

AN ILLUSION OF GUN CONTROL

Julius (Jay) Wachtel

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Recent events exemplify our country's ongoing struggle to achieve the proper balance between gun control and liberty interests. During an intemperate public exchange with President Clinton, who favored presale background checks for buyers at gun shows, the N.R.A., who is opposed, accused the Feds of threatening the public safety by failing to enforce laws already on the books. Just one week later, Smith and Wesson apparently capitulated to the enemy by agreeing to settle the gun safety lawsuit, then quickly "clarified" its position when faced by criticisms from pro-gun interests, who fear the consequences of even incremental increases in oversight.<sup>1</sup> Of course, if more oversight leads to less firearms-related injury, many would say so much the better. But this paper proposes that political accommodations and ignorance of the illicit gun marketplace have led to legislation that actually increases the threat posed by the criminal misuse of firearms.

### Brady – Flawed and Potentially Dangerous

In 1968, Federal law was enacted to prohibit felons from acquiring or possessing firearms, including handguns, rifles and shotguns.<sup>2</sup> A provision requires that individuals who buy guns from licensed dealers declare in writing that they have not been convicted of a

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<sup>1</sup> "Gun Maker's Accord on Curbs Brings Industry Pressure." *New York Times*, March 30, 2000. For Smith and Wesson's official "Clarification", see <http://www.smith-wesson.com/misc/agreement.html>.

<sup>2</sup> Gun Control Act of 1968, 18 USC 922(g). It was justified, in part, by assertions that the unregulated transfer of firearms threatens Federal officials and impairs Interstate Commerce.

felony.<sup>3</sup> No procedure was imposed to confirm the truthfulness of a buyer's assertions, such as by a criminal record check. As far as the Feds were concerned, buyers could visit a gun store, present identification, complete the Form 4473 and walk out with a firearm.<sup>4</sup>

Predictably, some felons chose to circumvent the law's intent by simply answering falsely on the Form 4473. Frequent episodes of "lying and buying" came to light as ATF agents traced the ownership history of guns seized by police. Selling guns on the "honor system" came to a close with passage of the Brady bill, which imposed pre-delivery criminal record checks for sales by licensed dealers. Private sales – including transactions at gun shows - are unaffected by Brady and in many States remain wholly unchecked.<sup>5</sup> To allow time for the record check, a three-day waiting period was initially imposed. It has since been supplanted by a national Insta-check system that allows buyers to walk out with their purchase on the same day.<sup>6</sup>

Brady reflected a personal crusade by a well-known victim of gun violence and his spouse. Unlike more draconian Federal gun registration and licensing proposals, Brady offered a realistic opportunity to "move" on gun issues. Instead of imposing additional prohibitions, it proposed a straightforward way to increase the effectiveness of current law:

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<sup>3</sup> 18 USC 922...In practice, this is accomplished by having buyers check a box on a gun transaction form (ATF Form 4473).

<sup>4</sup> A few States, including California, required record checks and waiting periods, going far beyond the provisions of Federal law. These locales are unaffected by *Brady*. To the present day, Forms 4473 remain at a dealer's premises and – aside from their use during the *Brady* process - receive no routine confirmation or review. Indeed, concern that Federal record-keeping requirements might lead to a national gun registration system leads Federal legislators, each year, to insert language in the ATF appropriations bill that prohibits creating a central registry of gun buyers.

<sup>5</sup> *Brady* now encompasses all firearm transactions, including shotguns and rifles.

<sup>6</sup> States with more restrictive laws can impose their own waiting periods. In California, the wait is 10 days.

since we cannot trust felons to be honest, buyer qualifications should be verified before guns are delivered.<sup>7</sup>

What did Brady accomplish?

1. In States that lacked pre-existing mechanisms, felons using genuine identification were denied the opportunity to personally acquire guns from licensed dealers. In the process, willful and mistaken attempts to acquire firearms by legally unqualified persons were also documented.

2. Before the advent of Insta-check, a three-day wait might have averted some impulsive crimes and suicides.

Opponents of Brady raised two significant objections.

1. The waiting period necessary for conducting a record check imposed an unnecessary burden, particularly onerous for those with an urgent need for self-protection.

2. Brady was an ineffective solution because guns used in crime do not come from dealers – they are either stolen or acquired through a private transaction.

