McGeorge Law Review

Volume 31 | Issue 2 Article 8

1-1-1999

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Recommended Citation

Stephen T. Bang, *Crimes /Forfeiture of Computer Equipment: Preventing Computer Criminals from Getting Back to Work*, 31 McGeorge L. Rev. 253 (2000).
Available at: https://scholarlycommons.pacific.edu/mlr/vol31/iss2/8

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Forfeiture of Computer Equipment: Preventing Computer Criminals from Getting Back to Work

Stephen T. Bang

Code Sections Affected
Penal Code §§ 480, 502, 502.01 (amended).
AB 451 (Maddox); 1999 STAT. Ch. 254

I. INTRODUCTION

Today, computers can play any of three types of roles where crime is concerned, as (1) the subject of the crime,[1] (2) the object of the crime,[2] and (3) the instrument used to commit the crime.[3] Crimes such as theft, fraud, embezzlement and trespass are all typical crimes which can be committed using computers as an instrument.[4] Although most of today's press coverage on computer crimes only focuses on teenaged "hackers," other types of computer crimes, less publicized than the crime of "hacking,"may be far more damaging to the nation.[5] So-called "street criminals" and white-collar criminals are learning the value of using computers to commit their crimes more efficiently.[6] In addition, organized crime rings are also using computers to aid their counterfeit operations,[7] and a real fear exists that counterfeit currency may help such criminals obtain the means to buy or create

1. *See* Xan Raskin & Jeannie Schaldach-Paiva, *Eleventh Survey of White Collar Crime*, 33 AM. CRIM. L. REV. 541, 543 (1996) (explaining that computers are the subject of a crime when the computer is the physical site of the crime, such as when the computer is infected with a virus).

2. *See id.* (noting that computers are the object of a crime when they are targeted for theft).

3. *Id.*

4. *Id.*

5. *See id.* at 542 (stating that some experts believe crimes committed by criminals, such as disgruntled or greedy employees, cause far more damage than teenage hackers).

6. *See* Glenn D. Baker, *Trespassers Will Be Prosecuted: Computer Crime in the 1990s*, 12 COMPUTER L.J. 61, 62 (1993) (explaining that people other than "computer geeks"are now using computers to commit crimes, and that street criminals and white-collar criminals are using computers as their "weapon of choice").

7. *Act Aims to Curb Convicts' Counterfeiting*, ORANGE COUNTY REG., Feb. 20, 1999, at B07; *see id.* (noting that Chapter 254 is intended to prevent criminals from regaining access to computers and software used in their counterfeiting operations).

chemical, biological and nuclear weapons.[8] Clearly, computer crimes and counterfeiting pose a serious threat to national security.[9]

Counterfeiting U.S. currency is a serious problem which has detrimental effects to the U.S. economy worldwide.[10] Computer technology and reprographics[11] have advanced so quickly in recent years that highly affordable computer equipment now can make counterfeiting U.S. currency easier and cheaper.[12] Estimates show that approximately $500 billion in counterfeit U.S. currency is being laundered worldwide.[13] At least a portion of this money eventually funds terrorism, drug operations and weapons sales.[14] Moreover, the value and negotiability of the American dollar in other parts of the world have been injured due to a decline in trust regarding the authenticity of U.S. currency.[15] In fact, counterfeiting is so much of a problem in areas such as the Middle East that U.S. currency is worth less than face value.[16]

Chapter 254 seeks to enhance the ability of law enforcement officials to force the forfeiture of equipment used by computer criminals.[17] The new law prevents criminals from regaining access to their equipment,[18] closes a loophole which had allowed employees to be immune from prosecution,[19] allows for redistribution of computer equipment,[20] and expands the applicable list of crimes where computer

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8. *See id.* (quoting the primary author of Chapter 254, Assemblymember Ken Maddox, stating that "[counterfeiting] is becoming big business for street gangs" and noting that Chapter 254 is intended to prevent criminals from regaining access to computers and software used in their counterfeiting operations); *see also* Nathan K. Cummings, *The Counterfeit Buck Stops Here: National Security Issues in the Redesign of U.S. Currency*, 8 S. CAL. INTERDISC. L. J. 539, 549 (1999) (observing the view of some experts that counterfeit currency and proceeds derived from counterfeit currency could fall into the hands of organized crime and pose a danger to worldwide stability).

9. *See generally* Cummings, *supra* note 8, at 547-49 (examining the dangers counterfeiting poses to the value of U.S. currency, which may be devalued by the use of proceeds generated from counterfeiting).

10. *Id.* at 549.

11. Reprographics refers to the process of reproducing, reprinting or copying by mechanical, photographic or electronic means by using digital scanners, copiers, printers and computers. *Id.* at 550.

12. *Id.* at 550-51.

13. *Id.*

14. *Id.*

15. *See id.* at 548 (noting that U.S. currency is accepted worldwide, yet many doubt the authenticity of the currency and either are unwilling to accept it at all, or require additional compensation to accept it).

16. *Id.*

17. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 451, at 3 (June 22, 1999).

18. *See* CAL. PENAL CODE § 502.01(a)(1) (amended by Chapter 254) (expanding the list of crimes for which equipment is subject to forfeiture).

19. *See id.* § 502(h)(1)-(2) (amended by Chapter 254) (creating an exemption so that employees will not be held liable when they act within the new definition for scope of employment).

20. *See id.* § 480(b) (amended by Chapter 254) (providing that counterfeiting equipment and computers must be "disposed of pursuant to Section 502.01" so that the equipment is forfeited and redistributed instead of being destroyed).

equipment may be forfeited if used in the commission of a crime enumerated by the new law.[21]

II. LEGAL BACKGROUND

A. A Deficiency in the List of Crimes Subject to Forfeiture

Prior to the enactment of Chapter 254, several shortcomings existed in California's Penal Code provisions governing computer crimes.[22] The provisions in the Penal Code that prevent convicted computer criminals from regaining access to their computers and software are inadequate and ineffective by themselves,[23] because they allowed the same computer equipment and software that criminals had used to commit their crimes to ultimately be returned to them after their release from incarceration.[24] Moreover, only a limited list of computer crimes had been subject to the forfeiture provisions of the former version of Penal Code section 502.01.[25] Because only individuals convicted of: (1) gaining unauthorized access to computers, computer systems and computer data;[26] (2) obtaining telephone or telegraph services by fraud;[27] or (3) advertising, using or possessing telecommunication devices with the intent to avoid payment[28] were required to forfeit the equipment used in the commission of these crimes,[29] criminals charged with crimes other than these found themselves outside the scope of the statutory language, and were entitled to regain possession of their confiscated computer equipment and software after their release from incarceration.[30]

For example, in *People v. Lamonte*,[31] the defendant requested the return of the equipment seized during his arrest, including telephone equipment, computer hardware and software which he admittedly used to alter credit cards and commit

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21. *Compare* 1998 Cal. Legis. Serv. ch. 555, sec. 1, at 3093 (amending CAL. PENAL CODE § 502.01) (enumerating forfeiture to include property used in the commission of a crime in violation of either Penal Code sections 502(c), 502.7 or 502.8), *with* CAL. PENAL CODE § 502.01(a)(1) (amended by Chapter 254) (expanding forfeiture to include property used in the commission of a crime under Penal Code sections 470, 470a, 472, 476, 480, 484e(b), 484e(d), 484f(a), 484i(b), 502(c), 502.7, 502.8, 529, 529a or 530.5).

22. *See infra* notes 23-30 and accompanying text (elucidating the deficiencies in the law prior to the enactment of Chapter 254).

23. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 451, at 5 (Mar. 24, 1999); *see also Act Aims to Curb Convicts' Counterfeiting*, *supra* note 7, at B07 (discussing the criminal's ability to regain possession of counterfeiting computer equipment after being released from incarceration).

24. *Act Aims to Curb Convicts' Counterfeiting*, *supra* note 7, at B07.

25. *Supra* note 21.

26. 1998 Cal. Legis. Serv. ch. 863, sec. 3, at 4435 (amending CAL. PENAL CODE § 502).

27. CAL. PENAL CODE § 502.7 (West 1999 & Supp. 2000).

28. *Id.* § 502.8 (West 1999 & Supp. 2000).

29. 1998 Cal. Legis. Serv. ch. 555, sec. 1, at 3093 (amending CAL. PENAL CODE § 502.01).

30. *Id.*

31. 53 Cal. App. 4th 544, 61 Cal. Rptr. 2d 810 (1997).

fraud.[32] The court granted the return of all property belonging to Lamonte, because "the [computer] equipment itself is not illegal to possess."[33] This loophole in the law allowed computer criminals to continue their criminal activity immediately after being released from incarceration.[34]

B. *The Scope of Employment Loophole*

Prior to Chapter 254's passage, employees who committed computer crimes against their employers were immune from prosecution due to the ambiguous language of the former version of Penal Code section 502(h).[35] Although the prior law created an exemption for employees who were acting within the scope of their employment when violating Penal Code section 502(c), the phrase "scope of his or her lawful employment" was never explicitly defined in the Penal Code.[36] As a result, courts were forced to rely on the definition of "scope of employment" used in tort law.[37] The "scope of employment" inquiry in tort law serves a wholly different purpose than that in criminal law by allowing for monetary compensation to the injured victim from the employer under principles of vicarious liability.[38] Thus, under the tort law definition of "scope of employment,""[t]ortious conduct that violates an employee's official duties or disregards the employer's express orders may nonetheless be within the scope of employment."[39] Therefore, the tort definition of scope of employment has been broadly construed, deriving from the doctrine of respondeat superior.[40] Even when courts have applied the definition of scope of employment within the context of tort law, they have struggled with the

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32. *Id.* at 547-48, 61 Cal. Rptr. 2d at 812-13.

33. *Id.* at 553, 61 Cal. Rptr. 2d at 816.

34. *See supra* note 7 and accompanying text (shedding light on the criminal's ability to continue criminal activity with the same equipment).

35. *See* ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 451, at 6 (Mar. 24, 1999) (stating that, under prior law, employees who maliciously destroyed their employers' data were immune from prosecution due to the lack of a definition for "scope of employment").

36. *See* 1998 Cal. Legis. Serv. ch. 863, sec. 3, at 4436 (amending CAL. PENAL CODE § 502) (providing no definition for this phrase).

37. Letter from Alberto Roldan, Deputy District Attorney, Sacramento County District Attorney's Office, to Steven Meinrath, Legislative Advocate, California Attorneys for Criminal Justice (Mar. 26, 1999) (copy on file with the *McGeorge Law Review*) [hereinafter Roldan]; *see also* Mary M. v. City of Los Angeles, 54 Cal. 3d 202, 209, 814 P.2d 1341, 1344, 285 Cal. Rptr. 99, 102 (1991) (holding that, for purposes of tort law, an activity occurs within an employee's "scope of employment" "when[,] in the context of the particular enterprise[,] an employee's conduct is not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer's business").

38. *Mary M.*, 54 Cal. 3d at 209, 815 P.2d at 1343, 285 Cal. Rptr. at 101 (articulating that one of the rationales for applying respondeat superior is "to ensure that the victim's losses will be equitably borne by those who benefit from the enterprises that give rise to the injury").

39. *Id.* at 209, 814 P.2d at 1344, 285 Cal. Rptr. at 102.

40. *See* Farmer's Ins. Group v. County of Santa Clara, 11 Cal. 4th 992, 1004-05, 906 P.2d 440, 448-49, 47 Cal. Rptr. 2d 478, 486-87 (1995) (citing the many cases that have found "scope of employment" to include personal acts committed while in the employer's employment).

multiple broad definitions cited in case law.[41] For example, under one interpretation, public entities and employers are not liable for their employees' actions when the employees commit tortious acts due to their own personal malice.[42] The underlying justification courts have used in drawing these conclusions is based on the fairness of imposing monetary damages upon employers as a "cost of doing business."[43] Therefore, courts establish whether an employee's conduct was within the scope of employment by using a test of foreseeability, which is supposed to measure the fairness of holding an employer liable under the doctrine of respondeat superior.[44]

However, the exception in the former version of Penal Code section 502(h)(1) had freed employees from criminal liability for their use of computer services if they were acting *within* the scope of their employment in causing the computer-induced damage.[45] If the employee acted *outside* the scope of employment when the damage was caused, and either (1) no injury was caused to any person or the employer, or (2) the total value of the supplies or computer services used was less than $100, then the employee would escape criminal liability.[46]

C. Counterfeiting

Computer equipment used in counterfeiting was previously required to be destroyed instead of being redistributed for legitimate purposes.[47] California's counterfeiting law previously provided for the physical destruction of *all* machines and materials intended to be used for counterfeiting.[48] Although computers were not specifically addressed in Penal Code section 480, the statutory language was broad enough to encompass the physical destruction of computer equipment as well.[49] However, computers have become an increasingly prevalent instrument in the world of counterfeit-dollar production.[50] Home computer systems equipped with high-quality scanners and ink-jet printers are now capable of producing such high-quality counterfeits that expensive counterfeiting machines are not necessary, and indeed

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41. *Id.* at 1004-05, 906 P.2d at 448-49, 47 Cal. Rptr. 2d at 486-87.

42. *See id.* at 1004, 906 P.2d at 448, 47 Cal. Rptr. 2d at 486.

43. *See, e.g., id.* at 1004, 906 P.2d at 448, 47 Cal. Rptr. 2d at 486 (finding fairness in the imposition of tort liability on an employer for employees acting within the scope of their employment).

44. *Id.* at 1004, 906 P.2d at 448, 47 Cal. Rptr. 2d at 486.

45. 1998 Cal. Legis. Serv. ch. 863, sec. 3, at 4436 (amending CAL. PENAL CODE § 502).

46. *Id.*

47. *See* 1977 Cal. Stat. ch. 165, sec. 6, at 642 (amending CAL. PENAL CODE § 480) (requiring the physical destruction of computer equipment that had been used in crimes).

48. *Id*

49. *Id.*

50. *See* J. Taylor Buckley & Tony Boylan, *New $20 Bill Key Weapon in War on Counterfeiting*, USA TODAY, Apr. 9. 1998, at A01 (describing the trend of counterfeiters using computer scanners and ink-jet printers rather than counterfeit machines).

are rarely used by criminals today.[51] As a result, the use of computers in counterfeiting operations has increased at such a high rate that from 1995 to 1997, the amount of counterfeit currency produced by computer ink-jet printers increased by 3400%.[52] Traditional counterfeiting machines[53] served only one, illegitimate purpose, and were destroyed upon capture to prevent the materials and machinery from being used again.[54] However, because computer equipment has numerous legitimate applications, physical destruction is a wasteful and infeasible remedy.

III. CHAPTER 254

A. *New Crimes Subject to Forfeiture*

Chapter 254 expands the list of crimes that can cause a person to forfeit the tools used to commit his or her crime. The new law updates the list of crimes subject to forfeiture, making forfeiture applicable to a comprehensive list of crimes, including: general forgery;[55] forgery of a driver's license or identification card;[56] forgery or counterfeiting of documentary seals;[57] money counterfeiting;[58] possession or making of counterfeiting equipment;[59] forgery of bills, notes and checks; acquiring four or more access cards within 12 months which he or she knows or has reason to know were acquired illegally;[60] acquiring or possessing access card information with the intent to defraud;[61] making or altering access cards;[62] false impersonation of another in her private or official capacity;[63] and unauthorized use of personal identification information to obtain credit, goods, services or medical information in the name of another person.[64]

When minors use computer equipment owned by their parents to commit any one of the newly applicable crimes listed in Penal Code section 502.01(a)(1), existing provisions serve to create a method by which parents may prevent the forfeiture of their equipment.[65] A minor's parents may avoid forfeiture of their

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51. *Id.*
52. *Id.*
53. *See Cummings*, *supra* note 8, at 550 (describing the key piece of expensive machinery that counterfeiters were required to use prior to the proliferation of computers—an intaglio press—which operates by using special ink and forcing this ink onto the paper).
54. Roldan, *supra* note 37.
55. CAL. PENAL CODE § 470 (West 1999 & Supp. 2000).
56. *Id.* § 470(a) (West 1999 & Supp. 2000).
57. *Id.* § 472 (West 1999 & Supp. 2000).
58. *Id.* § 476 (West 1999 & Supp. 2000).
59. *Id.* § 480(a) (amended by Chapter 254).
60. *Id.* § 484e(b) (West 1999 & Supp. 2000).
61. *Id.* § 484e(d) (West 1999 & Supp. 2000).
62. *Id.* § 484i(b) (West 1999 & Supp. 2000).
63. *Id.* § 529 (West 1999 & Supp. 2000).
64. *Id.* § 530.5 (West 1999 & Supp. 2000).
65. *Id.* § 502.01(e) (amended by Chapter 254).

computer equipment if they sign a statement and submit it to the court, guaranteeing that the minor will not have access to the computer at any time in the two years after the date on which the minor is sentenced.[66] However, if the minor commits another crime enumerated by Penal Code section 502.01(a)(1), the original property subject to forfeiture from the first crime *and* the property used to commit the second crime will both be forfeited.[67] Parents then have one last opportunity to protect their property from forfeiture—to avoid forfeiture, they must pay full restitution to the victims of the minor's offenses if the property used in the commission of the crime was located in the minor's primary residence during the criminal act.[68]

As an additional safeguard against unnecessary forfeiture, Chapter 254 grants courts discretion where either an adult or a minor defendant "is not likely to use the property otherwise subject to forfeiture for future illegal acts."[69] Because most computer crimes do not involve violence, a defendant would most likely receive probation and lose access to his or her computer during this probationary period as punishment.[70] By giving courts discretion in deciding whether to grant a prosecutor's request for forfeiture, Chapter 254 avoids the imposition of an additional penalty that would be too harsh.

