

ADDRESSING GUN VIOLENCE THROUGH LOCAL ORDINANCES

A LEGAL RESOURCE MANUAL FOR
CALIFORNIA CITIES AND COUNTIES

2000 SUPPLEMENT

Legal Community Against Violence

LEGAL COMMUNITY AGAINST VIOLENCE WAS FORMED IN THE WAKE OF THE
JULY 1, 1993, 101 CALIFORNIA STREET MASSACRE, WHICH LEFT EIGHT PEOPLE
DEAD AND SIX OTHERS WOUNDED.

LEGAL COMMUNITY AGAINST VIOLENCE IS DEDICATED TO REDUCING GUN
VIOLENCE THROUGH EDUCATION, LEGISLATION AND LITIGATION.

The views expressed in this publication are those of Legal Community Against Violence. This publication is not intended as legal advice to any person or entity, and should not be regarded as such.

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TABLE OF CONTENTS

ACKNOWLEDGMENTS	v
CHAPTER I: LOCAL AND NATIONAL TRENDS	1
<i>A. LOCAL ORDINANCE UPDATE</i>	1
1. LCAV’s Local Ordinance Project	1
2. 300 Local Firearms Regulations Now In Effect Statewide.....	2
3. The Next Generation of Ordinances.....	5
a. Regulating gun shows and the sale or possession of firearms on public property.....	5
b. Requiring ammunition purchaser permits	5
c. Banning the sale of “ultra-compact” handguns	6
4. Benefits of the Local Ordinance Approach.....	6
<i>B. NATIONAL OVERVIEW</i>	7
1. The Epidemic Continues.....	7
a. Gun deaths and injuries	7
b. Firearm ownership patterns and the cost of gun violence.....	9
c. Legislative unresponsiveness to the crisis	10
2. Reasons for Optimism	11
CHAPTER II: DEVELOPMENTS IN FEDERAL AND STATE LAW	17
<i>A. FEDERAL FIREARMS POLICIES</i>	17
1. The Brady Act	17
a. General provisions and implementation.....	17
b. <i>National Rifle Association v. Janet Reno</i>	19
c. Proposals to strengthen Brady	20
i. Closing the private sale (a.k.a. "gun show") loophole.....	20
ii. Extending the three-day limit for background checks and encouraging more states to become POCs	21
iii. Increasing access to mental health records	23
2. Legislative Update.....	25
a. Defeated legislation.....	25

3.	Other federal proposals.....	26
a.	The National Gun Enforcement Initiative	26
b.	HUD’s Buyback America Program	27
c.	The “eZ Check” Firearm License Verification System	27
4.	The Second Amendment.....	28
a.	The <i>Emerson</i> case.....	28
b.	LCAV’s Second Amendment Education Campaign.....	31
B.	<i>CALIFORNIA FIREARMS POLICIES</i>	32
1.	Legislative Update.....	32
a.	1999 – A landmark year	32
b.	Legislative developments in 2000	33
c.	Looking to the future – licensing and registration	34
i.	Licensing	35
ii.	Registration.....	35
2.	Assault Weapons Litigation Update - <i>Kasler v. Lockyer</i>	36
C	<i>SELECTED DEVELOPMENTS IN OTHER STATES</i>	38
1.	Colorado.....	39
2.	Connecticut	40
3.	Maryland	40
4.	Massachusetts.....	42
a.	Consumer protection regulations upheld.....	42
b.	Legislation prohibiting residential dealers upheld.....	42
c.	Assault weapons ban upheld	43
5.	New York	43
6.	Oregon	45
7.	Texas	45
	CHAPTER III: LOCAL ORDINANCE LITIGATION UPDATE	47
A.	<i>RESOLVED CASE SUMMARIES</i>	47
B.	<i>ONGOING LITIGATION</i>	50
1.	Sacramento’s Saturday Night Special Sales Ban	50
2.	San Leandro’s Firearm Tax	51
C.	<i>NEW ORDINANCE-RELATED LITIGATION</i>	51
1.	Los Angeles County’s Ban on the Sale of Firearms and Ammunition on County Property	51
a.	The ordinance and lower court proceedings	51

b.	The Ninth Circuit appeal and certification to the California Supreme Court.....	53
2.	Alameda County’s Ban on the Possession of Firearms and Ammunition on County Property.....	54
a.	The ordinance and lower court proceedings.....	55
b.	The Ninth Circuit appeal and certification to the California Supreme Court.....	57
CHAPTER IV: LITIGATION AGAINST FIREARMS MANUFACTURERS.....		59
A.	<i>GOVERNMENTAL LITIGATION UPDATE</i>	59
1.	Retaliatory legislation and litigation.....	60
2.	The Smith and Wesson settlement.....	61
a.	Settlement terms.....	61
b.	The Communities for Safer Guns Coalition.....	63
c.	The backlash against Smith and Wesson.....	64
B.	<i>PRIVATE PARTY LITIGATION UPDATE</i>	64
1.	The 101 California Street Case.....	64
2.	<i>Dix v. Beretta</i>	65
3.	<i>Hamilton v. Accu-tek</i>	66

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CHAPTER I

LOCAL AND NATIONAL TRENDS

A. LOCAL ORDINANCE UPDATE

1. LCAV's Local Ordinance Project

This is the fourth and final Supplement to LCAV's 1996 Local Ordinance Manual, "Addressing Gun Violence Through Local Ordinances, A Legal Resource Manual for California Cities and Counties." The Local Ordinance Manual and annual Supplements have been distributed, free of charge, to thousands of local officials statewide – including government attorneys, police chiefs, sheriffs, county health department heads and members of city councils and county boards of supervisors – as part of LCAV's Local Ordinance Project. That project has two primary objectives: 1) to educate community leaders about the issue of gun violence and the existence of effective, legally defensible local regulations to help reduce that violence; and 2) to provide support services to cities and counties seeking to adopt or defend violence-prevention measures.

The Local Ordinance Manual and annual Supplements are central to the educational component of the project. These publications provide summaries of state and federal firearms laws, updated statistical information regarding gun deaths and injuries and a discussion of the latest studies in the field, e.g., those analyzing firearm ownership patterns and public attitudes toward gun violence. They also provide information regarding a wide variety of local regulations that can fill gaps in state and federal firearms laws, and a discussion of the unique legal issues that may arise in the context of those regulations. In addition, the Manual and Supplements include updates of ordinance-related activity and litigation, and summaries of significant judicial and legislative developments nationwide.¹

Local Ordinance Project support services include consultation regarding the drafting of local firearms regulations, coordination of *pro bono* litigation assistance when

¹ The Local Ordinance Manual, annual Supplements and other LCAV publications can be found online at www.lcav.org. Hard copies of these materials can be obtained by contacting LCAV's San Francisco office.

a city or county is sued following the adoption of such a regulation, and local ordinance presentations. LCAV also acts as a firearms regulation clearinghouse by maintaining a library of ordinances adopted statewide, as well as pleadings filed in ordinance-related litigation.

The 2000 Supplement provides a snapshot of significant recent developments in the firearm violence prevention movement. The issue of gun violence is increasingly in the national spotlight and there is a great deal to report regarding this rapidly evolving area of public policy and the law. Chapter I provides an overview of local and national trends, beginning with a discussion of the enormous success of California's local ordinance movement and continuing with a summary of national developments, both disturbing and encouraging. Chapter II focuses on federal and state legislative and judicial actions and Chapter III discusses ordinance-related litigation in California. Chapter IV provides an update of governmental and private litigation against the firearms industry.

2. 300 Local Firearms Regulations Now In Effect Statewide

As discussed below, California cities and counties have adopted an unprecedented number of local violence prevention regulations, successfully filling gaps in state and federal law. This is a new phenomenon, however. Firearms regulations were traditionally thought to be beyond the authority of local governments because the California Legislature had adopted statutes preempting local action regarding: a) the licensing and registration of commercially manufactured firearms; b) the manufacture, sale or possession of "imitation firearms;" and c) the imposition of licensing or permitting requirements with respect to the purchase or possession of concealable firearms in the home or place of business.² Although the courts had rarely had the opportunity to interpret these state law provisions, cities and counties generally refrained from regulating the sale of firearms and ammunition in their communities, deferring instead to the authority of the Legislature.

Local lawmakers began to reconsider conventional wisdom, however, as gun violence soared to record levels in the mid-1990s. Frustrated by the failure of federal and state legislators to adopt laws to reduce the proliferation and misuse of firearms,

² See Government Code §§ 53071, 53071.5 and Penal Code § 12026. State preemption laws vary greatly across the country. Some states, like Texas, almost totally preempt local firearms regulations. Others, like Illinois, give local governments great latitude in the area. In response to requests for assistance from local officials and community leaders outside of California, LCAV has begun to expand its local ordinance assistance work into other states without preemption of firearms regulations.

courageous city and county officials began adopting such laws locally. Although the gun lobby and other opponents of local firearms regulations repeatedly filed lawsuits challenging the laws, those legal challenges have almost uniformly been rejected by the courts. (See Chapter III, Local Ordinance Litigation Update.) Accordingly, a growing body of case law has confirmed that cities and counties do, in fact, have a great deal of authority to regulate the sale of firearms and ammunition in their communities. Buoyed by these successes, the local ordinance movement has spread rapidly throughout the state.

The results of LCAV's latest local ordinance survey, conducted in partnership with Prevent Handgun Violence Against Kids, illustrate the enormous growth of firearm-related regulations in California since 1995. Those survey results, summarized in "Communities on the Move 2000, How California Communities Are Addressing the Epidemic of Handgun Violence," reveal that as of May 31, 2000, 101 cities and 10 counties had adopted 300 innovative firearm regulations statewide. This figure contrasts sharply with the results of LCAV's first local ordinance survey, conducted in 1995, which showed that 25 cities had adopted 45 firearm-related regulations.³

Some of the most effective and widely adopted ordinances include those which:

- Prohibit the sale of poorly made, unreliable handguns known as "junk guns" or "Saturday Night Specials;"⁴
- Require firearms dealers to obtain a local law enforcement license or permit;
- Prohibit firearms dealers from operating in residential neighborhoods or near other "sensitive" areas, such as schools, playgrounds and places of worship;
- Require background checks of dealer employees to ensure that those individuals are not convicted felons or otherwise prohibited from possessing firearms;
- Prohibit the sale of high-capacity ammunition magazines, i.e., those capable of holding more than 10 rounds of ammunition;
- Impose firearm-related taxes to offset the public health costs of gun violence;

³ The local ordinance survey monitors the adoption of innovative regulations, such as those banning the sale of a particularly dangerous class of firearms or regulating the business practices of firearms dealers; it does not track ordinances which have been traditionally adopted statewide, e.g., those banning the discharge of firearms within city/county limits.

⁴ The Gun Control Act of 1968 banned the importation of handguns "not particularly suitable for or readily adapted to sporting purposes." Regulations implementing the Act have had the effect of prohibiting the importation of junk guns. Because the 1968 law does not apply to domestically manufactured weapons, however, the sale of junk guns has flourished in this country. See p. 42 for a discussion of a recent study demonstrating the effectiveness of Maryland's 1988 junk gun ban.

- Require dealers to record ammunition sales to discourage illegal purchases;
- Limit handgun purchases to one per person per month to reduce gun trafficking and “straw purchases” (purchases by persons legally eligible to buy firearms for resale to convicted felons, juveniles or other prohibited individuals);
- Require firearms dealers to carry liability insurance to ensure that persons harmed by dealer negligence will be adequately compensated;
- Mandate the sale of locking devices with all handguns to prevent unintentional and/or unauthorized discharge.

California’s historic local ordinance movement has had a great impact at the state level. As discussed in Chapter II, in 1999 the California Legislature adopted five major laws to reduce gun violence. Those laws: 1) prohibit the manufacture and sale of handguns that fail to meet minimum safety standards; 2) require firearms dealers to equip all firearms with child-safety locks; 3) strengthen the state’s assault weapons ban; 4) prohibit the sale of high-capacity ammunition magazines; and 5) limit handgun purchases to one per person per month. Each of these laws – with the exception of the assault weapons ban – was modeled after innovative local ordinances adopted by California cities and counties since 1995.⁵

⁵ The 1999 Supplement includes a composite dealer ordinance with many of the provisions commonly found in local dealer regulations, e.g., the residential dealer prohibition, dealer employee background checks and liability insurance and locking device requirements.

3. The Next Generation of Ordinances

a. Regulating gun shows and the sale or possession of firearms on public property

California local governments continue to adopt cutting-edge ordinances throughout the state. As discussed in Chapter III, several counties have recently adopted ordinances to prohibit the sale or possession of firearms on county-owned property. Alameda County, for example, banned the possession of firearms and ammunition on county property in response to a 1998 shooting rampage at the County Fair. Los Angeles County banned the sale of firearms and ammunition on county property after a Department of Justice undercover investigation revealed numerous illegal firearm sales at a gun show at the County Fairgrounds, and a report by the Bureau of Alcohol, Tobacco and Firearms (ATF) found that gun shows provide a forum for criminal activity across the nation. Both ordinances, as well as an Alameda-style measure adopted by Sonoma County, are the subject of legal challenges now pending in federal and state courts. (See pp. 52-58.)

In July of 2000, the Marin County Board of Supervisors adopted a resolution requiring gun show promoters to pay for the training and presence of law enforcement officers at gun shows held on county property. The Sheriff's Department is responsible for determining the number of officers necessary to ensure public safety and weapons accountability at each show. Under current federal and state law, no law enforcement agency is specifically charged with ensuring the legality or safety of gun show activities.

California local governments are also considering various security measures to reduce illegal sales and thefts at gun shows, including those to require vendors to account for all firearms brought in and out of shows and to secure firearms by tying them down or displaying them under glass.

b. Requiring ammunition purchaser permits

Other jurisdictions, led by the City of Los Angeles, are considering ordinances to require purchasers of ammunition to obtain a permit. Under current California law, it is illegal for a person who is prohibited from owning or possessing a firearm to "own, possess, or have under his or her custody or control, any ammunition or reloaded ammunition."⁶ California law does not, however, provide any mechanism whatsoever for

⁶ Penal Code § 12316(b)(1).

ammunition sellers to determine whether a purchaser falls into a prohibited class. Although Penal Code Section 12316(a) prohibits the sale of any ammunition to a person known by the seller to be under the age of 18, and the sale of handgun ammunition to a person known to be under the age of 21, that statute does not affirmatively obligate the seller to determine the age of the purchaser. Rather, proof that the seller demanded, and was shown, bona fide evidence of majority and identity provides a defense to any criminal prosecution against the seller.⁷

An ordinance requiring ammunition purchasers to obtain a local permit would help close this huge loophole in state law. The permit would only be issued after law enforcement officials had completed an investigation and criminal background check to confirm that the applicant was not disqualified from owning or possessing a firearm under California law. The permit could be renewed annually or within whatever other time period local legislators deemed appropriate.

c. Banning the sale of “ultra-compact” handguns

Another innovative ordinance, now in effect in Oakland and San Francisco, prohibits the sale of “ultra-compact” or “ultra-concealable” handguns. Those handguns, sometimes referred to as “pocket rockets” because of their small size and enormous power, are frequently used by criminals.⁸ According to the Violence Policy Center, the firearms industry has heavily promoted pocket rockets in response to a growing number of state laws that permit licensed persons to carry concealed guns.⁹

4. Benefits of the Local Ordinance Approach

California’s local ordinance movement has proven to be a highly effective way to influence gun policy in this state. The local ordinance approach has been successful in California – and can be successful in other states – for several reasons. First, firearms laws are more easily passed at the local, rather than at the state or federal, level because local officials are generally more responsive to their constituents. This increased responsiveness is due, in large part, to the fact that the National Rifle Association (NRA) and other anti-regulatory groups provide less financial support to, and therefore exert less

⁷ Penal Code § 12316(a)(2).

⁸ Violence Policy Center, *Pocket Rockets: The Gun Industry's Sale of Increased Killing Power* (July 2000).

⁹ Ordinances to ban the sale of ammunition have been proposed in the cities of Los Angeles and West Hollywood. Both jurisdictions have deferred action on the proposals. Under existing case law, the legal viability of an ammunition sales ban is unclear.

influence over, local officials. In addition, city and county lawmakers are physically closer to the communities they represent and thus more likely to: 1) witness first hand the devastation caused by local gun violence; 2) personally hear from constituents demanding stronger gun laws; and 3) be held accountable for their failure to support such laws.

