

ISSUE PAPER

THE "ASSAULT WEAPON" PANIC

POLITICAL CORRECTNESS TAKES AIM AT THE CONSTITUTION

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THE "ASSAULT WEAPON" PANIC

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Political Correctness Takes Aim at the Constitution

By Eric C. Morgan and David B. Kopel

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Executive Summary

ACQUISITIONS

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 it 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

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.)

"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."

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

"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."

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 which 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

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

"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."

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

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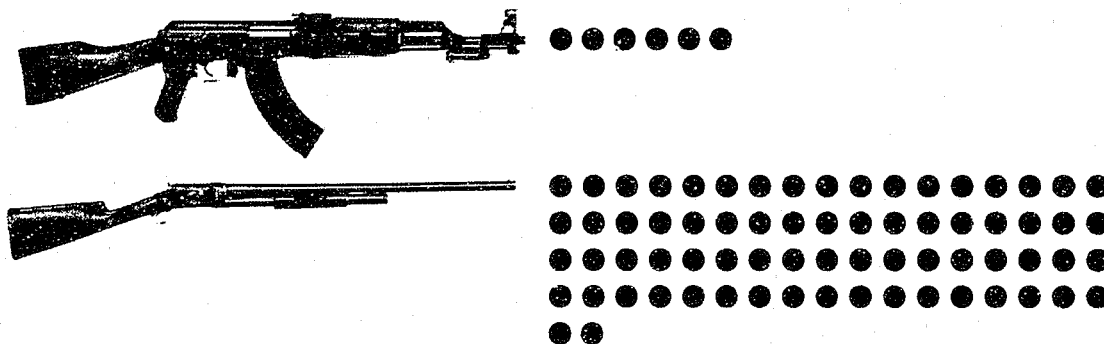
cartridge that would have longer effective ranges than the traditional submachinegun cartridge but would still generate controllable levels of recoil.²⁶ The Germans won the race to introduce this new "assault rifle." In 1942, as Soviet troops surrounded the crack unit *Kampfgruppe Scherer*, German aircraft 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 unleashed in seconds. In contrast, a semi-automatic "assault rifle" could fire at most five or six bullets in the same time period.



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.

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

"...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."

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.

WHAT IS AN "ASSAULT WEAPON"?

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

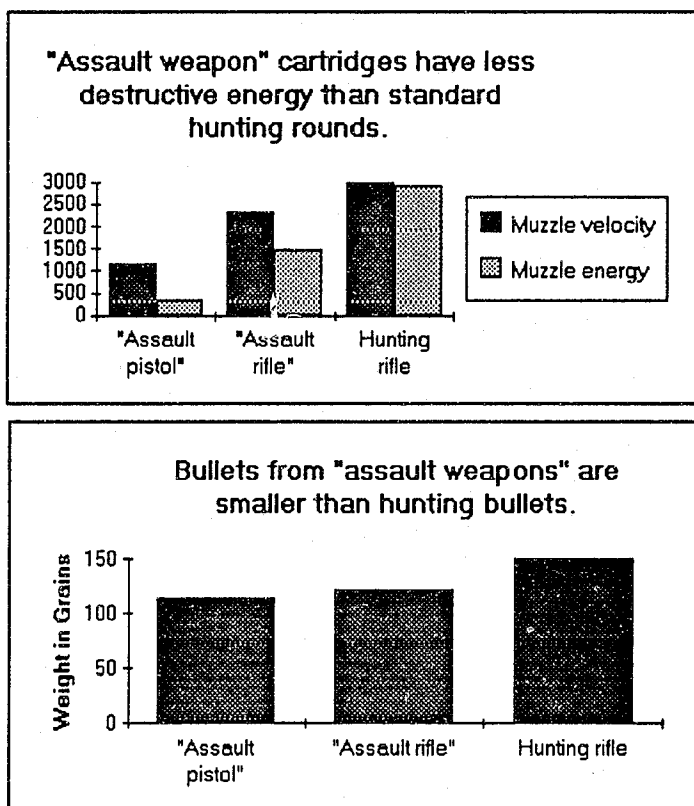
weapon" bullets are actually smaller than bullets for big-game hunting.

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 climates.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 "ASSAULT WEAPON" PANIC

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.