As an exception to the forfeiture provisions, criminals who are prosecuted for an infraction under Penal Code section 502 will not be required to forfeit their computer equipment.[71] Had Chapter 254 allowed for the forfeiture of computer equipment used to commit crimes, then it would have dramatically overstepped the boundaries of proportionate punishment. The maximum penalty for infractions of this sort is a fine of no greater than $250 for first-time offenders.[72] The cost of computer equipment can be as much as ten times that amount, so the forfeiture of such technology would result in a disproportionate punishment.[73]

B. Crimes Committed During the Scope of Employment

The phrase "scope of employment" as used in Penal Code section 502(h)(1) is now explicitly defined to include "acts which are reasonably necessary to the performance of [the actor's] work assignment."[74] This is a significantly narrower

66. *Id.* § 502.01(e)(2) (amended by Chapter 254).
67. *Id.* § 502.01(e)(3) (amended by Chapter 254).
68. *Id.* § 502.01(e)(4) (amended by Chapter 254).
69. *Id.* § 502.01(f) (amended by Chapter 254).
70. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 451, at 12 (June 22, 1999).
71. *Id.* § 502.01(a)(1) (amended by Chapter 254).
72. *Id.* § 502 (d)(3)(A) (amended by Chapter 254); *see id.* (setting the punishment for a first-time violation of Penal Code sections 502(c)(6), 502(c)(7) and 502(c)(8) at a fine of $250 where no injury has occurred).
73. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 451, at 11 (June 22, 1999).
74. CAL. PENAL CODE § 502(h)(1) (amended by Chapter 254).

definition than the broad and ambiguous tort definition of "scope of employment."[75] The prior law potentially could have allowed employees to maliciously delete critical data from an employer's computer systems if their employment involved modifying or deleting files from a computer.[76] Although this criminal activity previously would have fallen within the definition of "scope of employment," the new definition would not allow such an employee to escape criminal liability, because maliciously deleting critical data cannot be characterized as a "reasonably necessary" task.[77]

C. *Redistributing Forfeited Computers and Computer Equipment*

Computers and equipment used to counterfeit currency in violation of Penal Code section 480 will no longer be physically destroyed.[78] The new provisions created by Chapter 254 specifically address computers by providing that computers, computer systems and computer networks will be "disposed of" according to Penal Code section 502.01,[79] which allows for a hierarchical method of redistribution.[80] According to the existing provisions in Penal Code section 502.01, the victim has the first priority in receiving the forfeited property.[81] If the victim chooses not to accept the property, or the court elects to exercise its discretion, the property or remaining funds may distributed to: "(1) the prosecuting agency;[82] (2) the public entity of which the prosecuting agency is a part;[83] (3) the public entity whose officers or employees conducted the investigation resulting in the forfeiture;[84] (4) other state and local public entities, including school districts;[85] (5) nonprofit charitable organizations;"[86] or (6) any combination of these entities.[87]

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75. *See supra* Part II.B (pointing to the broadness and ambiguity of the previously applicable tort law definition).

76. *See* SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 451, at 9 (June 22, 1999) (reciting Chapter 254's author's intent to prevent employees from escaping criminal liability for their malicious acts against their employer where the employees are authorized to modify or delete files from a computer).

77. *Id.*

78. CAL. PENAL CODE § 480(b)(1)-(2) (amended by Chapter 254).

79. *Id.*

80. *Id.* § 502.01(g) (amended by Chapter 254).

81. *Id.* § 502.01(g)(1) (amended by Chapter 254).

82. *Id.* § 502.01(g)(2)(A) (amended by Chapter 254).

83. *Id.* § 502.01(g)(2)(B) (amended by Chapter 254).

84. *Id.* § 502.01(g)(2)(C) (amended by Chapter 254).

85. *Id.* § 502.01(g)(2)(D) (amended by Chapter 254).

86. *Id.* § 502.01(g)(2)(E) (amended by Chapter 254).

87. *Id.* § 502.01(g)(2) (amended by Chapter 254).

IV. ANALYSIS OF THE NEW LAW

A. *Notorious Recidivists*

The effectiveness of creating forfeiture provisions for computer-related crimes is questionable. Some skeptics argue that forfeiture will only slightly inconvenience computer criminals because such criminals may be able to continue their illicit activities by simply purchasing new computers.[88] Computer criminals are known to be "notorious recidivists," and, unfortunately, forfeiture of their equipment may achieve little in deterring criminals who are determined to break the law again.[89]

While one of the asserted effects of providing for forfeiture upon conviction is that it prevents crime, the penalty might not be effective in accomplishing this goal. Computer equipment has become so inexpensive that criminals will have little difficulty in purchasing newer and more sophisticated equipment.[90] Using forfeiture as a method of deterrence assumes that criminals will not have adequate resources or funds to purchase new computer equipment. Currently, $500 billion in counterfeit currency is being circulated worldwide, and as a result, organized crime groups have access to large amounts of counterfeit currency and proceeds generated from their money laundering operations.[91] Therefore, the overall effect of using forfeiture as a method of deterrence ignores the financial capabilities of computer criminals. However, Penal Code section 502 does impose increasingly stiffer penalties for each subsequent violation.[92] Consequently, fines and jail time may be a more effective method of deterrence than forfeiture.

B. *Computer Criminals and the Tendency to Rationalize*

Stopping computer criminals from perpetrating their crimes will remain difficult for another reason. Their propensities to repeatedly commit computer crimes often is based on their underlying belief that they are not doing any harm.[93] Computer criminals rationalize their criminal behavior by claiming that the use of

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88. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 451, at 12 (June 22, 1999).

89. *See id.* (reaffirming the view that computer criminals are notorious recidivists, and arguing that they may only be inconvenienced by forfeiture).

90. *See* Cummings, *supra* note 8, at 547-49 (emphasizing that the cost of computer systems has directly brought the cost of counterfeiting operations down).

91. *Id.* at 549.

92. *See* CAL. PENAL CODE § 502(d)(2)(B) (amended by Chapter 254) (increasing the possible punishment for subsequent violations of Penal Code section 502(c)(3) so that a maximum fine of $10,000 or three years in prison may be imposed); *see also id.* § 502(d)(4)(B) (creating an increased penalty of up to $5,000, one year in jail, or both a fine and imprisonment for subsequent violations of Penal Code section 502(c)(9), or where the violation results in an injury).

93. *See* DONN B. PARKER, FIGHTING COMPUTER CRIME 180-82 (1983) (analyzing the rationale used by a notorious computer criminal who commits telephone fraud and other computer-related crimes).

idle services[94] does not create any additional expenditure or injure the consumer.[95] The illegal use or transmission of data and electricity through a telephone line purportedly requires no additional expenditure because the "circuit already has a flow of electricity through it."[96] According to an unwritten "code of ethics" supposedly followed by "phreaks"[97] and hackers, delaying or denying service to consumers is strictly forbidden.[98]

Another reason that computer criminals further justify their actions is that many of them "suffer" from what is known as the "Robin Hood Syndrome."[99] Criminals who have this mentality believe that inflicting harm upon an individual is immoral, yet harming organizations, companies and computers is acceptable behavior.[100] Attacking these entities is not only seen as harmless, but is also considered a heroic act which helps solve security flaws in computer systems.[101] Regardless of the truth or falsity of these assertions and assumptions, computer criminals truly believe their conduct is not harmful, and generally do not think twice about breaking the law again.[102]

C. *The Potential Danger to Employers*

California Attorneys for Criminal Justice (CACJ) raises the argument that the forfeiture provisions of Chapter 254 do not prevent crime.[103] Because computer equipment may be used for both legitimate and illegitimate purposes, CACJ is concerned that the forfeiture of computer systems could result in employers losing their computer equipment due to the criminal acts of their employees.[104] Businesses that are heavily reliant upon computer systems can suffer dire consequences upon such forfeiture, and their ability to conduct business could become crippled.[105]

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94. Idle services consist of telephone and computer services for which incremental use does not require any additional resources or expenditures. *Id.* at 180.

95. *See id.* at 180-81 (explaining the argument that a few additional users make no significant difference in response time or costs).

96. *Id.* at 180.

97. A "phone phreak" is an individual who engages in telephone fraud. *Id.* at 171.

98. *See id.* at 181 (reciting the claim of "Cap'n Crunch," a notorious phreak, that he and his associates abide by this ethical code while engaging in their criminal activities).

99. *Id.* at 181-82; *see id.* (explaining that computer criminals believe harming individuals is wrong but harming organizations is, in some circumstances, acceptable behavior).

100. *Id.*

101. *See id.* (reciting the claim by hackers and phreaks that their illicit criminal activity actually benefits consumers and companies by identifying security issues).

102. *See generally id.* at 170-82 (reporting the multiple arrests of Cap'n Crunch and his views on why he believes his criminal activity benefits companies and consumers).

103. Letter from Steven Meinrath, Legislative Advocate, California Attorneys for Criminal Justice, to Ken Maddox, Assemblymember, California State Assembly (Mar. 28, 1999) (copy on file with *McGeorge Law Review*).

104. *Id.*

105. *Id.*

However, these critics ignore the fact that Penal Code section 502.01 has several safeguards in place which ensure that computer equipment will not be wrongfully forfeited.[106] Under existing law, a party who has an interest in the forfeited equipment has several opportunities to regain possession of the property.[107] Before a hearing is held to determine whether the property in question should be forfeited, an investigation is held to give notice to persons who may have an interest in the property.[108] Interest holders may then file a motion for redemption to declare their interest in the property.[109] As long as the State cannot show by a preponderance of the evidence that the interest holder knew or should have known the property was being used to commit the crime, or that the interest holder failed to take reasonable steps to prevent the use of the property to commit the crime, then the sentencing court may grant the interest holder possession of the property.[110] Furthermore, the State still has the burden of proving by a preponderance of the evidence that property used by the criminal is subject to forfeiture.[111]

V. CONCLUSION

Almost every possible crime a computer can be used to commit is now included in the provisions of Chapter 254 so that when an individual engages in any one of the listed criminal activities, the computer equipment used in the commission of the crime will be forfeited.[112] The list of crimes subject to forfeiture may now be more complete, but whether and to what extent it will help deter criminals is uncertain at best.[113] Nevertheless, while computer criminals are known to be "some of the worst recidivists,"[114] if forfeiture will not deter criminals, it at least might hinder their illegal activities.[115]

Ironically, victims of the computer-related crimes might not be the parties most benefitted by Chapter 254; perhaps the parties who will gain the most from the new law will be employers, as the new law specifically exempts them from its "scope of employment" definition so that when their employees use the employers' computer equipment to commit their crimes, the employers themselves will not have to forfeit their equipment, so long as they neither knew nor should have known

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106. *See* CAL. PENAL CODE § 502.01(c) (amended by Chapter 254) (creating a remedy for parties who have an interest in the equipment subject to forfeiture by allowing the parties to file a motion for redemption).

107. *Id.* § 502.01(b)-(e) (amended by Chapter 254).

108. *Id.* § 502.01(c) (amended by Chapter 254).

109. *Id.*

110. *Id.*

111. *Id.* § 502.01(b) (amended by Chapter 254).

112. *Id.* § 502.01(a)(1) (amended by Chapter 254); *see supra* notes 55-64 and accompanying text (defining the expanded list of crimes for which property is now subject to forfeiture).

113. *See supra* Part IV.B (explaining the justification computer criminals use to repeatedly commit crimes).

114. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 451, at 8 (June 22, 1999).

115. *Id.*

of the illegal operations in question.[116] At the same time, however, employees who commit computer crimes may no longer escape criminal liability by hiding under the formerly ambiguous "scope of the employment" exception.[117] Prior to Chapter 254, employees whose employment allowed the use of an employer's computer equipment for data modification could be found to fall within the "scope of employment" exception despite the criminal intentions of the employee.[118]

Chapter 254 also addresses the counterfeiting dilemma, and seeks to deter computer criminals by amending Penal Code sections 480, 502, and 502.01.[119] By preventing criminals from regaining access to their equipment, closing a loophole which had allowed employees to be immune from prosecution, allowing for the redistribution of computer equipment, and enumerating a more thorough list of computer crimes for which owners may be subject to forfeiture, the amended statutes now provide a more thorough and useful method of deterring computer criminals.[120]

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116. *See supra* note 78 and accompanying text (explaining that employers can rest assured that, so long as they had no occasion to know that their employees were using company equipment to commit their computer crimes, then the equipment will not be subject to forfeiture).

117. *See supra* notes 74-75 and accompanying text (defining the phrase "scope of employment" to distinguish it from the broad tort definition).

118. *See supra* note 76 and accompanying text (recounting the narrow situation where employees could have exploited a loophole in the prior law to escape criminal liability).

119. *See supra* Part I (explaining the goal of the State Legislature to hinder the criminal endeavors of counterfeiters who use computers and to deter computer criminals by expanding the scope of the forfeiture provisions in Chapter 254 for computer-related crimes).

120. *Supra* Part III.

Trigger Locks and Warning Labels on Firearms Become a Reality

Stephen T. Bang

Code Sections Affected

Penal Code §§ 12087, 12087.5, 12088, 12088.1, 12088.2, 12088.3, 12088.4, 12088.5, 12088.6, 12088.7, 12088.8, 12088.9 (new).
AB 106 (Scott); 1999 STAT. Ch. 246

I. INTRODUCTION

On January 1, 1992, the day California's new criminal-storage-of-a-firearm law[1] went into effect, a 4-year-old boy unintentionally shot and killed himself with a gun only moments after his grandfather had used it to celebrate New Year's Eve.[2] After learning that the grandfather usually kept the firearm locked away in a cabinet, a judge reduced the felony charge against the grandfather to a misdemeanor.[3] Eventually, the grandfather was sentenced to probation and subsequently was ordered to launch a public awareness campaign regarding the dangers of firearms.[4]

This unfortunate tale is one of many which demonstrates the reluctance by prosecutors to fully punish family members when their negligent storage of a firearm causes injury to a loved one. Although the purpose of creating a punishment for negligently storing a firearm is to promote safety,[5] far more is required to remedy the current epidemic of firearms-related injuries and fatalities.

Startling figures reported in firearms safety studies show dangers posed by firearms are a source of great concern among Americans. Since 1972, more than 30,000 people per year have died from gunshot wounds, making gunshot wounds the second leading cause of death in the United States.[6] Furthermore, more than 1,000 Americans are injured or killed *unintentionally* by firearms every year.[7]

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1. CAL. PENAL CODE § 12035 (West 1992 & Supp. 2000).
2. Katherine Seligman, *Law Winks at Parents of Kids Who Use Guns*, S.F. EXAM., Mar. 29, 1998 at A1.
3. *Id.*
4. *Id.*
5. *Id.*
6. Charles Marwick, *HELP Network Says Firearms Data Gap Makes Reducing Gun Injuries More Difficult*, 281 JAMA 784, 784 (1999).
7. Nancy Sinauer et al., *Unintentional, Nonfatal Firearm-Related Injuries: A Preventable Public Health Burden*, 275 JAMA 1740, 1740 (1996).

Between 1986 and 1996 alone, as many as 1,500 people per year were killed by such unintentional gunshot wounds.[8] Even more disturbingly, eighteen percent of those victims suffering an unintentional fatal gunshot wound in 1988 were under the age of fifteen.[9]

While a variety of activities can result in the unintentional infliction of gunshot wounds,[10] at least one study shows that cleaning a gun is the most common such activity.[11] Hunting and playing with a firearm were reported as the second and third most common such activities, respectively.[12] Still, a large percentage of unintentional shootings were characterized as having been caused by "other" activities, including carrying, showing, and looking at a firearm.[13]

In a survey of police officers on firearms safety, seventy-nine percent of police officers recommended the use of either a trigger lock or a lockbox for firearms stored at home.[14] Furthermore, fifty-nine percent of police officers listed trigger locks as their preferred method for preventing unintentional firearms accidents at home.[15] Police officers are not alone in their views; seventy-four percent of the public supports safety regulation of the firearms industry.[16] However, firearms consumers are apparently interested in finding types of child safety devices for their firearms which will still afford them immediate access to the gun when necessary.[17]

In an attempt to reduce the tragic accidents resulting from negligent firearms storage and handling, Chapter 246 creates standards for firearms safety devices,[18] requires devices sold or manufactured in California to meet these standards,[19] mandates that safety devices be included with all firearms sold in the State,[20] and requires warning labels to be affixed to all firearms sold or transferred in California.[21]

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8. *Id.*

9. *Accidental Shootings: Data on Children*, General Accounting Office Reports and Testimony, *available in* 1991 WL 2659317.

10. *Id.*

11. *See* Sinauer, *supra* note 7, at 1742-43 (identifying the most common activities reported by victims of non-fatal, unintentional gunshot wounds as: (1) cleaning a gun, at 13.7%; (2) hunting-related activities, at 12.3%; and (3) playing with a firearm, at 7.7%).

12. *Id.*

13. *See id.* (categorizing responses that were too few to report separately as "other" and finding that "other" shootings accounted for 23.9% of the shootings reported).

14. Donna M. Denno et al., *Safe Storage of Handguns: What Do the Police Recommend?*, 150 ARCHIVES PEDIATRICS ADOLESCENT MED. 927, 927-31 (1996).

15. *Id.*

16. *See* CAL. PENAL CODE § 12087.5(h) (enacted by Chapter 246) (citing the results of a public opinion poll conducted by the National Opinion Research Center at the University of Chicago).

17. *See* Mark D. Polston & Douglas S. Weil, *Unsafe by Design: Using Tort Actions to Reduce Firearm-Related Injuries*, 8 STAN. L. & POL'Y REV. 13, 14 (1997) (noting that "many people strongly . . . believe that they need a readily available gun").

18. CAL. PENAL CODE § 12088.2 (enacted by Chapter 246).

19. *Id.* § 12088 (enacted by Chapter 246).

20. *Id.* § 12088.1(a) (enacted by Chapter 246).

21. *Id.* § 12088.1(b) (enacted by Chapter 246).

II. BACKGROUND

A. *California's Strict Gun Control Laws*

California has some of the most stringent gun control laws in the U.S.[22] All sales, transfers, and loans of guns in the state must be conducted by a licensed gun dealer.[23] Gun dealers must perform background checks on prospective gun owners, obtain a basic firearms safety certificate, and offer to provide the purchaser with a pamphlet explaining firearms laws.[24] Moreover, persons interested in purchasing a gun must wait ten days before gaining possession of the gun.[25] Recent figures indicate that these strict laws have proved to be moderately effective in preventing criminals from attaining guns.[26]

In addition to the strict requirements California has in place for purchasing or transferring guns, gun owners can be subject to criminal liability for the improper storage of firearms.[27] If a child under the age of sixteen uses a gun stored improperly by the gun owner, the gun owner may be charged with criminal storage of a firearm in the first degree if the child or any other person suffers great bodily injury as a result of the improper storage.[28] Those who are prosecuted for this offense face up to three years in prison, up to $10,000 in fines, or both prison time and fines.[29] Where a child or any other person suffers injuries "other than great bodily injury" as a result of a child gaining access to a firearm,[30] the gun owner faces a comparatively lighter punishment of up to one year in jail, up to $1,000 in fines, or both jail time and fines.[31] Similarly, if a child under the age of sixteen carries a firearm off the premises of any location where a firearm is stored, the gun owner may be subjected to a lighter punishment of up to one year in jail, up to

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22. Noah Isackson, *U.S. Gun Laws Would Toughen State's Weapons: Some of California's Restrictions, However[,] Are Stronger than the Proposed Federal Standards*, ORANGE COUNTY REG., June 22, 1999, at A4. Even though the proposed federal legislation (H.R. 1512) would have imposed even tougher gun control restrictions on California had it passed, the State Attorney General would have chosen to enforce the tougher set of laws. *Id.*; *see also* Amy Chance, SACRAMENTO BEE, *Gun Makers Under Siege: Poll Finds Increasing Support for Controls*, May 30, 1999, at A1 (explaining that California has 675 state gun control laws now in effect, not including regulations, ordinances, and federal laws).

23. CAL. PENAL CODE § 1207(a) (West 1992 & Supp. 2000).

24. *Id.*

25. *Id.* § 12072(c)(1) (West 1992 & Supp. 2000).