Rhetorical feuding aside, reliable data about the first point is lacking. As to the second, recent studies of guns confiscated by police reveals that 25 percent or more are relatively new handguns (bought new at retail within the past year), of moderate and large caliber (.38 / 9mm. and above), and that the majority are not stolen. This data is consistent with accounts of ATF casework, which suggest that factors such as dealer corruption, resale

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<sup>7</sup> As proof of the “honor system’s” weakness, consider the many unqualified buyers who get caught trying to buy a gun through the Brady record-check process.

by unlicensed “street” dealers, and transfers through straw buyers (persons who buy guns on another’s behalf) are common paths to gun recovery and misuse.<sup>8</sup>

In a recent evaluation, Brady was found to have no impact on the homicide rate.<sup>9</sup> That seems hardly surprising.

1. “Felon” and “criminal” are not synonymous. Brady only bars gun acquisition by convicted felons or by those who have been formally charged.<sup>10</sup>

2. Brady cannot diagnose dealer misconduct. It is only effective against buyers.

3. Brady cannot interdict straw transactions.<sup>11</sup> It is impotent when persons with a clean record buy a gun for someone else.

4. Brady applies to transfers by licensees only – sales by unlicensed “street” dealers are beyond its reach.

5. Insta-check eliminates the alleged benefits of a “cooling-off” period.

Bans - such as Brady - that target possessors instead of guns assume that certain characteristics, such as a felony conviction or court-ruled mental incapacity, have predictive value. Simply put, a felon can be expected to misuse guns, while those never convicted of a felony can be expected to use them wisely. Clearly, many persons whose criminal history

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<sup>8</sup> Wachtel, Julius, “Sources of Crime Guns in Los Angeles, California.” *Policing: An International Journal of Police Strategies & Management* (21:2, 1998).

<sup>9</sup> Cook, Philip and J. Ludwig, “Homicide and Suicide Rates Associated With the Implementation of the Brady Handgun Violence Prevention Act.” *Journal of the American Medical Association*, Aug. 2, 2000.

<sup>10</sup> Amendments have added a few additional categories, including persons convicted of spousal abuse.

<sup>11</sup> Indeed, there is no Federal law that specifically bars surrogate transactions.

does not reach the felony conviction threshold can be poor risks.<sup>12</sup> Even the assumption that a record-check system will work as intended is questionable, particularly when (as in Brady) stringent time limits are imposed. In Texas, where State law allows individuals to gain State-wide concealed carry permits, record checks have failed to screen out some legally prohibited persons.<sup>13</sup> Perhaps most importantly, background checks can do nothing to prevent surrogate transactions, as those who are screened out can easily have someone else buy a gun on their behalf.

What about increasing the level of enforcement of current laws? When prospective buyers first visit a gun store, they are asked to certify on the Form 4473 that they are not felons or otherwise forbidden to acquire firearms. If applicants are rejected because their answer is incorrect, their “false statement” on the form makes them vulnerable to prosecution.<sup>14</sup> The Government has been repeatedly pressed to follow through on these violations, perhaps in part to counter claims by gun control opponents that existing laws are not being enforced. But doing so may be problematic, as some buyers may not have known they were prohibited, while others may have just been trying to find out for sure. Is it sound public policy to proceed as though denied applicants acted in bad faith when the process itself assures that no substantial harm (i.e., a prohibited delivery) can result?<sup>15</sup>

On the other hand, a concerted effort to prosecute felons who actually possess guns may prove useful. Still, doing so continues a tradition of relying on enforcement and

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<sup>12</sup> See, for example, Wintemute, Garen, “Prior Misdemeanor Convictions as a Risk Factor...”. *Journal of the American Medical Association*, December 23-30, 1998.

<sup>13</sup> “Felons Get Concealed Gun Licenses Under Bush’s ‘Tough’ Law”. *Los Angeles Times*, October 3, 2000, p. A-1; “Murder Case Puts New Focus on Texas’ Concealed Gun Law.” *Los Angeles Times*, November 2, 2000, p. A-5.

<sup>14</sup> 18 USC 922(a)(6).

<sup>15</sup> Paradoxically, the pre-Brady practice of prosecuting “lying and buying” cases seems more defensible, as the absence of a presale gun check allowed a gun to be acquired.

prosecution, both imperfect and expensive remedies. Brady, a supply-side strategy, was enacted in part to redress the inadequacy of simply closing the barn door. But given the imperatives of politics and the elasticity of the gun marketplace, it built a drafty house, indeed.

