to provide a variety of opinions and comment, in addition to straightforward news reporting...But the time for opinions on the dangers of gun availability is long since gone, replaced by overwhelming evidence that is represents a growing threat to public safety...our responsibility now is to confront indifference about the escalating violence the unwillingness to do something about it.

145. CONG. REC. Feb. 28, 1989, at S. 1868 (Subcommittee on the Constitution).

146. In early February 1993, KABC apparently falsified a news item in order to promote the station's gun control agenda. In a news segment regarding 9mm handguns, the station showed clips of a person firing a 9mm handgun at an extremely rapid rate (over one shot per second), and of metal targets being knocked down by the shots. The impression created was that 9mm handguns can fire very rapidly and very accurately at the same time. Undisclosed to the television audience (but later admitted by the person doing the shooting) was the fact that KABC had shot two different segments. In the first segment, the shooter fired as rapidly as possible, and his hand jerked extensively since he did not take time to steady his hand or aim before firing.In the second segment, the shooter slowed down his rate of fire considerably, and aimed at the metal silhouette targets which had been positioned a few yards away. KABC, however, put the different segments' shooting events into one film, thereby creating the impression that the targets were being knocked down one after the other by a shooter firing more than a shot per second.

147. *Assault Weapons and Accessories in America.* When Sugarmann wrote the memo, he was affiliated with an organization called "New Right Watch." Although attaching the "assault weapon" label to semiautomatics greatly misled the public — as Sugarmann knew it would, Sugarmann did not make a verifiably false statement. The more palpably false statements have come from Handgun Control, Inc., with its untrue claims that "assault weapons" are the "weapon of choice" of criminals and are "weapons of war."

148. SENATE REPORT, *supra* note 6, at 16. Senators Thurmond, Hatch, Simpson, Grassley, and Humphrey commented that "[i]n the attempt to generate support for banning these guns, they have been referred to as 'assault weapons,' a term which conjures up some idea of terrible weapons that have no purpose other than killing innocent people." *Id.*

149. 135 CONG. REC. §1868 (daily ed. Feb. 28, 1989).

150. This Issue Paper's condemnation is not to say that journalists (or Issue Paper authors) must never express a point of view. But even advocacy journalism should do its best to present accurate factual data.

151. "The single-shot, level-action, and bolt-action rifles which copied the 19th century military firearm in design were the universal choice of sportsmen until World War I. By World War II, the United States was the only nation using semiautomatic firearms as standard equipment, and in the 1950s, civilians, too, sought semiautomatic designs for hunting rifles. There is nothing new about the popularity of military-style firearms, and there is nothing new about the semiautomatic mechanical action itself. What is new is the cosmetic appearance of some semiautomatic firearms, as once again some civilian shooters favor firearms resembling those used by the military." *Hearings, supra* note 5, at 68.

152. Jamison, .223, .308, .30-06, .45-70: The U.S. Military's Fearsome Foursome, SHOOTING TIMES, March 1990, at 36. This article notes that four modern military cartridges, and the military-style semiautomatics that chamber them, have become very popular with hunters. The author particularly highlights the use of the .223 cartridge by ranchers attempting to control the populations of varmints such as gophers and coyotes.

153. *See* p. 15, *supra*.

154. Milek, *Shootin ench*, GUNS & AMMO, November 1989, at 16.

155. *L.A. Times*, Feb. 24, 1989, at V1, cols. 2, 4.

156. *Hearings, supra* note 23, at 70.

157. The Colt AR-15 has an excellent reputation for accuracy and reliability and has been a preferred rifle in target competitions, which include courses of fire of under 600 yards. National Rifle Association, *M-16 AR-15* (1987, NRA Book Service). In 1977, at Camp Perry, Ohio, these M16 rifles were used by several shooters of the National Trophy Individual Match event, and they have also been used in NBPRP and other NRA matches. *Id.* at 12.

158. 135 CONG. REC. 1872 (daily ed. Feb. 23, 1989).

159. S. Helsley, Acting Assistant Director, Investigation and Enforcement Branch, memorandum to G. Clemons, Director, Division of Law Enforcement, Oct. 31, 1988, at 4 ("a ban would devastate competitors in California...assault weapons cannot be defined in a workable way...we should leave the issue alone.").

160. Thomas Jefferson advised his nephew: "Games played with a bat and ball are too violent, and stamp no character on the mind...[A]s to the species of exercise, I advise the gun." J. Foley, THE JEFFERSON ENCYCLOPEDIA (1967), at 318. Were Jefferson to visit a high school shooting competition, and then a high school football game where students cheered as a player was slammed to the ground, Jefferson might think his earlier view confirmed.

161. Because of budget constraints, the DCM program will lose its federal subsidy. That the program must become financially self-sufficient does not prove that it is no longer important. Many important federal programs, such as aviation safety and airport construction, are financed by user fees.

162. It might be interesting to ask the anti-gun lobby why a gun designed to kill an innocent game animal is more legitimate than a gun designed to protect an innocent human being against a criminal attack.

163. U.S. CONST. amend. II.

164. *Dred Scott* v. *Sanford*, 60 U.S. (19 How.) 393, 417 (1857) (If free Blacks were citizens, they would have the right "to carry arms wherever they went."); *United States* v. *Cruikshank*, 92 U.S. 542, 551-53 (1876) (The Second Amendment right to bear arms, like the First Amendment right to assemble, was not granted by the Constitution, but was merely recognized by that document, since arms bearing and assembly are both fundamental human rights that are "found wherever civilization exists."); *Robertson* v. *Baldwin*, 165 U.S. 275, 281-82 (1896) (In this case, the Court wrote "The right of the people to keep and bear arms is not infringed by laws prohibiting the carrying of concealed weapons." The obvious implication is that laws prohibiting the carrying of unconcealed weapons would violate the Second Amendment, a fact that could only be true if the Amendment recognized an individual right); *United States* v. *Miller*, 307 U.S. 174 (1938 (discussed extensively below); *Moore* v. *East Cleveland*, 431 U.S. 494, 502 (1976) ("the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures" are part of the "full scope of liberty" guaranteed by the Constitution and made applicable against the states by the due process clause of the 14th amendment); *United States* v. *Verdugo-Urquidez*, 110 S.Ct. 1056, 1061 (1990)("[T]he 'people' protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of the national community or who have otherwise developed sufficient connection with this country to be considered part of that community.")

165. As the Senate Subcommittee on the Constitution noted in 1982, "The Framers of the Bill of Rights consistently used the words 'right of the people' to reflect individual rights — as when these words were used to recognize the 'right of the people to peaceably assemble'" in the First Amendment.

166. Eighty-nine percent of Americans believe that as citizens they have a right to own a gun, and 87 percent believe the Constitution guarantees them a right to keep and bear arms. J. Wright, P. Rossi, and K. Daly, UNDER THE GUN: WEAPONS, CRIME AND VIOLENCE IN AMERICA 229 (1983), quoting survey conducted by Decision-Making Information Inc.