26. *See, e.g.*, Isackson, *supra* note 22, at A4 (stating that over 3,000 applications for guns in California were rejected in 1998 due to the criminal history of the applicants).

27. *See infra* notes 28-32 and accompanying text (listing the various crimes for which gun owners may be prosecuted where children gain access to a negligently stored firearm).

28. *See* CAL. PENAL CODE § 12035(b)(1) (West 1992 & Supp. 2000) (imposing criminal liability upon a firearms owner who improperly stores a firearm which a child under the age of sixteen is likely to access and which in fact causes great bodily injury as a result of the negligent storage).

29. *Id.* § 12035(d)(1) (West 1992 & Supp. 2000).

30. *Id.* § 12035(b)(2) (West 1992 & Supp. 2000).

31. *Id.* § 12036(d)(2) (West 1992 & Supp. 2000).

$1,000 in fines, or both jail time and fines.[32] However, these sources of criminal liability have not proved to be very effective deterrents to improper firearms storage because these laws are rarely enforced.[33] This is so despite the legal requirement for licensed gun dealers to conspicuously post a sign in their businesses warning prospective gun owners of criminal liability for causing injury by negligently storing their firearms.[34]

In response to demand for more effective deterrents, lawmakers have introduced four firearms safety bills similar to Chapter 246 in the last ten years.[35] Unfortunately, both Governor George Deukmejian and Governor Pete Wilson vetoed these bills.[36] In the meantime, several California counties and cities were busy enacting their own local ordinances, which required gun dealers to provide trigger locks on the sale of all new guns.[37] By 1998, twenty-two California counties and cities had already enacted local ordinances requiring gun dealers to provide trigger locks on all new guns.[38] By 1999, that figure had risen to a total of thirty California counties and cities requiring mandatory trigger locks.[39]

B. Why Trigger Locks Are Needed

Children have the ability to fire guns at very young ages.[40] To pull the trigger on an average handgun, the operator need only apply approximately ten pounds of pressure to the trigger.[41] A study on children's ability to fire guns determined that some children as young as three years old could apply sufficient pressure to fire a

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32. *Id.* § 12036(b) (West 1992 & Supp. 2000).

33. *See* Seligman, *supra* note 2, at A1 (noting the reluctance of district attorneys to bring charges against parents whose improper storage of a firearm results in the death of a child).

34. CAL. PENAL CODE § 12071(b)(7)(A)-(B) (West 1992 & Supp. 2000).

35. *See* SB 861 (1988) (as introduced on March 6, 1989, but not enacted); SB 134 (1993) (as introduced on January 26, 1993, but not enacted); AB 1124 (1997) (as introduced on February 2, 1997, but not enacted); SB 1550 (1998) (as introduced on February 11, 1998, but not enacted).

36. *See* Mark Gladstone et al., *Assembly OKs Bill to Require Trigger Locks*, L.A. TIMES, June 4, 1999, at A1 (noting that trigger lock legislation had been attempted several times by the Legislature, but was always vetoed by past governors).

37. *See* Ray Huard, *New S.D. Law Requires Gun Trigger-Locks*, SAN DIEGO UNION-TRIB., Mar. 18, 1998, at A1 (stating that 22 California counties and cities, including Alameda County, Berkeley, Contra Costa County, Daly City, Fremont, Hayward, Hercules, Lafayette, Livermore, Los Angeles, Oakland, Piedmont, Pleasanton, Richmond, Sacramento, San Francisco, San Jose, San Leandro, San Mateo, San Mateo County, San Pablo, and West Hollywood have trigger lock ordinances in place).

38. *Id.*; *see also* Luis Monteagudo, Jr., *Chula Vista Approves Trigger Lock Law*, SAN DIEGO UNION-TRIB., Feb. 18, 1999, at B2 (noting that San Diego, Escondido, Imperial Beach, National City, and Chula Vista have similar laws in place which require gun dealers to provide trigger locks upon the sale of each handgun).

39. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 130, at 7 (Apr. 6, 1999).

40. *See* Sara M. Naureckas et al., *Children's and Women's Ability to Fire Handguns*, 149 ARCHIVES PEDIATRICS ADOLESCENT MED. 1318, 1320 (1995) (reporting the findings of a study which compared the ability of children and their mothers to fire handguns).

41. *Id.*

gun.[42] These figures indicate that children can seriously injure or kill themselves or others when they stumble upon negligently stored firearms.

When Connecticut enacted mandatory firearms safety laws without developing a method of certifying locks,[43] crafty manufacturers engineered "legality locks" or "junk locks" solely designed to satisfy the statutory requirements for firearms safety devices without being effective as true safety devices.[44] Such trigger locks are so ineffective that the lock can easily be removed by a child, and the gun may still fire with the trigger lock installed.[45] An enforceable standard would prevent the use of such "junk locks" as a method of foregoing the safety features of the lock.[46]

C. Firearms Safety Technology

Technology to create safer guns that can reduce the number of unintentional shootings has been in development for several years.[47] Significant evidence shows that measures to protect children from unintentional gunshot wounds have been necessary since as far back as 1884, when Smith & Wesson developed the "lemon squeezer" gun.[48] The unique grip of the "lemon squeezer" gun required the gun to be squeezed before the trigger could be pulled.[49] This feature prevented children with smaller and weaker hands from firing the gun due to their inability to perform both actions at once.[50]

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42. *See id.* (reporting that 25% of 3- and 4-year-olds, 75% of 5- to 6-year- olds, and 90% of 7- to 8-year-olds could apply the 10 pounds of pressure required to fire a gun when using 2 fingers); *see also* CAL. PENAL CODE § 12087.5(e) (enacted by Chapter 246) (finding legislatively that children have the ability to fire negligently stored firearms).

43. *See* CONN. GEN. STAT. ANN. §§ 29-33(c), 29-37b (West 1990 & Supp. 1999) (creating the requirement that any "pistol or revolver" must be equipped with a "reusable trigger lock, gun lock or gun locking device appropriate for such pistol or revolver, which lock or device shall be constructed of material sufficiently strong to prevent it from being easily disabled").

44. *See VPC Demonstrates How Weak Senate Bill Allows "Junk Locks,"* June 8, 1999, U.S. NEWSWIRE, *available in* 1999 WL 4636699 (demonstrating the need for a statutory standard to counteract the manufacture and use of ineffective gun locks which can be easily removed or bypassed).

45. *See* Marwick, *supra* note 6 (quoting Bruce Skane of the National Rifle Association); *see also* Paul M. Barrett & Vanessa O'Connell, *Pursuit of "Smart Gun" Leaves Famed Manufacturer Wounded: Colt's Attacked by Rival Firearms Firms, Hit with Costly Boycott*, SAN DIEGO UNION-TRIB., May 23, 1998, at A29 (quoting Colt executive Roland Stewart's statement that "most gun locks can be defeated by a 6-year-old with a screwdriver").

46. Marwick, *supra* note 6.

47. *See infra* notes 48-57 and accompanying text (describing the efforts by gun makers to produce guns with safety features, including the Smith & Wesson lemon squeezer and the Colt Z-40).

48. *See* James T. Dixon, *On Lemon Squeezers and Locking Devices: Consumer Product Safety and Firearms, A Modest Proposal*, 47 CASE W. RES. L. REV. 979, 993 (1997) (stating that the idea of producing a child-proof firearm is over a century old as evidenced by the "lemon squeezer" gun).

49. *Id.*

50. *Id.*

More recently, guns equipped with computer microchips, dubbed "smart guns," have been the subject of much debate.[51] The development and use of smart guns has been hindered by the unwillingness of gun owners to support smart guns.[52] However, Colt Manufacturing Company, Inc. (Colt) emerged as the sole gun manufacturer willing to take advantage of a federal grant to research safer gun technology in smart guns.[53] Colt developed the prototype Z-40 smart gun, which utilized a wristband to emit coded radio signals for owners to operate their smart guns.[54] When gun owners received word of Colt's invention, a massive boycott resulted, crippling Colt's sales.[55] Gun advocates feared that the development of smart guns could lead to a ban of traditional guns not equipped with technologically advanced safety mechanisms such as Colt's.[56] Although technology may be readily available to help curb the number of unintentional shootings, strong opposition from pro-gun organizations such as the National Rifle Association (NRA) has effectively prevented smart guns from being widely recognized as a safety design alternative.[57]

III. CHAPTER 246

A. *Establishing Minimum Standards for Firearms Safety Devices*

Chapter 246 requires the California Department of Justice (DOJ) to develop minimum safety standards for firearms safety devices and gun safes[58] and to report these final regulations to the California Legislature by January 1, 2001.[59] To implement these standards, the DOJ must certify laboratories that will test prospective firearms safety devices[60] for compliance with the legislative intent to reduce the risk of firearms-related injuries inflicted upon children seventeen years of age and younger.[61] Based on these standards, the laboratories will test the effectiveness of the devices and submit these findings to the DOJ.[62] The DOJ is then

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51. *See* Barrett & O'Connell, *supra* note 45, at A29 (reporting that smart gun proponents believe guns should be equipped with safety features that do not allow children to operate them while smart gun opponents believe that if smart guns are built, guns that are not smart can eventually be banned).

52. *See, e.g., id.* (explaining the devastating economic impact on Colt's business after Colt developed a prototype smart gun).

53. *Id.*

54. *Id.*

55. *Id.*; *see also id.* (recounting the organized effort of gun owners and gun dealers to boycott Colt's prototype gun by distributing flyers, clogging Colt's phone lines, and discontinuing orders for Colt's products).

56. *Id.*

57. *Id.*

58. CAL. PENAL CODE § 12088.2(a) (enacted by Chapter 246).

59. *Id.* § 12088.2(b) (enacted by Chapter 246).

60. *Id.* § 12088(a) (enacted by Chapter 246).

61. *Id.* § 12088.2(a) (enacted by Chapter 246).

62. *Id.* § 12088(c) (enacted by Chapter 246).

required to compile a list of approved devices that passed laboratory testing and compile, publish and maintain the list on or after July 1, 2001.[63]

After a list of approved firearms safety devices has been published by the DOJ, Chapter 246 requires all firearms sold or transferred in California to include one of the approved devices.[64] However, purchasers of firearms who: (1) already own a gun safe from which a firearm may not readily be removed;[65] and (2) present proof of ownership of such a gun safe, are not required to purchase a firearm with an approved safety device.[66] An additional exemption applies where the prospective gun owner: (1) purchases an approved safety device no more than thirty days prior to taking possession of the firearm;[67] (2) presents the safety device to the firearms dealer when picking up the firearm;[68] and (3) presents proof of purchase for the safety device.[69] The firearms dealer must verify that these criteria have been satisfied,[70] and the dealer must keep a copy of the receipt in his or her records.[71]

Additional exemptions of Chapter 246 allow some current gun owners to be wholly unaffected by the new law.[72] For example, antique guns are exempt from the requirements of the new law.[73] In addition, peace officers will also be exempt because their firearms are used in the course of their employment.[74]

To ensure that firearms safety devices meet the DOJ's standards, the new law also allows the DOJ to order the recall and replacement of nonconforming firearms safety devices and gun safes, or, alternatively, to require that the offending devices come into compliance with the standards listed at Penal Code sections 12088.1(a)[75] or 12088.2(a).[76]

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63. *Id.* § 12088(d) (enacted by Chapter 246).

64. *Id.* § 12088.1(a) (enacted by Chapter 246).

65. *See id.* § 12088.1(c) (enacted by Chapter 246) (applying to gun purchasers whose gun safes already comply with the requirements of the new Penal Code section 12088.2(a)(3), which mandates that such safes adequately store firearms without being easily opened by unauthorized individuals).

66. *Id.*

67. *Id.* § 12088.1(d)(1) (enacted by Chapter 246).

68. *Id.* § 12088.1(d)(2) (enacted by Chapter 246).

69. *Id.* § 12088.1(d)(3) (enacted by Chapter 246).

70. *Id.* § 12088.1(d)(4) (enacted by Chapter 246).

71. *Id.* § 12088.1(d)(5) (enacted by Chapter 246).

72. *Id.* § 12088.1(c) (enacted by Chapter 246); *id.* § 12088.8 (enacted by Chapter 246).

73. *Id.* § 12088.8(a) (enacted by Chapter 246).

74. *Id.* § 12088.8(b) (enacted by Chapter 246).

75. *Id.* § 12088.1(a) (enacted by Chapter 246) (requiring all firearms sold or transferred by licensed firearms dealers to be accompanied by a firearms safety device).

76. *Id.* § 12088.4 (enacted by Chapter 246); *id.* § 12088.2(a) (mandating that the standards for firearms safety devices address the risk of injury from unintentional gunshot wounds, address the risk of injury from self-inflicted gunshot wounds by unauthorized users, and ensure that firearms safety devices and gun safes are of adequate quality).

B. Warning Labels

By January 1, 2002, all guns manufactured or sold in California must bear a new warning label, the text of which is set forth in the new law.[77] In both English and Spanish, all labels must read:

> WARNING
> Children are attracted to and can operate firearms that can cause severe injuries or death. Prevent child access by always keeping guns locked away and unloaded when not in use. If you keep a loaded firearm where a child obtains and improperly uses it, you may be fined or sent to prison.[78]

If the firearm is contained within a package, the warning label must be affixed to the outside of the package.[79] Where there is no package, the warning label must be affixed to the firearm itself.[80]

C. Tracking the Effectiveness of the New Law

To ensure that the new law is effective, Chapter 246 also imposes a duty upon all law enforcement agencies to continually submit reports to the Department of Health Services (DHS).[81] Any incident where an unintentional or self-inflicted gunshot wound causes injury to a child under the age of eighteen, or where a child is treated for medical attention or dies, must be reported to the DHS.[82]

D. Punishments

A new crime created by Chapter 246 allows the State to assess penalties against those who fail to abide by the new law.[83] If a firearms dealer or manufacturer fails to provide approved firearms safety devices or to affix a proper warning label, the dealer may have to pay a fine of $1,000.[84] For the second offense, an additional $1,000 fine will be imposed, and the offender will be prohibited from selling or manufacturing firearms for thirty days.[85] Ultimately, a gun dealer or manufacturer

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77. *See id.* § 12088.1(b) (enacted by Chapter 246) (referencing section 12088.3(a) for the text of the warning label).
78. *Id.* § 12088.3(a) (enacted by Chapter 246).
79. *Id.* § 12088.3(a) (enacted by Chapter 246).
80. *Id.* § 12088.3(b) (enacted by Chapter 246).
81. *Id.* § 12088.5(a) (enacted by Chapter 246).
82. *Id.* § 12088.5(b) (enacted by Chapter 246).
83. *Id.* § 12088.6 (enacted by Chapter 246).
84. *Id.*
85. *Id.*

who violates the new law three times will be permanently prohibited from selling or manufacturing firearms in the State of California.[86]

E. Financing the New Law

To finance the cost of additional expenditures both the DOJ and the DHS will incur as a result of the new law, a fee of no greater than $1 may be assessed against gun purchasers by gun dealers for each gun purchased.[87] These funds will be collected and deposited into the Firearm Safety Account to assist the DOJ in fulfilling its duties imposed by the new law.[88] The DOJ estimates it will spend an additional $327,000 the first year, $307,000 the second year, and approximately $250,000 annually to carry out the new tasks of creating standards for firearms safety and certifying laboratories.[89] In addition, the DHS expects to spend $77,000 annually to manage and analyze the submitted data as required by Penal Code section 12088.5.[90]

IV. ANALYSIS OF CHAPTER 246

Some theorists believe safety features on guns may not be the only factor to consider in the effort to reduce unintentional gunshot injuries.[91] The natural assumption is that trigger locks prevent guns from being accidentally discharged, and therefore, mandatory trigger locks will decrease the likelihood and incidents of injury. However, skeptics are wary of the use of trigger locks as a preventative measure, and argue that they create an even greater danger.[92] The new law only requires that gun dealers *provide* gun owners with a trigger lock;[93] the assumption by the Legislature that gun owners will continue to use the device after taking the gun home may be flawed.[94] Skeptics of the law suggest that gun owners who value

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86. *Id.*

87. *Id.* § 12088.9(a) (enacted by Chapter 246).

88. *Id.* § 12088.9(b) (enacted by Chapter 246).

89. SENATE APPROPRIATIONS COMMITTEE, COMMITTEE ANALYSIS OF SB 130, at 1 (May 17, 1999).

90. *Id.*; *see* CAL. PENAL CODE § 12088.5 (enacted by Chapter 246) (stating that firearms accidents involving children must be reported to the DHS).

91. *See generally, e.g.*, Polston & Weil, *supra* note 17, at 15 (explaining the theory that unintentional shootings could be reduced by changing both the design of firearms and the behavior of gun owners).

92. *See* Ralph D. Sherman, *Trigger Locks Are Dangerous* (visited Oct. 26, 1999) <http://www.ralphdsherman.com/Press%20Archive/98-09-12%20Hartford%20Courant.htm> (copy on file with the *McGeorge Law Review*) (arguing that trigger locks create greater danger when used improperly and should not be viewed as a reliable method of firearms safety); *see also* SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF AB 106, at 11 (Aug. 19, 1999) (presenting the argument that trigger locks by themselves will not address the underlying need to educate gun owners on the proper use and storage of guns).

93. CAL. PENAL CODE § 12088.1(a) (enacted by Chapter 246).

94. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SB 130, at 13 (Aug. 25, 1999) (citing the opposing argument to Chapter 246 that providing trigger locks to gun owners will not guarantee that the safety devices will be used).

the utility of trigger locks already own them, and those gun owners who do not own trigger locks probably never intend to use one.[95]

Even if the use of trigger locks is targeted at first-time gun owners, another potential danger exists. Trigger locks are designed to be attached to unloaded guns.[96] If a user inadvertently attaches the trigger lock to a loaded gun, the gun could mistakenly go off when the user attempts to remove the device.[97] This possibility multiplies each time the user attaches and detaches the device during practice and hunting activities.[98] Therefore, instead of preventing accidents, trigger locks may actually facilitate them.[99]

In addition, gun owners could depend too heavily upon a trigger lock to prevent accidental injury.[100] The highly skeptical NRA analogizes the use of trigger locks to the popular auto security device "The Club."[101] Automobile owners attach "The Club" to their vehicles, trusting the effectiveness of the device and ignoring the potential that the automobile may still be stolen with the device attached.[102] If gun owners use trigger locks in the same way automobile owners use "The Club," a false sense of security may take hold, which does little to help educate gun owners concerning firearms safety.[103]

Another relevant analogy is the use of child-proof medicine bottles to prevent accidental medicine consumption by children.[104] At least one economist claims that the number of children unintentionally poisoned per year has increased as a result of child-proof medicine bottles,[105] because a failure by parents to properly educate their children regarding the dangers of the medicine cabinet is a direct result of reliance upon the safety features of child-proof medicine bottles.[106]

On the other hand, providing a trigger lock to first-time gun owners may at least prevent some injuries where a gun owner would never willingly purchase a firearms safety device despite the risk of criminal prosecution for causing injury to a child due to improper firearms storage.[107] Ultimately, the debate leaves lawmakers and

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95. *See* Sherman, *supra* note 92 (stating that, because trigger locks are readily available and only cost $10, gun owners who do not already own such locks are unlikely to use a trigger lock that is pre-installed on a newly purchased gun).