While record-checks such as Brady are an incomplete solution, they likely have the same general deterrent effect as other criminal laws: to discourage those they can, and to place others on notice and at risk. Certainly no one would argue that theft should be decriminalized because its clearance rate is low.

Unfortunately, the Insta-check provisions of Brady may actually facilitate the distribution of guns to criminals. There are reasons for delaying deliveries beyond simply “cooling off” hotheads or suicidal purchasers. Consider that in most States, individuals can buy as many guns as they wish. Unlicensed “street” dealers often amass hundreds of guns by having legally-qualified buyers acquire ten or more at once.<sup>16</sup> Without a substantial waiting period, authorities may not learn of large-scale purchases for days or weeks – if at all. Insta-check can make it impossible to interdict straw buyers and unlicensed dealers, thus allowing weapons to “hit the street” in quantity before anyone can react.<sup>17</sup> Given the expense of running a record-check program, promoting Insta-check as a solution (as even gun-control proponents seem wont to do) might even cause States with their own waiting-period rules to reconsider.

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<sup>16</sup> Wachtel, Julius, “Sources of Crime Guns in Los Angeles, California.”

<sup>17</sup> The author was personally involved in many such inquiries while employed with ATF, involving single purchases of as many as 50 weapons.

## Defining Bad Guns, Part I - “Assault Weapons”

Under Federal law and the laws of some States, such as California, semi-automatic firearms that possess certain features, alone or in combination, are classified as “assault weapons” and banned from civilian use.

*Semi-auto – baseline criterion.* Semi-automatic means self-loading. As long as ammunition is present in an (internal) clip or (external) magazine, semi-auto weapons self-load and chamber another round for each depression of the trigger.<sup>18</sup> This permits users to achieve a substantial rate of fire while maintaining their aim. In the vernacular, semi-auto weapons “throw a lot of lead downrange.” Semi-auto rifles offer a substantial advantage over bolt- and lever-action rifles, as the latter require users to manipulate a mechanism to place each round into the chamber, thus greatly slowing the rate of fire and requiring shooters to re-aim. (The advantage of semi-auto pistols over revolvers is not quite as pronounced, as fully depressing the trigger of a revolver fires a round and rotates the cylinder, readying the next.)<sup>19</sup> Weapons are not banned simply for being semi-auto, as doing so would affect a substantial proportion of guns sold today.<sup>20</sup>

*Disqualification by Name.* Under Federal and California State law, certain semi-auto firearms are banned by make and model names alone.<sup>21</sup>

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<sup>18</sup> Fully automatic firearms, which are illegal, continue to fire as long as a trigger is depressed.

<sup>19</sup> Semi-auto pistols require far less pressure on the trigger than a revolver, thus providing a steadier platform for rapid-fire shooting.

<sup>20</sup> In 1998, U.S. manufacturers produced 930,828 (semi-auto) pistols for the domestic marketplace, a majority for private (non-law enforcement) use.

<sup>21</sup> The Federal list of banned guns is fixed (18 USC 921[a][30][A]), while weapons can be added to the California list on motion of the State Attorney General (PC 12276).

*Disqualification by Feature.* Weapons can also be disqualified because they possess certain characteristics. These fall into two groups:

1. Internal operating features - such as a removable magazine – which directly affect the functioning of a firearm.

2. External design features - such as handgrips, flash suppressors and folding stocks – that ostensibly enhance a weapon’s functionality.

For example, California law prohibits the possession of a semi-auto rifle that can accept a detachable magazine and has either a pistol grip, thumbhole stock, folding or telescoping stock, or a flash suppressor. Also banned are rifles with fixed magazines that can accept more than ten rounds and rifles that have an overall length of less than 30 inches.<sup>22</sup> Federal law bans semi-auto rifles that can accept a detachable magazine and have two or more of certain external features (folding stock, pistol grip, bayonet mount, flash suppressor, threaded barrel, or grenade launcher.)<sup>23</sup>

*A matter of lethality.* Simply put, the purpose of assault weapons bans is to limit the lethality of firearms in private hands.