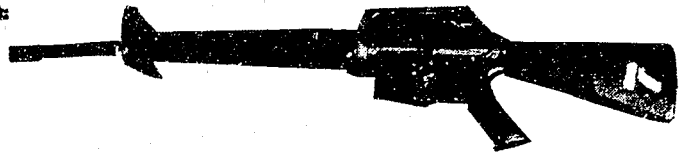
Assault Rifles vs. "Assault Weapons," Part 2

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



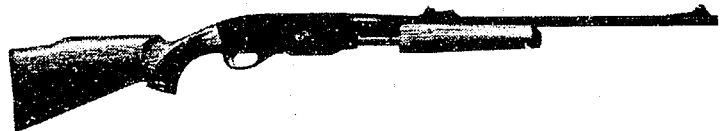
U.S. Army M-16 assault rifle

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

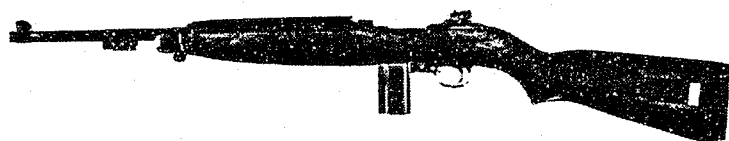


Norinco AK-56s rifle



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

"Assault Weapons" (continued)



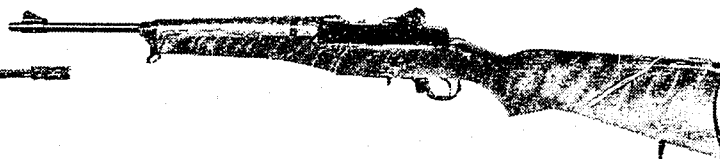
M1 carbine



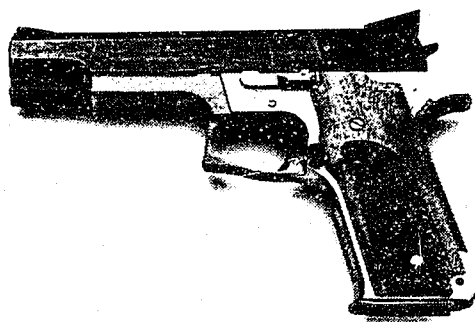
Ruger 10/22 rifle



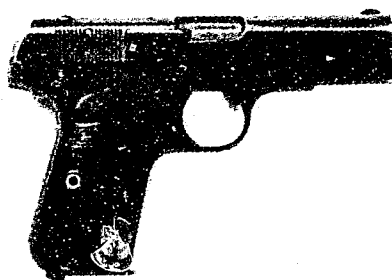
Heckler & Koch HK91 rifle



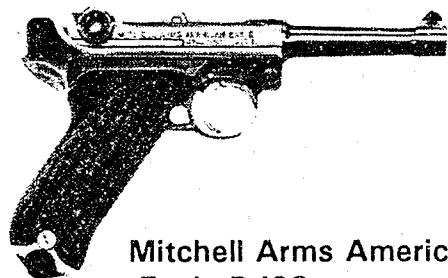
Ruger Mini-14 rifle



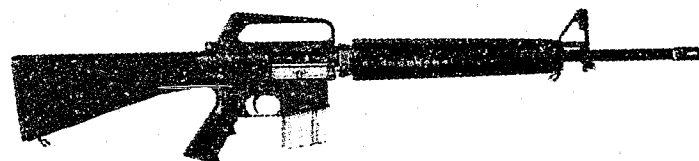
Smith & Wesson model 745



Colt .32 pistol (1903)



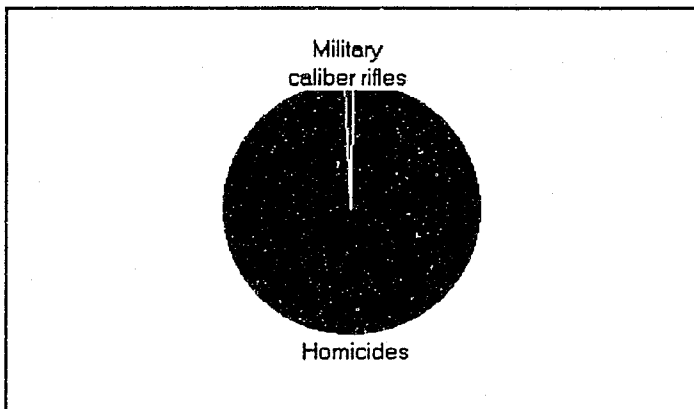
Mitchell Arms American
Eagle P-'08



Colt AR-15A2 rifle

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.