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF AB 106, at 11 (Aug. 19, 1999).

101. *See id.* (citing the NRA's argument that trigger locks may create a false sense of security).

102. *Id.*

103. *Id.*

104. Sherman, *supra* note 92.

105. *Id.*

106. *Id.*

107. *See* CAL. PENAL CODE § 12035 (West 1992 & Supp. 2000) (creating a criminal punishment where children under the age of sixteen injure themselves or any other person with negligently stored firearms).

gun owners in a "Catch-22" situation, where weighing the benefits and burdens of trigger locks seems limitless.

V. CONCLUSION

While existing law provides for criminal prosecution where one causes injury to a child from negligently storing a firearm, no existing or new law imposes criminal penalties for storing a gun without a trigger lock or storing the gun outside of a locked gun safe.[108] For a negligent gun owner to be charged, a child must first be injured, which accomplishes little, as prosecutors currently are reluctant to fully punish violators.[109] Children have the ability to operate firearms at a very early age,[110] and the technology to create safer guns is at least possible.[111] However, fierce opposition to firearms safety devices is based in part on the fear that any mandatory firearms safety device is a step toward completely banning guns.[112] Requiring trigger locks, gun safes, and warning labels may be all that can be accomplished through the legislative process. Proper education on firearms safety and expanded criminal punishments may be the key to realistically reducing the number of unintentional gun shot wounds.[113] Nevertheless, Chapter 246 takes the first step towards that goal by finally putting firearms safety devices into the hands of gun owners.[114]

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108. *Id.*; *id.* § 12036 (West 1992 & Supp. 2000); *see supra* Part II.A (explaining that criminal penalties are imposed only when a child uses a negligently stored firearm to cause injury);

109. *See supra* note 33 and accompanying text (explaining that the negligent storage of a firearm law is not being enforced); *see, e.g., supra* notes 1-4 and accompanying text (reciting the story of a grandfather who was charged under the negligent storage of a firearm law after his grandson unintentionally shot himself, and explaining that the grandfather's criminal charge was ultimately reduced to a misdemeanor).

110. *See supra* notes 40-42 and accompanying text (reporting the results of a study which tends to prove that children as young as three can apply sufficient pressure to operate a gun).

111. *See supra* Part II.C (analyzing the history of firearms safety technology).

112. *Supra* note 56 and accompanying text.

113. Polston & Weil, *supra* note 17.

114. *See supra* Part III (detailing the new requirements imposed upon gun dealers by Chapter 246).

The Mentally Disordered Offenders Law: The Legislature Responds to *People v. Anzalone*

M. R. Carrillo-Heian

Code Sections Affected
Penal Code § 2962 (amended).
SB 279 (Dunn); 1999 STAT. Ch. 16 (*Effective April 22, 1999*)

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I. INTRODUCTION

The Mentally Disordered Offenders (MDO) Law addresses the involuntary commitment and treatment of prisoners with severe mental disorders.[1] The purpose

1. CAL. PENAL CODE §§ 2960–2981 (West 1982 & Supp. 2000); *id.* § 2962 (amended by Chapter 16). *See generally* Deborah A. Dorfman, *Through a Therapeutic Jurisprudence Filter: Fear and Pretextuality in Mental Disability Law*, 10 N.Y.L. SCH. J. HUM. RTS. 805, 810 (1993) (considering the California Penal Code provisions dealing with the release of mental health patients); Tanya M. Montano, Comment, *Will California's Sexually Violent Predators Act Survive Constitutional Attacks?*, 39 SANTA CLARA L. REV. 317, 327 n.96 (1998) (contrasting the MDO Law with California's provisions for sexually violent predators); Gregory B. Leong et al., *Dangerously Mentally Disordered Criminals: Unresolved Societal Fear?*, 36 J. FORENSIC SCI. 210, 214-16 (1991)

of the MDO Law is to assure treatment for mentally disordered offenders when the offender's mental disorder is a factor in the commission of a crime "using force or violence."[2] Until 1999, the California Supreme Court had not considered the question of whether an implied threat of force, rather than an actual display of force, was sufficient to meet the "force or violence" provision in the MDO Law.[3] In *People v. Anzalone*,[4] the court held that an implied threat of force was not sufficient to sustain an MDO judgment.[5] Chapter 16 is the Legislature's response to the holding in *Anzalone*.[6] Chapter 16 expressly provides that prisoners convicted of crimes involving implied force are eligible for treatment under the MDO Law, and adds certain arson crimes to the list of enumerated crimes for MDO eligibility.[7]

II. LEGAL BACKGROUND

A. The MDO Law

California has adopted the position that a prisoner with a severe mental disorder should be treated for that disorder both in prison and upon release from prison.[8] The MDO Law requires that a prisoner be treated by the State Department of Mental Health as a condition of parole if she meets the following criteria: (1) "The prisoner has a severe mental disorder that is not in remission or cannot be kept in remission without treatment;" (2) "The severe mental disorder was one of the causes of or an aggravating factor in the commission of a crime for which the prisoner was sentenced to prison"; and (3) "The prisoner has been in treatment for the severe mental disorder for 90 days or more within the year prior to the prisoner's parole or release."[9] Prisoners who are adjudged to represent "a substantial danger of

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(describing the problem of MDOs and society and citing California's MDO Law as an attempt to deal with the problem).

2. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 279, at 5 (Mar. 16, 1999); *see* CAL. PENAL CODE § 2960 (West Supp. 2000) (indicating that the Legislature has found that MDOs should continue to be treated upon their release); *id.* § 2962 (amended by Chapter 16) (providing a list of enumerated crimes qualifying an offender for MDO status, and adding that the commission of a non-enumerated crime that nevertheless involved the use of force or violence also qualifies one for MDO status).

3. *See* People v. Anzalone, 19 Cal. 4th 1074, 1076, 969 P.2d 160, 161 (1999) (indicating that the California Supreme Court considered this case to settle the issue).

4. 19 Cal. 4th 1074, 969 P.2d 160 (1999).

5. *Id.* at 1082, 969 P.2d at 162.

6. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 279, at 2 (Mar. 16, 1999).

7. CAL. PENAL CODE § 2962(e)(2) (amended by Chapter 16).

8. *See id.* § 2960 (West Supp. 2000) (declaring the legislative findings concerning prisoners with severe mental disorders).

9. *Id.* § 2962(a)-(c) (amended by Chapter 16). Under this section, a "severe mental disorder" means a condition or illness that impairs behavior, judgment, or perception of reality. *Id.* § 2962(a) (amended by Chapter 16). This term does not include mental retardation or developmental disabilities, epilepsy, or addiction to intoxicants. *Id.* "Remission" means that the outward symptoms of the disorder are controlled by medication or other treatment. *Id.* Evaluations are conducted by the person in charge of treating the prisoner and a practicing

physical harm to others" are eligible for MDO status; these findings are certified by the Board of Prison Terms.[10] The MDO Law was amended in 1995 to add a list of specific felonies; commission of a listed felony can also determine MDO eligibility.[11] Thus, the State need only establish that the offender was convicted of a listed crime, rather than prove the existence of certain underlying conduct, to classify a defendant as an MDO.[12] The rationale for this amendment appears to be that the original offense is helpful in identifying which prisoners are likely to be a danger to society, as opposed to a prisoner's mental state and conduct while in prison, which have not been good predictors.[13]

B. Court Interpretations of the MDO Law

The interpretation of the terms "force" and "violence" in the MDO Law has been the subject of several cases. In *People v. Collins*,[14] the court determined that the words "force" and "violence" in the statute were not synonymous.[15] Charles Collins was convicted of grand theft after he took a Hulk Hogan doll from a four-year-old child.[16] He denied using force or violence to take the doll, and claimed that he had traded "a cartoon" for it.[17] The court noted that there was sufficient evidence to support the jury's determination that Collins qualified for MDO status.[18]

In detailing the history of Penal Code section 2962, the court commented that the standard for determining MDO status was unclear and construed the statute so

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psychologist or psychiatrist from the State Department of Mental Health at a facility at the Department of Corrections. *Id.* § 2962(d)(1) (amended by Chapter 16).

10. *Id.* § 2962(d)(1) (amended by Chapter 16).

11. *See infra* notes 19-20 and accompanying text (relating the difficulty of interpreting Penal Code section 2962(e) and the suggestion by the court to amend it); 1995 Cal. Legis. Serv. ch. 761, sec. 1, at 4602 (amending CAL. PENAL CODE § 2962) (appending a list of enumerated felonies, including voluntary manslaughter, attempted murder, certain crimes in which the prisoner "personally used a deadly or dangerous weapon," and non-enumerated crimes "in which the prisoner used force or violence"). The fact that a prisoner was convicted of a felony listed in section 2962 must be proven in addition to showing that the prisoner suffers from a mental disorder. CAL. PENAL CODE § 2962(e) (amended by Chapter 16).

12. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 279, at 5 (Mar. 16, 1999). Provisions for determining if a crime qualifies under section 2962 have been rather broad in the past, leading to difficulties in establishing that the crime involved force or violence. *See infra* notes 19-20 and accompanying text (noting the previous wording of section 2962 and the circumstances of its amendment in 1995). *See generally infra* Part II.B (discussing interpretations of qualifying crimes under the MDO Law).

13. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 279, at 5 (Mar. 16, 1999).

14. 10 Cal. App. 4th 690, 12 Cal. Rptr. 2d 768 (1992).

15. *Id.* at 696-97, 12 Cal. Rptr. 2d at 772.

16. *Id.* at 693, 12 Cal. Rptr. 2d at 770.

17. *Id.*, 12 Cal. Rptr. 2d at 770.

18. *Id.* at 698, 12 Cal. Rptr. 2d at 773. The appellate court held that the trial court erred in advising the jury as to the consequences of its verdict, and the verdict was reversed on this basis. *Id.* at 695, Cal. Rptr. 2d at 771.

as to avoid redundancy and to give each word significance.[19] The court suggested that the Legislature amend the statute to specify more clearly what crimes qualify a prisoner for MDO status.[20]

People v. Pretzer[21] also held that "force" and "violence" were not synonymous.[22] On March 14, 1989, David Pretzer entered a Fresno animal hospital, announced that he had a gun, and demanded that the employees give him drugs.[23] Although he was not armed with a gun, he did have a plastic razor in his coat pocket.[24] He pleaded guilty to two counts of false imprisonment, was sentenced to three years in prison for this incident, and served this sentence in the state mental hospital at Atascadero.[25] Pretzer was certified as a "mentally disordered offender" under California Penal Code section 2962, effectively continuing his involuntary treatment at Atascadero.[26]

Pretzer appealed his MDO certification, contending that he did not meet the "force or violence" requirement.[27] In 1992, a California appellate court affirmed his certification,[28] noting that Pretzer was convicted of false imprisonment, which requires either express or implied force to restrain a person's liberty.[29] Reasoning by analogy to the robbery statute, the appellate court held that Pretzer's act of pretending to have a gun was sufficient to make a showing of force that overcame his victims' resistance to escape.[30] The impact of *Pretzer* was to accept the use of *implied* force to sustain a determination of MDO status.[31]

In *People v. Anzalone*,[32] the California Supreme Court considered the use of

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19. *Id.* at 698, 12 Cal. Rptr. 2d at 773. Before 1995, the MDO Law applied when "[t]he crime referred to . . . was a crime in which the prisoner used force or violence, or caused serious bodily injury." *Id.* at 696 n.4, 12 Cal. Rptr. 2d at 772 n.4.

20. *Id.* at 697-98, 12 Cal. Rptr. 2d at 773. *See* 1995 Cal. Legis. Serv. ch. 761, sec. 1, at 4602 (amending CAL. PENAL CODE § 2962) (listing specific crimes for MDO eligibility).

21. 9 Cal. App. 4th 1078, 11 Cal. Rptr. 2d 860 (1992).

22. *Id.* at 1082, 11 Cal. Rptr. 2d at 862.

23. *San Joaquin Valley News Briefs*, UPI, Mar. 15, 1989, *available in* LEXIS, California News Sources Library (copy on file with the *McGeorge Law Review*). Fifteen months earlier, Pretzer used a toy gun to force his way into a Fresno television station during a live news broadcast, and demanded that the sportscaster read a religious statement. *Man with Toy Gun Disrupts News Show, Forces Sportscaster to Read Statement*, SAN DIEGO UNION-TRIB., Dec. 5, 1987, at A3.

24. *Pretzer*, 9 Cal. App. 4th at 1081, 11 Cal. Rptr. 2d at 862 (1992).

25. *Id.* at 1081, 11 Cal. Rptr. 2d at 861-62.

26. *Id.*, 11 Cal. Rptr. 2d at 861-62.

27. *Id.* at 1082, 11 Cal. Rptr. 2d at 862.

28. *Id.* at 1083, 11 Cal. Rptr. 2d at 863.

29. *Id.*, 11 Cal. Rptr. 2d at 863.

30. "In the context of the robbery statute, [citation omitted] 'force' is not limited to an application of power such as bludgeoning the victim. [citation omitted] The test is whether 'resistance is involuntarily overcome.'" *Id.* at 1083, 11 Cal. Rptr. 2d at 863 (citing People v. Dreas, 153 Cal. App. 3d 623, 628, 200 Cal. Rptr. 586, 589 (1984)).

31. *Id.*, 11 Cal. Rptr. 2d at 863.

force under the MDO Law. Russell Anzalone walked into a bank and handed the teller a note that said, "This is a robbery, give me the money."[33] Without showing any weapon or displaying any other threatening conduct, he then directed the teller to give him twenty dollars.[34] When the teller gave him the money, he left.[35] Anzalone was convicted of second degree robbery and sentenced to prison.[36] Before his release from prison, the Board of Prison Terms determined that he was a mentally disordered offender under the MDO Law; a trial court confirmed this status.[37]

On appeal to the California Supreme Court, Anzalone argued that his commitment was improper because his offense involved neither actual force nor the use of a dangerous weapon.[38] The court determined that his crime did not involve "the use of 'force or violence' within the meaning of section 2962, subdivision (e)(2)(P)."[39] To support its position concerning legislative intent, the court echoed the *Collins* court's suggestion for the Legislature to clarify the offenses qualifying a prisoner for MDO status.[40] The *Anzalone* court reasoned that the Legislature, had it so desired, could have expressly included the implied threat of force in its list of crimes, as it had in other sections of the Penal Code.[41] Therefore, prior to Chapter 16, California law followed the ruling of *Anzalone* and its theory that only actual force would support a determination of MDO status.[42]

III. CHAPTER 16

Chapter 16 amends California Penal Code section 2962 in three ways. First, Chapter 16 creates a new subdivision allowing an MDO commitment to be based upon a crime in which the offender made a credible threat to use force or violence likely to inflict serious bodily injury.[43] Second, Chanter 16 adds new arson provisions to the list of enumerated felonies. Previously, the only arson included as a specific underlying felony was arson causing "great bodily injury."[44] Chapter 16

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32. 19 Cal. 4th 1074, 969 P.2d 160, 81 Cal. Rptr. 2d 315 (1999). The defendant died while his appeal was pending, but the Supreme Court exercised its jurisdiction to consider the case. *Id.* at 1076, 969 P.2d at 161, 81 Cal. Rptr. 2d at 316.
33. *Id.*, 969 P.2d at 161, 81 Cal. Rptr. 2d at 316.
34. *Id.*, 969 P.2d at 161, 81 Cal. Rptr. 2d at 316.
35. *Id.*, 969 P.2d at 161, 81 Cal. Rptr. 2d at 316.
36. *Id.* at 1077, 969 P.2d at 161, 81 Cal. Rptr. 2d at 316.
37. *Id.*, 969 P.2d at 161, 81 Cal. Rptr. 2d at 316.
38. *Id.*, 969 P.2d at 161, 81 Cal. Rptr. 2d at 316.
39. *Id.* at 1078, 969 P.2d at 162, 81 Cal. Rptr. 2d at 317.
40. *Id.* at 1082, 969 P.2d at 165, 81 Cal. Rptr. 2d at 320.
41. *Id.* at 1080-81, 969 P.2d at 164, 81 Cal. Rptr. 2d at 319.
42. *Id.* at 1083, 969 P.2d at 165, 81 Cal. Rptr. 2d at 320.
43. CAL. PENAL CODE § 2962(e)(2)(Q) (amended by Chapter 16).
44. *See* 1995 Cal. Legis. Serv. ch. 761, sec. 1, at 4603 (amending CAL. PENAL CODE § 2962) (including "[a]rson in violation of subdivision (a) of Section 451" as one of the enumerated crimes).

adds any arson other than that causing "great bodily injury"[45] to the list of enumerated felonies, and it also adds any attempted arson "that posed a substantial danger of physical harm to others"[46] to the list of enumerated felonies.[47] Finally, Chapter 16 contains an urgency clause to prevent the release of, and guarantee mental health treatment for, offenders who might otherwise be released under the holding of *Anzalone*.[48]

IV. ANALYSIS OF THE NEW LAW

A. *Fiscal Analysis*

The addition of implied-force and arson offenders to MDO eligibility requirements will likely increase the number of prisoners declared MDOs.[49] Under *Anzalone*, perhaps forty to fifty current MDOs could be released.[50] Without Chapter 16, these prisoners would be released on parole, resulting in immediate savings in treatment costs.[51] However, these savings are offset by the potential for subsequent offenses.[52] Chapter 16 allows these prisoners to be adjudged MDOs, resulting in an initial cost of about $5 million for treatment.[53] After initial costs, the combination of implied-force offenders and new arson offenders is estimated to produce annual costs of about $5 million.[54]

This cost seems to be minimal in relation to the State's total criminal justice agency expenditures, which have been more than $10 billion annually since 1988-89.[55] In 1995-96, the corrections expenditures alone were approximately $6

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45. CAL. PENAL CODE § 451(a) (West 1999).

46. *Id.* § 2962(e)(2)(L) (amended by Chapter 16).

47. *Id.*

48. 1999 Cal. Legis. Serv. ch. 16, sec. 3, at 67 (providing that the new law becomes effective immediately).

49. *See* SENATE COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF SB 279, at 1 (Mar. 22, 1999) (detailing increased costs due to commitments under the new arson provision in addition to retention of implied-force MDOs).

50. ASSEMBLY COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF SB 279, at 1 (Apr. 14, 1999). Presumably, these are implied-force offenders who were adjudged MDO under *Pretzer*, but would need to be released under *Anzalone*. *See supra* notes 21-42 and accompanying text (relating the history of the MDO Law under the *Pretzer* and *Anzalone* cases).