...The Legislature has restricted the assault weapons specified in Section 12276 based upon finding that each firearm has such a high rate of fire and capacity for firepower that its function as a legitimate sports or recreational firearm is substantially outweighed by the danger that it can be used to kill and injure human beings.<sup>24</sup>

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<sup>22</sup> California Penal Code Sec. 12276.1

<sup>23</sup> 18 USC 921(a)(30)(B)

<sup>24</sup> PC 12275

In California, the Legislative intent is expressed as a calculus of costs and benefits, balancing a weapon's suitability for sporting purposes against threats such as "rate of fire" and "capacity for firepower". Federal law does not specify an underlying rationale. However, during Congressional hearings, proponents of the ban cited reports that assault weapons frequently turned up in crime and offered anecdotes of brutal misuse. Criticism was also levied at "military-style" characteristics such as flash suppressors and threaded barrels, and features such as folding stocks, which aid concealment.<sup>25</sup>

Banning guns by name inconvenienced manufacturers and made already manufactured guns perpetually illegal. But as reported in Congressional testimony, it proved to be an incomplete, easily circumvented solution.<sup>26</sup> For example, consider the Colt AR-15, a semi-auto version of the US Military's standard issue rifle, which fires the lethal .223 caliber cartridge. These weapons were originally configured and sold to the public with handgrips and flash suppressors. When "AR-15 series" was banned by name in Federal law, Colt simply changed its model designation to "Sporter", thus circumventing the name ban, and removed the flash suppressor, thus circumventing the Federal ban on features (though, ultimately, not California's, which is more strict).

But why is the Colt AR-15 unreasonably lethal? Model designations - whether "AR-15" or "Sporter" - are not themselves injurious. So it must be a characteristic. Is it the removable magazine? Many legal semi-automatic weapons have removable magazines, which even at the current 10-round maximum can obviously "throw a lot of lead downrange".

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<sup>25</sup> Remarks of Sen. Ted Kennedy, 140 Cong Rec 123, 103<sup>rd</sup> Congress, 2<sup>nd</sup> Session, August 24, 1994.

<sup>26</sup> Remarks of Rep. Fortney Stark, 139 Cong Rec 35, 103<sup>rd</sup> Congress, 1<sup>st</sup> Session, March 19, 1993.

Is it the handgrip? The flash suppressor? Here is what Senator Frank Murkowski had to say during debates on the Federal assault weapon ban:

[The definition of an assault weapon]...is really in the eyes of the beholder. The editorial I have shows it in pictures. One weapon shown is the Colt AR-15. And beneath it is a picture of a Ruger Mini 14. Now, only one would remain legal. However, the two are both semiautomatics firing the same 5-millimeter ammunition. In the hands of a criminal, they could each do the same thing-no more, no less. The difference between the two is the AR looks more menacing-it really does-because it has a plastic stock and a pistol grip. That is the difference. That is all. One is classified as an assault weapon and the other is not.<sup>27</sup>

When Mr. Murkowski – an avowed opponent of gun legislation – says there is no practical difference between the AR-15 and the Ruger Mini-14, we ought to listen. Where the Ruger differs is in not having a handgrip. Given that both guns have little recoil, its steadying influence seems superfluous. (The Mini-14 mimics the appearance of the M-14, the military rifle the AR-15 replaced. The M-14 not only lacked a handgrip but “kicked like a mule”.) Of course, as Mr. Murkowski suggests, the AR-15 and Mini-14 differ substantially in appearance. The former is undeniably a “military” looking gun, while the latter is advertised by its manufacturer as a wonderful varmint-getter.

The Mini-14 and Ranch Rifle, designed to get the most out of the powerful .223 cartridge, are durable firearms, perfect when a few quick shots are needed, that have

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<sup>27</sup> Remarks of Sen. Frank Murkowski, 140 Cong Rec 124, 103<sup>rd</sup> Congress, 2<sup>nd</sup> Session, August 25, 1994

had their mettle tested on ranches and farms across America, and have not been found wanting.<sup>28</sup>

The Colt AR-15's military origins and "menacing" appearance probably pushed it over the edge. But as we pointed out, its ban-by-name under Federal law was really a soft landing. Colt now mass-markets the "Match Target", a virtually indistinguishable, magazine-fed .223 semi-auto rifle with a handgrip.<sup>29</sup> While residents of most States are free to buy this weapon, those who reside in California cannot, as its laws makes semi-auto rifles with handgrips illegal. Accordingly, California residents who want a weapon similar in functionality to the AR-15 must turn to the Ruger Mini-14.

What factors have led to this tangle of purpose and execution?