Second, local ordinances can create momentum critical to the enactment of state violence prevention laws, particularly when the ordinances are adopted in great numbers. As noted previously, in 1999 the California Legislature enacted four landmark laws modeled after innovative local firearm regulations. The regulations “trickled up” to the state level following the groundswell of public support for the regulations and widespread publicity surrounding their adoption. In addition, many city and county officials who pioneered local firearms regulations have now been elected to state office, increasing the likelihood of future reform by the Legislature.

A final benefit of the local ordinance approach is that it provides a natural opportunity for the formation of grassroots coalitions and the mobilization of activists. As a general rule, people are more willing to participate in the political process when an issue directly affects their lives and they believe their voices are likely to be heard. Tragically, gun violence affects a wide array of people in this nation. In California, the local ordinance movement has provided a meaningful opportunity for activists and other community leaders to work together to help reduce that violence.

This collaborative effort has involved a diverse cross section of the community, including gun violence victims and their loved ones, law enforcement representatives, public health professionals, religious leaders, violence prevention organizations, lawyers, educators and other community members. Once formed, these coalitions have successfully networked with others across the state and country to support violence prevention laws at all governmental levels.

B. NATIONAL OVERVIEW

1. The Epidemic Continues

a. Gun deaths and injuries

Despite the unprecedented growth of California’s violence prevention movement,

as well as that gaining momentum nationwide, firearm-related deaths and injuries continue at horrific levels. According to the U.S. Centers for Disease Control and Prevention (CDC), 30,708 Americans died from firearm-related injuries in 1998, the last year for which statistics are available.¹⁰ The CDC estimates that 64,484 others were treated in hospital emergency departments for nonfatal gunshot wounds.¹¹ Firearm injuries are now the second leading cause of injury-deaths nationwide, surpassed only by motor vehicle injuries.¹²

Gun violence has a profound impact on children and adolescents in this country, killing an average of 10 young people ages 19 and under each day.¹³ According to the CDC, the overall firearm-related death rate among U.S. children under the age of 15 is nearly 12 times higher than that among children in 25 other industrialized nations *combined*.¹⁴ In California, more youth ages 13-19 died from firearm violence in 1998 than from motor vehicle injuries, disease and all other causes.¹⁵

Americans have been particularly shaken by the string of school shootings in recent years, most notably the one that occurred at Columbine High School on April 20, 1999. On that date two students went on a shooting rampage, killing a teacher and 12 other students before turning the guns on themselves. Tragically, incidents of gun violence involving children have occurred with numbing regularity since Columbine. Incidents that received the most media attention include:

- the August 1999 shooting by a white supremacist at the North Valley Jewish Community Center in Granada Hills, California, that left 3 children, a teenage counselor and a receptionist injured and a Filipino-American postal worker dead;
- the February 2000 fatal shooting of a first-grader by her 6-year-old classmate in Flint, Michigan;

¹⁰ Centers for Disease Control and Prevention, National Center for Health Statistics, National Vital Statistics Reports, *Deaths: Final Data for 1998* (July 24, 2000).

¹¹ Unpublished 1998 data from the Centers for Disease Control and Prevention Firearm Injury Surveillance Study using the National Electronic Injury Surveillance System of the U.S. Consumer Product Safety Commission.

¹² Centers for Disease Control and Prevention, National Center for Health Statistics, National Vital Statistics Reports, *Deaths: Final Data for 1998* (July 24, 2000).

¹³ *Id.*

¹⁴ Centers for Disease Control and Prevention, National Center for Injury Prevention and Control, Morbidity Mortality Weekly Report, *Rates of Homicide, Suicide and Firearm-Related Death Among Children – 26 Industrialized Countries* (February 7, 1997).

¹⁵ California Department of Health Services, Death Records. In 1998, a total of 3,333 Californians died from firearm-related injuries.

- the April 2000 gun battle at the National Zoo in Washington, D.C., which left 7 children wounded; and
- the May 2000 fatal shooting by a 13-year-old boy of his English teacher on the last day of school in Lake Worth, Florida.

While many Americans are familiar with these and other highly publicized shootings, the vast majority of gun-related injuries and deaths simply escape public awareness. Most people do not realize that the death rate from our nation's military encounters pales in comparison to that caused by civilian gun use. In fact, more Americans were killed by guns during the *18-year period between 1979 and 1997* than in *all wars since 1775* – including the Revolutionary War, War of 1812, Mexican War, Civil War, Spanish-American War, both World Wars, Korean War, Vietnam War, Persian Gulf War and conflicts in Lebanon, Grenada and Panama.¹⁶ The true extent of firearm violence in this country is almost incomprehensible.

b. Firearm ownership patterns and the cost of gun violence

Americans own an estimated 200 million firearms.¹⁷ According to a Gallup poll released October 5, 2000, four in ten Americans report owning a gun. Of course, no one knows exactly how many guns are in our country because there is no system of federal registration or other comprehensive record-keeping requirements to track firearm ownership. Indeed, federal law currently prohibits the creation of a national database of gun owners.¹⁸

Researchers have found that millions of children live in homes with easily accessible guns. One recent study indicates that 34% of all American children (more than 22 million children) live in homes with firearms, and 43% of those homes have at least one unlocked gun.¹⁹ In addition, 2.6 million children live in homes with firearms stored unlocked and loaded, or unlocked and unloaded with ammunition nearby.²⁰

¹⁶ Between 1979 and 1997, 651,697 Americans were killed with guns. Military deaths in all wars since 1775 total 650,858. This comparative analysis was published by Handgun Control, Inc. on December 30, 1999, on the basis of statistical information compiled by the National Center for Health Statistics, Department of Defense and United States Statistical Abstract.

¹⁷ Philip Cook and Jens Ludwig, *Guns in America: Results of a Comprehensive National Survey on Firearm Ownership and Use*, U.S. Department of Justice, National Institute of Justice (May 1997). This study found that in 1994 Americans owned 192 million firearms, 65 million of which were handguns.

¹⁸ 28 C.F.R. § 25.9(b)(2), Brady Handgun Violence Prevention Act, Public Law 103-159, § 103(i)(2).

¹⁹ Mark A. Schuster et al., *Firearm Storage Patterns in U.S. Homes With Children*, American Journal of Public Health (April 2000).

²⁰ *Id.*

Another recent study revealed that 3.5% of all college students – approximately 450,000 students nationwide – keep a working firearm at school.²¹ That study also found a correlation between gun possession and driving after binge drinking, being arrested for driving under the influence and damaging property as a result of alcohol ingestion.

Researchers have also found a correlation between high rates of gun ownership and high rates of crime. In October of 2000, the National Bureau of Economic Research published a paper by University of Chicago researcher Mark Duggan. That paper, “More Guns, More Crime,” demonstrates that increases in gun ownership lead to substantial increases in the nation’s overall homicide rate. That paper also found that laws permitting individuals to carry concealed weapons do not reduce crime in those jurisdictions.²²

Gun violence takes an astounding economic toll on our nation. A 1999 study in the Journal of the American Medical Association estimates the medical costs of treating gunshot injuries received during 1994 at \$2.3 billion.²³ That study found that U.S. taxpayers pay for almost half of all firearm-related medical costs. According to a new book by economists at Georgetown University and Duke University, medical expenses represent only a fraction of the true cost of gun violence. That research indicates that the total cost of criminal shootings, unintentional shootings and gun suicides is \$100 billion annually.²⁴ In addition to medical costs, that figure includes pain and suffering, lost productivity, criminal justice system expenditures and other, less obvious expenses, such as those incurred for firearm security measures at airports and other public buildings.

c. Legislative unresponsiveness to the crisis

In December of 1999, the Milton S. Eisenhower Foundation published a 30-year update of a landmark study by the National Commission on the Causes and Prevention of Violence, established in 1969 by President Johnson after the assassinations of Martin Luther King, Jr. and Robert F. Kennedy.²⁵ That report concludes that little has been done

²¹ Matthew Miller et al., *Guns at College*, Journal of American College Health (July 1999).

²² As discussed below, this finding is consistent with new research regarding the impact of Texas’ concealed weapons law.

²³ Philip Cook et al., *The Medical Costs of Gunshot Injuries in the United States*, Journal of the American Medical Association (August 4, 1999).

²⁴ Philip Cook and Jens Ludwig, *Gun Violence: The Real Costs*, Oxford University Press (2000).

²⁵ The Milton S. Eisenhower Foundation, *To Establish Justice, To Insure Domestic Tranquility: A Thirty Year Update of the National Commission on the Causes and Prevention of Violence* (1999).

to combat gun violence in this country since the original National Commission study, noting that in the ensuing 30 years an estimated one million Americans have been killed by gunfire. The principal findings of the report include the following:

If there ever were a metaphor for a failure of democracy, lack of firearms control may be it.... In the late 1960s, there were 90 million firearms in the U.S. Today, there are almost 200 million firearms in this country.... In the 1960s, the dialogue on firearm violence was dominated by political assassinations and the shock of losing some of our nation's most promising leaders. In the 1990s, the dialogue has shifted to our children, and to public shootings in schools, places of worship and day care centers.²⁶

Although Congress did adopt some critical firearm-related legislation in the mid 1990s, including the Brady Act and assault weapons ban, all subsequent efforts to reform our nation's gun laws have been successfully blocked by the gun lobby. Many Americans had hoped that the tragedy at Columbine High School would finally shake the federal government into action. Little has changed at the federal level since Columbine, however. While the Senate responded by passing some modest firearm legislation, that legislation was soundly rejected by the House. (See p. 26.)

Most state legislators have been equally unresponsive. A comprehensive comparative survey of state firearm statutes, published in April 2000 by the Open Society Institute, found that the vast majority of states "lack even basic laws governing the sale and ownership of guns." (See p. 39.)

2. Reasons for Optimism

Notwithstanding the grim reality of gun violence in our nation, significant progress is being made. According to a CDC report issued in July of 2000, firearm-related deaths have decreased steadily since 1993, when they reached a peak of 39,595.²⁷ Moreover, in October of 2000 the U.S. Department of Justice reported that between 1993 and 1997 nonfatal firearm injuries from assaults decreased 39 percent and firearm-related homicides fell 27 percent.²⁸

²⁶ *Id.*, at p. iv.

²⁷ Centers for Disease Control and Prevention, National Center for Health Statistics, National Vital Statistics Reports, *Deaths: Final Data for 1998* (July 24, 2000).

²⁸ U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Firearm Injury and Death from Crime, 1993-97* (October 2000).

Although causation regarding these trends is difficult to pinpoint, likely factors include the strong economy and low unemployment rate, increased efforts to trace guns and enforce firearms laws, and a smaller population of teenagers and young adults. In addition, changes in federal laws (however incremental) have clearly helped reduce gun violence in this country. The Brady Act, for example, has prevented over 585,000 gun sales to prohibited purchasers since it went into effect in 1994.²⁹ The number of federally licensed firearms dealers has also decreased dramatically, falling from 244,042 in January of 1992 to 68,025 in July of 2000.³⁰ That decrease can largely be attributed to a strengthening of federal law in 1994, which increased the cost of a three-year dealer license from \$30 to \$200 and required applicants, for the first time, to be photographed and fingerprinted and prove compliance with state and local laws.³¹

Perhaps the most significant trend in recent years is the increasingly public focus on the issue of gun violence and the emergence of strong, diversified support for policies to reduce that violence nationwide. Recent public opinion polls show that the overwhelming majority of Americans favor stronger gun laws. For example, a nationwide survey conducted by the University of California at Los Angeles, published in November of 1999 in the journal *Science*, found that 87.9 percent favored “child-proofing” firearms, 74.9 percent favored governmental safety standards for guns and 94.9 percent believed that domestically made firearms should meet existing import standards. Support among gun owners was almost as strong, with 83.7 percent, 70 percent and 94.3 percent favoring the policies in question, respectively.³²

Similarly, a July 2000 survey conducted by Handgun Control, Inc., found that a majority of registered voters “strongly favored” licensing of handgun owners, background checks on all purchasers at gun shows and requiring the sale of child-safety locks with all guns.³³ In addition, in the first national poll of high school students regarding this issue, Hamilton College researchers found almost universal support for stricter gun laws, with 90 percent or more of the students favoring registration of handguns, licensing of gun

²⁹ See pp. 17-25 for an in-depth discussion of the Brady Act and proposals to strengthen that law.

³⁰ The 1992 figures are provided in “Operation Snapshot,” a July 12, 1993, publication of the Bureau of Alcohol, Tobacco and Firearms (ATF) Office of Compliance Operations, Firearms and Explosives Division. The 2000 figures were provided by ATF Public Information Officer Marti McKee on September 1, 2000, on the basis of an unpublished ATF report dated July 28, 2000. ATF figures are based on Type 01 dealers, i.e., those authorized to deal in firearms other than destructive devices.

³¹ 18 U.S.C. § 923.

³² Susan B. Sorenson, *Regulating Firearms as a Consumer Product*, *Science* (November 19, 1999).

³³ Handgun Control, Inc., Study #5861b, Peter D. Hart Research Associates (July 2000).

owners and requiring background checks on all handgun purchasers. That survey, released in August of 2000, also found that many high school students were willing to work for the passage of such laws by signing petitions, participating in demonstrations and volunteering their time.³⁴

Although opinion polls showing that a majority of Americans support stronger gun laws are not new, the voice of the majority has, until recently, been silent. The Columbine High School massacre was a watershed event for many, however, that served to heighten public awareness about the pervasiveness of firearm violence in our culture and galvanize a new national movement. Americans have finally begun to say “enough is enough.”

One of the most visible manifestation of this new national movement was the Million Mom March, which took place on May 14, 2000 (Mother’s Day). On that date an estimated 750,000 women, men and children marched in Washington D.C. to urge Congress to pass common sense gun laws, including those requiring registration of guns and licensing of gun owners. Marches were also held in more than 70 cities throughout the country. The Million Mom March was organized by a New Jersey mother, Donna Dees-Thomases, in response to televised images of children fleeing a gunman during the North Valley Jewish Community Center shooting in Southern California. The Million Mom March has merged with the San Francisco-based Bell Campaign to create a new national organization with an education foundation and a lobbying arm. That organization has established more than 200 local chapters across the nation.³⁵

The November 2000 passage of ballot measures in Colorado and Oregon to require background checks on all gun show purchasers is further evidence of the growing strength of the national violence prevention movement. Voters in those states passed the measures after their state legislatures refused to do so (see pp. 40, 45).

The Colorado and Oregon initiatives received financial support from Americans for Guns Safety (AGS), another prominent new violence prevention organization. AGS was founded in July of 2000 by Andrew McKelvey, a Republican and CEO of the employment search company TMP Worldwide. The organization was responsible for recruiting U.S. Senator John McCain of Arizona to appear in television ads supporting the initiatives, despite McCain’s previous opposition to similar laws. AGS has also pledged millions of

³⁴ The Hamilton College Youth and Guns Poll was designed and analyzed by Hamilton Sociology Professor Dennis Gilbert. The poll was conducted by Zogby International and released August 21, 2000.

³⁵ For contact information regarding the Million Mom March, visit www.millionmomsmarch.org.

dollars to a nationwide gun violence education campaign and agreed to provide over \$1 million in funding to strengthen the capacity of 28 state violence prevention organizations.³⁶

The new national spotlight on firearm violence was illustrated by several other events during 2000, including “First Monday 2000: Unite to End Gun Violence,” presented by the Alliance for Justice and Physicians for Social Responsibility on October 2, 2000. First Monday events took place in 50 major cities and 300 colleges across the nation in an effort to inspire civic leaders and students from law, medicine, nursing and social work to work for stronger gun laws. Attorney General Janet Reno appeared at an event in Baltimore, Secretary of Housing and Urban Development Andrew Cuomo spoke in Washington, and Senator Charles Schumer and talk show host Rosie O’Donnell participated in New York. The Alliance for Justice holds First Monday events annually.³⁷ Although the focus of the events usually changes each year, First Monday 2000 is part of a two-year campaign addressing gun violence. This year’s program was co-sponsored by more than 200 violence prevention and health organizations nationwide, including LCAV.

In addition, in July of 2000, the National Education Association voted to launch a petition drive to pressure Congress to adopt meaningful gun laws, including licensing, registration, bullet imprinting, child safety locks and background checks with waiting periods. The teachers union was inspired to act after the May 2000 fatal shooting of a Florida teacher by his 13-year-old student.