167. Among the most recent endorsements of the individual right position are Amar, *The Bill of Rights as a Constitution*, 100 YALE L. J. 1131, 1164ff (1991) and Scarry, *War and the Social Contract: Nuclear Policy, Distribution, and The Right to Bear Arms*, 139 U. PENN. L. REV. 1257 (1991).

Similar conclusions were reached in the overwhelming majority of scholarly writing in the 1980s, of which the following is only a partial list: Levinson, *The Embarrassing Second Amendment*, 99 YALE L. J. 637 (1989); S. Halbrook, *A Right To Bear Arms: State And Federal Bills Of Rights And Constitutional Guarantees* (1989); L. Levy, *Original Intent and the Framers' Constitution* 341 (1988); Hardy, *The Second Amendment and the Historiography of the Bill of Rights*, 4 J.L. & POL'Y 1 (1987); Lund, *The Second Amendment, Political Liberty and the Right to Self-Preservation*, 39 ALA. L. REV. 103 (1987); Shalhope, *The Armed Citizen in the Early Republic*, 49 LAW & CONTEMP. PROBS. 125 (1986); Kates, *A Dialogue on the Right to Keep and Bear Arms* 49 LAW & CONTEMP. PROBS. 143 (1986); 4 *Encyclopedia of the American Constitution* 1639-40 (Karst & Levi eds. 1986); Hardy, *Armed Citizens, Citizen Armies: Toward a Jurisprudence of the Second Amendment*, 9 HARV. J.L.& PUB. POL'Y 559 (1986); Marina, "Weapons, Technology and Legitimacy: The Second Amendment in Global Perspective" in *Firearms and Violence: Issues of Public Policy* (D. Kates, ed. 1984); Dowlut, *The Current Relevancy of Keeping and Bearing Arms*, 15 U. BALT. L. REV. 32 (1984); Kates, *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH L.REV. 204, 244-52 (1983); Malcolm, *The Right of the People to Keep and Bear Arms: The Common Law Perspective*, 10 HAST. CONST. L.Q. 285 (1983); Dowlut, *The Right to Arms*, 36 OKLA. L. REV. 65 (1983); Senate Subcomm. on the Constitution of the Comm. on the Judiciary, 97th Cong., 2d Sess., *The Right To Keep and Bear Arms* (1982); Caplan, *The Right of the Individual to Bear Arms*, 1982 DET. COLL. L. REV. 789 (1982); Gardiner, *To Preserve Liberty—A Look at the Right to Keep and Bear Arms*, 10 N. KY. L. REV. 63 (1982); Note, *Gun Control: Is It A Legal and Effective Means of Controlling Firearms in the United States?*, 21 WASHBURN L.J. 244 (1982); Shalhope, *The Ideological Origins of the Second Amendment*, 69 J. AM HIST. 599 (1982); Cantrell, *The Right to Bear Arms*, 53 WIS. BAR B. 21 (1980).

Very few articles from the last decade support of the prohibitionist, anti-individual position. Significantly, even one of these rejects the states' right view. Beschle, *Reconsidering the Second Amendment: Constitutional Protection for a Right of Security*, 9 HAMLINE L. REV. 69 (1986) concedes that the Amendment does guarantee a right of personal security, but argues that the right can constitutionally be implemented by banning and confiscating all guns. The others are Fields, *Guns, Crime and the Negligent Gun Owner*, 10 N. KY. L. REV. (1982) (article by a non-lawyer spokesperson for the National Coalition to Ban Handguns); Spannaus, *State Firearms Regulation and the Second Amendment*, 6 HAMLINE L. REV. 383, (1983); Cress, *An Armed Community: The Origins and Meaning of the right to Bear Arms*, 71 J. AM. HIS. 22 (1983); Ehrman & Henigan, *The Second Amendment in the Twentieth Century: Have You Seen Your Militia Lately?* 15 DAYTON L. REV. 5 (1990).

168. Madison's original structure of the Bill of Rights did not place the amendments together at the end of the text of the Constitution (the way they were ultimately organized); rather, he proposed interpolating each amendment into the main text of the Constitution, following the provision to which it pertained. If he had intended the Second Amendment to be mainly a limit on the power of the federal government to interfere

with state government militias, he would have put it after Article 1, section 8, which granted Congress the power to call forth the militia to repel invasion, suppress insurrection, and enforce the laws; and to provide for organizing, arming, and disciplining the militia. Instead, Madison put the right to bear arms amendment (along with the freedom of speech amendment) in Article I, section 9—the section that guaranteed individual rights such as habeas corpus. Donald B. Kates, "Second Amendment," in *Encyclopedia of the American Constitution*, ed. Leonard Levy (New York: MacMillan, 1986), p. 1639. See also Robert Shalhope, "The Ideological Origins of the Second Amendment," 69 *Journal of American History* (December 1982): 599-614; Joyce Malcolm, "The Right of the People to Keep and Bear Arms: The Common Law Tradition," *Hastings Constitutional Law Quarterly* 10 (Winter 1983): 285-314. *See also* discussion below, and legal scholarship cited in previous note.

169. *See, e.g.*, Hardy, *Armed Citizens, Citizen Armies: Toward a Jurisprudence of the Second Amendment*, 9 HARVARD JOURNAL OF LAW AND PUBLIC POLICY 559, 560 (1986). This article provides a summary of contemporary interpretations of the Second Amendment and a thorough discussion of the intent of its framers.

170. SENATE SUBCOMM. ON THE CONSTITUTION OF THE COMM. ON THE JUDICIARY, 97th Cong., 2d Sess., THE RIGHT TO KEEP AND BEAR ARMS 6 (Comm. Print 1982) [hereinafter SUBCOMM. ON THE CONSTITUTION].