1. Notice and enforceability: Banning guns by name and/or feature makes classification simple. It also places makers and possessors on clear notice that their manufacture or possession of a specific weapon is illegal.
2. Political capital: Bans that are riddled with loopholes provide an illusion of control while minimally discomfoting gun makers, pro-gun groups and gun enthusiasts.
3. Political reality: Bans are an evolutionary process, and the present flawed criteria will be "improved" (depending on one's point of view) when more favorable political conditions exist.<sup>30</sup>

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<sup>28</sup> [http://www.ruger-firearms.com/rfpages/centerfire\\_autotext.html](http://www.ruger-firearms.com/rfpages/centerfire_autotext.html)

<sup>29</sup> [http://www.colt.com/colt/html/a2g3\\_matchtar.html](http://www.colt.com/colt/html/a2g3_matchtar.html). AR-15 copycats made by other manufacturers are marketed throughout the U.S.

<sup>30</sup> For a comprehensive review of the rationale behind the bans, see *Kasler v. Lungren*, - Cal.App.4th - (3d Dist. 1998), a California appellate decision that overturned the State's assault weapons ban, and the subsequent California Supreme Court decision, *Kasler V. Lockyer*, (Cal. Supreme Court, no. S0069522,

Is there a better way to distinguish between “good” and “bad” guns? Let us return to the underlying basis for the distinction – the matter of lethality.

An assault weapon can be defined as a firearm that has a highly developed capability to overcome armed resistance. This definition can be operationalized thusly:

1. Lethality of the projectile: Variables that affect lethality include the bullet’s kinetic energy, its composition, and configuration (i.e., round-nose, hollow-point, etc.) Comparisons between projectiles can be made using the relative stopping power formula or by simply measuring the velocity and energy of known commercial ammunition.<sup>31</sup> For example, the typical load for the Colt Sporter is the .223 Remington hollow-point bullet, with a muzzle velocity of 3240 ft.-sec. and a muzzle energy of 1282 ft.-lbs. By way of comparison, a typical Remington 9mm. pistol projectile has a muzzle velocity of 1220 ft.-sec. and a muzzle energy of 334 ft.-lbs.<sup>32</sup> A surrogate indicator of lethality might be a projectile’s ability to overcome protective garments commonly worn by police, such as Class II-A or III-A ballistic vests.

2. Rapid-fire capability, including ammunition capacity, cyclic rate (mechanical interval between rounds) and recovery time (user interval to place the next aimed shot).

3. Accuracy at range.

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June 29, 2000), that reinstated the ban. According to the California Supreme Court, as long as the ban had a rational basis, it did not have to be overturned for being “underinclusive”. The Supreme Court agreed that defining assault weapons “generically” would ban those used for legitimate purposes, and that political reality (not the law) made this unfeasible. “Given that conviction, the Legislature was not constitutionally compelled to throw up its hands just because a perfectly comprehensive regulatory scheme was not politically achievable....The problems of government are practical ones and may justify, if they do not require, rough accommodations-illogical, it may be, and unscientific.” (Latter quoting *Dallas v. Stanglin* (1989) 490 U.S. 19, 27, quoting *Metropolis Theatre Co. v. City of Chicago* (1913) 228 U.S. 61, 69-70.) The Court did not address the issue of whether these “illogical” but legal “accommodations” may have their own consequences.

<sup>31</sup> Garen J. Wintemute, “The Relationship Between Firearm Design and Firearm Violence,” *Journal of the American Medical Association*, vol. 275, no. 22 (June 12, 1996).

<sup>32</sup> Source: <http://www.remington.com/ammo/ballistics.htm>.

4. Speed and convenience of deployment (size, weight, ergonomics).

Semi-automatic rifles are particularly lethal because they allow sustained, accurate fire of extremely lethal projectiles, including .223 caliber, 7.62mm and .30-06 caliber rounds. As shown in Table 1, their velocity and energy vastly exceeds that of conventional handgun ammunition.