The violence prevention movement has also been bolstered by the recent publication of significant new firearm-related research. In August of 2000, for example, the Violence Policy Center published “License to Kill III: Texas Concealed Handgun Law’s Legacy of Crime and Violence,” a study that successfully rebuts the NRA’s claim that lax concealed weapons laws deter crime. (See pp. 45-46.) Another report, released in July of 2000 by Senator Charles Schumer, demonstrates that states with weak guns are frequently the source of illegal weapons in states with stronger gun laws. (See p. 39.)

Voluntary private sector actions also reflect an increased awareness of the issue of gun violence and a growing sense of national responsibility with respect to the issue. In October of 1999, for example, the United Parcel Service (UPS) announced that it

³⁶ More information about AGS is available at www.americansforgunsafety.com.

³⁷ The name “First Monday” refers to the day the U.S. Supreme Court begins each new annual term.

would no longer deliver handguns through its ground service. UPS had handled the great majority of handgun shipments for manufacturers and cited the risk of theft as the reason for the change in policy. All handguns must now be shipped via overnight air service. FedEx has also changed its policy in this regard and will now only accept shipments of firearms via Priority Overnight. Airborne Express has gone even further and now refuses to accept all shipments of firearms – handguns and long guns – as well as ammunition. In addition, in response to increased concerns about the dangers of Internet sales, E-Bay has stopped selling firearms, ammunition, high-capacity ammunition magazines and other firearm-related items on-line.

Many law enforcement agencies across the nation have also recently announced that they will voluntarily stop selling confiscated firearms or used service weapons (including pre-ban assault weapons) because those guns were frequently ending up in the hands of criminals. This issue first received national attention after the Jewish Community Center shooting in Los Angeles in August of 1999, when it was discovered that one of the firearms used in the shooting had been owned by a Washington State police department. The International Association of Chiefs of Police and U.S. Conference of Mayors are now urging law enforcement agencies to destroy used service weapons and confiscated guns.

Moreover, state gun laws are slowly being strengthened across the country, with states like California, Massachusetts and Maryland taking the lead. Significantly, gun violence prevention efforts are also beginning to receive bipartisan support, with prominent Republicans like U.S. Senator John McCain, New York Governor George Pataki and Colorado Governor Bill Owens advocating for stronger gun laws. (See pp. 40-46.)

Finally, there have been many encouraging judicial developments over the last year, including the California Supreme Court's decision upholding the state's assault weapons ban (see *Kasler v. Lockyer*, p. 37), a U.S. Court of Appeal's ruling upholding the federal government's Brady Act record retention practices (see *National Rifle Association v. Janet Reno*, p. 19), and the Massachusetts' Supreme Judicial Court's decision upholding the ability of the state's Attorney General to promulgate safety regulations for handguns (see pp. 42-43). In addition, local governments and private parties across the nation continue to pursue groundbreaking litigation against the gun industry in an effort to do through the courts that which Congress has refused to do, i.e., to force firearm

manufactures to produce a safe product and to responsibly market and distribute that product (see pp. 59-66).

CHAPTER II

DEVELOPMENTS IN FEDERAL AND STATE LAW

A. FEDERAL FIREARMS POLICIES

1. The Brady Act

a. General provisions and implementation

The Gun Control Act of 1968 prohibits the possession and receipt of firearms by certain classes of individuals, including convicted felons and fugitives from justice.³⁸ Other prohibited classes include persons who: 1) are unlawful users of controlled substances; 2) have been adjudicated as a mental defective or committed to a mental institution; 3) have been dishonorably discharged from the military; 4) have renounced their citizenship; 5) are subject to a court order restraining them from harassing, stalking or threatening an intimate partner or child of an intimate partner; or 6) have been convicted of a misdemeanor offense of domestic violence.³⁹

The Brady Handgun Violence Prevention Act of 1993 amended the Gun Control Act to require federally licensed firearms dealers to perform background checks on prospective handgun purchasers to ensure that the firearm transfer would not violate state or federal law.⁴⁰ Incredibly, before that time gun sales were governed by the “honor system,” i.e., a dealer was permitted to sell firearms to a purchaser who merely certified that he or she was not in a prohibited class.

³⁸ 18 U.S.C. § 922(g).

³⁹ *Id.* The federal categories of prohibited persons are the prevailing minimum for all states. Some states have enacted laws prohibiting additional persons from possessing firearms, e.g., persons addicted to alcohol or convicted of alcohol-related offenses.

⁴⁰ 18 U.S.C. § 922(s).

As originally adopted, the Brady Act included interim, as well as permanent, provisions. The interim provisions of the Act, implemented on February 28, 1994, applied to handgun sales only and gave law enforcement officials up to five business days to complete a background check on a prospective purchaser.⁴¹ Those provisions also directed the Attorney General to implement a national system for conducting instant background checks within five years. States with comparable or more stringent background check requirements were permitted to follow alternative procedures.⁴²

On November 30, 1998, the permanent provisions of the Brady Act went into effect, establishing the National Instant Criminal Background Check System (NICS) and extending the Act's background check requirements to purchasers of long guns.⁴³ Under NICS, a dealer initiates an instant background check by contacting the FBI or federally approved state point of contact (POC) after the prospective purchaser has provided a photo I.D. and completed a federal Firearms Transaction Record. The FBI or POC then conducts a name-based search of federal and state databases and notifies the dealer that the sale: 1) may proceed; 2) may not proceed; or 3) is delayed pending further investigation. If the dealer has not received notice within three business days that the sale would violate federal or state laws, the sale must proceed.⁴⁴ Regulations promulgated by the Justice Department allow the FBI to retain records of NICS searches relating to allowed transfers for up to six months.⁴⁵

Each state determines its involvement in the NICS process. The FBI currently performs NICS checks for all firearm purchases for 24 states, as well as the District of Columbia, Puerto Rico and U.S. Virgin Islands.⁴⁶ Fifteen POC states, including California, conduct their own checks and eleven others are "partial participants," i.e., states that have the FBI perform checks for long gun purchases, but conduct their own checks for handgun purchases.⁴⁷ FBI checks are provided at no charge; state law determines the cost of background checks provided by POCs.

⁴¹ 18 U.S.C. § 922(s)(1)(A)(ii).

⁴² Brady Handgun Violence Prevention Act, Pub. L. 103-159, 107 Stat. 1536.

⁴³ 18 U.S.C. § 922(t).

⁴⁴ 18 U.S.C. § 922(t)(1).

⁴⁵ National Instant Background Check System Regulation, 63 Fed. Reg. 58303, 58303-04 (1998).

⁴⁶ United States General Accounting Office, *Gun Control: Implementation of the National Instant Criminal Background Check System* (February 2000).

⁴⁷ *Id.*

The Brady Act has proven to be a highly effective system for keeping guns out of the wrong hands. Between February of 1994 and December of 1999, federal and state law enforcement officials performed approximately 25 million background checks on prospective purchasers and prevented over 585,000 gun sales to convicted felons and other prohibited persons.⁴⁸

b. *National Rifle Association v. Janet Reno*

On the day NICS went into effect, the NRA filed suit against the Justice Department in the U.S. District Court for the District of Columbia, arguing that the Department's temporary retention of approved transfer records violates provisions of the Brady Act: 1) requiring that such records be "destroyed;" 2) prohibiting the transfer of NICS records to a governmental facility; and 3) prohibiting use of NICS to establish a system of firearm registration.⁴⁹ The complaint also alleged that the Attorney General has no authority to permit retention of NICS records by state agencies performing background checks in lieu of the FBI, despite Brady Act provisions permitting such retention if the records are "part of a record system created and maintained pursuant to an independent state law."⁵⁰ The district court rejected each of these arguments and dismissed the complaint.

On July 11, 2000, the U.S. Court of Appeals for the District of Columbia Circuit affirmed the lower court's dismissal, holding that nothing in the Brady Act or implementing regulations unambiguously requires immediate destruction of NICS records.⁵¹ The court also held that nothing in federal law prohibits the government from retaining NICS information at a government facility, noting that the Act expressly authorizes the retention of certain NICS records, such as those pertaining to firearm transfers that have been denied.

The court also rejected the NRA's claim that the government's temporary retention of approved transfer records constitutes a system of firearm registration, finding that: 1) the express purpose of the practice was to permit audits of NICS performance and to detect any misuse of NICS data; and 2) the information available in any given six month

⁴⁸ U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Bureau of Justice Statistics 2000: At a Glance* (August 2000).

⁴⁹ See 18 U.S.C. § 922(t)(2)(C) and Brady Act §§ 103(i)(1), (2).

⁵⁰ 28 C.F.R. § 25.9(d)(1), (d)(2).

⁵¹ *National Rifle Association of America, Inc. et al. v. Janet Reno*, 216 F.3d 122 (D.C. Cir. 2000).

period “represents only a tiny fraction of the universe of firearm owners.”⁵² Finally, the court rejected the NRA’s assertion that the Attorney General had no authority to exempt states from the Brady Act’s record destruction requirements, holding that the exemption merely clarifies that state record retention requirements are not preempted by federal law.

c. Proposals to strengthen Brady

i. Closing the private sale (a.k.a. “gun show”) loophole

The Brady Act provides a critical, common sense mechanism for keeping guns away from criminals and other prohibited purchasers. Yet the effectiveness of the law could be greatly increased. The most significant weakness of the Brady Act is that its application is currently limited to sales made by federally licensed firearms dealers. Under the Gun Control Act of 1968, however, only those “engaged in the business” of dealing in firearms must be licensed. The term “engaged in the business” is defined to exclude persons who “make occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby, or who sells all or part of his personal collection of firearms.”⁵³ Accordingly, persons who purchase guns from private collectors or hobbyists – nearly half of all gun purchasers⁵⁴ – are not required to undergo Brady background checks.

Although this huge gap in federal law is commonly referred to as the “gun show loophole,” this term is misleading because current law does not obligate private sellers to conduct background checks at *any* sales location. Gun shows are particularly problematic, however, because they occur so frequently – more than 4,400 take place each year – and because they attract so many criminals.⁵⁵

The deadly impact of this loophole is illustrated by the case of white supremacist Benjamin Nathaniel Smith. In June of 1999 Smith attempted to purchase guns from a licensed dealer in Peoria Heights, Illinois. That effort was thwarted after a background

⁵² *Id.* at 131.

⁵³ 18 U.S.C. § 921(a)(21)(C).

⁵⁴ Open Society Institute, *Gun Control in the United States: A Comparative Survey of State Firearm Laws* (April 2000).

⁵⁵ Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, *Gun Shows: Brady Checks and Crime Gun Traces* (January 1999). Indeed, gun shows have been the source of firearms used in many notorious shootings, including those at Columbine High School and 101 California Street. Convicted Oklahoma City bomber Timothy McVeigh and David Koresh of Waco, Texas, also acquired firearms at gun shows.

check revealed that he was a prohibited purchaser. Thereafter, Smith successfully purchased two handguns from a private, residential seller. On July 4, Smith began a three-day shooting rampage, killing two and injuring nine others.⁵⁶

California has closed this loophole in federal law and requires all firearm sales to be conducted through a dealer, or in counties of less than 200,000, through an authorized law enforcement agency.⁵⁷ Although the U.S. Senate passed legislation to require background checks for sales at gun shows in 1999, that legislation failed to pass the House of Representatives.⁵⁸ (See p. 26.)

ii. Extending the three-day limit for background checks and encouraging more states to become POCs

The Brady Act could also be significantly strengthened if: 1) Congress extended the time within which FBI background checks must be completed; and 2) more states agreed to conduct their own background checks or provide more complete state records to the FBI.

As noted previously, federal law mandates that FBI checks be completed within three business days. If the system does not provide a definitive response to a dealer within that time period, the dealer must transfer the firearm by default. A report issued by the FBI in March of 2000 illustrates the problem with this provision of the Brady Act. That report found that during the first year of NICS operation, 3,849 prohibited purchasers were able to buy guns because their background checks could not be completed within the three-day period.⁵⁹

According to the FBI, 72 percent of all prospective gun purchasers receive NICS authorizations to complete the purchase within 30 seconds and 95 percent of all others

⁵⁶ In June of 2000, the Legal Action Project of the Center to Prevent Handgun Violence filed suit on behalf of four of the victims of the Smith shooting. Defendants include the gun manufacturers and sellers.

⁵⁷ Penal Code § 12072(d).

⁵⁸ A study reported in the August 2, 2000, issue of the Journal of the American Medical Association, "Homicide and Suicide Rates Associated with Implementation of the Brady Handgun Violence Prevention Act," concluded that the Brady Act has had little impact on homicide and suicide rates nationwide. Researchers Jens Ludwig and Philip Cook compared rates of homicide and suicide in the 18 states that had pre-Brady background checks and waiting periods with the remaining 32 states, and found no difference in those rates. However, the authors acknowledged that the decline in firearm-related crime that has coincided with implementation of the Brady Act could be attributed to a disruption of the flow of guns from the 32 Brady states. The authors also conclude that the effectiveness of Brady has been undermined by the "enormous loophole" which excludes private sales from the provisions of the Act.

⁵⁹ U.S. Department of Justice, Federal Bureau of Investigation, Criminal Justice Information Services Division, *National Instant Criminal Background Check System (NICS) Operations Report (November 30, 1998-December 31, 1999)* (March 2000).

receive a definitive response within two hours. The remaining five percent of NICS checks cannot be completed electronically, however, and require the FBI to contact state or local authorities to confirm the purchaser's eligibility. The FBI has found that a purchaser whose NICS check takes longer than 24 hours to complete is 20 times more likely to be a prohibited purchaser than other applicants.⁶⁰

FBI investigations regarding prohibited purchasers who are permitted to buy guns by default typically take 25 days to complete.⁶¹ This delay is due to the fact that many states fail to provide the FBI with necessary information about disqualifying offenses, such as outstanding felony warrants, domestic violence restraining orders and the final disposition of arrest records, i.e., whether the arrest resulted in a conviction or acquittal. As a result of these state-reporting deficiencies, the FBI requires additional time to search local court or police records, many of which are not computerized or accessible on weekends.

In order to minimize the number of "delayed denials" in the future, the FBI has recommended that the Brady Act's current three-day limitation be extended. Although most states use the federal three-day limit, others allow law enforcement additional time to complete background checks. New York, for example, gives law enforcement officials 180 days to complete a background check. Other states, such as California, have "waiting periods," i.e., laws requiring that a specified number of days pass before a firearm can be transferred, regardless of whether the purchaser passes a background check prior to that time.⁶² In some states, the waiting period coincides with the time permitted for the completion of a background check, so that a firearm must be transferred once that period expires, even if the check has not been completed. In California, in contrast, there is no outside time limit for the completion of a background check, i.e., a firearm transfer may not occur until the Department of Justice has approved the transfer.

In addition to recommending that the three-day limit be extended, the FBI believes that the effectiveness of the Brady Act could be enhanced if more states agreed to serve as POCs. As noted previously, 24 states currently conduct their own NICS background checks, rather than contacting the FBI. Those state checks are more comprehensive than those performed by the FBI because the POCs can access the state's independent

⁶⁰ *Id.*

⁶¹ United States General Accounting Office, *Gun Control: Implementation of the National Instant Criminal Background Check System* (February 2000).

⁶² California currently has a 10-day waiting period. Penal Code § 12072 (c)(1).

criminal history database, as well as those maintained by NICS. State databases are more complete because they typically include state and local files not available to the FBI, e.g., final disposition records and information regarding individuals who are subject to a domestic violence restraining order. Indeed, because of the more complete state data, background checks performed by POCs yield a higher rejection rate – 3% compared to the FBI’s 1.8% rate.⁶³

The FBI is also encouraging states that are unwilling to serve as POCs to provide more complete records to NICS. Many states rely on the FBI to conduct background checks, yet fail to submit complete records. The consequences of this practice can be tragic, however. In June of 1999, for example, a NICS check conducted by the FBI in connection with a handgun purchase by a Colorado man failed to reveal that a restraining order had been issued against the man. Within hours of his purchase, the man shot and killed his three young daughters. Colorado, like many states, had stopped performing its own background checks after NICS went into effect, but had failed to provide restraining order records to the FBI. After the June 1999 shooting, however, Colorado Governor Bill Owens ordered temporary reinstatement of the state background check system. Legislation was adopted in 2000 to make the state checks permanent.⁶⁴

iii. Increasing access to mental health records

Finally, the effectiveness of the Brady Act could be greatly enhanced if law enforcement agencies were given better access to mental health records. The vast majority of states currently block access to mental health records in order to protect the privacy of the mentally ill. Consequently, those who have been adjudicated mentally ill or involuntarily committed to a mental institution are legally prohibited from possessing firearms, but can still buy guns easily because background checks rarely detect this information. Indeed, according to the Department of Justice, of the 204,000 people prevented from purchasing firearms in 1999 nationwide, less than 1% were rejected on

⁶³ U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics Bulletin, *Background Checks for Firearm Transfers, 1999* (June 2000).