51. SENATE RULES COMMITTEE, FLOOR ANALYSIS OF SB 279, at 8 (Mar. 23, 1999).

52. SENATE RULES COMMITTEE, FLOOR ANALYSIS OF SB 279, at 8 (Mar. 23, 1999).

53. *See* ASSEMBLY COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF SB 279, at 1 (Apr. 14, 1999) (estimating that MDO commitments cost the State about $107,000 per MDO annually).

54. The Department of Mental Health and the Youth and Adult Correctional Agency estimate that about thirty MDOs would be affected annually—at a cost of $3.2 million—and if fifteen persons are adjudged to be MDOs due to the added arson provisions—at a cost of $1.6 million—the cost could reach $5 million. ASSEMBLY COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF SB 279, at 1 (Apr. 14, 1999).

55. This figure includes costs from law enforcement, prosecution, public defense, courts, and corrections. CRIMINAL JUSTICE STATISTICS CENTER, CALIFORNIA DEPARTMENT OF JUSTICE, *Criminal Justice Agency Expenditures, Fiscal Years 1951/52–1996/97* <http://caag.state.ca.us/cjsc/cd97/tabs/cd97tb48.pdf> (visited Nov. 16, 1999) (copy on file with the *McGeorge Law Review*).

billion.[56] The costs of implementing and maintaining provisions in Chapter 16 would also be mitigated by reduced parole costs and potentially reduced recidivism.[57] The cost of recidivism is spread across all aspects of the criminal justice system, for these prisoners must be booked, prosecuted, defended, and incarcerated again.[58] Studies of the MDO program have shown a recidivism rate of about five percent, while the estimate of mentally ill prisoners returning to prison without the program is ninety-four percent.[59]

B. *Comparison of Alternative Procedures: The Lanterman-Petris-Short Act*

Provisions already exist for involuntary commitment and treatment of dangerous persons. The Lanterman-Petris-Short (LPS) Act[60] provides for involuntary treatment of mentally disordered and gravely disabled persons.[61] The LPS Act is broader than the MDO Law concerning who may be treated,[62] but the treatment under the LPS Act is of shorter duration.[63] Parolees with mental disorders are not specifically addressed in the LPS Act.[64] The California Code of Regulations establishes procedures for revoking parole.[65] If a parolee suffers from a mental disorder that renders him a danger to the community, or if he has displayed conduct

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56. *Id.* The total criminal justice agency expenditures for 1995-96 were more than $16 billion. *Id.*

57. *See* ASSEMBLY COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF SB 279, at 2 (Apr. 14, 1999) (estimating reduced parole costs of approximately $100,000, with no estimate of savings from recidivism); *see also infra* notes 58-59 and accompanying text (considering the scope of recidivism costs in the corrections system and reporting decreased recidivism rates for prisoners in the MDO program).

58. SENATE RULES COMMITTEE, FLOOR ANALYSIS OF SB 279, at 7-8 (Mar. 23, 1999); *see* CRIME STATE RANKINGS 80 (Kathleen O'Leary Morgan et al. eds., 1st ed. 1994) (listing the average cost of incarceration in California in 1990 to be $21,816 per inmate, based on data from the United States Department of Justice, Bureau of Justice Statistics).

59. SENATE RULES COMMITTEE, FLOOR ANALYSIS OF SB 279, at 7-8 (Mar. 23, 1999).

60. CAL. WELF. & INST. CODE §§ 5000–5550 (West 1998 & Supp. 2000).

61. *Id.* § 5001 (West 1998). The LPS Act also provides for appointment of a conservator for gravely disabled persons. *Id.*

62. *See id.* § 5002 (West 1998) (stating that persons impaired by chronic alcoholism and mentally disordered persons may receive services under the LPS Act); *id.* § 5170 (West 1998) (allowing dangerous persons and persons "gravely disabled as a result of inebriation" to be taken into civil protective custody); *id.* § 5200 (West 1998) (specifying mentally disordered and gravely disabled persons as persons who may be given court-ordered evaluations).

63. *Compare* CAL. WELF. & INST. CODE §§ 5250, 5270.15 (West 1998) (providing that, after an initial 72-hour holding period and extension of fourteen days, persons dangerous to others and persons who remain gravely disabled and unable to accept voluntary treatment may be certified for further treatment for up to thirty days), *and id.* § 5260 (West 1998) (specifying that suicidal persons are eligible for continued intensive treatment under the LPS Act for up to fourteen days after the initial holding period and extension), *with* CAL. PENAL CODE § 2970 (West Supp. 2000) (providing that, under the MDO Law, the district attorney may file a petition for continued involuntary treatment at the end of the prisoner's parole or time of release from prison, if the prisoner did not agree to treatment as a condition of parole).

64. *See supra* note 62 (detailing who may be treated under the LPS Act; no reference to parolees is made).

65. CAL. CODE REGS. tit. 15, §§ 2600–2744 (2000).

indicating a deterioration in mental condition likely to produce future criminal behavior, parole may be revoked.[66]

While the idea of involuntary treatment of persons with mental disorders is embodied in both the LPS Act and the MDO Law, the underlying purpose of each set of laws is distinct. Both require prisoners to meet conditions to be certified for treatment, but the procedures for certification under the MDO Law are more likely to identify prisoners whose mental disorders are dangerous to society.[67] The purpose of the LPS Act is to identify potentially dangerous persons or persons unable to care for themselves.[68] Prisoners who meet the MDO criteria are eligible for commitment under the LPS Act; however, under the LPS Act, the burden of committing such individuals after they are out on parole is on the ex-prisoner or some member of the public.[69] The eligibility requirements of the MDO Law strongly suggest that its purpose is to hold those prisoners who have shown themselves to be dangerous to the public as the result of a mental disorder, and to adequately treat them before they are returned to the community.[70]

Without Chapter 16, the existing forty to fifty MDOs who could be released under *Anzalone* would not necessarily receive treatment, and if they did, they would receive treatment for a shorter period of time.[71] These offenders may be more likely to commit subsequent offenses without treatment.[72] Under Chapter 16, these prisoners are automatically considered for treatment, and will continue to receive treatment until their condition can be kept in remission.[73] Conditions for parole

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66. *Id.* §§ 2637(6), 2616(a)(14) (2000).

67. *Compare* CAL. WELF. & INST. CODE §§ 5260, 5270.15 (West 1998) (noting the conditions under which persons may be certified for further involuntary treatment under the LPS Act), *with* CAL. PENAL CODE § 2962(a)-(c) (amended by Chapter 16) (listing the requirements for prisoners eligible for treatment pursuant to the MDO Law); *compare* CAL. WELF. & INST. CODE § 5201 (West 1998) (allowing any individual to apply for a petition under the LPS Act to allege that a person is, as a result of a mental disorder, dangerous to others), *with* CAL. PENAL CODE § 2962(b) (amended by Chapter 16) (requiring that, as a condition of parole, a prisoner whose mental disorder was a factor in the commission of a crime must be treated, subject to other criteria).

68. *See* CAL. WELF. & INST. CODE § 5001 (West 1998) (expressing the intent of the Legislature in adopting the provisions of the LPS Act).

69. *See id.* § 5003 (West 1998) (specifying that a person may commit herself for voluntary treatment under the LPS Act); *see also* CAL. WELF. & INST. CODE §§ 5250, 5270.15 (West 1998) (discussing the procedure for selecting persons for involuntary treatment under the LPS Act).

70. *See* CAL. PENAL CODE § 2960 (West Supp. 2000) (stating one of the Legislature's findings of fact that these prisoners should be provided with treatment before they are returned to the community).

71. *See supra* note 63 (comparing the treatment provisions under the MDO Law with other existing treatment options).

72. *See supra* notes 57-59 and accompanying text (considering the fiscal impact of Chapter 16 with respect to recidivism, and noting that the recidivism rate for offenders in the MDO program is about five percent).

73. CAL. PENAL CODE § 2968 (West Supp. 2000). If the condition does not go into remission, a petition for continued involuntary treatment may be filed. *Id.* § 2970 (West Supp. 2000). If a prisoner fails to meet the criteria of the MDO Law, the Director of Corrections may use the LPS Act to subject the prisoner to treatment. *Id.* § 2974 (West Supp. 2000).

revocation remain the same regardless of the presence of Chapter 16,[74] but evaluating prisoners automatically before parole is granted is more effective at preventing future crime.[75]

V. CONCLUSION

Protection of public health and safety is the focus of the MDO Law.[76] Because the conduct and the mental state of prisoners in prison are poor predictors of future behavior on their own, the original offense is important in identifying which prisoners are more likely to be dangerous to society.[77] Chapter 16 includes implied-force and arson offenders within the scope of the MDO Law.[78] While procedures already exist for involuntary mental treatment, they rely on someone who will take the initiative to commence treatment after the prisoner is out on parole, rather than the prisoner merely continuing treatment upon release into society.[79] Automatic consideration of a prisoner's mental health at the time of parole, with respect to previous criminal activity, will probably be more effective in protecting public welfare.[80]

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74. *See supra* notes 65-66 and accompanying text (addressing the existing regulations concerning parole revocation).

75. *See supra* notes 67-68 and accompanying text (comparing the underlying purposes of the LPS Act and the MDO Law).

76. CAL. PENAL CODE § 2960 (West Supp. 2000).

77. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 279, at 5 (Mar. 16, 1999).

78. CAL. PENAL CODE § 2962(e)(2)(L), (Q) (amended by Chapter 16); *see supra* Part III (detailing the provisions of Chapter 16).

79. *See supra* notes 60-66 and accompanying text (discussing existing provisions for the commitment of mentally disordered persons).

80. *See supra* Part II.A (recapitulating California's position on prisoners with mental disorders and the provisions of the MDO Law); *supra* text accompanying notes 67-70 (concluding that the likely purpose of the MDO Law is to identify prisoners who are potential dangers to society and to certify such prisoners for mandatory treatment).

Insatiable "Up-Skirt" Voyeurs Force California Lawmakers to Expand Privacy Protection in Public Places

David D. Kremenetsky

Code Section Affected
Penal Code § 647 (amended).
AB 182 (Ackerman); 1999 STAT. Ch. 231

I. INTRODUCTION

The law of privacy marks the boundary line in the battle between privacy of individuals within society and the community in which they live.[1] This battle is characterized on one side by an increasing encroachment of the community into the private sphere.[2] The other side is composed of persons seeking to assert rules, or social norms, against other members of their community to protect them against "injury to the inner person" caused by undue invasion into their private lives and to allow them to remain unique and autonomous individuals.[3] The common law tort of invasion of privacy guards what some have called the rules of civility.[4] However, as predicted by the famous law review article by Justices Warren and Brandeis, privacy is threatened on two fronts: (1) by the press;[5] and (2) by the proliferation of mechanical devices.[6] The inevitable and periodic reconciliation between new technology and the embattled moral standards of society has resulted in a recent intensification of concerns over privacy.[7] Use of video recording devices in public places is one present manifestation of the old battle.[8]

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1. *See* Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CAL. L. REV. 957, 957 (1989) ("Privacy is commonly understood as a value asserted by individuals against the demands of a curious and intrusive society.").
2. *Id.* at 957-58.
3. *Id.*
4. *See id.* (employing the phrase "civility rules" in discussing "the dissemination of information").
5. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 196 (1890).
6. *Id.* at 195.
7. Andrew Jay McClurg, *Bring Privacy Law out of the Closet: A Tort Theory of Liability for Intrusions in Public Places*, 73 N.C. L. REV. 989, 990-91 (1995).
8. *Id.*

A rash of incidents involving surreptitious videotaping under women's skirts and down their blouses in public places has fueled the fire of the old controversy.[9] Inspired by newly available technology, some individuals have taken to the new endeavor which some describe as a modern-day hunt for sport.[10] Three incidents in particular have come to represent a source of frustration for police officials and prosecutors alike.[11] All three incidents involved men caught in the act: one at Disneyland, one at the Garden Grove Strawberry Festival, and a third at Huntington Beach, all in Orange County, California.[12] All three men were let go after questioning because even though their behavior may have been "sick" and "perverted," apparently it was not illegal.[13]

A man wearing a goatee spent eleven hours at Disneyland trying to slide a bag containing a camera under women's legs.[14] Relentlessly following women around the park, the man would position the bag under their skirts or shorts for up to ten minutes at a time.[15] In Garden Grove, a man filmed down women's tops at the Strawberry Festival as they got off rides and walked around the park.[16] In another incident, police officers trained to spot sexual predators detained a man at Huntington Beach who was carrying a camera concealed in a boom box.[17] The officers noted the man was "acting strangely and following women around."[18] After reviewing his tape for images of children under age sixteen and observing only images of adult beachgoers, police released the man.[19]

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9. *See* Bill Rams, *Cyber-Peeping: It's Growing, It's Frustrating, and It's Legal—Trend: Officials Say There's Nothing They Can Do to Stop Men from Filming up Skirts in Public Places*, ORANGE COUNTY REG., June 26, 1998, at A1[hereinafter Rams, *Cyber-Peeping*] (describing an incident in which some men were caught using video cameras to surreptitiously film up women's skirts and down their blouses); Bill Rams, *Prosecuting Up-Skirt Videotaping May Be Uphill Battle—Crime: Another Man Is Acquitted of Similar Charges. The Problems Is the Law Doesn't Address the Offense*, ORANGE COUNTY REG., Aug. 27, 1998, at B2 [hereinafter Rams, *Prosecuting Up-Skirt Videotaping*] (providing the cases of David Wayne Lyman and John Lopez as examples).

10. *See* Bill Rams, *Cyber-Peeping*, *supra* note 9, at A1 (quoting Robert Roy, an employee of an Irvine-based Internet site) (stating that videotaping underneath skirts "is a high-tech, urban form of hunting").

11. *See id.* (quoting an outraged Sergeant Bob Conklin, who said that "[n]o one should have to feel that they [sic] need to be careful because someone might stick a camera up her dress").

12. *See infra* notes 14-19 (describing the three incidents which were the impetus for the passage of Chapter 231).

13. *Infra* notes 14-19.

14. *Peeping Toms Find Legal Ways to Film. Some Pictures Are Shown on Internet*, SAN DIEGO UNION-TRIB., June 27, 1998, at A3.

15. *Id.*

16. Rams, *Cyber Peeping*, *supra* note 9, at A1.

17. Robert J. Manzano, *Focus: Orange County Community News Northwest / Huntington Beach: Man on Beach Detained for Concealed Video Camera*, L.A. TIMES, May 29, 1998, at B2.

18. *Id.*

19. *Id.* The article illustrates that it was not against the law to surreptitiously tape adults at a public beach. *Id.*

Demand for "up-skirt" pictures has produced more than one hundred Internet sites devoted to this genre.[20] A group of employees who work on such sites routinely go "hunting" for "up-skirt" pictures.[21] Although video camcorders have been in existence since 1985, the recent expansion of the Internet fueled the "up-skirt" craze.[22]

As California lawmakers explored the prospects of amending the law to curb such behavior, they discovered to their satisfaction strong support for a narrow measure to stop the abuses. In fact, Chapter 231, which indeed amends the law in this regard, received unanimous support on the floors of both houses of the California Legislature. [23] Part II of this Legislative Note examines the legal background supporting the right to privacy, including civil and criminal penalties existing to protect that right. Part III outlines the provisions of Chapter 231, and explains how the expansion of the right to privacy in public places is a departure from existing law. Part IV of this Note analyzes the effect of Chapter 231 on the right to privacy and its impact as a deterrent to "up-skirt" voyeurs. Finally, Part V attempts to place the new law in the context of a changing society.

II. LEGAL BACKGROUND

The tort of "invasion of privacy" was born after *Harvard Law Review* published an influential law review article by Justices Warren and Brandeis in 1890.[24] In 1960, Dean William Prosser separated the common law tort of invasion of privacy into four distinct causes of action: (1) intrusion upon seclusion; (2) publication of private facts; (3) appropriation; and (4) false light.[25] Many courts around the country currently use Dean Prosser's definition of invasion of privacy, which is articulated in the Restatement (Second) of Torts.[26] The tort of "intrusion" is committed by "[o]ne who intentionally intrudes, physically or otherwise, upon the

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20. Robert Salladay, *Assembly Targets Video Voyeurs; Peeping Toms Tape 'Upskirt' Shots, Post on Internet*, S.F. EXAMINER, Apr. 7, 1999, at A1; *see id.* (quoting Assemblyman Dick Ackerman, the principal author of Chapter 231) (noting that the sites are "making millions and millions of dollars at" posting such images).

21. *Id.*; *see also id.* (detailing the activities of the so-called "V-team," which, according to a spokesperson for Upskirts.com, Andrew Drake, "'infiltrate[s] by every means possible the places where women least expect to be seen'").

22. McClurg, *supra* note 7, at 1017-25. Justices Warren and Brandeis originally identified technology as a looming threat to privacy. *Id.* The video recorder as a mechanical device poses a great peril to human privacy. *Id.* Those using video camcorders to surreptitiously film women have found encouragement on the Internet. *See* Rams, *Cyber-Peeping*, *supra* note 9, at A1 (identifying the Web sites that are "teaching men how to film 'up-skirt' or 'down-blouse' without getting caught").

23. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 182, at 4-9 (Aug. 13, 1999); *see id.* (reporting that the Assembly voted 79-0 on May 28, 1999, and the Senate 40-0 on July 15, 1999).

24. Warren & Brandeis, *supra* note 5, at 193.

25. William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960).

26. *E.g.*, Fernandez-Wells v. Beauvais, 983 P.2d 1006, 1008 (N.M. Ct. App. 1999); Doe v. Methodist Hosp., 690 N.E.2d 681, 684 (Ind. 1997); Stien v. Marriott Ownership Resorts, Inc., 944 P.2d 374, 377 (Utah Ct. App. 1997).

solitude or seclusion of another or his private affairs or concerns . . . if the intrusion would be highly offensive to a reasonable person."[27]

In addition to this common law tort, California has a statute forbidding invasion of privacy which contains modern language to supplant the common law definition.[28] California voters even passed a constitutional amendment in 1974 which places privacy on a pedestal reserved for rights deemed foremost in importance.[29] Nevertheless, for all the protection that these laws offer, no U.S. jurisdiction has ever explicitly upheld the right of privacy in public places on the theory that individuals have a reasonable expectation of privacy in public.[30]

In addition to civil penalties, California has a criminal Peeping Tom statute which classifies as a misdemeanor looking into a private area in which the occupant has a reasonable expectation of privacy,[31] regardless of the location in which the

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27. RESTATEMENT (SECOND) of TORTS § 652B (1976).