Table 1 - Comparison of ballistics for 9mm. pistol and selected rifles<sup>33</sup>

Handgu	Muzzle velocity	Muzzle energy
9 mm	1220	334
Rifle	Muzzle velocity	Muzzle energy
.22	2690	723
.223	3300	1209
.30	1990	967
.30-06	2700	2913
7.62	2365	1552

Due to their velocity and energy, the wounding potential of rifle cartridges is particularly pronounced:

As [a] high-velocity [bullet] travels through the tissue, it sends out pressure waves [that create] 'a temporary cavity' behind the path of the bullet, which may be 10 to 15 times - or even greater - [than] the diameter of the bullet itself. ... These high-velocity

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<sup>33</sup> Ibid.

missiles can damage or destroy organs, break bones - including the femur, possibly the strongest bone in the body - without ever touching them.<sup>34</sup>

Ballistic vests were designed as protection against handgun ammunition, not against rifle cartridges.<sup>35</sup> Due to their velocity and energy, .223, 7.62 and .30-06 caliber rounds easily defeat ordinary ballistic garments worn by uniformed police. Those that offer protection against such threats are heavy, cumbersome affairs of “hard” (often, ceramic) construction, which greatly limit mobility and are used only by tactical teams.<sup>36</sup> The unique threat posed by rifle cartridges is reflected in the UCR. Seventeen of the 58 law enforcement officers murdered by firearms in 1998 were killed with a rifle, the largest proportion since 1989, when these statistics began to be kept.<sup>37</sup> During the same period, the average distance between murdered officers and their assailants increased. In 1989, 8 of the 57 slain officers were more than twenty feet from their assailant, while in 1998 nearly twice as many (15 of 56) were slain at these distances.<sup>38</sup> The comparative lethality of rifle cartridges is supported by findings that between 1989 and 1998, each of the seventeen officers killed by a projectile that penetrated their ballistic vest was shot with a rifle - five by .223 caliber, five by 7.62 mm caliber, and seven by a .30 caliber variant.<sup>39</sup>

There is no question that semi-automatic rifles pose a considerable risk to police. In the infamous North Hollywood bank shootout of February 28, 1997, two bank robbers (Larry

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<sup>34</sup> Testimony of Dr. Garen Wintemute before the California State Assembly, 1 Assem. J. (1989-1990 Reg. Sess.) p. 447.

<sup>35</sup> National Institute of Justice, “Selection and Application Guide to Police Body Armor”, NIJ Guide 100-98, October, 1998.

<sup>36</sup> Ceramics have their own limitations. They can deflect rounds inappropriately (i.e., to the head) and are brittle, thus may fail to protect against multiple hits. Ceramic breastplate inserts are available for conventional vests. Their weight and rigidity make them ungainly to wear in an undergarment.

<sup>37</sup> Federal Bureau of Investigation, *Uniform Crime Reports: Law Enforcement Officers Killed and Assaulted, 1998*, p. 14.

<sup>38</sup> *Ibid*, p. 15.

<sup>39</sup> *Ibid*, p. 17.

Phillips and Emil Matasareanu) wounded eight police officers and five civilians. They were armed with a 9mm pistol and five semi-auto rifles, each illegally converted to full auto fire. Weapons used include three Norinco “MAK-90” 7.62mm rifles (AK-47 knock-offs), one Bushmaster .223 cal. rifle (AR-15 knock-off) and one H&K .308 caliber rifle.<sup>40</sup> Due to the range, cyclic rate and penetration power of these weapons, responding police officers were instantly pinned down. Their pistols and shotguns proved inadequate because the encounter was at long range and the robbers wore heavy body armor. (Ultimately, one assailant committed suicide and the other was killed after a close confrontation where he was repeatedly shot in the lower legs, beneath his armor).

This horrifying event spurred many agencies to increase their firepower. In Southern California, weapons such as the AR-15 rifle, which were formerly restricted for SWAT use, began to be carried in patrol vehicles.<sup>41</sup>

Are police overreacting? Are concerns about semi-auto rifles misplaced? A Lexis-Nexis® search for Los Angeles Times articles that mentioned “assault weapons” or “assault rifles” and “police” or “deputy” in 1998, 1999 and 2000 yielded the following incidents in the Los Angeles SMSA. Information is reported in as much detail as provided.

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<sup>40</sup> As contemporaneously reported to the author by sources in the Bureau of Alcohol, Tobacco and Firearms, Los Angeles Field Division.

<sup>41</sup> “O.C. Arming Deputies With Assault Rifles.” *Los Angeles Times*, January 5, 2000.