⁶⁴ In *Printz v. United States*, 521 U.S. 898 (1997), the United States Supreme Court held that the mandatory background check requirements of the interim provisions of the Brady Act imposed unconstitutional obligations on state officers to administer a federal regulatory program. In a concurring opinion, Justice O’Connor observed that Congress does have the ability to enter into contractual agreements with states regarding the implementation of federal programs, i.e., it can condition the states’ receipt of federal funds for certain programs on compliance with federal requirements. Thus, Congress cannot force states to become POCs or provide more complete state records to the FBI, but can otherwise encourage them to do so.

the basis of mental illness or disability (.5% by state and local agencies and 0% by the FBI).⁶⁵

In April of 2000, the New York Times published an in-depth study regarding this mental health loophole.⁶⁶ That study analyzed 100 rampage shootings over the last 50 years, most occurring within the last ten years, and found that: 1) half the killers had a history of serious mental health problems; and 2) at least eight had been involuntarily committed to mental institutions. According to the New York Times, only nine states currently report psychiatric information to law enforcement agencies conducting background checks within those states, and the FBI's access to mental health records is limited to those treated in veterans hospitals.⁶⁷

The Times found that some states began to report mental health information only after their failure to do so directly resulted in firearm-related deaths and injuries. Utah, for example, recently enacted a law requiring courts that commit people to mental institutions to notify the Bureau of Criminal Identification.⁶⁸ To safeguard the confidentiality of the records, the information can only be used for gun checks and cannot be shared with other government agencies. The Utah law was adopted after two shootings – one in January of 1999 and the other in April of that year – which left three dead and six others wounded. Although both shooters suffered from schizophrenia and other mental problems, they easily passed background checks and were able to purchase guns.

Connecticut adopted a similar law after an accountant with a history of mental illness killed four people and then himself in 1998.⁶⁹ Because the man had been voluntarily (and not involuntarily) committed to a mental institution, however, the new law would not have prevented his purchase of firearms. The Connecticut Legislature subsequently amended the statute to allow the police to seize guns from anyone who, in the judgment of law enforcement, is a danger to himself, herself or others.⁷⁰ Soon after

⁶⁵ U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics Bulletin, *Background Checks for Firearm Transfers, 1999* (June 2000).

⁶⁶ The New York Times series ran from April 8-11, 2000.

⁶⁷ A March 2000 report of the U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Survey of State Procedures Related to Firearm Sales, Midyear 1999*, found that 15 states access mental health records during the course of background checks. The number of reporting states is dangerously low, regardless of whether it is 9 or 15.

⁶⁸ See Utah House Bill 176, effective May 2000.

⁶⁹ See Public Act No. 98-129, approved May 27, 1998.

⁷⁰ See Public Act No. 99-212, approved June 29, 1999.

that law took effect, in the fall of 1999, the police used it to seize five guns from a man who was suffering from depression and had told officers he was going to kill his neighbors and co-workers.

In short, provisions of federal law that prevent the mentally ill from purchasing firearms will continue to be meaningless unless they are enforced. Carefully tailored laws can protect the privacy rights of the mentally ill, while safeguarding the public from dangerous individuals.

2. Legislative Update

a. Defeated legislation

According to a June 2000 study by Common Cause, “Paying the Price, How Tobacco, Gun, Gambling & Alcohol Interests Block Common Sense Solutions to Some of the Nation’s Most Urgent Problems,” between 1989 and 1999 the NRA and other gun groups spent more than \$14.5 million in independent expenditures and political action committee contributions to federal candidates, and \$1.3 million in soft money contributions to Republican party committees.

These expenditures appear to have paid off. Congress has repeatedly failed to pass legislation to reduce firearm-related violence, despite mounting public pressure to do so. In addition, in July of 1996 the House voted to cut \$2.6 million from the budget of the Centers for Disease Control and Prevention (CDC) – exactly the amount it requested for research on gun-related injuries. Although the Senate restored the cut, it directed the CDC to spend the money on brain injury research and do nothing that could be construed as gun control advocacy.

The gun lobby’s stranglehold over Congress appeared to have been finally loosened in May of 1999, when the U.S. Senate passed the first significant gun control bill since the Republicans gained control of Congress in 1994. That legislation, included in a juvenile justice bill, was adopted in response to the Columbine High School massacre, which had occurred one month earlier. Key provisions of the bill would have:

- Closed the “gun show loophole” by requiring background checks on all firearm purchasers at gun shows;

- Banned the importation of high capacity ammunition magazines, i.e., those capable of holding more than 10 rounds of ammunition;⁷¹ and
- Required the sale of a “secure gun storage safety device” with all handguns.

The House of Representatives rejected these provisions of the bill, however, and disparate versions of the legislation languished in a congressional conference committee.

Several other significant firearm-related bills went nowhere in Congress during the last session, including the following:

- The Firearms Safety and Consumer Protection Act 1999. Sponsored by Representative Patrick Kennedy (D-RI) and Senator Robert Torricelli (D-NJ), this bill would have authorized the Department of the Treasury to regulate the manufacture, sale and distribution of firearms and ammunition. The Consumer Product Safety Act currently exempts firearms and ammunition from federal health and safety regulations.⁷²
- The Firearm Licensing and Record of Sale Act. This bill, sponsored by Senator Dianne Feinstein (D-CA), would have made it unlawful for a person to possess a handgun or any semiautomatic firearm that can accept a detachable magazine unless that person had obtained a federal license. In order to receive a license, an applicant would have been required to pass a written examination demonstrating knowledge of the safe storage, handling and use of firearms and an understanding of federal, state and local firearms laws. The bill also would have established a federal record of sale system, mandated background checks on all firearm purchasers and required licensees to report lost or stolen firearms.
- The Military Sniper Weapon Regulation Act of 1999. Sponsored by Representative Rod Blagojevich (D-IL), this bill would have regulated 50 caliber, long range, military style sniper rifles, capable of penetrating armor plating yet currently available in the civilian market.

3. Other federal proposals

a. The National Gun Enforcement Initiative

In January of 2000, President Clinton asked Congress to fund the National Gun Enforcement Initiative. That initiative, part of the President’s proposed 2001 budget, called for \$280 million to fund: 1) 500 new ATF agents and inspectors; 2) over 1,000

⁷¹ Although the 1994 assault weapons ban prohibited the future manufacture of high-capacity ammunition magazines, it permitted the sale of existing magazines. Unlike domestically manufactured magazines, however, those imported from other countries do not contain serial numbers which allow their manufacturing date to be determined. As a result, foreign-made magazines continue to flood into our country.

⁷² See 15 U.S.C. §§ 2051 et seq., 2052(a)(1)(E).

federal, state and local prosecutors to handle gun cases; 3) the first nationally-integrated ballistics testing system and expansion of existing gun tracing programs; 4) local media campaigns to discourage gun violence and inform the public about penalties for gun-related crimes; and 5) the development of “smart gun” technologies.

Despite Republican criticism that the Clinton Administration has failed to enforce existing laws, in June of 2000 the House Appropriations Committee refused to fund key provisions of the initiative, including the President’s proposal to spend \$150 million to hire 1,000 federal, state and local prosecutors. Other gutted provisions include those calling for increased funding for local anti-gun violence media campaigns and “smart gun” technology. As of November 1, 2000, no final action had been taken with respect to the remaining provisions of the Initiative.

b. HUD’s Buyback America Program

In the fall of 1999, the Clinton Administration launched Buyback America, a \$15 million program to encourage city housing agencies to buy and destroy unwanted firearms. The three-year program is operated through the Department of Housing and Urban Development (HUD), which provides matching grants to public housing authorities (cash or gift certificates worth an average of \$50). In June of 2000, the Republican chairman of the House Appropriations Committee ordered HUD Secretary Andrew Cuomo to stop the program, arguing that HUD has no authority to finance gun buybacks. Although buybacks in some cities were put on hold in response to the dispute, the Clinton Administration vowed to continue the program. As of April 2000, 84 cities had participated in the program and purchased approximately 50,000 guns.

c. The “eZ Check” Firearm License Verification System

On September 23, 2000, President Clinton announced a new online system that will allow firearms dealers to verify the authenticity of a federal firearms license prior to shipping or selling guns to another dealer. The new ATF “eZ Check” system was launched in an effort to block minors and criminals from using forged licenses to obtain firearms through the mail.

Under existing law, dealers are required to view a photocopy of the purchasing dealer’s license, but not to verify its accuracy or report persons who attempt to purchase guns with a falsified license. It has been very easy, therefore, for persons posing as

dealers to successfully purchase guns through the mail, particularly as Internet sales have increased. (According to the White House, there are now 4,000 firearm-related sites on the Internet and 80 sites where guns are sold by auction.) Impersonating a dealer is very beneficial to a prohibited purchaser because dealer purchases are not subject to background checks or applicable state waiting periods. In addition, dealers can buy guns through the mail at wholesale prices.

The issue of fraudulent dealer licenses received public attention in May of 1999 after two 17 year-olds were arrested in Montclair, New Jersey, for using a forged license to purchase four firearms over the Internet from a Texas dealer. The teenagers were only caught because a UPS deliveryman became suspicious when the guns for "Clint's Gun Distributors" were being delivered to a residence (although residential dealers are permitted under federal law) and no adults were present to sign for the delivery. In another case, an Oakland, California, man bought 1,100 guns after changing the date on his expired federal firearms license. Many of the guns he sold were later used in violent crimes.

In addition to establishing the "eZ Check" system, which currently can be found on the ATF web site (www.atf.treas.gov), the Clinton Administration has drafted new regulations that will require firearms manufacturers, wholesalers and dealers to: 1) verify the authenticity of a dealer's federal license before transporting guns; and 2) notify ATF when they are presented with an invalid license. These regulations are expected to take effect early in 2001 after a required comment period.

4. The Second Amendment

a. The *Emerson* case

"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."

On March 30, 1999, a federal district court in Texas astounded legal scholars and historians nationwide by holding that the Second Amendment to the U.S. Constitution guarantees an individual right to bear arms. That decision, issued in a case entitled *U.S. v Emerson*, involved a challenge to 18 U.S.C Section 922(g)(8), the federal law prohibiting firearm possession by a person subject to a domestic violence restraining order.⁷³ The defendant in the case, Dr. Timothy Joe Emerson, had been indicted for

⁷³ See 46 F. Supp. 2d 598 (N.D. Tex. 1999).

illegally possessing numerous guns (including an SKS assault rifle with a bayonet) while subject to a divorce court's order restraining him from threatening his estranged wife and daughter.

Emerson moved to dismiss the indictment on several grounds, arguing, among other things, that 18 U.S.C. Section 922(g)(8) violates his rights under the Second Amendment.⁷⁴ District Court Judge Samuel Cummings agreed, holding that the law impermissibly infringes on Second Amendment rights because it permits prosecution based on restraining orders issued in a state divorce proceedings without a substantial showing or finding that the individual represents a credible threat of violence to an intimate partner or child.⁷⁵

Judge Cummings' ruling in the *Emerson* case was completely unsupported by legal precedent. In fact, the court's decision was contrary to more than 60 years of well-established case law, including the seminal U.S. Supreme Court case of *U.S. v. Miller*.⁷⁶ In *Miller*, the court considered whether a federal law prohibiting the interstate transportation of sawed off shotguns violated the Second Amendment. The court unanimously rejected this argument, holding that the "obvious purpose" of the Amendment was "to assure the continuation and render possible the effectiveness" of the state militia, and it "must be interpreted and applied with that end in view."⁷⁷ Since *Miller*, more than 100 state and federal courts have interpreted the Second Amendment. Without exception, those courts have held that the protection afforded by the Amendment only arises in the context of service to a state-run militia, rejecting the argument that the Constitution is a barrier to laws regulating the manufacture, sale or possession of firearms.⁷⁸

⁷⁴ Emerson also argued that the law: 1) violated his Fifth Amendment due process rights because he did not know that he was prohibited from possessing firearms; 2) exceeds the authority of Congress to regulate interstate Congress; and 3) violates the Tenth Amendment.

⁷⁵ The court also granted Emerson's motion to dismiss on Fifth Amendment grounds. Dismissal was denied on the basis of the other theories advanced.

⁷⁶ 307 U.S. 174 (1939).

⁷⁷ *Id.* at 178.

⁷⁸ The Supreme Court has also held that the Second Amendment only serves as a constraint upon the federal government and not the states. See *U.S. v. Cruikshank*, 92 U.S. 542 (1857) and *Pressser v Illinois*, 116 U.S. 252 (1886). Thus, the Second Amendment has no bearing whatsoever on state or local firearms laws. See, e.g., *Fresno Rifle & Pistol Club, Inc. v. Van de Kamp*, 965 F.2d 723 (9th Cir. 1992) (only the state has standing to assert a Second Amendment defense to a federal law). This issue did not arise in the *Emerson* case, however, because the action involved a challenge to a federal statute.

Despite this clear line of legal precedent, including two decisions of the Fifth Circuit Court of Appeals, the Emerson court characterized the issue before it as “one of first impression.”⁷⁹ To support its conclusion that the framers of the Constitution intended the Second Amendment to guarantee an individual right to bear arms unrelated to service in a state-sponsored militia, the court relied almost exclusively on recent law review articles and other commentary.

The Justice Department has appealed the *Emerson* ruling to the Fifth Circuit and oral argument was heard in the case in June of 2000. *Amicus* briefs were filed in support of the Department by numerous constitutional law scholars and by the Center to Prevent Handgun Violence on behalf of several law enforcement agencies and on behalf of LCAV.

Many experts expect the Fifth Circuit to reverse the lower court’s decision as it relates to the Second Amendment. Because the *Emerson* case raises legal issues aside from the Second Amendment, however, it is possible that the appeal will be resolved on other grounds, e.g., the Fifth Amendment. The *Emerson* case is unlikely to reach the U.S. Supreme Court, though, because the Supreme Court has had numerous opportunities to reinterpret the Second Amendment since *Miller*, but has consistently declined to do so.

⁷⁹ See *United States v. Johnson*, 441 F.2d 1134 (5th Cir. 1971) and *United States v. Williams*, 446 F.2d 486 (5th Cir. 1971).

b. LCAV's Second Amendment Education Campaign

The NRA and other anti-regulatory groups have successfully convinced most Americans that the Second Amendment guarantees an individual, fundamental right to possess firearms. In 2000, LCAV launched its Second Amendment Education Campaign in an effort to counteract the gun lobby's distortion of the Constitution. The goal of the Campaign is to educate the public – including policy makers and members of the media – that the Second Amendment is not an obstacle to firearm-related laws at the federal, state or local level.

In March of 2000, LCAV sent an “open letter” to Charlton Heston, signed by almost fifty prominent legal scholars and historians across the country, asking the NRA to stop its misrepresentations regarding the Constitution. That letter formed the basis of an ad LCAV placed in the national edition of the New York Times on March 27, 2000. The New York Times ad and letter to Charlton Heston are available on the LCAV web site.⁸⁰

As part of the Second Amendment Education Campaign, LCAV provides updates of significant developments in the area, including those involving the judiciary (e.g., the *Emerson* case), as well as new scholarship in the field. This year, LCAV is pleased to report on two important recent Second-Amendment related publications. The first is a book by Michael Bellesiles, a colonial historian at Emory University, entitled “Arming America: The Origins of a National Gun Culture.” That book, published in September 2000, challenges the widely held belief that gun ownership was nearly universal in the frontier era.

According to Professor Bellesiles, firearm ownership was, in fact, rare among early Americans. After examining more than 1,000 probate records from New England and Pennsylvania for the period 1763 to 1790, Professor Bellesiles found that only 14 percent owned firearms, and more than half of those were described as inoperable. In colonial times, Bellesiles writes, the only available firearms were imported muskets – expensive, inaccurate and difficult to operate. Early Americans were primarily farmers who viewed guns as a luxury item, completely ineffective for purposes of self-defense or hunting. Professor Bellesiles found that firearm ownership did not become widespread until the Civil War of 1861-65, after the invention of the revolver. Thus, America's gun culture is a relatively new phenomenon and is not, as popular mythology would have it, deeply rooted in colonial America.