171. *Id.* The English background of the individual right to possess weapons dates back to the reign of King Alfred the Great in 690 A.D. Hardy, *supra* note 169, at 562. Under King Alfred, every free male was required by law to possess the weapons of an infantryman and serve in the citizen militia (although the word "militia" itself was not used until the late 16th century). In 1181, King Henry II's Statute of Assize of Arms ordered all freemen to bear arms for national defense. The Assize required every freeman to "bear these arms in his [Henry II's] service according to his order and in allegiance to the lord King and his realm." The Assize was based on the old Saxon tradition of the fyrd, in which every male aged 16 to 60 bore arms to defend the nation. Statute of Assize of Arms, Henry II, art. 3 (1181); Robert W. Coakley and Stetson Conn, *The War of the American Revolution* (Washington: Center of Military History United States Army, 1975), at 2. Complaining about an increase in crime, Edward I enacted the Statute of Winchester, which required "every man," not just freemen, to have arms. The types of arms required to be owned by the poorest people were Gisarmes (a type of pole-ax), knives, and bows. Other anti-crime measures in the statute ordered local citizens to apprehend fleeing criminals, and established night watches. 13 Edward I chapter 6 (1285). By the late 16th century, gun ownership had become mandatory for all adult males — for anti-crime purposes, and for the defense of the realm. Arms were necessary so that all citizens could join in the *hutesium et clamor* (hue and cry) to pursue fleeing criminals; indeed, citizens were legally required to join in. Any person who witnessed a felony could raise the hue and cry. Frederick Pollock and Frederic W. Maitland, *The History of English Law before the Time of Edward I* (Cambridge: Cambridge University Press, 1911, 2d ed., 1st pub. Cambridge, 1895), II, chapter IX, § 3, pp. 578-80; Blackstone, IV, pp. *293-94; Statute of Winchester, 13 Edward I, chapter 1 & 4; Bradley Chapin, *Criminal Justice in Colonial America, 1606-1660* (Athens: University of Georgia Press, 1983), p. 31, citing Michael Dalton, *The Country Justice, Containing the Practise of Justices of the Peace out of Their Sessions* (London: 1619), p. 65, and Ferdinando Pulton, *De Pace Regis Regni Viz A Treatise declaring which be the great and generall offences of The Realme, and the chiefe impediments of the peace of The King and The Kingdom* (London: 1609), pp. 152-56. The English Bill of Rights of 1689 recognized a right to bear arms, albeit one subject to limitation. "The subjects which are protestants may have arms for their defence suitable to their conditions as and allowed by law." Bill of Rights of 1689, 1 William & Mary, sess. 2 chapter 2.

172. "The fifth and last auxiliary right of the subject, that I shall at present mention, is that of having arms for their defence, suitable to their condition and degree, and such as are allowed by law. Which is also declared by the same statute 1 W. & M. st. 2 c. 2. and is indeed a public allowance, under due restrictions, of the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression." William Blackstone, *Commentaries on the Laws of England*, I (Chicago: University of Chicago Press, 1979) (facsimile of First Edition of 1765-1769), p. 139.

173. Blackstone, IV, p. *82.

174. Hardy, *supra* note 169, at 588.

175. *Id.*

176. Between 1620 and 1775, "almost the entire male population of New England actively participated in the militia." Marie Ahearn, *The Rhetoric of War: Training Day, the Militia, and the Military Sermon* (Westport, Connecticut: Greenwood Press, 1989), p. 2.

177. *Essex Gazette*, April 25, 1775, p. 3, col. 3; Coakley and Conn, pp. 25-26.

178. Halbrook, *The Right to Bear Arms in Texas: The Intent of the Framers of the Bill of Rights*, 41 BAYLOR L. REV. 629, 636 (1989).

179. "The experience of the Revolution thus strengthened the colonial perception of a link between individual armament and individual freedom. The colonists, who perceived themselves as staunch Whigs, continued to see free individual armament as Whig dogma." *Hardy*, 169, at 593.

180. Daniel Boorstin, *The Americans: The Colonial Experience* 370 (1965). See also William Marina and Diane Cuervo, "The Dutch-American Guerrillas of the American Revolution," in ed. Gary North, *The Theology of Christian Resistance: A Symposium*, vol. 2 of *Christianity and Civilization* (Tyler, Texas: Geneva Divinity School Press, 1982): 242-65.

181. *Hardy*, *supra* note 169, at 600-15.

182. *Id.* at 600.

183. *Id.* at 600-15.

184. W. Bennett, ed., *Letters from the Federal Farmer to the Republican* 21, 22, 124 (1975). Lee sat in the Senate that ratified the Second Amendment. SUBCOMMITTEE, *supra* note 170, at 5.

185. Hardy, *supra* note 169, at 599.

186. N. Webster, "An Examination into the Leading Principles of the Federal Constitution" in P. Ford, ed., *Pamphlets on the Constitution of the United States* 56 (1888).

187. *The Federalist*, No. 46 (J. Madison). At the time Madison wrote, "half a million citizens" amounted to almost the entire adult white male population.

188. *The Federalist*, no. 28 (A. Hamilton).

189. *The Federalist*, no. 29 (A. Hamilton).

190. Coxe, Pennsylvania Gazette, Feb. 20, 1788, quoted in Halbrook, *To Keep and Bear Their Private Arms: The Adoption of the Second Amendment, 1787-1791*, 10 N.KY. L. REV. at 17 (1982).

191. Hardy, *supra* note 169, at 604.

192. H.R. DOC. NO. 398, 69th Cong., 1st Sess. 1026 (1927).

193. *Id.*

194. Quoted in ed. Morton Borden, *The Antifederalist Papers*, vol. 3 (East Lansing: Michigan State University Press), p. 386.

195. "State conventions had made no fewer than five appeals for such a right; such accepted rights as freedom of speech, of confrontation, and against self-incrimination could boast but three endorsements." Hardy, *supra* note 169, at 604.

196. SUBCOMM. ON THE CONSTITUTION, *supra* note 170, at 6.

197. Quoted in Clinton Rossiter, *The Political Thought of the American Revolution* (New York: Harcourt, Brace and World, 1953), pp. 126-27.

198. Quoted in Borden, p. 425.

199. House Report No. 141, 73d Cong., 1st sess. (1933), pp. 2-5. Congress did so in order that the National Guard could be sent into overseas combat. The National Guard's weapons cannot be the arms protected by the Second Amendment, since Guard weapons are owned by the federal government. 32 U.S.C. § 105[a][1].

200. *Subcommittee on the Constitution*, at 7. "There can be little doubt...that when the Congress and the people spoke of a 'militia,' they had reference to the...entire populace capable of bearing arms, and not to any formal group such as what is today called the National Guard....When the framers referred to the equivalent of our National Guard, they uniformly used the term 'select militia' and distinguished this from 'militia.' Indeed, the debates over the Constitution constantly referred to organized militia units as a threat to freedom comparable to that of a standing army, and stressed that such organized units did not constitute, and indeed were philosophically opposed to, the concept of a militia."

Several states included a similar right to bear arms guarantee in their own constitutions. If the Second Amendment protected only the state uniformed militias against federal interference, a comparable article would be ridiculous in a state constitution.

201. *Webster's Ninth New Collegiate Dictionary* 103 (1984).

202. *Quilici* v. *Village of Morton Grove*, 532 F. Supp. 1169 (N.D. Ill.), *affd.* 695 F.2d 261 (7th Cir., 1982), *cert. denied* 464 U.S. 863 (1983).

203. 307 U.S. 174 (1938).

204. *Id.* at 175.

205. *Id.* at 177.

206. A federal statute at the time allowed appeals directly to the Supreme Court when a federal district court found a federal statute unconstitutional.

207. *Miller*, 307 U.S. at 179.

208. *Id.*

209. *Id.*

210. *Id. at 178.*

211. *Id.* (quoting *Aymette* v. *State*, 21 Tenn. (2 Hum.) 154, 158 (1840)).

212. *United States* v. *Cruikshank*, 92 U.S 542, 551-53 (1876).