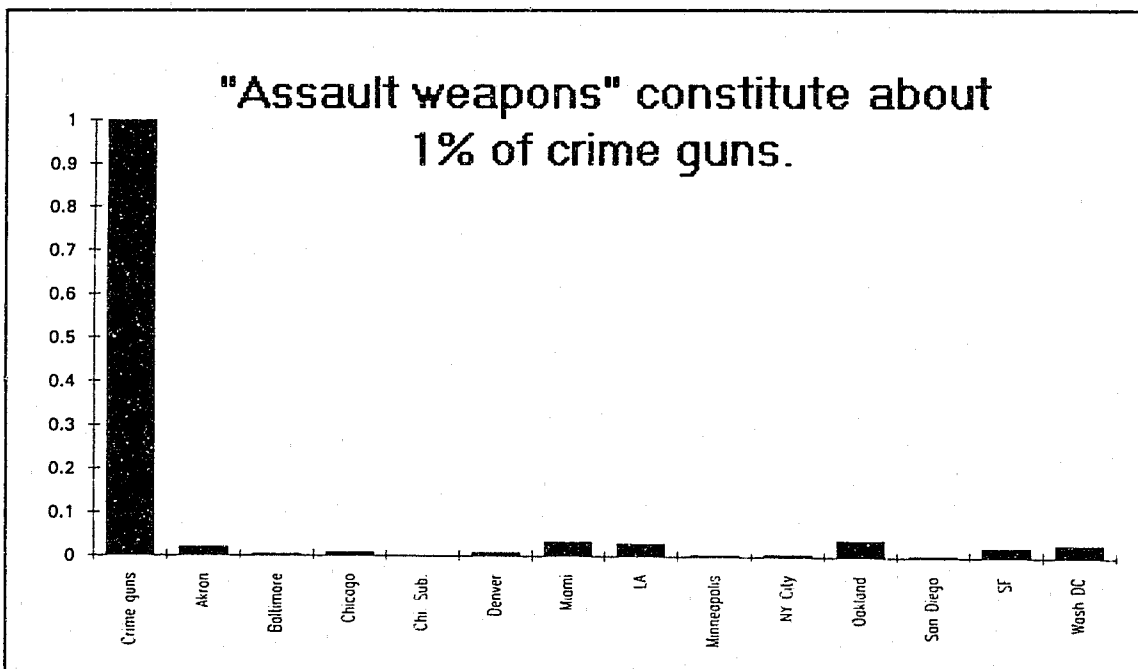
Minneapolis. From April 1, 1987 to April 1, 1989, the Minneapolis police property room received 2,200 firearms. Of the 2,200 guns, 8 were "semiautomatic assault rifles."⁸⁷

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



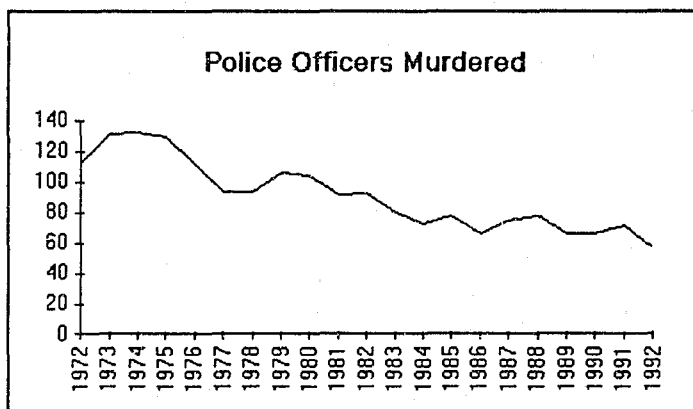
THE "ASSAULT WEAPON" PANIC

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.