⁸⁰ www.lcav.org

The second important new publication in this field is from the Chicago-Kent Law Review. An upcoming issue of that Review, "Symposium on the Second Amendment – A Fresh Look," is completely dedicated to an analysis of the Second Amendment. That issue includes articles by ten renowned constitutional law and history professors that dispel the NRA mythology regarding the meaning of the Second Amendment.⁸¹

B. CALIFORNIA FIREARMS POLICIES

1. Legislative Update

a. 1999 – A landmark year

During 1999, the California Legislature passed, and Governor Davis signed, several groundbreaking firearm-related laws. Those laws:

- Ban the manufacture and sale of unsafe handguns, i.e., those that do not pass a drop test and firing safety test and contain a manually operated safety. The law does not apply to private (non-dealer) sales or to handguns owned by individuals prior to the January 2001 effective date;⁸²
- Reduce gun trafficking by prohibiting the purchase of more than one handgun per month per person;⁸³
- Strengthen the state's assault weapons ban by banning the manufacture, sale, transfer and possession of firearms that have one or more military characteristics, and the sale/transfer of magazines capable of holding more than 10 rounds of ammunition;⁸⁴
- Require gun dealers, as of January 1, 2002, to equip all firearms with child-safety locks approved by the Department of Justice;⁸⁵
- Prohibit persons under the age of 18 from attending gun shows without a parent, grandparent or guardian, require gun show promoters to notify the Department of Justice and local law enforcement of upcoming shows and proposed security plans with respect thereto, obtain liability insurance, and ensure that all firearms brought into the shows are cleared of ammunition and tagged for identification purposes.⁸⁶

⁸¹ Chicago-Kent Law Review, Vol. 76, Issue 1, Year 2000 (expected publication in December of 2000).

⁸² Penal Code § 12125 et seq.

⁸³ Penal Code § 12072(c)(6), 12071(b)(7)(e).

⁸⁴ Penal Code § 12276.1

⁸⁵ Penal Code § 12087 et seq.

⁸⁶ Penal Code § 12071.1.

Although Governor Davis signed several significant firearm-related bills in 1999, he vetoed others, including a bill to strengthen the state's CAP (child access prevention) law.⁸⁷ In the Governor's veto statement regarding the bills, he urged the Legislature to refrain from passing additional gun legislation during the balance of the two-year session so that law enforcement agencies could "absorb and enforce the major revisions enacted into law" and the impact of those laws could be "measured and analyzed."

b. Legislative developments in 2000

In response to the Governor's request for a moratorium on new gun legislation, several California legislators dropped promising bills to reduce firearm violence in this state, including those to prohibit residential dealers and require meaningful law enforcement oversight of gun shows. A few firearm-related bills were adopted into law in 2000, however, including those to study ballistic "fingerprinting," fund public service announcements regarding new gun laws and regulate imitation firearms.

The ballistic fingerprinting law requires the Department of Justice to provide a report by June 2001 regarding the viability and possible implementation of a ballistic identification system in California.⁸⁸ Such a system would require that handguns be test-fired by the manufacturer prior to sale to determine the unique ballistic markings left by each weapon. That information would be computerized for later use by law enforcement when a bullet or casing is found at the scene of a crime.⁸⁹

The second firearm-related bill requires the Department of Justice to produce public service announcements in English and Spanish to inform the public about: 1) changes in gun laws and how to obtain more information about existing laws; and 2) a gun owner's responsibilities regarding the safe storage of a firearm. The Legislature appropriated \$125,000, on a one-time basis, to fund the bill.

Finally, the California Legislature adopted a bill to prohibit the manufacture, sale and receipt of imitation firearms unless the entire exterior surface of the firearm is bright orange or bright green.⁹⁰ The issue of realistic looking toy guns received public attention

⁸⁷ AB 1142, sponsored by Assemblywoman Nell Soto, would have made it a crime to leave a loaded firearm easily accessible to a child under 18 (current law applies to children under 16), and toughened the penalties for statutory violations.

⁸⁸ Penal Code § 12072.5.

⁸⁹ Maryland and New York have recently adopted statutes to implement a system of ballistic fingerprinting. See pp. 41 and 44.

⁹⁰ Penal Code §§ 417.2 and 12020.3.

in California in November of 2000 after police officers in separate incidents in Los Angeles and Mountain View fatally shot individuals who had pointed replica firearms at the officers.

The most significant gun bill to be considered by the California Legislature in 2000 was AB 273, a handgun licensing bill introduced by former Assemblyman (now state Senator) Jack Scott. The Scott bill would have required handgun buyers to obtain a state license after proving California residency, undergoing a background check, attending a certified safety course and passing a “hands on” firearm proficiency test. The bill also would have required applicants to pass a written test demonstrating knowledge of the state’s firearm laws and recommended safety practices. (Current California law requires handgun buyers to watch a safety video or take a simple written safety test that may be administered by the gun dealer.) Although AB 273 passed the Senate, Senator Scott withdrew the bill after Governor Davis signaled his lack of support for the legislation. Senator Scott intends to reintroduce the measure in 2001.

c. Looking to the future – licensing and registration

Laws requiring licensing of firearm owners and registration of firearms are widely recognized as a critical component of responsible gun policy. Accordingly, leaders of the violence prevention movement in California and nationwide have made licensing and registration a top legislative priority.⁹¹

Firearm licensing and registration laws are frequently analogized to laws requiring licensing of automobile owners and registration of automobiles. Both regulatory schemes impose minimal, common sense requirements on the owners of instrumentalities known to cause huge numbers of deaths and injuries in our society. Automobile drivers, for example, have long been required to obtain a state driver’s license after demonstrating that they know the relevant laws, are competent to drive and are adequately insured. Automobile owners must also register their cars and will be held accountable if they fail to do so. Similarly, firearm licensing and registration laws require gun owners to meet minimal standards of competence and safety, and to register their guns or suffer the consequences.

On December 1, 1999, then-Assemblyman Jack Scott convened a hearing on the subject of licensing and registration. One of the speakers at the hearing was Philip

⁹¹ As stated in Chapter I, California state law preempts the field of licensing and registration. Local governments, therefore, have no authority to adopt legislation in this field.

Alpers, a prominent expert in the field of international firearm regulations. Mr. Alpers observed that among industrialized nations worldwide, the United States is the *only* nation without a system of gun licensing and registration. According to Mr. Alpers, it is no coincidence that the United States also suffers the highest rate of firearm-related death among 24 high-income nations worldwide. (The American rate of gun death is double that of Northern Ireland, the country with the next highest death rate.)⁹²

Because laws requiring licensing of gun owners and registration of guns are complementary, they are frequently discussed together. They involve distinct concepts and policy goals, however, and should be understood separately.

i. Licensing

Although licensing laws vary, those that are most effective require all gun owners – not just owners of handguns or future firearm purchasers – to obtain a state license. That license will only be issued after the applicant has provided fingerprints and proof of residency, and passed written and performance-based tests showing that the applicant knows how to safely load, fire and store a gun, and has knowledge of relevant firearm laws.

Once an applicant passes these tests, as well as a thorough background check, he or she is issued a card with a number, photograph and other identifying information, including the licensee's address and date of birth. The license must be displayed and its authenticity verified by a firearms dealer prior to the purchase of a firearm. In addition, the license must be renewed after a specified time period (the license proposed in the Scott bill would have been valid for five years).

The policy goals behind licensing laws are straightforward. Licensing helps: 1) reduce the number of unintentional shootings by ensuring that gun owners know how to safely use and store firearms; 2) increase compliance with existing firearms laws by requiring gun owners to demonstrate knowledge of those laws; and 3) decrease illegal gun sales by ensuring that only eligible purchasers are licensed.

ii. Registration

As noted in Chapter I, Americans own an estimated 200 million firearms. This figure cannot be confirmed, however, because federal law does not require – indeed, it

⁹² E.G. Krug, et al., *Firearm-related Deaths in the United States and 35 Other High- and Upper-middle-income Countries*, International Journal of Epidemiology (1998).

prohibits – firearm registration. In addition, federal law and the law of most states does not require private gun sellers to document gun sales or confirm that the prospective purchaser is eligible to own a firearm. Although California law requires all firearm sales to be processed through a dealer, the public is generally unaware of the law and it is often ignored. As a result, in California and across the country, guns flow easily from the legal to the illegal market.

Effective registration laws require firearm owners to register their weapons, usually by serial number and description, with a designated law enforcement agency. Whenever title is transferred, whether by sale or by gift, the firearm must be re-registered. In addition, law enforcement must be notified whenever the firearm is lost or stolen. Gun owners have incentive to comply with these requirements because they know they will share legal responsibility for any subsequent incidents involving the gun.

Gun owners must renew their registration annually or explain why they should no longer be legally responsible for the weapon. During the renewal process, owners must undergo an additional background check to ensure that they have not fallen into a prohibited class. Failure to register will result in revocation of the owners' firearm license.

The policy goals behind registration are also straightforward. Registration: 1) is a critical crime-fighting tool because it provides essential information about firearm ownership, thus facilitating fast and reliable gun tracing; 2) helps reduce illegal firearm sales by creating accountability for gun owners; and 3) provides a mechanism to ensure that firearm owners remain eligible to possess their weapons.

Public opinion polls show that Americans strongly support registration and licensing laws. A Time/CNN poll taken in July of 1999 found that 77 percent of the respondents favored a handgun owner licensing law and 76 percent supported mandatory federal handgun registration. A California Field Poll released in July of 2000 showed that 75 percent supported gun registration. A poll released that month by Handgun Control also showed that a majority of voters strongly favored gun licensing.

2. Assault Weapons Litigation Update - *Kasler v. Lockyer*

In *Kasler v. Lockyer*, decided June 29, 2000, the California Supreme Court upheld the state's 1989 Roberti-Roos Assault Weapons Control Act, reversing a decision by the Third District Court of Appeal.⁹³ The lower court had found the assault weapons ban unconstitutional on the grounds that: 1) it violated principles of equal protection because

⁹³ *Kasler v. Lockyer* (2000) 23 Cal. 4th 472. The case was originally denominated *Kasler v. Lungren*.

the list of banned weapons failed to include firearms that could also be classified as “assault weapons;” 2) the Act’s add-on provision, which permits the Attorney General to add to the list of banned weapons after obtaining a court order, violates the separation of powers doctrine by impermissibly delegating legislative powers to the judiciary; and 3) the Act violates due process because it is unduly vague and fails to give advance warning of the conduct prohibited. The Supreme Court considered, then rejected, each of these arguments, upholding the constitutionality of the Act by a vote of six to one.

The court began with an analysis of plaintiffs’ equal protection claim, determining preliminarily that the law should be reviewed under the rational basis, and not the strict scrutiny, test because it does not involve a suspect class or burden a fundamental right. In so holding, the court rejected plaintiffs’ argument that the Roberti-Roos Act burdened a fundamental right found in the California Constitution:

If plaintiffs are implying that a right to bear arms is one of the rights recognized in the California Constitution’s declaration of rights, they are simply wrong. No mention is made in it of a right to bear arms.... Moreover, ‘[i]t is long since settled in this state that regulation of firearms is a proper police function.’ (Citation omitted.) We reject any suggestion that the regulations at issue here impermissibly infringe upon the right to defend life or protect property guaranteed by the California Constitution.⁹⁴

The court observed that under the rational basis test, a statutory classification will be upheld if any reasonably conceivable set of facts could provide a rational basis for the classification, even if the law does not completely eliminate all of the evils sought to be addressed. After reviewing the circumstances giving rise to adoption of the Roberti-Roos Act (e.g., the Stockton schoolyard massacre and other violent incidents involving assault weapons, the testimony of law enforcement officials and the political difficulties of crafting the law), the court rejected plaintiffs’ argument that the law was irrationally underinclusive, holding instead that it was a rational attempt by the Legislature to “make California a safer place, even if only marginally and incrementally.”⁹⁵

The court also disposed of plaintiffs’ separation of powers argument, noting that the judiciary’s role in implementing the add-on procedure – reviewing whether a firearm the Attorney General seeks to add to the list of banned weapons meets the statutory criteria – is actually a very narrow, essentially adjudicatory one. The court held that the obligations imposed on the courts by the Act did not overburden them or pose duties that

⁹⁴ *Id.* at p. 481.

⁹⁵ *Id.* at p. 491.

would entangle them in political battles (the law does not, for example, require the judiciary to initiate the process of adding firearms to the list). Moreover, the court found that the delegation by the Legislature was not the result of an improper attempt to “duck” a controversial issue, but a valid attempt to defer to the expertise of the judiciary:

For good or ill, the Legislature stood up and was counted on this issue, one of the most contentious in modern society. The task it delegated – amending the list of assault weapons to capture the protean modifications of the weapons – was one it could not reasonably be expected to do itself.⁹⁶

Finally, the court rejected plaintiffs’ facial challenge of the Roberti-Roos Act on due process grounds, holding that: 1) the statute was not unconstitutionally vague with respect to the addition of weapons that had “slight” modifications from banned weapons or had been “redesigned,” since the interpretation of those terms was left to the Attorney General and the courts, and not to ordinary citizens; and 2) plaintiffs had failed to demonstrate that the existence of a temporal gap between the time a weapon is added to the list of banned weapons and publication of the notice thereof would present notice issues in the vast majority of cases.

C. SELECTED DEVELOPMENTS IN OTHER STATES

During 2000, three important new studies were published which illustrate the vital need for comprehensive, uniform national laws to regulate firearms. The first study was released in April of 2000 by the Open Society Institute’s Center on Crime, Communities & Culture and the Funders’ Collaborative for Gun Violence Prevention. That study, “Gun Control in the United States, A Comparative Survey of State Firearms Laws,” analyzed the gun laws in all 50 states and assigned each state a score based on 30 weighted criteria (e.g., whether the state has licensing and registration, background checks on private sales, waiting periods and regulation of assault weapons or “junk guns”). Points were deducted for laws preempting local firearms regulations and prohibiting lawsuits against the gun industry.

Out of a possible perfect score of 100%, the average score among all states was only 9%. Only a handful of states received scores in excess of 50%. The five highest-ranking states were Massachusetts, Hawaii, California, Connecticut and Maryland. Twenty states received scores below zero.

⁹⁶ *Id.* at p. 498.

In August of 2000, Handgun Control, Inc. released its fourth annual analysis of state laws protecting children from gun violence. That study considered five types of legislation, including those pertaining to juvenile handgun sales and possession, concealed weapons and child access prevention laws. Twenty five states received grades of “D” or “F” for the 1999-2000 school year. Only four states (Connecticut, Hawaii, Maryland and Massachusetts) received “A”s.

The third report, issued by Senator Charles Schumer in July of 2000, demonstrates how states with weak gun laws can undermine the effectiveness of those with strong gun laws. That report, “War Between the States,” found that 12 states supplied more than 1,000 guns traced to out of state crimes in 1999 and were the source of 57% of all out of state crime guns. Four states with extremely lax gun laws – Texas, Florida, Georgia and Mississippi – were the source of nearly one-fourth of all out of state crime guns nationwide.

1. Colorado

On November 7, 2000, Colorado voters overwhelmingly passed Amendment 22, a ballot measure to require background checks on all gun show purchasers, not just those buying from federally licensed dealers.⁹⁷ The measure was sponsored by SAFE (Sane Alternatives to the Firearms Epidemic) Colorado, an organization founded in the wake of the Columbine High School massacre. Three of the four guns used at Columbine were purchased at a gun show by a friend of the shooters who later testified that she would not have bought the weapons if she had been required to undergo a background check. Colorado residents decided to put Amendment 22 on the ballot after state legislators defeated similar legislation to expand background checks at gun shows.

The Colorado ballot measure was met with fierce NRA opposition and challenged in a series of unsuccessful lawsuits. (In July of 2000, the Colorado Supreme Court rejected a challenge to the wording of the initiative and in October rejected a separate challenge to the ballot signatures.) Amendment 22 received the backing of Republican Governor Bill Owens and significant financial assistance from Americans for Gun Safety, sponsor of TV ads featuring Republican U.S. Senator John McCain.

⁹⁷ The Amendment does not apply to private sales occurring outside of gun shows, however.

2. Connecticut

Two significant new firearm-related laws took effect in Connecticut in the fall of 1999. The first requires background checks of employees of retail firearms dealers where the principal part of the business is the retail sale of goods other than firearms (e.g., a Kmart or large sporting goods store).⁹⁸ That law also requires employees to complete a state-approved test regarding firearm safety and statutory procedures for firearm sales.