28. *See* CAL. CIV. CODE § 1708.8 (West Supp. 1999) (dividing invasion of privacy into physical invasion and constructive invasion). California Civil Code § 1708.8 states:

> (a) A person is liable for physical invasion of privacy when the defendant knowingly enters onto the land of another without permission or otherwise committed a trespass, in order to physically invade the privacy of the plaintiff with the intent to capture any type of visual image, sound recording, or other physical impression of the plaintiff engaging in a personal or familial activity and the physical invasion occurs in a manner that is offensive to a reasonable person.
>
> (b) A person is liable for constructive invasion of privacy when the defendant attempts to capture, in a manner that is offensive to a reasonable person, any type of visual image, sound recording, or other physical impression of the plaintiff engaging in a personal or familial activity under circumstances in which the plaintiff had a reasonable expectation of privacy, through the use of a visual or auditory enhancing device, regardless of whether there is a physical trespass, if this image, sound recording, or other physical impression could not have been achieved without a trespass unless the visual or auditory enhancing device was used.

Id.

29. CAL. CONST. art. 1, § 1. "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." *Id.*

30. *See* McClurg, *supra* note 7, at 995-96; *see, e.g.*, Fogel v. Forbes, Inc., 500 F. Supp. 1081, 1087 (E.D. Pa. 1980) (holding that when a researcher for Forbes Magazine took a picture of the plaintiffs at Miami International Airport, the researcher did not invade the plaintiffs' privacy because "this tort does not apply to matters which occur in a public place or a place otherwise open to the public eye"). *But see* Daily Times Democrat v. Graham, 162 So. 2d 474, 478 (Ala. 1964) (refusing to mechanically apply the principle that invasion of privacy cannot occur in public places where a woman's picture was taken by a newspaper photographer while her skirt was suddenly blown up by jets of air as she was leaving a fun house at a county fair).

31. CAL. PENAL CODE § 647(k)(1) (amended by Chapter 231); California Penal Code § 647(k)(1) provides:

> Any person who looks through a hole or opening, into, or otherwise views, by means of instrumentality, including, but not limited to, a periscope, telescope, binoculars, camera, motion picture camera, or camcorder, the interior of a bathroom, changing room, fitting room, dressing room, or tanning booth, or the interior of any other area in which the occupant has a reasonable expectation of privacy, with the intent to invade the privacy of a person or persons inside . . . .

Id.

perpetrator is standing.[32] Further, "peeping" is one of the acts which California Penal Code section 647 characterizes as "disorderly conduct."[33]

In 1996, the Legislature amended the Peeping Tom statute.[34] The amendment was intended to close a loophole which had stumped law enforcement officials and allowed some peeping toms to escape punishment.[35] However, just like the prevailing civil provisions protecting privacy, the criminal Peeping Tom statute was not intended to extend to public places.[36] Not surprisingly, the Peeping Tom statute proved inadequate in reining in the "up-skirt" voyeurs operating in public.[37]

III. CHAPTER 231

Chapter 231 amends the existing Peeping Tom statute with new language designed to expand the definition of disorderly conduct.[38] Under the pre-Chapter 231 Peeping Tom statute, the prohibited target of the disorderly conduct was an occupant of a private area.[39] Chapter 231 expands this prohibited target to any identifiable person in any area, including a public place.[40] Such a broad expansion of potentially illegal conduct necessitates limitations.[41] The statutory language has to be narrow enough so as not to be struck down as vague or overbroad, as

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32. *See id.* § 647(i) (West 1999) (applying to peeping toms only if the perpetrator is "loitering, prowling, or wandering upon the private property of another").

33. *Id.* § 647 (amended by Chapter 231); *see id.* (including the following acts in the definition of "disorderly conduct": engaging in lewd conduct in a public place, section 647(a); soliciting or engaging in prostitution, section 647(b); aggressive panhandling, section 647(c); loitering around a public toilet "for the purpose of engaging in or soliciting any lewd or lascivious or any unlawful act," section 647(d); loitering in public, section 647(e); appearing intoxicated in public, section 647(f); peeping into an inhabited building while trespassing upon private property of another, section 647(i); lodging in any place without the owner's permission, section 647(j); looking into a private area where the occupant has a reasonable expectation of privacy, section 647(k)).

34. 1996 Cal. Stat. ch. 1020, sec. 2, at 4810. *See generally* Lisa F. Wu, *Peeping Tom Crimes*, 28 PAC. L.J. 705, 709 (1996) (reporting on the passage of the 1996 amendment to section 647(k), which prohibits Peeping Tom crimes).

35. *See* Wu, *supra* note 34, at 709 (disclosing that the law was written to address refusal by courts to find invasion of privacy where the perpetrator used a device such as a video camera).

36. *See supra* notes 24-30 and accompanying text (explaining that historically, privacy could not be invaded in a public place).

37. Rams, *Cyber-Peeping*, *supra* note 9, at A1.

38. *See* CAL. PENAL CODE § 647(k)(2) (amended by Chapter 231) (classifying as a misdemeanant: [a]ny person who uses a concealed camcorder, motion picture camera, or photographic camera of any type, to secretly videotape, film, photograph, or record by electronic means, another, identifiable person under or through the clothing being worn by that other person, . . . without the consent or knowledge of that other person, with the intent to arouse, appeal to or gratify the lust, passions, or sexual desires of that person and invade the privacy of that other person, under circumstances in which the other person has a reasonable expectation of privacy).

39. 1996 Cal. Stat. ch. 1020, sec. 2, at 4810.

40. CAL. PENAL CODE § 647(k)(2).

41. *Cf.* SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 182, at 4-9 (June 8, 1999) (explaining that laws which do not define "disorderly conduct" with a reasonable degree of certainty risk violating the United States and California guarantees of due process).

California Penal Code section 647(e) once was.[42] Therefore, lawmakers adopted limiting language to narrow the scope of the targeted offense.[43]

In order for conduct to fall under the definition of Chapter 231, it must meet all of the following conditions.[44] First, a person must use a concealed device to secretly film or record another person under or through the other's clothing.[45] Second, the person being recorded must be identifiable.[46] Third, the recording must be "for the purpose of viewing the body of, or the undergarments worn by, th[e] other person."[47] Fourth, such a recording must be done without the consent or knowledge of the other person.[48] Fifth, the disorderly conduct described above must be done with the specific intent "to arouse, appeal to, or gratify the lust, passions or sexual desires" of the perpetrator.[49]

Chapter 231 is aimed at providing law enforcement with a tool to address concerns occasioned by the three highly publicized incidents in Orange County.[50] Moreover, it answers the legislators' concerns over emerging infrared technology, which may allow victims to be viewed through their clothing in normal lighting.[51] However, Chapter 231 is not meant to criminalize the work of private investigators, photojournalists or law enforcement officers.[52]

IV. ANALYSIS OF THE NEW LAW

The incidents which necessitated this amendment required a swift and sure response.[53] Nevertheless, while the intent behind Chapter 231 is admirable, its

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42. *See* Pryor v. Municipal Court, 25 Cal. 3d 238, 252 (1979) (holding that "vague statutory language . . . creates the danger that police, prosecutors, judges and juries will lack sufficient safeguards to reach their decisions"); *cf., e.g.*, Kolender v. Lawson, 461 U.S. 352, 361 (1983) (striking down California Penal Code section 647(e), an anti-loitering statute, for vagueness, as it was likely to lead to arbitrary enforcement in the definition of the word "identification"). *Kolender* was a declaratory judgment action brought by a man who was convicted under section 647(e) for failing to "identify" himself to police when he was stopped while walking on a vacant street late at night. *Id.* at 354 n.2.

43. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 182, at 4-9 (June 8, 1999).

44. CAL. PENAL CODE § 647(k)(2) (amended by Chapter 231).

45. *Id.*; *see id.* (defining such a concealed device as a video camcorder, motion picture camera, or photographic camera of any type).

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *See* SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 182, at 3 (June 8, 1999) (identifying the three incidents in Orange County as the specific impetus for Chapter 231); *see also supra* text accompanying notes 11-18 (recapitulating these incidents).

51. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 182, at 3 (June 8, 1999).

52. *Id.* at 4.

53. *See supra* text accompanying notes 9-18 (detailing the intrusive acts of some "up-skirt" voyeurs, which could not be halted by law enforcement officers without amending existing law).

enforcement may prove problematic.[54] The language of the statute requires that the victims of the crime be identifiable.[55] However, one of the main reasons that Chapter 231 was needed is the fact that the victims could not be identified from the pictures taken by the voyeurs.[56] These victims could not sue for invasion of privacy in civil court precisely for this reason.[57] Furthermore, defense arguments would undoubtedly stray to the question of whether a reasonable expectation of privacy existed under the circumstances.[58] A woman wearing a "short skirt" or a "see-through blouse" may not reasonably expect that her undergarment would remain unobserved.[59] Still, even if such a woman expects her undergarments to be seen by the naked eye, she may not necessarily assent to being videotaped for sexual purposes.[60]

Proof that visual recordings were made for purposes of sexual gratification presents an additional problem for prosecutors.[61] Because the law requires this specific intent element, employees of commercial enterprises, such as those on the Internet, would not fall within its scope.[62] Any would-be video voyeur could cast reasonable doubt on the purpose of his or her activities simply by securing an inexpensive "up-skirt" Internet site for supposedly commercial purposes rather than sexual gratification.[63] Not only are Internet "up-skirt" voyeur sites not concerned about the passage of Chapter 231, they are thankful for its passage.[64] An unfortunate

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54. *See* SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 182, at 4-9 (June 8, 1999) (noting the myriad of problems associated with enforcement of the amendment).

55. CAL. PENAL CODE § 647(k)(2) (amended by Chapter 231); *see also* SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 182, at 5 (June 8, 1999) (raising the "issue of whether a defendant can be found guilty of criminal violation of privacy where it cannot be determined whose privacy was invaded").

56. *See* Salladay, *supra* note 20, at A1 (illustrating from the comments of Andrew Drake, the spokesman for Upskirts.com, why it is so difficult for victims to sue in civil court, and now under the Penal Code, even if the element of expectation of privacy is met: "We never show women's faces. It would be very hard to recognize someone from their behind. Their faces are blurred out.").

57. *Id.*

58. *See* CAL. PENAL CODE § 647(k)(2) (amended by Chapter 231) (requiring the victim to have a "reasonable expectation of privacy"); SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 182, at 5-7 (June 8, 1999) (characterizing this issue as "particularly difficult in situations where (1) the victim wears a 'short skirt' which allows observation without any 'extraordinary effort by the defendant,' and (2) where the victim is wearing transparent clothing").

59. *Cf.* SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 182, at 7 (June 8, 1999).

60. *See id.* (observing that the issue revolves around the victim's reasonable expectation of privacy); McClurg, *supra* note 7, at 1036-41 (asserting that a person does not automatically assume the risk of being photographed or videotaped simply by leaving home).

61. *See* SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 182, at 7-8 (June 8, 1999) (explaining that the requirement that the "defendant have surreptitiously visually recorded the underclothing or body of another for purposes of sexual gratification" will exclude defendants who act for commercial purposes, such as those engaged in an Internet "up-skirt" enterprise).

62. *Id.*

63. *Id.*

64. *See* Robert Salladay, *Voyeur Videos Skirting the Law? Web Site Showing Tapes of Women Gets Unexpected Boost*, S.F. EXAMINER, Aug. 27, 1999, at A19 (reporting an upsurge in business for Internet voyeur sites due to the recent spotlight focused on the issue by "the media, the Legislature and [Governor] Davis").

and unexpected effect of the growing focus on the "up-skirt" voyeur problem has been an increase in business for Internet voyeur site entrepreneurs.[65] Also, the new law might not encompass visually recorded "down blouse" images wherein the victim was "bent over from the waist."[66] With so many loopholes in the new law, that many of the intended targets of Chapter 231 would be deterred is unlikely, except perhaps for the "lone fetishist" who is not sophisticated enough to "skirt" the law.[67]

V. CONCLUSION

Necessary limitations handcuffing Chapter 231 are likely to make enforcement and prosecution of most "up-skirt" voyeurs ineffective.[68] However, Chapter 231 does extend the reach of privacy protections by explicitly recognizing a right to privacy in public places.[69] Prior to Chapter 231's passage, statutory and common law regulating intrusion had stopped short of recognizing a right to privacy in public places.[70] Regardless of the practical effectiveness of Chapter 231, it represents a shift of the boundary line in the battle between privacy of individuals within society and the community in which they live in favor of individual privacy, and therefore impacts the relatively new but dynamic field of privacy law.[71]

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65. *Id.*

66. *See* SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 182, at 8-9 (June 8, 1999) (implying that when the victim "is bent over from the waist," her body or undergarments may be viewed in the open and a device need not be concealed or otherwise kept secret in order to film the victim, and further implying that such filming would not capture the image of the victim under or through her clothing, a requirement of the new law).

67. *See id.* at 8-9 (predicting that prosecutors will have a difficult time establishing intent of sexual gratification unless the defendant is caught during an act of masturbation).

68. *Supra* text accompanying notes 45-49.

69. CAL. PENAL CODE § 647(k)(2) (amended by Chapter 231).

70. *Supra* Part II.

71. *Supra* text accompanying notes 53-60.

Gun Control 2000: Reducing the Firepower

Brent W. Stricker

Code Sections Affected
Penal Code §§ 12071, 12072, 12076, 12077 (amended).
AB 202 (Knox); 1999 STAT. Ch. 128
Penal Code §§ 12079, 12276.1 (new), 245, 12001, 12020, 12022, 12022.5, 12280, 12285, 12289 (amended).
SB 23 (Perata, Alpert, Bowen, Ortiz, Villaraigosa); 1999 STAT. Ch. 129
Penal Code §§ 12125, 12126, 12127, 12128, 12129, 12130, 12131, 12131.5, 12132, 12133 (new).
SB 15 (Polanco); 1999 STAT. Ch. 248

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I. INTRODUCTION

The California Legislature was active in the area of gun control during the summer of 1999. The session saw debates over bills concerning the ban of assault weapons, proposed safety standards for handguns in California, and the enactment of legislation placing a cap on the number of handguns purchased by citizens each month. Some of this legislation was not so new;[1] however, a new administration provided hope for the passage of laws that had been rejected many times before. The efforts were successful in part. Gun control proponents won the long-waged battle over the assault weapons ban,[2] as the Legislature passed Chapter 129, finally enacting a comprehensive definition of the assault weapons to be banned. Additionally, Chapter 128 was among the new laws enacted, restricting prospective firearms buyers to one handgun per month. Furthermore, the Legislature also passed Chapter 248, outlawing Saturday Night Specials in California and guaranteeing gun owners a level of safety from their weapons.

To provide background information regarding these important laws, Part II of this Legislative Note will address the constitutional issues regarding the regulation of firearms by the states. Part III details the expansion of California's assault weapons ban, examining Chapter 129, the most recent California law on the matter. Part IV discusses Chapter 128, the new one-handgun-a-month law. Part V concerns the minimum safety standards of Chapter 248, which bans Saturday Night Specials.

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1. *See infra* note 20 and accompanying text (detailing the history of failed attempts at assault weapons ban legislation in California).

2. *See infra* note 20 and accompanying text (explaining how the gun control lobby has tried to pass similar laws many times in the past).

Finally, this Note concludes by commenting upon the strength of the newly enacted legislation in this field.[3]

II. CONSTITUTIONAL ISSUES: THE LAST UNINCORPORATED AMENDMENT?

> *A powerful lobby dins into the ears of our citizenry that these gun purchases are constitutional rights protected by the Second Amendment....*[4]

Despite the fact that many guarantees of the Bill of Rights have been applied against both the state and federal government, a question still exists as to which constitutional provisions found in the Bill of Rights may restrict the powers of the states[5]—and this question manifests itself most saliently in the argument over whether the Second Amendment[6] bars the state regulation of firearms. The Second Amendment originally was a vibrant piece of national defense guaranteeing an armed citizen militia, but disuse of the militia system led to replacement of citizen militias by the National Guard.[7] The Second Amendment might have passed into a comfortable state of historical anachronism if not for a popular belief that it somehow granted a constitutional right to own guns.[8] Despite its popularity, this belief may be incorrect.[9]

The Supreme Court has not had much to say on this subject, and what it has said is more than a little dusty. Two nineteenth century cases are the only major statements from the Supreme Court on the matter, both holding that the Second Amendment does not apply to or restrict the power of the states to regulate firearms.[10] The Supreme Court has said on many occasions that the Bill of Rights—the first ten amendments to the Constitution protecting the rights of

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3. *Infra* Part VI.

4. Adams v. Williams, 407 U.S. 143, 150 (1972) (Douglas, J., dissenting).

5. 21A AM. JUR. 2D *Criminal Law* § 976 (1998).

6. "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." U.S. CONST. amend. II.

7. Hickman v. Block, 81 F.3d 98, 102 n.8 (9th Cir. 1996).

8. *See* Richard B. Schmidt, *Whose Right? The 2nd Amendment: It's a Constant and Confusing Refrain; NRA's Favorite Hobbyhorse Rarely Appears in Court; Militias vs. the Individual; 'You Want to Win Your Case'*, WALL ST. J., May 25, 1999, at A1 (discussing poll results showing that 80% of Americans believe that the Second Amendment confers upon them the right to bear arms).

9. *See* Brannon P. Denning, *Can the Simple Cite Be Trusted?: Lower Court Interpretations of* United States v. Miller *and the Second Amendment*, 26 CUMB. L. REV 961, 963 (1995-96) (discussing the recommendation of the American Bar Association House of Delegates to encourage legal professionals to "educate the public and lawmakers regarding the meaning of the Second Amendment to the United States Constitution" to correct existing misapprehensions concerning the rights protected in the Amendment).

10. *See id.* at 977-81 (discussing *United States v. Cruishank*, 92 U.S. 542 (1875), and *Presser v. Illinois*, 116 U.S. 252 (1886), cases holding that the Second Amendment does not apply to the states).

individuals—affects the federal government only, and does not automatically restrict the actions of the states.[11] Over time, however, the Court has recognized certain rights as being fundamental to individual liberty, holding the states in check as the Court applies a process called selective incorporation.[12] Under this process, the Court finds that select provisions of the Bill of Rights guarantee individuals protection from both state and federal government action.[13] The Supreme Court decisions noted above were decided before the modern trend of selective incorporation, but later cases have refused to recognize the Second Amendment as encompassing an individual right against firearms-related state regulation.[14] Absent a provision in a state constitution granting such a right, individuals cannot expect to be free from state interference with their rights to gun ownership. Because California does not grant such a right to its citizens,[15] the State Legislature may freely regulate firearms. Lower federal courts have employed the above interpretation of the Second Amendment's application to the states.[16] Supreme Court Justice Douglas even felt so comfortable as to state, "There is under our decisions no reason why stiff state laws governing the purchase and possession of pistols may not be enacted."[17]

III. BANNING ASSAULT WEAPONS: CHAPTER 129

With the recent tragedies in Littleton, Colorado, and similar incidents throughout the nation fresh in the public mind,[18] the California Legislature passed Chapter 129, finally securing a comprehensive assault weapons ban in the State.[19] Enactment of Chapter 129 caps a long legislative history: four times in ten years,

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11. 21A AM. JUR. 2D *Criminal Law* § 976 (1998).

12. 16A AM. JUR. 2D *Constitutional Law* § 404 (1998).