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



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

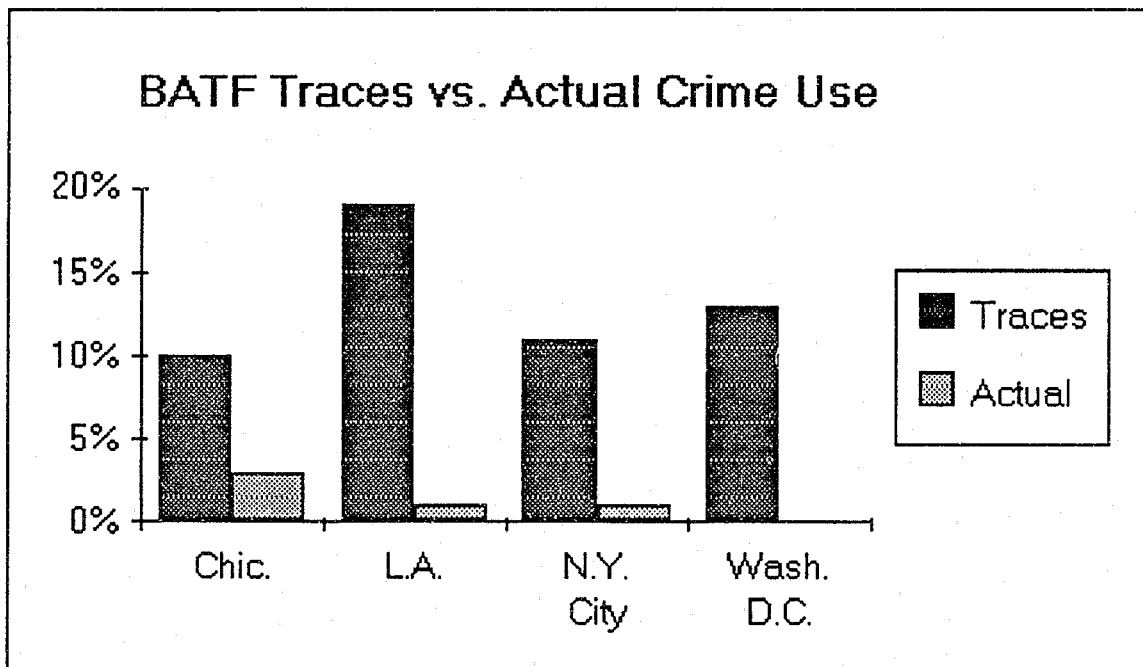
semi-automatic and military look-alike weapons, that the most common weapon used to murder peace officers was that of the .38 Special and the .357 Magnum revolver." The *Journal* found that "Calibers which correspond to military-style shoulder weapons" accounted for 8% of firearms used to murder police 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



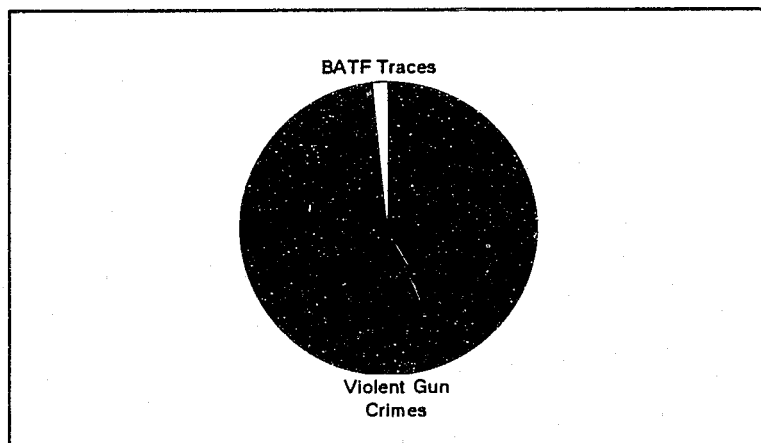
The small sample of BATF traces vastly over-estimated the frequency of "assault weapon" use in crime, according to police data.

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?

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.*



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

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

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

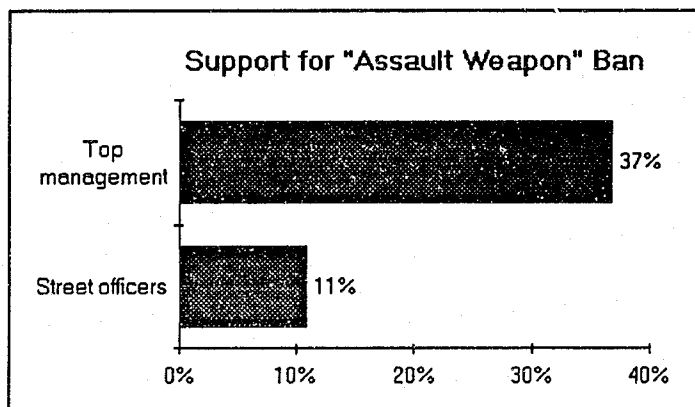
In addition, there are a number of possible reasons why "assault weapons" would be more likely be selected for a trace request than other guns. Most "assault weapons" were manufactured relatively recently, and newer guns are easier to trace. Moreover, many "assault weapons" have an unusual appearance, 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.