The second important new law permits law enforcement to seize the firearms of a person who has been found by a court to pose a risk of imminent personal injury to himself, herself or others. That person is entitled to a hearing within 14 days of the seizure to determine whether the firearms should continue to be held by the state or returned.⁹⁹

As discussed previously, the Connecticut Legislature adopted this law in response to a March 1998 shooting spree by an accountant who killed four people at the Connecticut Lottery headquarters and then shot and killed himself. The man was not legally prohibited from possessing firearms under existing state or federal law because he had not been involuntarily committed to a mental institution or declared mentally incompetent. (See discussion regarding proposals to strengthen the Brady Act at pp. 20-25.)

3. Maryland

In April of 2000, Maryland Governor Parris Glendening signed the “Responsible Gun Safety Act of 2000,” one of the most far-reaching firearm laws in the nation. Key provisions of the innovative new law:

- Require ballistic “fingerprinting” of all new handguns shipped into the state after October 1, 2000;¹⁰⁰

⁹⁸ Although employee background checks are a common feature of many local dealer ordinances in California, those ordinances apply to all firearms dealers, regardless of whether firearms sales are the principal part of the business. Under existing federal and state law, firearms dealers may legally employ convicted felons or other person who are ineligible to purchase guns.

⁹⁹ See Public Act No. 99-212, approved June 29, 1999.

¹⁰⁰ In accordance with the new law, manufacturers are required to test-fire each new handgun shipped into the state and provide a spent shell casing to the purchasing firearms dealer. Once the gun is sold, the dealer must forward the casing to the state police, who will then enter its unique markings in a database for possible use in future criminal investigations. As stated previously, California recently adopted legislation to study the viability and possible implementation of a similar ballistic identification system.

- Provide for the disposal of law enforcement-owned handguns by destruction or transfer to another law enforcement agency or retired state police officer;
- Prohibit anyone convicted of a felony or violent crime while a juvenile from possessing a handgun until the age of 30;
- Require the sale of external safety locks with all handguns manufactured before December 31, 2002. All handguns manufactured after that date must include a built-in, integrated mechanical safety device to prevent unintentional discharge. In addition, beginning on or before July 1, 2002, the Handgun Roster Board must review the status of “personalized gun” technology and report its findings to the Governor on an annual basis.

In October of 1999, Maryland Attorney General J. Joseph Curran outlined his bold vision for a safer country in a comprehensive report entitled “A Farewell to Arms: The Solution to Gun Violence in America.” That report proposes that handgun ownership ultimately be banned nationwide, except by law enforcement personnel and those who can demonstrate that their guns will only be used in regulated sporting activities.

Until that goal can be accomplished, however, the Attorney General recommends that federal and state legislators impose stringent health and safety standards on the firearm industry, as well as licensing and more rigorous screening requirements on prospective gun owners. Those laws would prohibit anyone who breaks the law – even if the crime is a misdemeanor – from owning a gun. The report also calls for a fundamental change in our country’s attitude towards firearms, so that handgun ownership (like smoking or driving a car without a seatbelt) is viewed by most Americans as a dangerous behavior.

In 1999, researchers at Johns Hopkins School of Public Health published a study analyzing the impact of Maryland’s landmark 1988 law banning the manufacture and sale of “Saturday Night Specials” or “junk guns.”¹⁰¹ That study identified the proportion of crime guns banned by the law, comparing Baltimore with 15 cities outside Maryland. The researchers found that the law had significantly reduced the use of those guns by criminals in Baltimore; i.e., a smaller proportion of the banned guns appeared in Baltimore than in the other cities. Thus, the study showed that, contrary to the claims of the gun lobby, regulation of the lawful market can affect the behavior of criminals.

¹⁰¹ Jon Vernick, et al., *Effects of Maryland’s Law Banning Saturday Night Special Handguns on Crime Guns*, Johns Hopkins School of Public Health, Center for Injury Research and Policy and Center for Gun Policy and Research, Injury Prevention (1999).

4. Massachusetts

a. Consumer protection regulations upheld

On April 3, 2000, Massachusetts Attorney General Thomas F. Reilly began implementing the landmark gun safety regulations promulgated in 1997 by his predecessor, Scott Harshbarger. Those regulations define as an unfair or deceptive practice the sale of a handgun: 1) without a tamper-resistant serial number; 2) made from inferior materials; 3) without child-proofing or safety devices, including a loaded chamber indicator;¹⁰² and 4) with a barrel shorter than four inches, unless certain disclosures are made to the consumer.

Enforcement of the regulations had been enjoined by a Superior Court after the gun industry filed suit challenging the Attorney General's authority to establish design and performance standards for firearms. In June of 1999, however, the Massachusetts Supreme Judicial Court vacated the lower court order, holding that the Attorney General acted within his authority to regulate deceptive or unfair acts in the sale of products that fail fundamental requirements of safety and performance.¹⁰³ The court remanded the case for further proceedings in light of the fact that the state had, during the pendency of the action, adopted legislation modeled after some of the regulations (i.e., those requiring childproofing or safety devices and banning the sale of firearms made from inferior materials).

On January 14, 2000, the Superior Court issued its final judgment in the case, holding that the regulations were immediately enforceable, except for those that conflicted with state law. The plaintiffs did not appeal the order.

b. Legislation prohibiting residential dealers upheld

In May of 2000, a Massachusetts Superior Court upheld provisions of the state's 1998 Gun Control Act prohibiting residential gun dealers. The court rejected the dealers' claim that the statute was unconstitutionally vague and violated their rights of equal protection. The court did find, however, that law enforcement revocation or suspension of the dealers' licenses without the opportunity for a hearing, in contravention of statutory notice provisions, had violated the dealers' due process rights. Accordingly, the court

¹⁰² As the name implies, a loaded chamber indicator alerts the user that a bullet is located in the chamber. The absence of this safety feature has resulted in many unintentional shootings by people who have mistakenly assumed that a firearm is unloaded after they removed the ammunition magazine (see *Dix v. Beretta*, pp. 65-66).

¹⁰³ See *American Shooting Sports Council, Inc. v. Attorney General*, 711 N.E.2d 899 (Mass. 1999).

upheld the statute as written, but found that it had been applied in an unconstitutional manner.¹⁰⁴ The Superior Court ruling was not appealed.

Although many local dealer ordinances in California require dealers to operate out of commercial premises, Massachusetts appears to be the first state in the country to ban “kitchen table” dealers. Between October 21, 1998 (the date the law went into effect) and October 15, 2000, the number of gun dealers in Massachusetts fell from 966 to 478.¹⁰⁵

c. Assault weapons ban upheld

In September of 2000, a U.S. District Court Judge for the District of Massachusetts dismissed a lawsuit challenging the constitutionality of the state’s Gun Control Act of 1998 relating to assault weapons and high capacity ammunition magazines. The suit alleged that the statute violated plaintiffs’ equal protection and due process rights, was unconstitutionally vague and violated the First Amendment. The court rejected each of these arguments.¹⁰⁶ That order is on appeal.

5. New York

In August of 2000, New York Republican Governor George Pataki signed comprehensive legislation to regulate the sale of firearms in that state. Key provisions of the law:

- Require background checks on all gun buyers at gun shows;
- Raise the age for handgun permits from 18 to 21;
- Require ballistic “fingerprinting” of all handguns shipped into the state after March 1, 2001;¹⁰⁷
- Mandate the reporting of a lost or stolen firearm within 24 hours of discovery;
- Direct the State Police, in conjunction with other agencies, to conduct a comprehensive study of the availability and effectiveness of existing technology for personalized firearms;

¹⁰⁴ See *Sullivan v. Reilly*, No. 2000-0446-H (Mass. Super. Ct., May 24, 2000).

¹⁰⁵ October 16, 2000, telephone conversation with William E. Pickett, Jr., Director of the Massachusetts Firearms Records Bureau.

¹⁰⁶ See *Gun Owner’s Action League v. Cellucci*, U.S. District Court No. 98-CV-12125, order dated September 28, 2000.

¹⁰⁷ This provision of the law is similar to that adopted in Maryland.

- Require firearms dealers to sell child safety devices with all firearms and post information regarding the safe storage of guns in their places of business; and
- Ban assault weapons and high-capacity ammunition magazines (this provision mirrors the 1994 federal assault weapons ban to allow state prosecution of violators).

6. Oregon

On November 7, 2000, Oregon voters overwhelmingly passed Measure 5, a ballot initiative to require background checks on all prospective firearm purchasers at gun shows. Oregon residents, like those in Colorado, decided to bring the issue to the voters after the state legislature rejected similar legislation to close the “gun show loophole.” Measure 5 also imposes record-keeping requirements with respect to the sale of long guns.

7. Texas

In June of 2000, the Violence Policy Center published “Gunland USA,” a report ranking states according to the number of gun shows, gun retailers, machine gun owners and dealers, and gun manufacturers. The state of Texas ranked number one in each category. Four other states – California, Ohio, Florida and Pennsylvania – appeared in the top ten for each category.

In August of 2000, the Violence Policy Center released another study, “License to Kill III: The Texas Concealed Handgun Law’s Legacy of Crime and Violence.” That study found that between January 1, 1996, and April 30, 2000, Texas concealed handgun license holders were arrested for 3,370 crimes, including murder, rape, kidnapping and theft. The study found further that since the law was adopted, license holders had been arrested for: 1) more than two crimes a day; 2) more than three drunk driving offenses per week; and 3) weapons-related crimes at a rate 66 percent higher than that of the state’s overall adult population.

Governor George W. Bush signed the concealed weapons law in 1995, overturning a 125-year ban on the carrying of hidden handguns in Texas. In 1997, Bush further weakened state law by signing a bill to permit concealed weapons in churches, amusement parks, hospitals and nursing homes. That law also allows persons with concealed weapons permits from other states to carry their weapons in Texas.

On October 3, 2000, the Los Angeles Times published the results of a yearlong investigation of the Texas concealed weapons law. That investigation found that since the law took effect, more than four hundred convicted criminals –including rapists and armed robbers – had been issued concealed weapons permits. The investigation also found that thousands of the 215,000 Texans currently licensed to carry concealed

weapons had been arrested for criminal behavior or found to be mentally unstable.

Interestingly, while a majority of Texans support the law that allows the carrying of concealed weapons, 75 percent also support handgun registration and 74 percent believe that all guns sold in the United States should be equipped with built-in trigger locks. These findings were the result of a Scripps Howard Texas Poll taken from May 22 to June 16, 2000.

CHAPTER III

LOCAL ORDINANCE LITIGATION UPDATE

As discussed in Chapter I, when California cities and counties first began adopting innovative firearms-related ordinances in the mid-1990s the extent of their authority to do so was not well defined. Indeed, the traditional view had been that state law preempted local regulation of firearms and ammunition. As gun deaths continued to skyrocket in this state and nationally, however, local officials began adopting innovative ordinances to fill the gaps left by federal and state law. Not unexpectedly, anti-regulatory groups and other opponents of local action began filing lawsuits to challenge the ordinances.

As discussed below, several of those lawsuits have now been finally resolved, with the courts almost uniformly upholding the ability of cities and counties to regulate firearms and ammunition in their communities. This Chapter provides a summary of the resolved cases, as well as other ongoing ordinance-related litigation. This Chapter also discusses significant new lawsuits presenting legal challenges to ordinances prohibiting the sale and/or possession of firearms and ammunition on county-owned property.

A. RESOLVED CASE SUMMARIES

Within the last several years, the California courts have considered – and overwhelmingly rejected – lawsuits challenging six types of local firearm regulations. Those actions involved: 1) West Hollywood’s Saturday Night Special sales ban; 2) Lafayette’s ordinance to regulate firearms dealers; 3) Santa Clara County’s ban on the sale of firearms at the County Fairgrounds; 4) San Francisco’s gross receipts tax; 5) Los Angeles’ ban on the sale of high-capacity ammunition magazines; and 6) Union City’s discharge ban. The rulings in these cases are summarized below.¹⁰⁸

West Hollywood. In *California Pistol and Rifle Association, Inc. v. City of West Hollywood* (1998) 66 Cal. App. 4th 1302, the Second District Court of Appeal upheld the

¹⁰⁸ Previous Supplements provide a detailed discussion of the legal issues and procedural history of these cases. See 1997 Supp., pp. 10-20, 1998 Supp., pp. 19-26 and 1999 Supp., pp. 27-34.

city's ban on the sale of Saturday Night Specials. In its comprehensive analysis of the issue of preemption, the court emphasized that the issue does not involve the question of whether the Legislature has bestowed a particular power upon a local government, but whether it has taken that power away. The court held that the Legislature has not taken away the ability of local governments to regulate firearm sales, either through express or implied preemption; rather, it has "studiously avoided comprehensive preemption of such local laws."¹⁰⁹ The court also rejected plaintiff's contention that the ordinance violated constitutional guarantees of equal protection and due process, holding that the law was rationally related to a legitimate governmental purpose, i.e., to protect the public from the dangers of poorly made handguns. Although plaintiff appealed to the California Supreme Court, that court declined to review the case.¹¹⁰

Lafayette. In *Suter v. City of Lafayette* (1997) 57 Cal. App. 4th 1109, the First District Court of Appeal rejected a challenge to the City's ordinance regulating firearms dealers, holding that state law does not preempt the broad field of firearms sales or regulation of firearms dealers. The court ruled that the City had authority to require dealers to sell trigger locks and obtain liability insurance, prohibit their operation in residential neighborhoods and near other sensitive areas, and prevent them from admitting minors unless accompanied by an adult. The court also rejected plaintiffs' argument that the ordinance violated their constitutional rights, including those protected by the First Amendment. The court did, however, invalidate one ordinance provision – that imposing security measures for firearm storage – holding that similar, but less stringent, provisions of state law preempted the regulation.

Santa Clara County. In *Nordyke v. Santa Clara County*, 110 F.3d 707 (9th Cir. 1997), the Ninth Circuit Court of Appeals considered a challenge to a lease provision banning the sale of firearms at the County Fairgrounds. Significantly, the court rejected the argument that the sale of a gun qualifies as "speech" within the meaning of the First Amendment. However, the court held that because the lease also prohibited "offering for sale" of guns at the Fairgrounds, it curtailed protected commercial speech. The court opined that the County would not have run afoul of the First Amendment if it had adopted an *ordinance* making the sale of guns at the Fairgrounds illegal, noting that the

¹⁰⁹ *Id.* at 1308.

¹¹⁰ West Hollywood was the first California local government to ban the sale of Saturday Night Specials. LCAV's Local Ordinance Survey indicates that as of May 31, 2000, 55 cities and counties had followed West Hollywood's lead. As discussed previously, in response to this groundswell of local activity the California Legislature adopted legislation, effective January 1, 2001, to set minimum safety and performance standards for handguns manufactured and sold in this state.

Constitution only protects proposals to engage in *lawful* commercial transactions. The court did not consider whether state law preempted the lease provision.

San Francisco. In *San Francisco Gun Exchange, Inc. v. City and County of San Francisco* (San Francisco Superior Court Case No. 975-036), the Superior Court rejected the claim that the City's gross receipts tax was preempted by state law and violated the commerce clause, equal protection clause, First Amendment and Proposition 62 (requiring voter approval for local real property transfer taxes). The complaint was later amended to include a cause of action based on Proposition 218, which requires voter approval of local taxes. The court granted the City's motion for summary judgment and dismissed the complaint, holding that the tax must be approved by the voters, but was otherwise lawful. The Gun Exchange filed, but later abandoned, an appeal of the ruling.¹¹¹

Los Angeles. *Hance v. City of Los Angeles* (Los Angeles County Superior Court Case No. BC 181327) involved a challenge to the City's ordinance banning the sale of magazines capable of holding more than 10 rounds of ammunition. The court denied plaintiffs' motion for a temporary restraining order, rejecting the arguments that the ordinance was preempted by state law, void for vagueness and impermissibly overbroad. Plaintiffs dismissed the case after the City agreed to amend the ordinance to exempt museums and businesses involved in the entertainment industry. Those amendments were adopted April 28, 1998.¹¹²

Union City. *Lynch v. City of Union City* (Alameda County Superior Court Case No. H-203180-2) involved a challenge to an ordinance prohibiting the discharge of firearms within the limits of Union City.¹¹³ Plaintiffs in the case, duck hunters and two duck clubs, argued, among other things, that the ordinance was preempted by state and federal law and violated their alleged constitutional "right" to hunt ducks. The City successfully demurred to plaintiffs' first amended complaint and the action was dismissed with prejudice on November 1, 1999.

¹¹¹ In accordance with the court's order, the City was permitted to continue collecting taxes for two years, until November of 1998, when the gross receipts tax could be placed before the voters. The issue has not been put on the ballot, however.