Table 2. Anecdotal reports of “assault weapon” misuse in Southern California<sup>42</sup>

Date	Weapon Used	Injuries	Incident Type	R	F
1/15/98	AR-15	Two officers shot	Mental?	Y	N
10/29/98	Norinco AK-47	2 persons killed	Gang	Y	?
11/29/98	Assault rifle	Officer killed	Gang	Y	?
12/7/98	Assault rifle	None	Bank Robbery	N	?
12/16/98	Assault rifle	5 shot (1 killed)	Gang	N	?
12/16/98	Assault rifle	1 person killed	Gang	N	?
12/31/98	Assault rifle	1 officer shot	Mental?	Y	N
1/19/99	Carbine	None	Mental?	Y	N
2/1/99	Norinco AK-47	2 persons killed	Domestic	Y	Y
6/12/99	AK-47 style	1 officer killed	Mental?	Y	N
8/10/99	Bushmaster AR-15	5 persons shot	Hate crime	Y	Y
12/7/99	Assault rifle	1 suspect killed	Mental	Y	?
1/1/00	Assault rifle	None	Domestic	Y	?
4/29/00	AR-15	1 officer killed, one wounded	Gang	Y	?
4/29/00	Assault rifle	3 shot (1 killed)	Gang	N	?
6/29/00	Assault rifle	3 persons killed	Unknown	N	?
8/13/00	AK-47	4 shot (1 killed)	Armed robbery	Y	?
9/6/00	Assault weapon	1 officer wounded	Gang	N	?
11/20/00	Assault rifle	2 officers wounded	Bail arrest	Y	Y
12/16/00	Semi-auto rifle	1 person killed, 3 officers wounded	Neighbor dispute	Y	Y

<sup>42</sup> *Los Angeles Times* (issue dates as noted).

1/13/01	Rifle	1 officer killed	Neighbor dispute	Y ?
1/16/01	Assault rifles	1 guard wounded	Robbery	N ?

R: Weapon recovered F: Possessor a felon

According to Table 2, four officers were killed and three received nonfatal wounds from encounters with persons armed with “assault weapons”, as variously defined, between January 1998 and October 2000 in the Los Angeles SMSA. Twelve civilians were reported killed (including 1 suspect) and fourteen were reportedly wounded by “assault weapons” during the same period.<sup>43</sup> Had we expanded our search to the year 1997 for officer-involved shootings only, we would add the North Hollywood shootout, the killing of two Riverside County deputy sheriff’s with an M-1 .30 caliber carbine, and the wounding of a police officer (in an incident where four other persons were killed and one wounded) by a deranged employee armed with an “AK-47” type rifle.<sup>44</sup>

Clearly, any regulatory scheme that addressed lethality could easily wind up banning all semi-automatic rifles that fire projectiles of certain calibers. Indeed, this is the approach taken by Mexico, which generally prohibits private persons from possessing handguns in calibers greater than .38 /.380 and rifles in calibers greater than .22 rim fire. Handguns in

<sup>43</sup> Police shootings were verified against official sources.

<sup>44</sup> Wounding of police officer occurred December 20, 1997, reported in the *Los Angeles Times* the following day; killing of deputies occurred on January 5, 1997, reported in the *Los Angeles Times* the following day.

calibers .357 magnum, .38 super, 9mm, and larger, and rifles in caliber .223, 7mm., 7.62, and .30 caliber are specifically reserved for military and police use.<sup>45</sup>

Given the ease with which laws can be circumvented, a concern about lethality might also require restrictions on ammunition. However, even small calibers can be “souped up”. One example is the .223 round, which although nominally a .22 caliber carries a large powder charge, enabling a heavy projectile to achieve extremely high velocity, greatly enhancing its penetration and wounding capacity. A generic approach might be possible; for example, banning ammunition that can penetrate Class II-A body armor, which is the type commonly worn as an undergarment by uniformed police. Doing so would unavoidably affect certain gun sports and enthusiast activities.

As a matter of public policy, what threat should officers face? Can we expect or demand that officers stand their ground against persons armed with semi-automatic rifles? If law enforcers take up the challenge and arm themselves accordingly, what might be the effect of their “militarization” for the role of the police and its relations with the public?

#### Defining Bad Guns, Part II – “Saturday Night Specials”

Saturday Night Specials have been defined as “inexpensive, short-barreled handguns made of inferior materials.”<sup>46</sup> Thirty years ago, that used to mean a .25 pistol or, at the most, a small .38 caliber revolver. In 1973, the two most frequently produced handgun calibers in the United States were the .38 special (31 percent of handgun manufacture) and the .22 (28 percent of handgun manufacture.)