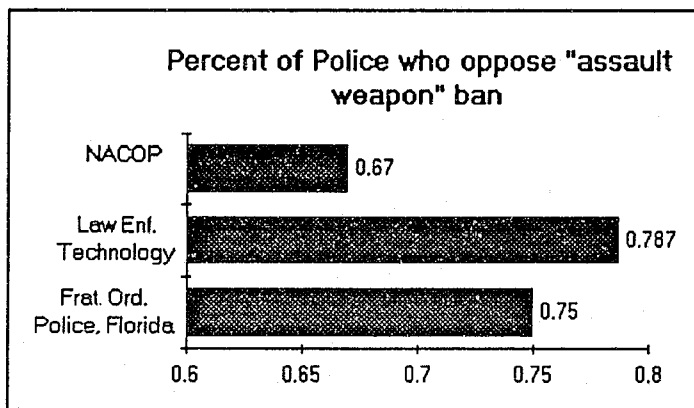
Police firearms examiners (who catalogue and study all crime guns seized by their department) tell a very different story from the politically-minded chiefs. All seven of the firearms examiners in Dade County (Miami), Florida have stated that the use of "assault weapons" in shootings in the county has 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



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

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 stationery, 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

THE "ASSAULT WEAPON" PANIC

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.

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.

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 psychopath 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.

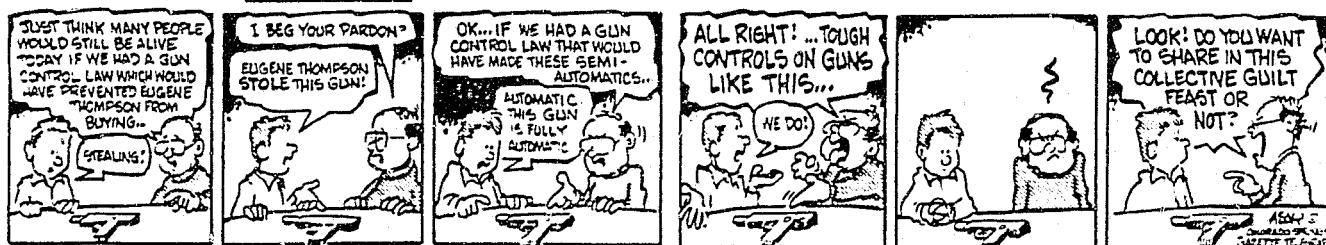
We are told that "weapons of war" have no place in our society, because they are not useful for hunting. Actually, some so called weapons of war, like the AR-15 or the Ruger M-14 Rancher, are used by hunters because of their ruggedness and reliability in adverse weather. The MAC-11, it's true, is of 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 particularly 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.