213. The Court's decision failed to consider *Dred Scott*, where the Court had stated the right to carry arms was included within the" Privileges and Immunities" clause of Article IV, section one of the Constitution.

214. *Fresno Rifle and Pistol Club* v. *Van de Kamp*, 746 F.Supp. 1415 (E.D. Calif. 1990).

215. *Fresno Rifle & Pistol Club*, Inc v. *Van de Kamp*, —965 F.2d— 723, 1992 WL 106981 (9th Cir. 1992).

216. *Moore* v. *East Cleveland*, 431 U.S. 494, 502 (1976) ("the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures" are part of the "full scope of liberty" guaranteed by the Constitution and made applicable against the states by the due process clause of the 14th amendment).

217. Said Rep. Sidney Clarke of Kansas, during the debate on the Fourteenth Amendment, "I find in the Constitution of the United States an article which declared that 'the right of the people to keep and bear arms shall not be infringed.' For myself, I shall insist that the reconstructed rebels of Mississippi respect the Constitution in their local laws." Quoted in David Hardy, "The Constitution as a Restraint on State and Federal Firearm Restrictions," in D. Kates, ed. *Restricting Handguns: The Liberal Skeptics Speak Out* 181 (1979). For more on the history of the 14th Amendment, see S. Halbrook, THAT EVERY MAN BE ARMED, *supra* note 167; Kates, *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH L.REV. 204 (1983).

218. 116 U.S. 252 (1886).

219. *Id.* at 265.

220. *Nunn* v. *State*, 1 Ga. (1 Kel.) 243, 251 (1846)

221. *Coleman* v. *Chafin*, civil action no. D-67151 (Fulton Superior Ct., July 31, 1989)(Alverson, J.). The court's decision granted a temporary restraining order against enforcement of the ordinance, and the city failed to appeal the decision.

222. 50 Tenn. (3 Heisk.) 165 (1871).

223. *Id.* at 179.

224. *Fife* v. *State*, 31 Ark. 455, 461 (1876).

225. *Id.* at 460-61.

226. *Oregon* v. *Kessler*, 289 Or. at 369, 614 P.2d at 99.

227. *Kessler*, 289 Or. at 368, 614 P.2d at 98.

228. *Id.* The Texas Constitution has also been interpreted to deny a right to possess machineguns.

229. Oregon Attorney General, Opinion 82-15, Apr. 20, 1990; *Oregon State Shooting Association* v. *Multnomah County*, no. 9008-04628 (Circuit Court, August 22, 1991). The trial court reasoned that the Supreme Court's methodology for determining which weapons are covered by the Oregon Constitution had been outlined in a case involving knives, and thus was not binding to a case involving guns.

230. *Arnold* v. *Cleveland*, 1991 WL 228628 (Ohio App., Oct. 31, 1991)(not selected for official publication), *jurisdiction granted* 63 Ohio St.3d 1457, 590 N.E.2d 752 (May 6, 1992).

An "assault weapon" ban enacted by the city of Columbus was upheld in *Hale* v. *Columbus*, 630 Ohio App. 3d 368, 578 N.E.2d 881 (Ohio App. 1990). No appeal was taken. In the *Hale* case, the attorney for the plaintiffs presented only one piece of evidence (that "assault weapons" were rarely used in crime in Columbus), simply asserted that ordinance was "arbitrary and capricious," and presented no evidence that the guns in question had legitimate uses.

231. David Kopel served as the lead attorney for the Attorney General of the State of Colorado. The State of Colorado's opinions were expressed in the briefs and oral arguments relating to the case; nothing in this Issue Paper should be construed as necessarily reflecting the views of the Colorado Attorney General.

232. Denver Revised Municipal Code, former § 38-130(a).

233. *Robertson, et al* v. *Denver*, no. 90CV603, slip opinion, at 6 (Feb. 26, 1992, Denver District Court)(Mullins, J.).

> The Colorado Constitution states:
>
> The right of no person to keep and bear arms in defense of his home, person and property, or in aid of the civil power when thereto legally summoned, shall be called in question; but nothing herein contained shall be construed to justify the practice of carrying concealed weapons.

Colo. Const., Article II, § 13.

234. *Robertson*, at 6.

235. The provision outlawed:

> All semiautomatic pistols that are modifications of rifles having the same make, caliber and action design but a shorter barrel and no rear stock or modifications of automatic weapons originally designed to accept magazines with a capacity of twenty-one (21) or more rounds.

Denver Revised Municipal Code, former § 38-130(b)(1)(c). The court found that "a person of common intelligence has no reasonable basis for determining if a particular pistol was based on a rifle design or based on the design of an automatic weapon." *Robertson,* at 17.

236. The provision outlawed:

> Firearms which have been redesigned from, renamed, renumbered, or patterned after one of the listed firearms in subdivisions (1), (2), (3) or those described in subdivision (4) regardless of the country of production or distribution or the country of origin or any firearm which has been manufactured or sold by another company under a licensing agreement to manufacture or sell the identical or nearly identical firearms as those listed in subdivision (1), (2), (3) or those described in subdivision (4) regardless of the company of production or distribution or the country of origin.

Denver Revised Municipal Code, former § 38-130(h)(5). The court found that "No person with less knowledge than an expert in firearm can make a determination that they are carrying, storing, or otherwise possessing a weapon which is covered by Section 38-130(h)(5)."

237. *Hearings, supra* note 23, at 104. Hon. Charles B. Rangel, National Council For a Responsible Firearms Policy, Inc., stated:

> I understand the second amendment and the right to bear arms. I understand the right to protection and all of those issues. I am well aware of the fact that just because a gun is powerful and has lots of fancy features, it does not mean that each and every person who purchases it does so with the intent of taking human lives.
>
> But I also understand the fact that we cannot continue to allow human beings, and not animals, to be hunted down with these weapons. People are being stalked through the streets and the neighborhoods and pumped full of bullets like prey on "Wild Kingdom."

238. 389 U.S. 347.

239. It should be noted that the Stockton murders were not made worse because Patrick Purdy owned a semiautomatic. He fired approximately 110 rounds in six minutes. Anyone who was willing — as Purdy apparently was — to spend some time practicing with guns, could have speedily reloaded even a simple bolt-action rifle, and fired as many shots in the same time period.

Moreover, medical technology has greatly outstripped firearms technology in the past two centuries. Because gunshot wounds are much less likely to result in fatality today, a criminal firing a semiautomatic gun for a given period (such as six minutes) today would kill fewer people today than a criminal firing a more primitive gun two hundred years ago.

240. One clearly obsolete provision of the Constitution is the guarantee of federal jury trials when the amount in controversy exceeds $20. Due to inflation, a $20 case today is immensely less significant than a $20 case from 200 years ago. Today, the $20 rule impedes judicial efficiency by guaranteeing a jury trial for even the pettiest of cases. Yet no-one suggests that a legislature could simply ignore the 7th amendment because of obsolescence. The only remedy is to propose an amendment.