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<sup>45</sup> Articles 9-11, Ley Federal De Armas de Fuego Y Explosivos, Comision de Defensa Nacional, Estados Unidos Mexicanos, December, 1995. Gun smuggling from the United States and official corruption have probably eroded the impact of these restrictions.

<sup>46</sup> Tom Diaz, *Making a Killing: The Business of Guns in America*. New Press, New York, 1999. p. 34.

But that was then. In 1998, the two most frequently produced handgun calibers, each with 22 percent of the handgun market, are 9mm. and calibers over 9mm.<sup>47</sup> As Table 3 demonstrates, the wounding potential of the larger handgun calibers is considerably higher.<sup>48</sup>

Table 3. Ballistics of commonplace pistol ammunition.

Caliber	Muzzle velocity (ft.-sec)	Muzzle energy (ft.-lbs.)
.25	760	64
.38	975	264
9 mm	1220	334
.40	1135	403

This phenomenon is conceptually similar to the proliferation of ever-larger SUV's. Critics charge that gun manufacturers used lethality as a marketing strategy to propel and respond in changes to consumer tastes. Responsibility has also been laid on the doorstep of police agencies, whose buying patterns reflect officer demands for larger and more powerful guns to counter the menace of more lethally-equipped criminals.<sup>49</sup> A recent survey of local law enforcement agencies in Orange County, California, revealed that for reasons of "stopping power" most issue and recommend .40 or .45 caliber pistols, and each that still allows the use of 9mm. pistols also offers a larger-caliber alternative.<sup>50</sup>

Are there other reasons why the lethality of weapons has escalated? Consider the anti-gun lobby's preoccupation with banning "Saturday Night Specials". Years ago, the rationale for banning these guns was that it would limit their availability to juveniles, who

<sup>47</sup> Bureau of ATF, *Annual Firearms Manufacturing and Export Report*, 1973 and 1998.

<sup>48</sup> From Remington ballistics charts (<http://www.remington.com/ammo/ballistics.htm>)

<sup>49</sup> Tom Diaz, *Making a Killing: The Business of Guns in America*.

<sup>50</sup> Association of Orange County Deputy Sheriffs, *Weapons Survey*, March 2000.

supposedly could not afford more expensive firearms. Pro-gunners countered that banning cheap firearms disenfranchised the poor, who cannot afford more expensive weapons. In response, the anti-gun lobby subtly shifted their position from anti-crime to pro-consumer. Their new focus, “safety”, emphasizes concerns that Saturday-night specials are particularly prone to malfunctions and accidental discharges. This new tack quickly scored legislative success, with various municipalities banning inexpensive, frequently recovered weapons. For example, the City of West Hollywood, Calif., prohibits the sale of guns that lack certain safety features or are cheaply made. For example, handguns are banned if they contain “a frame, barrel, breechblock, cylinder or slide that is not completely fabricated of heat treated carbon steel, forged alloy or other material of equal or higher tensile strength.”<sup>51</sup>

What does the anti-gunner’s new, “consumer protection” approach augur for firearm lethality? If nothing else, it insures that future guns will be even more lethal. Making weapons more reliable inevitably increases their threat from criminal misuse. This emerging concern with gun quality dovetails nicely with escalations in caliber. Not only can officers and citizens look forward to being shot with far more deadly bullets, they no longer fear that their assailant’s gun will jam or misfire.

Do jams and misfires save lives? Unfortunately, this data seems impossible to systematically collect. While employed with ATF, the author learned of several such incidents. Here are two:

1. May 11, 1991: Suspect points a loaded Star 9mm. pistol at LAPD officers and repeatedly pulls the trigger. The weapon misfires and the suspect is arrested.

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<sup>51</sup> West Hollywood Municipal Code, Sec. 4122.

2. May 5, 1997: Suspect points a loaded Raven .25 caliber pistol at an LAPD officer, pulls the trigger. The loaded misfires; the officer shoots back and wounds the suspect.

Naturally, those concerned with the utility of firearms for defensive use would argue that higher-caliber, better-quality weapons are a step in the right direction. In any case, if a denser population of increasingly lethal handguns is what we want, that is precisely the direction in which the gun industry, the pro-gun lobby and the anti-gun lobby are heading.