CHUCK ASAY



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

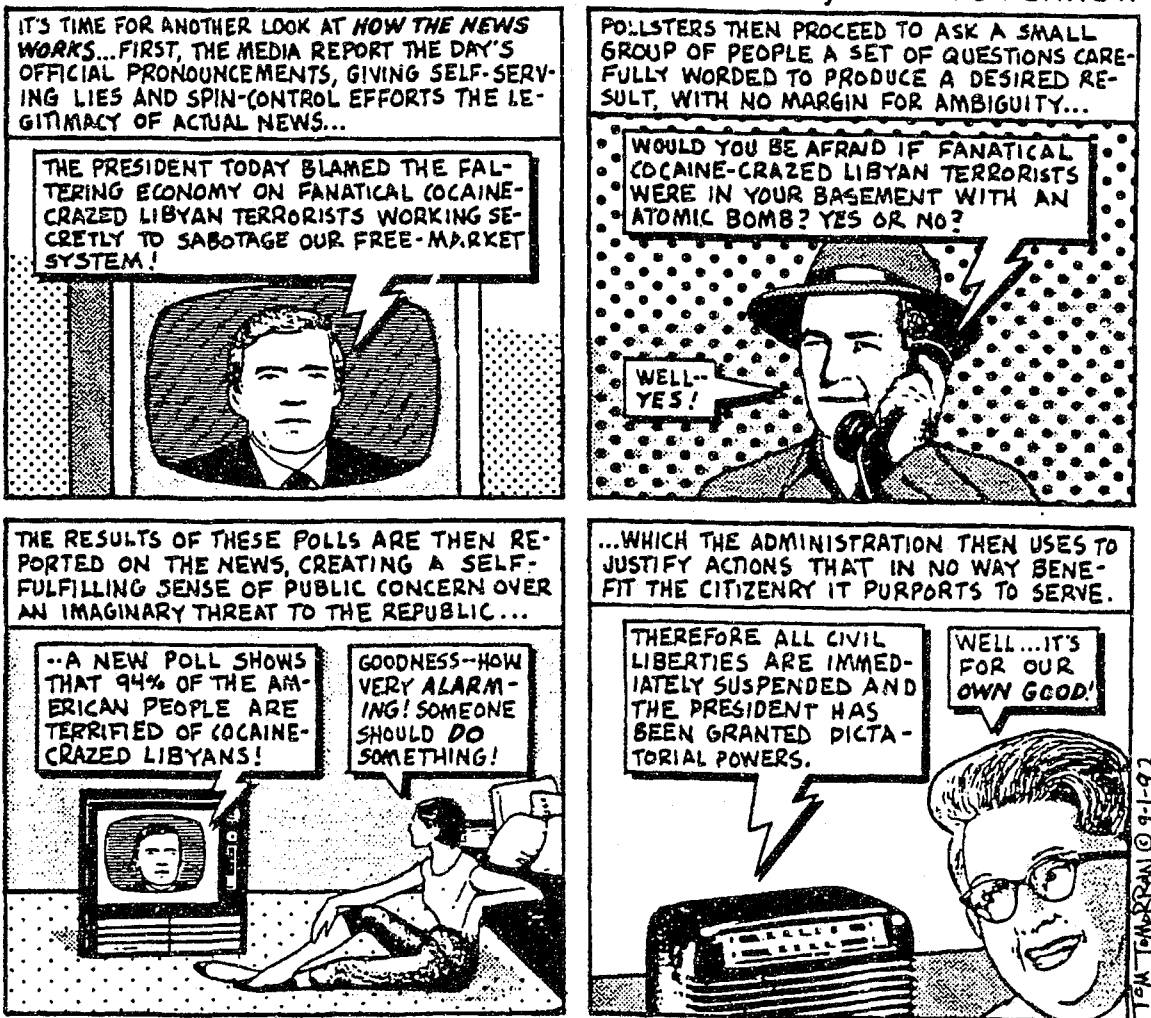
The Texas Poll was used by Handgun Control, Inc. to assert that even bedrock America wanted controls on "assault weapons." What the Texas poll actually showed was the pollsters' ignorance of the actual guns at issue in the "assault weapon" debate. The Texas Poll asked if sale of "assault weapons remains 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.)

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

" 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."

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 than 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 intent¹⁶⁸ 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."

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.

"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."

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 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."

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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

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 arms²¹⁹

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.

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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

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

" 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 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

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

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

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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

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

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.

"...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."

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.

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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.

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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.

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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 cavitory 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.

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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.

ENDNOTES

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.

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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 stationery.
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

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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).

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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 Sugarman 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 Sugarman knew it would, Sugarman 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, *Shooting Bench*, 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.")

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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 VASHBURN 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. HIST. 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 Gisarnes (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.

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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. 74 (1938).
204. *Id.* at 175.

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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.

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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'Connor 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'Connor, 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.

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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 trust 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

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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 out 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.

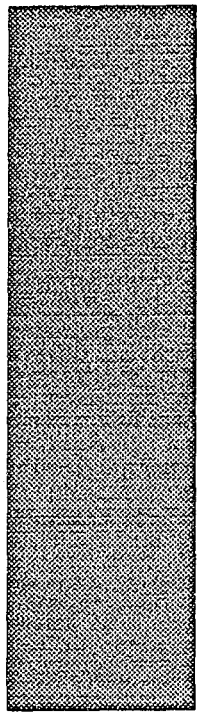
276. *Id.* at A19, col. 3. In fact, the study showed that after one episode of Miami Vice featured the Bren 10, gun stores were flooded with demands for the unusual weapon and the price has now reached \$1200 per gun. *Id.*

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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