¹¹² As discussed in Chapter II, the California Legislature adopted legislation banning the sale of high-capacity ammunition magazines in 1999.

¹¹³ The case was consolidated with a nearly identical action, *Demo v. City of Union City*.

B. ONGOING LITIGATION

1. Sacramento's Saturday Night Special Sales Ban

Miller v. City of Sacramento involves a challenge to a junk gun sales ban adopted by the City of Sacramento in December 1997.¹¹⁴ The ordinance was modeled after that adopted by the City of West Hollywood and dozens of other local governments throughout California. The first amended petition for mandamus and complaint contained twelve causes of action and alleged, among other things, that the ordinance was preempted by state law, violated petitioners' rights of due process and equal protection, and unconstitutionally delegated legislative powers to the Chief of Police.

Petitioners filed a second amended petition in June 1999, after the court sustained the City's demurrer without leave to amend as to ten of the twelve causes of action, finding that the issues of preemption, due process and equal protection had been decided in the *West Hollywood* case. While the City's demurrer to the amended petition was pending, petitioners filed a third amended petition asserting six causes of action. Those causes of action were denominated: 1) "Arbitrary and Capricious Action;" 2) "The Ban Roster is Ultra Vires;" 3) "The Administrative Appeal Procedure Violates Due Process;" 4) "Section 1983 Damages for Deprivation of Due Process;" 5) "Damages for Unlawful Conduct;" and 6) "Damages for Violation of First Amendment."

In November of 1999, the City filed a demurrer to third amended petition. The court overruled the demurrer to the first three causes of action at the hearing on the demurrer and took the remaining demurrer under submission. On April 14, 2000, the court issued an order sustaining the City's demurrer to the fourth, fifth and sixth causes of action. The court relied on the *Nordyke* and *Suter* cases in rejecting petitioners' First Amendment claim, finding that "offering or displaying a firearm for sale does not constitute a proposal to engage in a commercial transaction or other commercial speech protected by the First Amendment when it relates to the commission of an illegal transaction."

In the fall of 2000, petitioners filed a motion for the issuance of a writ of mandate with respect to the remaining three causes of action. A hearing on that motion was scheduled for December 8, 2000.

¹¹⁴ Sacramento Superior Court Case No. 98CS01422. Petitioners in the case include the California Rifle and Pistol Association, National Rifle Association and others.

2. San Leandro's Firearm Tax

Traders Sports, Inc. v. City of San Leandro involves a challenge to an ordinance requiring firearms dealers to pay a 3% business license fee based on the gross sales of concealable firearms and ammunition for those firearms. The ordinance was adopted by the voters of San Leandro on June 2, 1998.

The initial complaint, filed by Traders Sports and others in July 1998, sought relief under numerous legal theories.¹¹⁵ During the course of the City's motion for a judgment on the pleadings, however, the parties stipulated that plaintiffs would be limited to three theories of relief in the case, i.e., that the tax: 1) was placed on the ballot by a city council vote of 4 to 3, rather than the two-thirds vote required by law; 2) denies plaintiffs equal protection of the laws; and 3) is an invalid fee because it is not proportional to the cost of any service provided.

On April 3, 2000, the court entered an order granting the City's motion for judgment on the pleadings, but also granting plaintiffs leave to amend. The City demurred to the amended complaint, arguing that: 1) the two-thirds voting requirement is inapplicable because San Leandro is a charter city; 2) the ordinance complies with equal protection because it is rationally related to furthering a legitimate government interest, i.e., compensating the City for the cost of responding to crimes and other shootings involving concealable firearms; and 3) the law imposes a business tax, and not a fee, and therefore need not be proportional to any service provided.

On July 12, 2000, the Superior Court issued an order sustaining the City's demurrer without leave to amend and dismissing the action. Plaintiffs are expected to appeal the order.

C. NEW ORDINANCE-RELATED LITIGATION

1. Los Angeles County's Ban on the Sale of Firearms and Ammunition on County Property

a. The ordinance and lower court proceedings

On September 7, 1999, the Los Angeles County Board of Supervisors adopted an ordinance prohibiting the sale of firearms and ammunition on county-owned property.

¹¹⁵ Alameda County Superior Court Case No. H202695-0.

The ordinance is applicable to all county property, including the Los Angeles County Fairgrounds, located in the City of Pomona. At the time the ordinance was adopted, Great Western Shows, Inc. had been holding an average of three gun shows a year at the Fairgrounds for 22 years. In addition, Great Western had a show scheduled for October 29, 1999.

The Board made several legislative findings in support of the ordinance, including those relating to the large number of gun-related deaths and injuries in Los Angeles County. The Board also found, in reliance on the January 1999 ATF report, "Gun Shows: Brady Checks and Crime Gun Traces," that gun shows provide a forum for illegal firearm sales and gun trafficking nationwide. In addition, the Board found that during a sting operation by the Department of Justice at the Great Western show in April/May of 1999, agents were able to buy numerous illegal weapons and accessories, including assault weapons, a rocket launcher with projectile and several machine gun conversion kits. The firearms were immediately delivered to the agents in violation of state laws requiring background checks and a 10-day waiting period.

On September 22, 1999, Great Western filed suit against the County in the United States District Court for the Central District of California.¹¹⁶ The action was brought pursuant to 42 U.S.C. Section 1983 and alleges that the ordinance infringes commercial speech in violation of the First Amendment and deprives plaintiff of equal protection of the laws under the Fourteenth Amendment. The complaint also asserts state law claims, alleging that the ordinance is: 1) preempted by state law; and 2) invalid because the County has no jurisdiction to regulate conduct within the territorial limits of the City of Pomona.

Great Western sought a preliminary injunction to enjoin enforcement of the ordinance prior to its October show. On October 21, 1999, the Honorable Richard A. Paez issued the District Court's order granting the injunction. Judge Paez found that Great Western had "raised a substantial question whether the ordinance is preempted because it conflicts with existing state law." Specifically, the court found that the firearm sales prohibition conflicts with Penal Code Section 12071(b)(1)(B), a statute that, according to the court, "expressly sanctions" the sale of firearms at gun shows.¹¹⁷ The

¹¹⁶ *Great Western Shows, Inc. v. County of Los Angeles*, District Court Case No. CV 99-09661 RAP.

¹¹⁷ Section 12071(b) sets forth the requirements with which a licensed dealer must comply in order to avoid forfeiture of the dealer's license. Section 12071(b)(1)(A) states that "Except as provided in subparagraphs (B) and (C), the business shall be conducted only in the buildings designated in the license." Subparagraph (B) states that "A person licensed pursuant to subdivision (a) may take possession of firearms and commence preparation of registers for the sale, delivery or transfer of firearms at gun shows or events...if the gun show or event is not conducted from any

court also found that substantial questions exist regarding whether state law preempts local regulation of ammunition sales and whether the County had exceeded its authority in attempting to regulate conduct in the City of Pomona. With respect to the latter holding, the court stated that counties only have authority to pass extraterritorial regulations regarding their own property if they are acting in their governmental or sovereign capacity, and not in their proprietary capacity.

Finally, the court found that issuance of a preliminary injunction was appropriate because the “balance of hardships” weighed strongly in favor of Great Western; i.e., enforcement of the ordinance would cause Great Western to suffer loss of income and good will. In light of its analysis of the state law issues, the court found it unnecessary to address Great Western’s First Amendment and equal protection claims.

b. The Ninth Circuit appeal and certification to the California Supreme Court

The County appealed Judge Paez’ order to the United States Court of Appeals for the Ninth Circuit. On appeal, the County asserted three principal arguments regarding the issue of preemption:

1. The District Court’s preemption analysis is irreconcilable with controlling California authorities (including the *Suter* and *West Hollywood* decisions) holding that the broad field of firearms sales is not preempted by state law;
2. The ordinance does not conflict with Penal Code Section 12071(b)(1)(B), which, when viewed in context, merely allows dealers to sell firearms at gun shows regardless of the business location designated on their license. That statute specifically states that dealers must comply with “all applicable local laws” and cannot be viewed as creating an unfettered right to sell firearms at gun shows, especially when those sales occur on government property;
3. The District Court erroneously relied on a 1994 Opinion of the California Attorney General [77 Op. Att’y Gen. at 147 (1994)] to find preemption of ammunition sales because: a) the reasoning of the Opinion was flawed and sharply criticized in the *Suter* and *West Hollywood* decisions; and b) the Opinion is factually distinguishable because it analyzed a citywide

motorized vehicle or towed vehicle. A person conducting business pursuant to this paragraph shall be entitled to conduct business as authorized herein at any gun show or event in the state without regard to the jurisdiction within the state that issued the license pursuant to subdivision (a) provided the person complies with (i) all applicable laws, including, but not limited to...all applicable local laws, regulations, and fees, if any. (Emphasis added.)

ammunition sales ban, rather than a narrow ban applicable only to sales on county-owned property.

With respect to the issue of jurisdiction, the County first argued that it has extraterritorial jurisdiction over the Fairgrounds, even though it is located in Pomona, because the Fairgrounds is county-owned. The County also argued that the governmental/proprietary distinction relied on by the District Court in its sovereign immunity analysis has been rejected in most other contexts and should be rejected in this case as well. The County argued further that even if the governmental/proprietary distinction remains viable, the operation of the Fairgrounds is a governmental, not proprietary, activity and the County's regulation is therefore proper.

Finally, the County argued that because the District Court found the state law issues to be uncertain, it had a duty to abstain from ruling on the issues and abused its discretion by failing to do so. *Amicus* briefs were filed in support of the County by local governments and violence prevention organizations (including LCAV) across the state, and by the Los Angeles County Bar Association.

On September 12, 2000, the Ninth Circuit issued its order in the Great Western case. Finding that state law was uncertain with respect to the issue of preemption and jurisdiction, the Ninth Circuit certified the following questions to the California Supreme Court:

1. Does state law regulating the sale of firearms and gun shows preempt a municipal ordinance prohibiting gun and ammunition sales on county property?
2. May a county, consistent with Article II, S 7 of the California Constitution, regulate the sale of firearms on its property located in an incorporated city within the borders of the county?

The court stayed all further proceedings in the case pending receipt of the answers to the certified questions and ordered the preliminary injunction to remain in place during the pendency of the certification. On November 15, 2000, the Supreme Court accepted certification of the questions, modifying the second question to include ammunition sales.

2. Alameda County's Ban on the Possession of Firearms and Ammunition on County Property

a. The ordinance and lower court proceedings

On September 28, 1999, the Alameda County Board of Supervisors adopted an ordinance prohibiting the possession of firearms and ammunition on county property. The ordinance is applicable to all real property owned by the county, including the Alameda County Fairgrounds, located on unincorporated land in the City of Pleasanton. The ordinance was adopted in response to a mass shooting at the Fairgrounds on July 4, 1998, which occurred during a County Fair. The Board adopted the ordinance in the exercise of its police powers to promote the public health and safety after finding that gunshot fatalities and injuries had reached epidemic levels in the County.

In October 1999, gun show promoters Russell Nordyke and Sallie Nordyke, dba TS Trade Shows (also plaintiffs in the *Nordyke v. Santa Clara County* suit, discussed *supra*) filed suit in the United States District Court for the Northern District of California.¹¹⁸ The complaint seeks damages and injunctive relief, alleging, among other things, that the ordinance violates plaintiffs' right to free speech under the First Amendment and is preempted by state law.

On November 3, 1999, the Honorable Martin J. Jenkins issued the District Court's order denying the plaintiffs' motion for injunctive relief. With respect to plaintiffs' First Amendment claims, the court began by considering whether the possession of a gun on public property qualifies as expressive conduct for purposes of the Amendment. Noting that certain conduct – such as the burning of the American flag or a selective service card – has been held to sufficiently communicative to implicate the First Amendment, the court found no support for plaintiffs' claim that the mere possession of a gun qualifies as expressive conduct.

The court observed, however, that even where conduct is found to be expressive, a sufficiently important governmental interest in regulating the nonspeech element of conduct can justify incidental limitations on speech. Citing *U.S. v. O'Brien*, 391 U.S. 367 (1968), the court stated that a government regulation is constitutional even though it incidentally limits speech if: 1) it is within the constitutional power of the government; 2) it furthers an important or substantial governmental interest; 3) it is unrelated to the

¹¹⁸ *Nordyke v. King*, District Court Case No. CV 99-04389 MJJ.

suppression of free speech; and 4) the incidental restriction on speech is no greater than is essential to the furtherance of that interest.

Applying the *O'Brien* test, the court found that the Alameda County ordinance was within the constitutional powers of the County (see preemption analysis, below) and in furtherance of an important governmental interest, i.e., protecting the public from the misuse of guns on public property. The court found this interest unrelated to the suppression of speech, noting that plaintiffs remain free to express their views regarding guns verbally or through written materials or in any other way they choose.¹¹⁹ Finally, the court found that plaintiffs had failed to establish that the ordinance could have been more narrowly tailored. Thus, the court found that even if plaintiffs could overcome the initial hurdle of establishing that possession of a gun is expressive conduct, they would still be unable to show that the ordinance was unconstitutional under *O'Brien*.

The court also found, alternatively, that the ordinance was valid as a time, place or manner restriction of speech (again, assuming *arguendo* that plaintiffs could establish a predicate impact on speech). Relying on *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981), the court stated that content-neutral regulation of speech in a public forum does not offend the First Amendment where the regulation serves a significant governmental interest. In *Heffron*, the Supreme Court upheld a Minnesota law regulating the time, place and manner in which a religious sect sold its literature and solicited donations at the state fair, finding that the government interest in regulating activities at the fairground was compelling because of the great number of visitors and demands of safety. Similarly, Judge Jenkins found that Alameda County had a significant interest in regulating activities at its fairgrounds and had appropriately done so through its firearm possession ban.

The court next considered, then rejected, plaintiffs' claim that the Alameda ordinance restricts commercial speech. The court distinguished *Nordyke v. Santa Clara County* on the ground that the Santa Clara ordinance, unlike that adopted by Alameda, prohibited *offers* to sell firearms, as well as firearm sales. The Alameda County ordinance, in contrast, does not prohibit offers to sell firearms or firearm sales; it merely prohibits firearm possession. The court also refused to find that the sale of a gun is an example of "pure" speech (i.e., that the gun itself somehow conveys a message, like that conveyed by a t-shirt or bumper sticker containing a political slogan). Thus, the court

¹¹⁹ The court rejected plaintiffs' argument that the ordinance was invalid because a County Supervisor had stated that she hoped the measure would send the message that the County does not promote guns, noting that an otherwise constitutional law will not be struck down on the basis of an alleged illicit legislative motive.

concluded that the Alameda ordinance does not implicate commercial speech, either directly or indirectly.

Finally, the court analyzed plaintiffs' contention that the ordinance is preempted by state law. Although the complaint does not contain a claim based on the Second Amendment, the court began by stating that plaintiffs could not assert such a claim, noting that the Amendment only confers standing upon a state to challenge a federal law that infringes upon the state's ability to maintain an organized militia.

Proceeding with its preemption analysis, the court cited the *West Hollywood* case for the proposition that the analysis must start with the assumption that the County has the authority to ban the possession of firearms on its property; the pertinent inquiry then becomes whether the Legislature has taken that authority away. Following the in-depth preemption analysis of the *West Hollywood* and *Suter* decisions, the court held that nothing in state law preempts the Alameda ordinance, either expressly or impliedly. The court rejected plaintiffs' argument that the Gun Show Enforcement and Security Act of 2000, adopted by the Legislature in 1999 to regulate gun show promoters and vendors, had a preemptive effect.¹²⁰ On the contrary, the court observed, the new law requires vendors to comply with "local laws dealing with the possession and transfer of firearms." Thus, state law explicitly contradicts the proposition that the field of firearm possession has been preempted. The court also refused to follow Judge Paez' ruling in the *Great Western* case, noting it "could easily be argued" that the ruling was inconsistent with *West Hollywood* and *Suter*.

Because the court concluded that plaintiffs had little chance of prevailing on the merits, it denied the motion for injunctive relief and did not reach the question of balancing the hardships.

b. The Ninth Circuit appeal and certification to the California Supreme Court

Plaintiffs appealed Judge Jenkins' ruling to the United States Court of Appeals for the Ninth Circuit.¹²¹ An *amicus* brief was filed in support of the County by cities and counties across the state and by Bay Area violence prevention organizations, including LCAV.

¹²⁰ The new gun show legislation is summarized at pp. 32-33.

¹²¹ Because the *Nordyke* and *Great Western* cases involve related issues, the Ninth Circuit heard oral argument in the cases on the same date.