241. *See* text at p. 17, *supra.*

242. *Los Angeles Times*, May 13, 1988, at II, 3.

243. "Block Clubs Wage the Battle," *Washington Times*, November 25, 1988, p. C6.

244. "Drug Battle Truce," *Rocky Mountain News*, September 29, 1989, p. 4; "Anti-Drug Gun Battle Spurs Demand for Firearms," *Gun Week*, November 3, 1989, p. 9, citing *Spokane Chronicle*.

245. 135 CONG. REC. S1869-70 (daily ed. Feb. 28, 1989).

246. *Hearings, supra* note 23, at 77.

247. Alan Gottlieb, "Gun Ownership: A Constitutional Right," *Northern Kentucky Law Review* 10 (1982): 138.

248. Governor O'Conor of Maryland delivered a radio address on March 10, 1942, at which he called for volunteers to defend the state: "[T]he volunteers, for the most part, will be expected to furnish their own weapons. For this reason, gunners (of whom there are sixty thousand licensed in Maryland), members of Rod and Gun Clubs, of Trap Shooting and similar organizations will be expected to constitute a part of this new military organization." State Papers and Addresses of Governor O'Conor, vol. III, p. 618, quoted in Bob Dowlut, "The Right to Bear Arms: Does the Constitution or the Predilection of Judges Reign?" *Oklahoma Law Review* 36 (1985): 76-77, n. 52. See also D. Kates, *Why Handgun Bans Can't Work* 74 (Bellevue, Washington: 1982), citing Baker, "I Remember 'The Army' with Men from 16 to 79," *Baltimore Sun Magazine*, November 16, 1975, p. 46.

249. M. Schlegel, *Virginia On Guard—Civilian Defense and the State Militia in the Second World War* (Richmond: Virginia State Library, 1949), pp. 45, 129, 131. According to Schlegel, the Virginia militia "leaned heavily on sportsmen," because they could provide their own weapons. Ibid., p. 129; quoted in Bob Dowlut, "State Constitutions and the Right to Keep and Bear Arms," *Oklahoma City University Law Review* 2 (1982): 198.

250. "To Arms," TIME, March 30, 1942, p. 1.

251. Office of the Assistant Secretary of Defense, *U.S. Home Defense Forces Study* (March 1981), pp. 32, 34, 58-63, quoted in Dowlut, "State Constitutions," p. 197.

252. Originally printed as Bert Levy, *Guerilla Warfare* (New York: Penguin Books, 1942), p. 55; reprinted as Bert. Levy, *Guerilla Warfare* (Panther Publications: 1964), p. 56, quoted in Dowlut, "State Constitutions," p. 198, n. 91.

253. A study by the Arthur Little firm found that men who participated in the DCM shooting program before joining the military learned military shooting more speedily than did other recruits. DCM participants who do not join the military are still a national defense resource, since they will be able to use their skills in the event of an emergency of the type detailed in this section.

254. "Far North Has Militia of Eskimos," *New York Times*, April 1, 1986, p. A14.

255. Mao Zedong, *Mao-Tse Tung on Guerilla Warfare*, translated by S. Griffith (New York: Praeger, 1961), cited in Raymond Kessler, "Gun Control and Political Power," *Law and Policy Quarterly* 5 (1983): 395.

256. "One Year Later, Analysts Groping for Answers to Afghanistan," *Kansas City Times*, December 26, 1980, p. B-3, cited in Kessler, p. 395.

257. Gottlieb, p. 139.

258. For the Philippines, see R. Sherrill, THE SATURDAY NIGHT SPECIAL 272 (1973). For Uganda, "Uganda Curbs Firearms," *New York Times*, December 22, 1969, p. 36. For Cuba, see Kessler, p. 382; Crum, "Gun Control Paved Castro's Way, *Conservative Digest*, April 1976, p. 33 (use of Batista's registration lists to facilitate confiscation); Williams, "The Rise of Castro: 'If only we hadn't given up our guns!'", *Medina County Gazette*, October 15, 1978, p. 5. For Bulgaria, see GUN CONTROL LAWS IN FOREIGN COUNTRIES, rev. ed. (Washington: Library of Congress, 1976), p. 33. (Upon coming to power Bulgarian communists immediately confiscated all firearms.)

259. *Farmer* v. *Higgins*, 907 F.2d 1041 (11th Cir. 1990), *cert. denied*, 111 S.Ct. 753 (1991).

260. *Hopfman* v. *Connolly*, 471 U.S. 459 (1985).

261. The statute prohibits manufacture of machineguns for sale to civilians except "under the authority of the United States." 18 United States Code § 922(o). The federal district court, noting repeated Congressional statements of intent not to outlaw any firearms, found the phrase to require the Bureau of Alcohol, Tobacco and Firearms to issue manufacturing licenses to persons who were not otherwise prohibited from manufacture.

262. *Farmer* v. *Higgins*,

263. *See* p. 13, *supra*.

264. *See* p. 13, *supra*.

265. Massacres do not have to be planned. An inexperienced police officer, under stress and armed with a deadly "assault weapon" could do at least as much damage as an ordinary citizen who went berserk. Of course it would be wrong to deprive all police officers of useful firearms to guard against the unlikely possibility that an officer with no prior record of illegal violence would suddenly lose his bearings and start killing people. The same may be said of ordinary citizens.

266. In December 1992, an off-duty Bureau of Indian Affairs police officer opened fire and shot 50 rounds into a bar in Bemidjii, Minnesota. He used the Colt AR-15 type semi-automatic rifle which he had been issued by the government, as well as 9 mm handgun which he personally owned. Pat Doyle, "For 14 Long Minutes, Sheer Terror Filled Bar Attacked by Gunman," *Minneapolis Tribune*, Dec. 29, 1992.

267. In the spring of 1989, Philip McGuire testified before the U.S. Senate Subcommittee on the Constitution in favor of Senator Metzenbaum's S.386. The bill would have given the Bureau of Alcohol, Tobacco and Firearms the discretionary authority to outlaw almost every semiautomatic. Mr. McGuire, a former administrative official with the BATF, assured the Senators that BATF would not abuse its discretionary authority. The assurance was ironic, considering its source. When Mr. McGuire was Chief of Investigations for BATF, the United States Senate made the finding that "[E]nforcement tactics made possible by current firearms laws [which were later reformed over Mr. McGuire's strong opposition] are constitutionally, legally, and practically reprehensible.... [A]pproximately 75 percent of BATF gun prosecutions were aimed at ordinary citizens who had neither criminal intent nor knowledge, but were enticed by agents into unknowing technical violations." Senate Committee on the Judiciary, Subcommittee on the Constitution, THE RIGHT TO BEAR ARMS, 97th Cong., 2d. Sess., S. Doc. No. 2807 (February 1982), at 20-23 (unanimous report).