13. *Id.*

14. *See* Hickman v. Block, 81 F.3d 98, 103 n.10 (9th Cir. 1996) (citing the Ninth Circuit's reading of the Second Amendment in *Fresno Rifle & Pistol Club, Inc. v. Van De Kamp*, 965 F.2d 723 (9th Cir. 1992) for the proposition that the "Second Amendment is not incorporated against the states").

15. *See* Thomas B. McAffee & Michael J. Quinlan, *Bringing Forward the Right to Keep and Bear Arms: Do Text, History, or Precedent Stand in the Way?*, 75 N.C. L. Rev. 781, 893-99 (1997) (noting that forty-three states, excluding California, grant their citizens the right to bear arms).

16. Love v. Pepersack, 47 F.3d 120, 123-24 (4th Cir. 1995); United States v. Warin, 530 F.2d 103, 106 (6th Cir. 1976); Eckert v. City of Philadelphia, 477 F.2d 610, 610 (3d Cir. 1973); Vietnamese Fishermen's Ass'n v. Knights of the Ku Klux Klan, 543 F. Supp. 198, 210 (S.D. Tex. 1982).

17. Adams v. Williams, 407 U.S. 143, 150 (1972) (Douglas, J., dissenting).

18. *See* James Brooke, *Terror in Littleton: The Details; Attack at School Planned a Year, Authorities Say*, N.Y. TIMES, Apr. 24, 1999, § 1, at 1 (discussing the shootings at Columbine High School and copycat incidents throughout the country); John T. McQuiston, *Terror in Littleton: The Echoes; Wave of Copycat Threats Leads to Swift Responses Across U.S.*, N.Y. TIMES, Apr. 24, 1999, at A15 (same).

19. 1999 Cal. Legis. Serv. ch. 129, sec. 7, at 1553-54 (enacting CAL. PENAL CODE §§ 12276.1, 12079) (providing an expanded list of the definitions of an assault weapon); *see id.* (amending CAL. PENAL CODE §§ 245, 12001, 12020, 12022, 12022.5, 12280, 12285, 12289) (bringing existing statute references in line with the expanded definition list of section 12276.1).

the provisions of Chapter 129 appeared before the Legislature and the Governor, only to be defeated on the floor of the Legislature or vetoed by the Governor.[20] Finally, time and a new administration[21] have allowed these provisions to be enacted.

However, Chapter 129 is not breaking new ground. In reality, it represents an improvement on the already existing assault weapons ban in California.[22] Before Chapter 129, California law provided a list of firearms models identified as assault weapons; this list formed the basis of the assault weapons ban.[23] The listed models were, of course, banned, but as new weapons came on the market, they were compared with the example list of model assault weapons, and if they were similar in design, the new weapons were declared assault weapons and banned.[24] The problem with this approach is that it did not account for new designs and innovations from manufacturers. Chapter 129 solves this problem by creating a list of generic assault weapons characteristics to allow a flexible comparison for future designs of firearms.[25] The law is no longer limited by last year's model.

A. Existing Restrictions on Assault Weapons

1. The Roberti-Roos Assault Weapons Control Act

In January 1989, California was given the reason it needed to become the first state to enact an assault weapons ban.[26] In the city of Stockton, just forty miles south of the State capitol, a gunman fired more than 100 rounds from an AK-47 assault rifle at a schoolyard of children.[27] Among the dead that day were the gunman and five children.[28] In addition, twenty-nine children and one teacher were wounded.[29]

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20. The following bills were introduced in the California Legislature, but failed to pass into law: AB 2560 (1998) (as introduced on Feb. 23, 1998, but not enacted); AB 23 (1996) (as introduced on Dec. 2, 1996, but not enacted); SB 1128 (1993) (as introduced on Mar. 8, 1993, but not enacted); AB 334 (1989) (as introduced on Jan. 23, 1989, but not enacted).

21. In 1999, Gray Davis succeeded to the governorship after many years of Republican rule.

22. *See infra* Part III.A.1 (discussing the Roberti-Roos Act, California's Assault Weapons Ban).

23. *Infra* text accompanying note 37 (detailing the provisions of the model list of assault weapons that formed the basis of the Roberti-Roos Act's definition of an assault weapon).

24. *See infra* notes 39-41 and accompanying text (defining the California Attorney General's and the courts' role in defining weapons new to the market as assault weapons subject to the ban).

25. *See infra* Part III.B (detailing the provisions of Chapter 129 and the expanded definition of an assault weapon).

26. Thomas E. Romano, Note, *Firing Back: Legislative Attempts to Combat Assault Weapons*, 19 SETON HALL LEGIS. J. 857, 860 (1995).

27. Michael G. Lenett, *Taking a Bite Out of Violent Crime*, 20 U. DAYTON L. REV. 573, 573 (1995).

28. *Id.*

29. *Id.*

The Roberti-Roos Assault Weapons Control Act[30] was California's response.[31] The Roberti-Roos Act declares that the banned weapons are "particularly dangerous in the hands of criminals and serve no necessary hunting or sporting purpose for honest citizens."[32] The Act bans the manufacture, distribution, importation, sale, transfer, and possession of assault weapons by certain persons.[33] In addition to outlawing assault weapons, the Act also requires current gun owners to register their weapons with the State Attorney General's office.[34] Possession of assault weapons is limited to certain locations.[35] Violations of these provisions are felony offenses.[36]

The Legislature chose to define the term "assault weapon" in the Roberti-Roos Act by listing certain makes and models as banned and by providing that these makes and models should be used as examples in determining which later assault weapons should be banned.[37] The innovative technique used by the California Legislature to define assault weapons would be used later as a model for legislation in other jurisdictions.[38]

The Roberti-Roos Act included provisions allowing the Attorney General to seek declarations from state courts that certain firearms should be declared assault weapons,[39] the hope being that manufacturers would not escape the effect of the new law merely by changing the model's name. The Legislature gave guidance to the courts and the Attorney General in making this determination by declaring that renamed, redesigned, or renumbered models would automatically be subject to the

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30. 1989 Cal. Stat. ch. 19, sec. 3, at 64-70 (enacting CAL. PENAL CODE §§ 12275-12290).

31. Romano, *supra* note 26, at 857-58.

32. 1989 Cal. Stat. ch. 19, sec. 5, at 69-70.

33. CAL. PENAL CODE § 12280(a)(1) (amended by Chapter 129); *see also id.* §§ 12021(a)-(b), (d), 12021.1(b) (West Supp. 2000) (banning possession of assault weapons by certain persons including persons deemed mentally incompetent and convicted felons), CAL. WELF. & INST. CODE §§ 8100(a)-(b), 8103(a)(1), (b)(1), (c)(1), (d)(1), (e)(1), (f)(1), (g)(1) (West 1998) (same).

34. CAL. PENAL CODE § 12285(a) (amended by Chapter 129).

35. *Id.* These places include: (1) the owner's residences, business establishments, and other properties; (2) the properties of others, when the gun owners appear thereon with the property owners' permission; and (3) target ranges, shooting clubs licensed by the Fish and Game Department, and firearms exhibitions sponsored by or endorsed by law enforcement agencies or state or federal government agencies that promote education and proficiency about firearms. *Id.*; *see also id.* (limiting transportation to and from the above-mentioned places or to the facilities of a licensed gun dealer per California Penal Code section 12071 for service and repair in accordance with California Penal Code Section 1026.1).

36. *Id.* § 12280(a) (amended by Chapter 129).

37. *Id.* § 12276(a)-(c) (West Supp. 1999).

38. *See* Romano, *supra* note 26, at 860 (providing examples of jurisdictions such as New Jersey and the federal government following California's method of banning assault weapons); *see, e.g.*, 18 U.S.C.A. §§ 921-924 (West Supp. 1999) (providing a law similar to California's); N.J. STAT. ANN. § 2C:39-1 (West 1990) (same).

39. CAL. PENAL CODE §§ 12276(d), 12276.5(a) (West Supp. 1999).

ban.[40] By providing a list of characteristics of assault weapons,[41] the Legislature gave the courts some needed flexibility to address changes in design over time.

2. The Federal Assault Weapons Moratorium of 1994

Five years after California's passage of the Roberti-Roos Assault Weapons Control Act, the United States Congress convened to discuss crime and gun control.[42] The California law served as a model[43] for the federal Public Safety and Recreational Firearms Use Protection Act.[44] This Act's definition of "assault weapons" is similar to the California approach in that both use the model and characteristics list to define assault weapons.[45] The federal law went further than the California approach, however, in one respect—it placed a limit on magazine size.[46] In other ways, the law fell short of the California Act. The federal law is not a true ban, but only a moratorium set to expire at the end of ten years.[47] Furthermore, the federal law does not provide for a registration system for owners like that in the California Act.[48] The list of banned weapons is also very short compared to California's: the federal statute lists nineteen banned weapons to California's fifty.[49] The assault weapons characteristics list found in the federal law may be helpful to other states wishing to enact their own laws. Prior to the federal Act's passage, this approach was used first by the Bureau of Alcohol, Tobacco, and Firearms in 1989 in its own efforts to control assault weapons in the United States.[50] In the same year, the Bush Administration banned the importation of assault weapons possessing some of the following characteristics: large capacity magazines, folding stocks, pistol grips, flash suppressors, bipods, bayonet and grenade launcher mounts, and night sights.[51] These efforts by the executive branch provided the basis for the

40. *Id.* § 12276.5(a)(1).

41. *See id.* (listing characteristics to be considered by the court, including: folding or retractable stocks; larger magazine sizes; adjustable sights; and bayonet mounts).

42. Adam Clymer, *Congress Calls It Quits: Final Hours; Rancor Leaves Its Mark on 103d Congress*, N.Y. TIMES, Oct. 9, 1994, § 1, at 1.

43. *Supra* note 38 and accompanying text.

44. Pub. L. No. 103-322, 108 Stat. 1996 (codified at 18 U.S.C.A. §§ 921-924 (West Supp. 1999)).

45. *Compare* 18 U.S.C.A. §§ 921-922 (West Supp. 1999) (including in its ban of assault weapons a provision banning high-capacity magazines) *with* CAL. PENAL CODE §§ 12276(a)-(c), 12276.5(a)(1) (West 1992) (failing to ban high-capacity magazines).

46. 18 U.S.C.A. § 921.

47. *Id.* §§ 921-924 (West Supp. 1999).

48. *See* CAL. PENAL CODE § 12285(a) (amended by Chapter 129) (detailing the registration system for California gun owners).

49. *Compare* 18 U.S.C.A. §§ 921-924 (West Supp. 1999) (listing 19 weapons to be banned), *with* CAL. PENAL CODE §§ 12275-12290 (West Supp. 1999) (banning 50 types of firearms as assault weapons).

50. Lenett, *supra* note 27, at 574.

51. *Id.* at 574 n.5.

congressional characteristics list included in the 1994 legislation.[52] The federal characteristics list now serves as a model for the California Legislature.[53]

B. *Chapter 129: Supplementing the Roberti-Roos Assault Weapons Ban*

Chapter 129 states its purpose simply: to ban all assault weapons in the State of California.[54] It builds upon the Roberti-Roos Act by expanding the definition of assault weapons to include a larger list of assault weapons characteristics.[55] The statutory language describing these characteristics closely mirrors the language of the federal moratorium.[56] Chapter 129's characteristics list is broader than that of the federal law in that it defines a firearm as an assault weapon when the weapon possesses two of the listed characteristics, as opposed to the federal moratorium's three-characteristic requirement.[57] Moreover, Chapter 129 enacts a permanent ban, instead of the federal ten-year moratorium.[58]

One provision enacted by Chapter 129 that has been proposed and rejected for the last ten years by the Legislature and the Governor[59] is a limitation on magazine capacity.[60] The newly enacted Chapter 129 bans any magazine—an ammunition-feeding device—that carries more than ten rounds, declaring such to be a large-

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52. Pub. L. No. 103-322, 108 Stat. 1996 (codified at 18 U.S.C.A. §§ 921-924 (West Supp. 2000)) (outlawing the possession, manufacture, and transfer of: (1) semi-automatic rifles with a detachable magazine and at least two of the following: folding or telescoping stocks, bayonet mounts, pistol grips protruding conspicuously from beneath the weapon's action, grenade launchers, flash suppressors, or threaded barrels designed to accept flash suppressors; (2) semi-automatic handguns that may accept detachable magazines and at least two of the following: magazines that attach outside of the pistol grip, threaded barrels that accept flash suppressors, barrel extenders, forward handgrips, silencers, or barrel shrouds; (3) an unloaded firearm weighing fifty ounces or more; (4) a semi-automatic version of an automatic firearm; and (5) semi-automatic shotguns with at least two of the following: ability to accept detachable magazines, a telescopic or folding stock, pistol grips that protrude conspicuously beneath the weapon's action, and a fixed magazine with a capacity greater than five rounds).

53. *See infra* notes 55-56 and accompanying text (discussing the use in Chapter 129 of the characteristics list found in the federal moratorium).

54. 1999 Cal. Legis. Serv. ch. 129, sec. 12, at 36.

55. *Compare* CAL. PENAL CODE § 12276.5(a)(1) (West Supp. 2000) (providing that firearms with any of following characteristics are banned: a folding or retractable stock, a high-capacity magazine, adjustable sights, and bayonet mounts), *with id.* § 12276.1(a) (enacted by Chapter 129) (expanding upon the previous definition of assault weapons by employing the federal moratorium's characteristics list as noted *supra* at text accompanying note 51).

56. *Compare* 18 U.S.C.A. §§ 921-922 (West Supp. 2000) (detailing the provisions of the characteristics list of assault weapons in the federal moratorium), *with* CAL. PENAL CODE § 12276.1(a) (employing virtually the same characteristics list of assault weapons as appears in the federal moratorium).

57. *Compare* 18 U.S.C.A. § 922 (declaring a firearm to be an assault weapon when it possesses three characteristics on the list), *with* CAL. PENAL CODE § 12276.1(a) (defining a firearm as an assault weapon if it possesses two enumerated characteristics on the list).

58. *Compare* 18 U.S.C.A. § 922 (providing the automatic repeal of the federal moratorium in ten years), *with* CAL. PENAL CODE § 12280(a) (amended by Chapter 129) (banning assault weapons permanently in California).

59. SB 1128 (1993) (as introduced on Mar. 8, 1993, but not enacted).

60. CAL. PENAL CODE § 12020(a)(2), (c)(25) (amended by Chapter 129).

capacity magazine.[61] Chapter 129 prohibits the manufacture, sale, possession for sale, transfer, or lending of any large-capacity magazine.[62] The drafters of Chapter 129 borrowed the large-capacity magazine ban from the federal moratorium.[63] The magazine provision will prevent criminals from indiscriminately spraying large volumes of firepower from semi-automatic weapons.[64] The limited magazine capacity would force these individuals to slow their rates of fire by requiring them to reload more often, thereby allowing innocent bystanders to flee and police officers to respond more effectively. Violation of this provision is punishable as either a felony or a misdemeanor, depending on the circumstances of the violation.[65]

Chapter 129 expands the list of persons exempted from the assault weapons ban to allow certain off-duty peace officers to use and possess assault weapons.[66] The Roberti-Roos Act currently offers only on-duty police officers this privilege.[67] The new amendment will follow the federal example by allowing retired police officers to possess assault weapons and to have weapons transferred to their ownership from their former agency at the time of their retirement.[68]

C. *Analysis of Chapter 129*

Chapter 129 might well succeed. Its expanded weapons characteristics list is more inclusive than that of the federal moratorium, thereby making the identification and banning of new weapons easier. No new high-capacity magazines will be sold in California, and, as time passes, old high-capacity magazines will fall into disuse and disrepair.

Nevertheless, no matter how much of an improvement Chapter 129 is, it is not truly a ban; individuals may still posses assault weapons in California.[69] Accordingly, assault weapons will still be available for criminals to steal and then possess. However, under Chapter 129, these weapons will be highly regulated, and the provisions governing these weapons are permanent, unlike those of the federal

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61. *Id.*

62. *Id.*

63. *Compare* 18 U.S.C.A. § 921(a)(31) (West Supp. 2000) (detailing the federal moratorium's provisions dealing with high capacity magazines), *with* CAL. PENAL CODE § 12020(c)(25) (amended by Chapter 129) (providing a law similar to the federal law with regard to high-capacity magazines).

64. *Cf.* Jim Newtown & Beth Shuster, *The North Hollywood Shootout: LAPD Commander Turned Holdup 'Bedlam' Into Order*, L.A. TIMES, Mar. 4, 1997, at A1 (discussing the devastating effect of assault weapons equipped with high-capacity magazines used in a recent bank robbery).

65. CAL. PENAL CODE § 12020(a)(2), (c)(25) (amended by Chapter 129).

66. CAL. PENAL CODE § 12280(g) (amended by Chapter 129).

67. *Id.*

68. *Id.*

69. *See* CAL. PENAL CODE § 12285 (amended by Chapter 129) (allowing the possession of assault weapons under certain conditions).

moratorium.[70] Still, the California Legislature has already stated that assault weapons are "particularly dangerous in the hands of criminals and serve no necessary hunting or sporting purpose for honest citizens."[71] To effectively prevent assault weapons from being placed in the hands of criminals, perhaps the Legislature should impose a complete ban.

D. *Conclusions on Chapter 129*

Assault weapons represent a danger to the people of California. By expanding the definition of assault weapons and banning high-capacity magazines, Chapter 129 will limit the number of, and hence the dangers posed by, these weapons. Chapter 129 is an improvement over existing law aimed at achieving this end. Assault weapons will still exist in California, but with the passage of time, perhaps their numbers will decline along with the threat.

IV. CHAPTER 128: THE ONE-HANDGUN-PER-MONTH LAW

A. *Existing Restrictions on Handgun Sales*

The sale of firearms is heavily regulated in the United States by both state and federal law. Certain persons are barred by law from owning or possessing handguns.[72] Background checks exist to prevent these persons from acquiring such handguns.[73] Transfers and sales of handguns must also be completed through a licensed dealer.[74] California law requires that a purchaser of a handgun produce a firearms-training certificate before delivery.[75] California law even regulates the manner of storage and transportation of firearms.[76]

Despite these regulations, qualified purchasers have been able to acquire as many firearms as they wish in one visit to a gun shop.[77] This opportunity to make a one-time purchase of an arsenal has afforded many criminals easy and quick

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70. *Compare* CAL. PENAL CODE §§ 12275-12290 (enacted by Chapter 129) (regulating assault weapons in California, banning them in large measure), *with* 18 U.S.C.A. §§ 921-924 (West Supp. 2000) (providing for a temporary federal moratorium on assault weapons).

71. 1989 Cal. Legis. Serv. ch. 19, sec. 5, at 69-70.

72. *See, e.g.*, 18 U.S.C.A. § 922(d) (West Supp. 2000) (barring felons, those with a history of mental illness, and other classes from possessing or purchasing firearms); CAL. PENAL CODE §§ 12021(a)-(b), (d), 12021.1(b) (West Supp. 2000) (same); CAL. WELF. & INST. CODE §§ 8100(a)-(b), 8103(a)(1), (b)(1), (c)(1), (d)(1), (e)(1), (f)(1), (g)(1) (West 1998) (same).