In an order dated September 12, 2000, the Ninth Circuit found that state law is unclear regarding the issue of preemption and certified the following question to the California Supreme Court:

Does state law regulating the possession of firearms and gun shows preempt a municipal ordinance prohibiting gun possession on public property?

The court stayed all proceedings pending receipt of an answer to the certified question. On November 15, 2000, the Supreme Court accepted certification of the question.¹²²

¹²² In February of 2000 the Sonoma County Board of Supervisors also adopted an ordinance prohibiting the possession of firearms and ammunition on county-owned property. A gun show promoter sued the County in state court, asserting claims similar to those alleged in the Los Angeles and Alameda County cases. In May of 2000 the court issued an order denying plaintiff's motion for a preliminary injunction and the litigation is proceeding. See *Richard Smith dba Code of the West Productions v. County of Sonoma*, Sonoma County Superior Court Case SCV – 223804.

CHAPTER IV

LITIGATION AGAINST FIREARMS MANUFACTURERS

As discussed in Chapter I, the number of lawsuits filed against firearms manufacturers has grown dramatically in recent years. Groundbreaking litigation to reform the industry is currently being pursued by governmental entities, as well as private parties, across the country. This Chapter provides an update of some of that litigation.

A. GOVERNMENTAL LITIGATION UPDATE

In October of 1998, the City of New Orleans became the first local government to sue the firearms industry. As of November 1, 2000, 31 cities and counties across the country, as well as the State of New York, had followed New Orleans' lead.¹²³ Although the suits are being pursued under various legal theories (e.g., negligence, product liability and public nuisance), they generally seek to hold the industry accountable for the improper design, marketing and distribution of a lethal, yet essentially unregulated, product. The actions typically demand that manufacturers: 1) incorporate safety features to prevent unintentional shootings and unauthorized use; and 2) change the irresponsible marketing and distribution practices that make it easy for criminals and juveniles to acquire guns. Many actions also seek monetary damages to offset the costs of medical, law enforcement and other public expenditures attributable to gun violence.¹²⁴

The governmental lawsuits are at different stages of litigation. As of November 1, 2000, industry defendants had filed motions to dismiss in ten of the cases. Four of those motions – brought in the Chicago, Cincinnati, Miami-Dade County and Bridgeport, Connecticut cases – were granted and the actions dismissed (appeals are pending). Six

¹²³ The National Association for the Advancement of Colored People (NAACP) has also filed suit against the industry.

¹²⁴ The Legal Action Project of the Center to Prevent Handgun Violence serves as co-counsel in 25 of the suits. Detailed information regarding the litigation can be found at the Project's website, www.gunlawsuits.com. The Firearms Litigation Clearinghouse website, www.firearmslitigation.org, includes pleadings in cases filed against the industry.

others – brought against Atlanta, Boston, Cleveland, New Orleans, Wayne County, Michigan and the 12 California plaintiffs – were denied and discovery is proceeding.¹²⁵ Other cases have focused on preliminary jurisdictional issues, i.e., whether the cases should be prosecuted in state or federal court. To date, local government plaintiffs in seven cases have successfully argued that defendants improperly removed the actions from state to federal court. Those cases have been remanded to state court.¹²⁶

1. Retaliatory legislation and litigation

In response to the wave of local government lawsuits sweeping the country, the gun lobby has introduced legislation in dozens of states to shield the industry from future (and in some cases even existing) claims. As of November 1, 2000, those efforts had been successful in 19 states.¹²⁷ Immunizing legislation was passed in Louisiana and Georgia after New Orleans and Atlanta had already filed their complaints against the industry. Although the laws were intended to be retroactive, a Louisiana court found that retroactive application would be unconstitutional.¹²⁸ A Georgia court allowed the Atlanta suit to proceed without comment, implicitly finding the immunizing statute inapplicable.

On November 30, 1999, the Second Amendment Foundation and others filed suit against the United States Conference of Mayors and 23 individual mayors (including those involved in the California litigation) in the United States District Court for the District of Columbia. The suit alleges that the defendants have conspired to violate the civil and constitutional rights of gun manufacturers and consumers – including their “right to keep and bear arms” under the Second Amendment – by filing lawsuits intended to bankrupt or otherwise harm the industry. In the spring of 2000, the court granted orders dismissing the defendants for lack of personal jurisdiction. Plaintiffs have also dismissed the

¹²⁵ Plaintiffs in the California action include San Francisco, Oakland, Alameda County, Berkeley, East Palo Alto, Los Angeles, Inglewood, West Hollywood, Los Angeles County, Compton, Sacramento and San Mateo County. The complaint is somewhat unique, in that it alleges that the defendants’ conduct constitutes an unlawful, unfair and deceptive business practice within the meaning of Business and Professions Code § 17200 et seq. The complaint also alleges that the conduct has created a public nuisance and that defendants have failed to “personalize” their guns to prevent use by unauthorized persons. The defendants’ motion to dismiss was denied by San Diego Superior Court Judge Vincent P. DiFiglia on September 15, 2000.

¹²⁶ Those plaintiffs include Boston, New Orleans, Camden City, Wayne County, St. Louis, Miami-Dade County and the California local governments.

¹²⁷ Those states include Alabama, Alaska, Arizona, Arkansas, Colorado, Georgia, Kentucky, Louisiana, Maine, Michigan, Montana, Nevada, Oklahoma, Pennsylvania, South Dakota, Tennessee, Texas, Utah and Virginia.

¹²⁸ The Louisiana Supreme Court is scheduled to hear argument in the New Orleans case on November 27, 2000.

Conference of Mayors from the suit. Plaintiffs have appealed the dismissal of the individual defendants.¹²⁹

2. The Smith and Wesson settlement

a. Settlement terms

On March 17, 2000, Smith and Wesson entered into a settlement agreement with the State Attorneys General of Connecticut and New York, several local governments, and the federal Department of Housing and Urban Development (HUD). In exchange for the settlement, the local government plaintiffs agreed to dismiss their suits against Smith and Wesson and the State Attorneys General and HUD agreed not to file actions against the company. The agreement includes two major sections: 1) Safety and Design; and 2) Sales and Distribution.

In accordance with the terms of the Safety and Design section, Smith and Wesson agreed that all of its handguns will:

- Include a second, “hidden” serial number to prevent obliteration by criminals;
- Be designed, within 12 months, so that they cannot be readily fired by a child under the age of six;
- Include manually operated safety devices, external locking devices within 60 days and internal locking devices within 24 months;
- Be subject to a performance and drop test to ensure safety and quality;
- Include warnings about safe storage and handling within six months;
- Be designed, within three years, with “smart gun” technology to prevent firing by unauthorized users;
- Include a magazine disconnect for those customers who desire the feature within 12 months, and a chamber load indicator on all pistols within 12 months.

Smith and Wesson also agreed not to sell firearms that: 1) can be readily converted into fully automatic weapons; 2) are fingerprint resistant; or 3) can accept large capacity ammunition magazines manufactured prior to 1994 (the year federal law prohibited the manufacturer of such magazines).

Under the second section of the agreement, Sales and Distribution, Smith and Wesson agreed to adhere to a “code of conduct” obligating the company to sell only to

¹²⁹ See *Second Amendment Foundation v. United States Conference of Mayors*, Case No. 00-7188.

authorized dealers and distributors who also agree to such a code. The code of conduct requires authorized dealers and distributors, among other things, to:

- Make no gun show sales unless all sales at the show are completed only after a background check;
- Wait as long as necessary for a completed Brady check showing that the purchaser is not a felon or otherwise prohibited from possessing a firearm;
- Transfer firearms only to individuals who have passed a certified training course or exam demonstrating knowledge regarding the operation and safe storage of the weapon;
- Permit purchasers of multiple handguns to take possession of only one gun on the date of sale, the remainder to be collected after 14 days and the submission of a multiple sales report to ATF;
- Require all employees to attend ATF-approved training courses and pass an exam on firearms laws, straw purchases, illegal trafficking indicators and gun safety;
- Carry liability insurance, where available, with minimum coverage of \$1 million per incident;
- Require persons under the age of 18 to be accompanied by adults in gun stores or gun sections of stores;
- Refuse to sell large capacity magazines or semiautomatic assault weapons;
- Maintain an electronic record of all ATF trace requests and report those requests to Smith and Wesson;
- Provide law enforcement, government regulators and the Oversight Commission established in the settlement agreement with access to documents necessary to determine compliance with the code of conduct.

If Smith and Wesson receives notice of a violation by an authorized dealer or distributor, the company agrees to take action, including termination of sales to the dealer or distributor. Other provisions of the agreement obligate Smith and Wesson to: 1) refrain from marketing guns in any manner designed to appeal to juveniles or criminals; 2) take action, including possible termination or suspension, against an authorized dealer or distributor who has a disproportionate number of crime guns traced to it within three years; and 3) if technology is available, begin ballistic imaging within six months. An Oversight Commission was established under the agreement to oversee implementation of and compliance with the agreement.

Critics of the settlement observe (and Smith and Wesson has conceded) that

several provisions of the agreement merely codify the company's existing business practices. For example, Smith and Wesson has been providing external locking devices with all handguns since 1997 and its handguns already include hidden serial numbers. In addition, the company has been working on "smart gun" technology for several years.

Moreover, in the weeks following the settlement, the parties to the agreement had contrary interpretations of some its key provisions. As noted above, the agreement provides that Smith and Wesson dealers will make no gun show sales unless all sales at the show are completed after a background check. However, in the annotated edition of the agreement posted at Smith and Wesson's website (www.smith-wesson.com), the company "clarified" this provision by stating that it only applies to Smith and Wesson guns and not to private sales at gun shows.

b. The Communities for Safer Guns Coalition

In an effort to encourage other firearms manufacturers to adopt responsible business standards, HUD spearheaded the formation of the Communities for Safer Guns Coalition in March of 2000. The Coalition, comprised of several states and over 500 communities nationwide as of July 2000, will give Smith and Wesson – and any other manufacturer who agrees to the "code of conduct" established in the settlement agreement – a preference regarding the purchase of law enforcement firearms. The preference applies only to comparable weapons available at a comparable price that meet law enforcement agency needs.¹³⁰

¹³⁰ In April of 2000, seven firearms manufacturers filed suit against HUD and other members of the Communities for Safer Guns Coalition in federal district court for the Northern District of Georgia. The complaint alleges that the defendants have conspired to impose nationwide manufacturing standards in violation of the Commerce Clause, separation of powers doctrine and legislation passed by the U.S. Congress. See *National Shooting Sports Foundation, Inc. v. Cuomo et al.*, No. 100-CV-1063 (N.D. Ga.), filed April 26, 2000. Update provided in Vol. 14 of the Firearms Litigation Reporter (Spring/Summer 2000), published by the Firearms Litigation Clearinghouse.

c. The backlash against Smith and Wesson

Smith and Wesson received intense industry criticism and threats of consumer boycotts following its settlement of the governmental lawsuits. In addition, one of its large wholesalers and many retail dealers announced that they will no longer distribute or sell Smith and Wesson guns because of the agreement. Moreover, some manufacturers have allegedly threatened to withdraw magazine ads if the magazines continue to accept advertising from Smith and Wesson, and some shooting match organizers have told the company it is no longer welcome at their events.

In response to these retaliatory actions, the attorneys general of several states, including Connecticut, New York, Maryland and California, have launched a joint investigation to determine whether the industry has colluded to economically harm Smith and Wesson in violation of state antitrust laws.¹³¹

B. PRIVATE PARTY LITIGATION UPDATE

Many individuals are also looking to the courts for reform of the firearms industry. The following discussion provides an update of three innovative private party actions that have helped pave the way for the governmental litigation against the industry.

1. The 101 California Street Case

On July 1, 1993, Gian Luigi Ferri, a disgruntled former client of the law firm Pettit and Martin, walked into the 101 California Street building in San Francisco, armed with two TEC-DC9 assault weapons, a handgun and hundreds of rounds of ammunition. Ferri proceeded to the offices of Pettit and Martin and began a shooting rampage that continued on two other floors of the building. Within a few minutes he had killed eight people and injured six others. Ferri then fatally shot himself.

Survivors of the shooting, together with representatives of some of those who died, filed suit against Navegar, Inc., manufacturer of the assault weapons used in the massacre. Ferri, a California resident, had purchased the TEC-DC9s in Nevada at a gun show and retail gun store using a falsified Nevada driver's license. At the time, California's assault weapons ban expressly prohibited the sale of Navegar's TEC-9 and

¹³¹ Smith and Wesson is owned by London-based Tomkins PLC. In July of 2000, Tomkins announced that it will sell Smith and Wesson as part of a larger plan to sell off non-core operations.

impliedly banned the TEC-DC9, a nearly identical weapon that had been slightly modified by the company to evade an assault weapons ban in the District of Columbia.

The complaint asserted causes of action for common law negligence, negligence per se and strict liability for ultrahazardous activity. In May of 1997 the trial court granted Navegar's motion for summary judgment as to all causes of action. In September 29, 1999, however, the First Appellate District of the Court of Appeal reversed the trial court ruling with respect to the cause of action for ordinary negligence, holding that gun manufacturers have a duty to use care not to increase the inherent risk of danger posed by the presence of their products in society. In a landmark ruling, the court rejected Navegar's argument that it could not be held liable for Ferri's criminal use of the TEC-DC9s, noting that such use was foreseeable in light of the company's advertising, which called attention to features that would be of primary interest to criminals, e.g., the threaded barrel that can accommodate silencers and flash suppressors, and the fact that the surface has "excellent resistance to fingerprints." Indeed, the court found the record bereft of any evidence showing the TEC-DC9s had any legitimate civilian use whatsoever. Having found that Navegar owed a duty of care to plaintiffs, the court remanded the case to the trial court for a determination of whether that duty had been breached.¹³²

In January of 2000, the California Supreme Court granted review of the Court of Appeal ruling.¹³³ No date for oral argument had been set as of November 1, 2000.

2. Dix v. Beretta

Another pioneering private action is *Dix v. Beretta*, a lawsuit brought by Lynn and Griffin Dix following the death of their 15-year-old son, Kenzo. Kenzo was accidentally shot and killed by his 14-year-old friend on May 29, 1994, while the boys played at the friend's home. The friend had attempted to unload his father's Beretta 9mm semiautomatic handgun by removing the ammunition magazine, but did not realize that a bullet remained hidden in the chamber. When he pointed the gun at Kenzo and pulled the trigger, Kenzo was killed.

In April of 1995, the Dixes filed suit against Beretta U.S.A. in Alameda County Superior Court, alleging, among other things, that the handgun was defectively designed

¹³² See *Merrill v. Navegar, Inc.* (1999) 75 Cal. App. 4th 500.

¹³³ *Id.* at 92 Cal. Rptr. 2nd 256.

because it failed to alert users that a bullet could remain in the chamber even after the magazine has been removed.¹³⁴ In November of 1998, after a month-long trial, a jury found that Beretta was not liable for Kenzo's death. The Dixes moved for a new trial on the basis of juror misconduct after learning that a juror had made prejudicial remarks during the trial. Although that motion was denied, the First District Court of Appeal reversed the trial court in June of 2000 and ordered the court to reconsider the motion. On September 8, 2000, the trial court issued an order granting the Dixes' motion for a new trial. Beretta has appealed that order.

3. Hamilton v. Accu-tek

In *Hamilton v. Accu-tek*, gun violence victims and their families sought damages from 25 firearms manufacturers for the criminal use of their products in New York. The complaint alleged that the manufacturers' marketing and distribution practices fostered illegal gun trafficking which foreseeably led to the shootings.

On February 11, 1999, a federal jury found 15 of the defendants negligent in the marketing and distribution of their products, and 9 of the 15 jointly liable for three of the shootings. The jury absolved manufacturers with responsible business practices, however, such as those whose contracts with distributors banned sales to residential dealers or at gun shows.¹³⁵

The manufacturers appealed the verdict and on August 16, 2000, the Second Circuit Court of Appeals held that two questions must be certified to the New York Court of Appeals: 1) whether defendants owed plaintiffs a duty of care with respect to the marketing and distribution of their products; and 2) if so, whether liability in the case could be apportioned on a market share basis. The Court of Appeals has accepted certification and agreed to rule upon the questions.

¹³⁴ See *Dix v. Beretta*, Alameda Superior Court Case No. 750681-9.

¹³⁵ See *Hamilton et al. v. Accu-tek et al.*, 62 F. Supp. 2nd 802 (E.D.N.Y. 1999).