In 1982, Mr. McGuire was promoted to Associate Director, Law Enforcement, a position which he held until his retirement in 1988. In 1986, Congress enacted the Firearm Owners Protection Act, which narrowed the definition of offenses under the Gun Control Act of 1968, and sharply curtailed the search and seizure authority of BATF The preamble to the law reining in the enforcement activities under Mr. McGuire's supervision states:

> The Congress finds that (1) the rights of citizens (A) to keep and bear arms under the second amendment to the United States Constitution (B) to security against illegal and unreasonable searches and seizures under the fourth amendment (C) against uncompensated taking of property, double jeopardy, and assurance of due process of law under the fifth amendment and (D) against unconstitutional exercise of authority under the ninth and tenth amendments; require additional legislation to correct existing firearms statutes and enforcement policies...

18 U.S.C.S. § 921 (1990 Supp.), at 149.

268. "Gun-control foes' Lawsuit Alleges Warrantless Search," *Wash. Times*, July 17, 1990, at B5; "Pro-gun Groups Sues for Access to Papers Related to '88 Search," *The (Baltimore) Sun*, July 17, 1990.

269. The act which the police said justified the taking of photos was unfurling a banner comparing Governor Schaefer to Hitler, but no photograph shows such a banner. None of the photos showed persons engaging or seeming ready to engage in violent conduct. The photographs were mostly of speakers and persons quietly listening to them. The rally was the only 1991 State House demonstration where police photographed the demonstrators. "Police Photos Taken at State House Rally Irk Gun-Control Foes," *Wash. Times*, Mar. 28, 1991, at B4; "Police Photos and Gun Rally Blasted," *The (Baltimore) Evening Sun*, Mar. 27, 1991, at A1; "Gun Advocates Charge Intimidation," *Montgomery J.*, Mar. 28, 1991, at A1.

270. "Smile! You're on State Police Camera," *Montgomery J.*, Apr. 1, 1991, at A4 (editorial).

In March 1993, the Governor illustrated the need for a ban on "assault pistols" by picking up a gun from a display table, and pointing it at a reporter. "Some of you have never had [a gun] in your face," the Governor said. "I bet you wouldn't be laughing. I bet you wouldn't be smiling. I don't know what would happen to your pants, but I can imagine." Mike Littwin, "Just What was the Gun-toting Guv Aiming to Do?" *Baltimore Sun*, March 17, 1993, p. 1C.

271. The Nazi controls were based on a foundation of strict controls enacted by the Weimar government. For full text and analysis of the Weimar and Nazi laws, see Jay Simkin & Aaron Zelman, *Gun Control: Gateway to Tyranny* (Milwaukee: Jews for the Preservation of Firearms Ownership, 1992).

272. Quoted in David Hardy, "The Second Amendment as a Restraint on State and Federal Firearm Restrictions," in *Restricting Handguns*, pp. 184-85.

At "assault weapon" hearings in 1989, Representative William Hughes told witness Neal Knox (the lobbyist for the Firearms Coalition), that it was outrageous that Knox and his supporters did not the government. Knox shot back that it was outrageous that Hughes did not trust the people.

273. The Bush administration made a start in the right direction with its "Operation Triggerlock" prosecutions under the federal felon in possession statutes. Unfortunately, too many of the offenders swept within the net were simply easy marks for prosecutors, rather than real threats to public safety.

For example, in an Indiana case, a man named David Eubank who had served a prison sentence for robbery was released, and put on probation. He went straight, and checked in regularly with his

probation officer. He asked the officer if it was alright to get a .22 rifle for hunting for food, and the probation officer said yes.

The probation officer was correct under Indiana law, which allows ex-felons to own long guns, but was incorrect under federal law, which bars all gun possession by ex-felons.

A while later, Indiana police and federal officials raided Eubank's home, searching for evidence that he was committing robberies again. They found no such evidence, but they did find a .22 rifle. Ironically, Eubank faced a longer term for possessing the gun -- after his probation officer told him it was alright --than he would have served if he actually perpetrated more robberies! After spending nearly a year in prison on the gun charge, Eubank was released from prison following his acquittal in a jury trial, possibly as the result of jury nullification.

In an El Paso case, Bill Keagle, who had committed burglaries in 1978, went straight after release from prison, and, unaware of the federal laws, took the .22 rifle and a shotgun he owned down to a pawnshop and sold them. As part of the sale, he filled our the federal gun registration document, Form 4473. Since Keagle had sold the guns, and had been willing to fill out a registration form when he did so, he plainly was not planning to use the guns in a crime.

The fact did not stop the El Paso police and the federal government from finding the 4473 form, and prosecuting Keagle vigorously. In exchange for dropping charges which would have led to a 15 year mandatory minimum, Keagle was forced to plea bargain to an eight year prison sentence.

274. Thompson used a stolen, fully-automatic firearm.

275. *Austin Amer. Statesman*, Sept. 17, 1989, at A19 col. 2.

276. *Id.* at A19, col. 3. In fact, the study showed that after one episode of Miami Vice featured the Bren 10, gun stores were flooded with demands for the unusual weapon and the price has now reached $1200 per gun. *Id.*

277. *Id.*

278. Homicide rates in the United States, Canada, and South Africa all rose steeply after the introduction of television. Centerwall noted that after television was introduced in Canada, the homicide nearly doubled, even though per capita firearms ownership remained stable. In the United States, the rise in firearms homicide was paralleled by an equally large rise in homicide with the hands and feet. The data therefor implies that the underlying cause of the homicide increase was not a sudden surge in availability of firearms, since there was no surge in availability of hands and feet, and hand and foot homicide rose as sharply as firearms homicide. Centerwall suggested that one mechanism by which television causes homicide, and perhaps other violent crime as well, is simple imitation. He pointed to an ABC news poll of prisoners which asked "have you ever committed a crime you saw on television?" Over one quarter of prisoners remembered a specific crime episode they had imitated. Brandon Centerwall, "Exposure to Television as a Risk Factor for Violence," 129 *American Journal of Epidemiology* 643-652 (April 1989).

279. There is no First Amendment violation in subjecting the entertainment industry to the same criminal laws that apply to the rest of the population.

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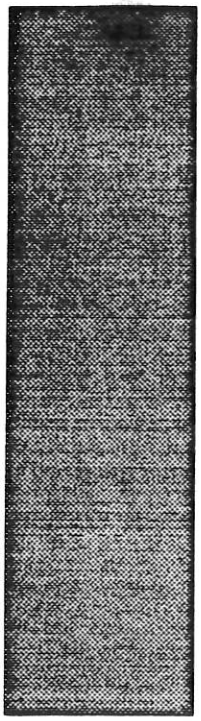

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#4

Remarks before the Kansas Senate Judiciary Committee on February 25, 1994, at Topeka, Kansas, pertaining to Senate Bill Number 648, providing for licensure to carry certain concealed weapons

My name is John B. Wooley. I am a native Kansan and have lived in Wichita Kansas since my birth there in 1926, except for approximately eleven (11) years (1931 - 1942) when our family lived on a cotton farm in Arkansas. My father was a hunter who taught me. There was an abundance of rabbits, squirrels quail and other small game in our immediate area. I grew up hunting and fishing and have been around guns all my life. Fishing and hunting remain my favorite recreation to this day.

I served three (3) years in the United States Navy as an enlisted man during and after World War II in the Pacific Theatre. I served thirty (30) years (1952 - 1982) in the U. S. Army Reserve and retired as a Colonel, JAG Corps. I have fired the 1903 Springfield .30 Calibur Rifle, the Garand .30 Calibur Rifle and the Army .45 Calibur Semi-automatic pistol more times than I can remember and have more expert medals for the latter two (2) weapons than I can remember.

I am a member of the Kansas Bar Association and the American Bar Association, having graduated from Washburn Law School in 1956. I practiced law in Wichita from 1956 until June, 1969 when I was selected as one of two (2) Federal Magistrate Judges in the District of Kansas. I served as a full-time U. S. Magistrate Judge from 1969 until October 1, 1993, when I retired.

I am in favor of the pending bill.

When I first heard of laws permitting the carrying of concealed weapons I like most people, I believe, reacted negatively, thinking that if anyone could

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carry a concealed weapon frequent shootings and killings would result from trivial disputes which otherwise would probably be resolved by fist fights at worst. I have long since changed my mind and I urge this committee to report favorably on this bill.

As a concerned citizen, I am alarmed at the recent proliferation of killings by gangs, drug addicts and dealers, and others in random and drive-by shootings where, all to often, innocent bystanders are among the victims and we all are put in fear for our personal safety.

I believe it must be obvious, or soon will be obvious, to intelligent people that laws such as the "Brady Bill", recently passed by Congress, and other "Gun Control" laws, which may, to some unknown degree, have some salutary affect, are not the answer.

While I, personally, have no objection to a reasonable waiting period to purchase a hand gun, no one that I know, or who I have communicated with, or heard about claim that such laws will completely solve the problem - not the Bradys, those members of congress who voted for the bill or President Clinton. I suggest to you that such laws will have no more impact on the problem, nationwide,than they have had in Washington, D. C. New York City, Los Angeles or Chicago. Whatever good such laws have had in those four cities has, so far, been so slight as to be unmeasurable.

Neither do I expect that Bill 648 will be a complete solution to the problem, but I do believe it will save more lives by changing the dynamics involved and creating circumstances under which the responsible, law-abiding citizen cannot only protect himself and his loved ones, but also on occasion, be in a position to prevent pointless and needless massacres such as occurred at Killeen, Texas in October, 1991 (when some twenty odd people were murdered) and the more recent New York commuter train incident where, as I now recall, five or six others were struck down for no reason other than they happened to be in the same car with the gunman.

There have been other such incidents. If only one of the persons present had been able to carry a concealed weapon, legally, the gunman would likely have been dispatched soon enough (or at least, impeded) to have saved some lives.

As I am sure you are aware, in at least ten (10) states (Washington, Utah, Florida, Virginia, Georgia, Pennsylvania, Oregon, West Virginia Idaho and Montana) some version of non-discretionary concealed carry laws are "on the books". Late last month, or early this month, the California legislature defeated a bill that would have made it a felony, instead of a misdemeanor, to carry a concealed weapon without a permit. I have been told, and I stress this is pure hearsay, that there is a growing movement underway in California to propose to the legislature there a concealed carry law.

In most of those ten (10) states that have enacted concealed carry laws there has been either a decline in murder rates (based on a percentage of the rates in the remaining forty-nine states) or such laws did no harm that is, they did not result in an increase in the murder rate.

In none of the states where concealed carry laws are in affect has there been a significant percentage of mis-use by those permitted to carry concealed weapons - in fact hardly any at all.

The conditions under which permits should be issued can, of course, be legally, in my opinion, restricted further that is now provided by Section Three of Bill 648. For example, the bill could provide that no one be issued a permit who:

1. Is an alien and/or not a citizen of the United States
2. Has <u>voluntarily</u> submitted himself to a mental institution or has <u>voluntarily</u> submitted himself to treatment for a mental problem
3. Is out on bail pending trial or appeal in a criminal case
4. Is subject to an outstanding arrest warrant for a felony or a misdemeanor

5. Is, or has been, within the past _____ years, subject to a court order or injunction not to possess a firearm
6. Is a fugitive from justice, an escapee or has fled into Kansasfrom another state to avoid sentencing
7. Has been dishonorably discharged from any of the armed services

In addition, the bill could contain a provision granting discretionary authority in the issuing officer(s) to refuse a permit to "anyone whose character and reputation is such that the person would be likely to act in a manner dangerous to public safety" or words to that affect. In such "discretionary" situations, however, the burden of proof should be on the issuing officer to show good cause for refusing a permit.

I thank the Committee for allowing me to appear and offer my comments about this pending legislation.

John B. Wooley

#5

TESTIMONY OF MICHAEL C. DALY

February 25, 1994

Senate Bill 648 is a huge step in the right direction in the effort to reduce violent crime. One has only to look at the reduction in violent crime in areas where concealed-carry laws exist to be convinced of the effect on crime.

In Florida, since the passage of Florida's concealed-carry law in 1987, over 175,000 people have received permits to carry a concealed handgun. An FBI report shows that the homicide rate in Florida has dropped 21% in the years following the law's passage while the national rate has risen 12%.

In Georgia, a concealed-carry law was enacted in 1976. From 1976 to 1992, Georgia's homicide rate dropped 21% while the national rate rose 6% during the same time.

The effects of this bill on crime would be to increase the ability of an individual to protect him/herself from the criminal, and to put criminals on notice that the citizens of Kansas are ready to do their part to protect themselves. According to Professor Gary Kleck, criminologist at the University of Florida, firearms are used approximately 2 million times a year in the United States for personal protection. Of that 2 million, less than 2% of all occurrences lead to the killing or wounding of the criminal. Merely brandishing the firearm, or firing a warning shot stops the commission of the crime in 98% of all occurrences. Of the yearly self-defense encounters, citizens used hand guns to protect themselves two-thirds of the time.

If a single, legally armed, citizen had been present during the train shootings in New York City, the shooting rampage could have ended with a minimum number of fatalities. The same may be said of the Luby Cafeteria shootings in Texas, a legally armed citizen could have stopped the killing.

The argument that private citizens do not need firearms to defend themselves just does not hold water. About 83% of the population will be victims of violent crime at some point in their lives. Our courts have ruled (1982, District of Columbia Court of Appeals) " The police responsibility is only to the public at large, and not to individual members of the community." Considering that, effectively, there is only one police officer on patrol for every 3,300 citizens of the United States, every citizen should be provided the opportunity to protect themselves from the criminal element. Senate Bill 648 shows insight and intelligence in response to the issue of violent crime. All of the members of the Kansas legislature who authored, co-authored or support the legislation should be commended for their support of the safety and welfare of the citizens of Kansas.

Please support and vote for Senate Bill 648. Support the safety and welfare of the citizens of Kansas. We would appreciate hearing your position on Senate Bill 648. Thank you.

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#6

Ms. Michael G. Ballard
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Hm-262-8820
Wk-264-5891

In regard to Senate Bill No. 648, I wish to go on record as supporting this legislation. The world today is a dangerous place, even in Kansas. I'm sure we can all remember when the front door wasn't necessarily locked and when to help a stranger by the side of the road wasn't looked on as an act of daring but one of kindness. I, as a competitive shooter, am capable of protecting myself should worse come to worse. Capable, that is, as long as I am at home or in my place of business, the only two places that I am legally allowed to carry a weapon. Most crime happens on the streets, and on the streets I am unprotected. On the highways of Kansas it can be a long way to any sort of help and roadside robbery and car theft all too often ends in death for the hapless motorist. The roadside death of Michael Jordan's father is an all too apt and sad example. The courts have made it plain that the police are not responsible for protecting my individual safety, they are only responsible for the safety of the community at large. I have no complaints about that. It is a reality of modern life. The police come onto the scene after the fact. It's almost inevitable. I would, however, like to have the privilege and responsibility of carrying concealed to protect myself as a law-abiding citizen.

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Women have differant liabilities where self-protection is concerned. We, in general, are smaller, have less upper body strength, and cannot run as fast. We are targets for robbery, carjacking, and of course, rape. In this day of the AIDS virus, rape is tantamount to murder, slow murder but murder none the less. The time for letting the criminal "have what they want" because then they "won't have any reason to hurt you" is over. Perhaps the most important thing this legislation might accomplish is to send a message to the criminal element of our society. The message is that we will be passive victims no longer. Although it is sad that some peoples life choices lead them to bad ends, we must come to terms with the fact that our concern should be for the law-abiding citizens that they prey on. At some point the criminals must accept responsibility for their actions and the consequences that arise from those actions.

I live in a beautiful, older neighborhood that has no serious crime problems on the surface but it is a rare night when you cannot hear gunfire from my front porch. Several years ago I bought a handgun (and learned to shoot it) so that I would be able to defend myself if necessary. As a consequence of my lessons, I also became involved in national competitive shooting, a past-time

more women than ever before are joining not only because it is fun but because it is excellent practice for self defense. In talking to competitors from around the country I learned that some states profer the privilege of carrying concealed to qualified, law-abiding citizens. I was also intrigued to learn that statistically crime rates fall in states where carrying concealed weapons is allowed and not just in the short term. I realize that carrying concealed weapons is not for everyone. At best a small percentage of the state will take advantage of the privilege. However I believe that it is a privilege that should be offered to qualified individuals who are willing to accept the responsibility that it entails. Retired law enforcement and military, competitive shooters and traditional hunters, make up a wealth of qualified citizens that could be licensed and available for law enforcement back-up upon request. Many of the people I know who have concealed carry privileges in their states have done so for years without ever having to draw their weapons. Others have interesting stories involving foiled robberies, assisting police officers in detaining multiple suspects until police back-up arrives, or more often, a criminal who just changed his mind when confronted by an armed "victim."

When I have to leave my home at night, I take all the sensible precautions, lights on, keys and pepper gas in hand yet I know in some circumstances it won't be enough. I pray that I will never have to use deadly force to protect myself under any circumstances but I also would ask that you pass Senate Bill No. 648 so that the law-abiding citizen at least has an even chance.

#7

Session 1994
February 24, 1994
Senate Bill No. 648
By Committee on Judiciary

Opponent - Gregory Gragg

Kansas Senators,

My name is Gregory Gragg, I reside in Prairie Village, Kansas. I am not a lobbyist, with the N.R.A. or with the Brady organization favoring gun control. I have no party affiliation. I am with Barbara A. Gragg, my mother, who at the age of 54 was struck down and murdered last July at an Independence Day celebration in Wichita. Her murderer was in a crowd of 25,000. The weapon he carried was a .44 caliber hand gun. He had attended the celebration, **concealing his weapon**, while he plotted to kill another young man after the celebration. He completed his task killing the young man in a dark shot put area outside the stadium where earlier fireworks had been displayed. Unfortunately my mother, who was unaware that this man was carrying a gun, was helping her crippled friend across the field and happened to be in the way of his bullets.

By passing Senate Bill No. 648, you will be opening the door for tragic events like this to occur. I hear that gun control opponents say, "If we outlaw guns, only criminals will have them." I do not know if this is true or not. What I do know is that Bill No. 648 will make it easier for criminals to hide their guns from innocent people, like my mother.

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People may say that individuals who are criminals will not be eligible. I feel that **Criminals can meet the Criteria** set under Sect 3 of this bill.

1) I know there are criminals that have resided in Kansas for over six months. Who 2) are older than 21, that 3) do not suffer from physical infirmity that will prevent them from firing a gun. Nor are they 4) are not ineligible to posses a hand gun under K.S.A. 21-4204 or 5) & 6) have any convictions or addictions related to drugs or alcohol. These criminals will 7) desire to carry a concealed weapon and say that they are carrying it for lawful self-defense, They will meet and present evidence satisfactory to the bureau of their completion of all hunter, NRA, fire arms safety, law enforcement safety, shot in competition, get a license to carry a gun and completed a fire arms training course.

I can hear the gang slang on the streets right now, "I've got my 648." By passing this law you will make in-vogue for gang members, before they have any criminal records, to possess the right to carry a concealed weapon. I can see it as one of their "rights of passage."

We make laws to protect people, from others and themselves. You have to ask yourself, does bill No. 648 give anyone the potential to kill another human being in an easier way.

It is my opinion that, people will be killed by anothers who possessed the right to conceal their weapons from their victims and the line of people like me coming and asking you for laws to stop the killing will grow.

And then people like you will have to explain to all of their children why they have only one grandma, while other children have two.

Please, for the safety of all, vote down bill No. 648.

Thank you

Gregory Gragg
3696 W. 75th Street
Prairie Village, KS 66208

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#8

Kansas Highway Patrol
Summary of Testimony
1994 Senate Bill 648
before the
Senate Judiciary Committee
February 25, 1994

Good morning Mr. Chairman and members of the Committee. My name is Sergeant Terry Maple and I appear before you on behalf of Superintendent Lonnie McCollum to express the Patrol's opposition to Senate Bill 648.

Senate Bill 648 would allow certain persons to obtain a permit and carry a concealed firearm provided they meet certain qualifications.

The Highway Patrol is concerned for the safety of all law Kansas police officers as well as the citizens we serve. We feel that SB 648 would jeopardize that safety by increasing the number of times law enforcement officers would contact armed individuals.

The fact a law enforcement officer cannot be aware of the intent of an individual possessing a weapon creates a potentially dangerous situation for both the officer and the citizen. This lack of initial knowledge of intent would undoubtedly create unstable situations jeopardizing the safety of both the citizen and officer.

With these facts in mind the Patrol respectfully request that the committee not pass SB 648.

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