73. *E.g.*, 18 U.S.C.A. § 922(s) (West Supp. 2000); CAL. PENAL CODE § 12076 (amended by Chapter 128).

74. *See, e.g.*, 18 U.S.C.A. § 922(a) (West Supp. 2000) (requiring interstate sales or transfers of firearms to take place through a licensed dealer); CAL. PENAL CODE § 12072(d) (amended by Chapter 128) (stating that intrastate transactions of firearms must also take place through a licensed dealer).

75. CAL. PENAL CODE § 12071(b)(8) (amended by Chapter 128).

76. *Id.* §§ 12031(a) (West Supp. 2000); *id.* § 12071(b)(14), (19) (amended by Chapter 128).

77. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 202, at 4 (June 8, 1999).

access to handguns.[78] A strawman, a person who may legitimately possess and purchase handguns, is often used by a criminal to purchase firearms for him or her.[79] The strawman, with money provided by the criminal, applies for a handgun or other firearms purchase, clears the background check, and, after receiving the handgun, transfers it to the criminal.[80] Often, this type of transaction involves numerous weapons, so a gang of criminals can be quickly equipped, or a black market dealer can quickly receive an inventory for illegal sales on the street.[81] Drafters of Chapter 128 hope to prevent this arsenal-shopping by placing a one-handgun-a-month limit on purchasers.[82]

1. Twin Guardians: Federal and California Regulation of Firearms

Sales of handguns in this country are closely watched by authorities.[83] Those trafficking interstate are required to obtain a federal firearm license (FFL).[84] California law also requires dealers to possess a State license.[85] Purchasing or dealing in handguns without these licenses is illegal in California.[86]

Buyers of firearms are also scrutinized. Felons and persons with mental illnesses are prohibited from possessing firearms in California.[87] A background check exists under both federal and California law to prevent these persons from obtaining firearms.[88] Every person seeking to purchase a firearm must complete an application for purchase.[89] If the applicant falls within a prohibited category, the purchase cannot legally be completed.[90]

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78. *See, e.g.*, Mark D. Polston, *Civil Liability for High Risk Gun Sales: An Approach to Combat Gun Trafficking*, 19 SETON HALL LEGIS. J. 821, 821 (1995) (detailing the purchase by one strawman of $6,000 worth of handguns, which were immediately handed over to a drug dealer).

79. David C. Anderson, *Street Guns: A Consumer Guide*, N.Y. TIMES, Feb. 14, 1993, § 6, at 20.

80. Polston, *supra* note 78, at 831-32.

81. *See. e.g.*, Jack Cheerer, *Corrupt Licensed Dealers Called Key Source of Handguns Used in Southland Crimes*, L.A. TIMES, Apr. 19, 1995, at B1 (providing the example of one Los Angeles street gang that purchased 1,000 handguns).

82. SENATE RULES COMMITTEE, FLOOR ANALYSIS OF AB 202, at 3-5 (June 30, 1999)

83. *See* 18 U.S.C.A. §§ 922-924 (West Supp. 2000) (detailing federal regulation of the possession and sales of firearms).

84. 18 U.S.C.A. § 922(a)(1)(A) (West Supp. 2000).

85. CAL. PENAL CODE § 12070 (West Supp. 2000).

86. *Id.*

87. *Id.* §§ 12021(a)-(b), (d), 12021.1(b) (West Supp. 2000); CAL. WELF. & INST. CODE §§ 8100(a)-(b), 8103(a)(1), (b)(1), (c)(1), (d)(1), (e)(1), (f)(1), (g)(1) (West 1998).

88. *See* 18 U.S.C.A. § 922(s) (West Supp. 2000) (promulgating background check procedures for purchasers and transferors of firearms); CAL. PENAL CODE § 12076 (amended by Chapter 128) (same).

89. 18 U.S.C.A. § 922(s); CAL. PENAL CODE § 12076(c) (amended by Chapter 128).

90. *See* 18 U.S.C.A. § 922(d) (West Supp. 2000) (barring felons and those with a history of mental illness, among others, from possessing or purchasing firearms); CAL. PENAL CODE §§ 12021(a)-(b), (d), 12021.1(b) (same); CAL. WELF. & INST. CODE §§ 8100(a)-(b), 8103(a)(1), (b)(1), (c)(1), (d)(1), (e)(1), (f)(1), (g)(1) (same).

A popular method used by criminals to circumvent these cumbersome regulations is gun trafficking.[91] Sometimes gun trafficking is an expensive and dangerous market; black market handguns often have a criminal history or carry a high price tag.[92] Selection and quality can be limited.[93] For these reasons, criminals may prefer new weapons, without a history, bought from a dealer having a large inventory. Criminal records prevent some from doing this, and so the strawman method is applied,[94] despite the fact that California law prohibits such transactions in the State.[95]

Some states' laws make finding a strawman difficult by limiting the number of eligible buyers.[96] For this reason, criminals often go out-of-state to purchase their handguns in states with less restrictive gun regulations.[97] Federal law disallows out-of-state residents from purchasing handguns and prohibits parties from conducting interstate strawman purchases.[98] Despite these regulations, gun trafficking continues.[99]

2. *Plugging the Holes in the System: The Federal Effort*

Until recently, a problem existed in federal government efforts to regulate gun trafficking: the requirements for the license itself were few.[100] One only had to demonstrate that she was twenty-one years of age or older, present a Social Security Number, pay a small fee of ten dollars per year, and affirm that she was not a felon and had no history of mental illness.[101] These last affirmations were easily managed with a lie because the Bureau of Alcohol, Tobacco, and Firearms could not effectively run background checks on applicants due to funding and staffing

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91. Polston, *supra* note 78, at 831.

92. Philip J. Cook et al., *Regulating Gun Markets*, 86 J. CRIM. L. & CRIMINOLOGY 59, 72 (1995).

93. *Id.*

94. Polston, *supra* note 78, at 831-32.

95. *See* CAL. PENAL CODE § 12070(a) (West Supp. 2000) ("No person shall sell, lease, or *transfer* firearms unless he or she has been issued a license . . . ."(emphasis added)).

96. Polston, *supra* note 78, at 829.

97. *Id.*

98. 18 U.S.C.A. § 922(a)(1)-(3) (West Supp. 2000).

99. *See, e.g.*, Debbi Wilgoren, *Report Traces Guns Used in Crimes; D.C. Offenders Increasingly Getting Weapons from Beyond Area*, WASH. POST, Feb. 22, 1999, at B01 (giving the example of gun trafficking in the nation's capitol, where handguns are essentially banned).

100. *See* 18 U.S.C.A. § 923(d)(1) (West Supp. 2000) (providing only four requirements to receive a federal firearms license).

101. *Id.*

limitations.[102] With a few lies, criminals could get a FFL and then order as many firearms as they wished straight from the manufacturer.[103]

Recently, the requirements for a FFL have been made more stringent.[104] The once-nominal FFL application fee has been increased to $200 for three years, with a $90 renewal fee for existing FFLs.[105] An improved FFL application also requires a fingerprint card and photograph of the applicant, which are needed tools in the identification of criminals who may apply for a FFL.[106] The result has been a decline in the number of FFLs nationwide.[107] Criminals can no longer acquire a shade of legitimacy by bucking the FFL system.[108]

3. Damming the Leaks: Efforts in Other States

Some criminals have turned to interstate gun trafficking as a source for their firearms.[109] New York City is one of the largest cities in the United States, and it has had a crime problem to match that size. In recent years, gun regulations in New York State have become restrictive, yet many criminals and gun traffickers have avoided these laws by shopping elsewhere.[110]

For years, Virginia was the gun shop for New York City.[111] To address the gun trafficking dilemma, Virginia passed a one-handgun-a-month law.[112] It limits strawmen and other legitimate buyers to only one handgun per month.[113] The hope

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102. *See* Polston, *supra* note 78, at 835 (providing the 1995 example of 200 Bureau of Alcohol, Tobacco, and Firearms agents performing in substandard fashion when given the task of monitoring 197,000 FFLs).

103. *See* Jack Cheevers, *Corrupt Licensed Dealer Called Key Source of Handguns Used in Southland Crimes*, L.A. TIMES, Apr. 19, 1995, at B1 (illustrating the criminal's ability to misuse the licensing system by telling of the use of one FFL to sell illegally 1,200 handguns in one year); *Four Indicted in Largest Gun Trafficking Case in Nation*, L.A. TIMES, May 30, 1999, at A33 (providing the example of one FFL who allegedly falsified his application to obtain 1,000 semiautomatic handguns traced to crime scenes); James C. McKinley Jr., *Dealer Accused of Selling Guns to Criminals*, N.Y. TIMES, June 22, 1995, at B3 (detailing the illegal sales of one FFL who originally paid $30 for a license that he used to supply a black market street dealer with inventory).

104. *See* Cook, *supra* note 92, at 79 (detailing the improvements in the FFL application and license requirements).

105. 18 U.S.C.A. § 923(a)(3)(B) (West Supp. 2000).

106. Cook, *supra* note 92, at 79.

107. *See* Robert L. Jackson, *Tighter U.S. Rules Result in 49% Fewer Gun Dealers in County Government: Many "Kitchen Table" Sellers Who Were a Source of Firearms Used in Crimes Have Been Weeded Out, Officials Say*, L.A. TIMES, Jan. 30, 1997, at B3 (reporting that toughened standards have resulted in a drop of 56% of licensed dealers nationwide and 63% in California).

108. *See supra* notes 100-03 and accompanying text (discussing the formerly lax standards for FFLs).

109. Polston, *supra* note 78, at 830-31.

110. *See id.* at 830 (noting "the tendency for guns to be trafficked from weak to strong gun control jurisdictions").

111. *See id.* ("In 1991, Virginia accounted for 41% of all the guns recovered at crime scenes in New York City, more than any other state.").

112. VA. CODE ANN. § 18.2-308.2:2 (Michie Supp. 1999).

113. *Id.*

was that this would slow the flow of firearms to New York City.[114] The results have been mixed.[115] Authorities report that after Virginia's law was passed, the State dropped from number one to number eight in the ranking of the source-states for handguns seized at crime scenes in the Northeast.[116] The results for New York City tell a different story, though; in 1998, Virginia was still the number two source-state for handguns traced from crime scenes in New York City.[117] Virginia's law also created another problem—it passed the gun trafficking problem to someone else.[118] Many gun traffickers followed the path of least resistance when it came to the Virginia situation: when one state's laws are too restrictive, go to another state.[119] Regretfully, Virginia's neighbor, Maryland, soon became the stop for gun runners.[120] Maryland and Virginia had previously been the leading sources for handguns for criminals in Washington, D.C.,[121] where handguns are illegal for most persons to possess.[122] Excluded buyers soon left Virginia for the State of Maryland's gun shops.[123] The response in Maryland was also predictable—within a few years of the promulgation of Virginia's law, Maryland passed a one-handgun-a-month law.[124]

However, one-handgun-a-month laws are not impregnable. Criminals have found ways around them by simply increasing their numbers of buyers.[125] The method is known as "smurfing."[126] Where just one strawman was used in the past, now several are employed, each buying the limit of one handgun per month, with several deliveries being made to the criminals employing them.[127] Therefore, the one-handgun-a-month law does not entirely prevent criminals from obtaining guns.

B. Chapter 128: California's One-Handgun-per-Month Law

California's Chapter 128 answers the call for limiting guns on the street by allowing citizens to purchase only one handgun every thirty days.[128] One can no

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114. Mark Johnson, *Virginia Gun Limit Has Enthusiastic Following but State Still Ranks High as Weapon Source*, RICHMOND TIMES-DISPATCH, Sept. 6, 1998, at A11.

115. *Id.*

116. Mark Johnson, *Gun-A-Month Law Has Mixed Results in Virginia, Maryland*, VIRGINIAN-PILOT & LEDGER STAR, Oct. 9, 1998, at A4.

117. *Id.*

118. *See id.* (noting that gun traffickers left Virginia for other states with less-restrictive laws).

119. *Id.*

120. *See Running Out the Gunrunners*, WASH. POST, May 29, 1993, at A26 (detailing Maryland's response to the gunrunning racket).

121. Johnson, *supra* note 114, at A11.

122. Wilgoren, *supra* note 99, at B1.

123. Johnson, *supra* note 116, at A4.

124. MD. ANN. CODE, Art. 27 § 442A (1999).

125. Johnson, *supra* note 116, at A4.

126. *Id.*

127. *See supra* notes 79-81 and accompanying text (discussing the normal strawman purchase).

128. CAL. PENAL CODE §§ 12071, 12072, 12076, 12077 (amended by Chapter 128).

longer enter a gun store and leave with an arsenal of handguns. Chapter 128 gives more power to an administrative watchdog, the State Department of Justice.[129] All gun purchasers must apply to purchase a handgun, and this application is forwarded to the State Department of Justice.[130] Under Chapter 128, if more than one application to purchase a handgun is filed by the same gun purchaser within thirty days, the State Department of Justice must notify the dealer and the local police that the applicant is violating the thirty-day limit.[131] The punishment for this crime increases with each violation.[132] First- and second-time violators will be fined $50 and $100, respectively.[133] Offenses after that point are misdemeanors[134] carrying a possible jail sentence of six months or a fine of fewer than $1,000.[135] Each application to purchase a handgun within the prohibited time period is considered a separate violation of the law and is punishable as such.[136] Delivery of a handgun to an ineligible applicant within the thirty-day limit is punishable as either a felony or a misdemeanor, depending on collateral circumstances.[137] Chapter 128 also requires dealers to post a notice telling that persons may not submit an application for a handgun purchase within thirty days of a prior application.[138]

However, Chapter 128 does not apply broadly to all handgun sales in California; it includes a long list of exemptions.[139] Law enforcement agencies,[140] correctional institutions,[141] private security companies,[142] peace officers,[143] motion picture, television, and theatrical companies,[144] individuals engaging in private sales,[145] and collectors[146] all may purchase handguns without prohibition by Chapter 128. Furthermore, Chapter 128 provides for persons who have had their handguns lost or stolen, or who merely want their guns exchanged or returned, by exempting those individuals from the thirty-day rule as well.[147]

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129. *See supra* Part IV.A.1 (detailing regulation of handguns as overseen by the California Department of Justice).

130. CAL. PENAL CODE § 12076 (amended by Chapter 128).

131. *Id.* § 12076(d)(3) (amended by Chapter 128).

132. *Id.* § 12072(g)(5) (amended by Chapter 128).

133. *Id.* § 12072(g)(5)(A)-(B) (amended by Chapter 128).

134. *Id.* § 12072(g)(5)(C) (amended by Chapter 128).

135. *See id.* § 19 (West Supp. 2000) (defining the punishment for a misdemeanor violation).

136. *Id.* § 12072(g)(5)(D) (amended by Chapter 128).

137. *Id.* § 12072(g) (amended by Chapter 128); *see id.* (including in the list of exacerbating circumstances the attempted purchase of a gun by a street gang member or a person with a prior record).

138. *Id.* § 12071(a)(7)(E) (amended by Chapter 128).

139. *Id.* § 12072(a)(9)(B) (amended by Chapter 128).

140. *Id.* § 12072(a)(9)(B)(i) (amended by Chapter 128).

141. *Id.* § 12072(a)(9)(B)(iii) (amended by Chapter 128).

142. *Id.* § 12072(a)(9)(B)(iv) (amended by Chapter 128).

143. *Id.* § 12072(a)(9)(B)(v) (amended by Chapter 128).

144. *Id.* § 12072(a)(9)(B)(vi) (amended by Chapter 128).

145. *Id.* §§ 12072(a)(9)(B)(vii), (ix) (amended by Chapter 128).

146. *Id.* § 12072(a)(9)(B)(x) (amended by Chapter 128).

147. *Id.* §§ 12072(a)(9)(B)(xi)-(xiii) (amended by Chapter 128).

C. Analysis of Chapter 128

Regretfully, criminals can avoid Chapter 128 by using many strawmen to buy their weapons.[148] This method, known as "smurfing,"[149] has already been used in Virginia and Maryland.[150] Essentially, smurfing operates in the same fashion as does a strawman purchase, except that the number of purchasers is increased as necessary to avoid the one-handgun-a-month limit.[151] This method is especially effective because one strawman or legitimate purchaser can buy a dozen handguns in a year under Chapter 128,[152] because although strawman purchases are still unlawful,[153] the new law will not prevent them from occurring in fact. Nevertheless, Chapter 128 does succeed in making the process more cumbersome, and this should dissuade criminals from dirtying the legitimate firearms market.

Chapter 128 may be labeled as either a success or a failure, depending on how one views the nature of the problem the bill attempts to address. The purpose of Chapter 128 is to stem the tide of guns flowing to criminals by removing an easy method of access for criminals to obtain them: the one-time strawman purchase of an arsenal.[154] If this is viewed as the problem, Chapter 128 will likely be a success, but if one steps back and looks at the larger problem—illegal gun trafficking[155]—Chapter 128 does not make a dent.

Chapter 128, like most attempts at gun regulation, is concerned only with the legitimate seller.[156] It prevents a legitimate buyer or strawman from purchasing a large number of handguns at one time.[157] The problem with this approach is that criminals have sources other than the legitimate market from which to access weapons.[158] On the black market, guns that were legitimately purchased or perhaps stolen can be sold without time-consuming background checks, waiting periods, or

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148. *See supra* notes 79-82 and accompanying text (explaining how criminals can avoid gun restrictions by using strawmen).

149. *See supra* notes 125-27 and accompanying text (discussing the smurfing method of avoiding the effect of one-handgun-a-month laws).

150. Johnson, *supra* note 116, at A4.

151. *Id.*

152. *See* SENATE RULES COMMITTEE, FLOOR ANALYSIS of AB 202, at 5 (June 30, 1999) (illustrating this proposition by stating that one family of two can purchase 24 handguns in a year under Chapter 128).

153. *See* CAL. PENAL CODE § 12070(a) (West Supp. 2000) ("No person shall sell, lease, or *transfer* firearms unless he or she has been issued a license . . . .") (emphasis added).

154. *See* SENATE RULES COMMITTEE, FLOOR ANALYSIS of AB 202, at 3 (June 30, 1999) (stating that "[b]ulk purchase limits are aimed at so-called "straw transactions""); *see supra* notes 81-84 and accompanying text (discussing the strawman purchase method and its significance).

155. *See supra* text accompanying notes 91-93 (discussing the black market for guns).

156. *See* CAL. PENAL CODE §12072(c)(6) (amended by Chapter 128) (limiting the purchase, by an *otherwise authorized buyer*, to one handgun every thirty days).

157. *Id.*

158. *See supra* text accompanying notes 91-93 (demonstrating that a black market for guns exists).

a thirty-day limit between purchases.[159] In fairness, Chapter 128 was not intended to address the black market problem.[160] As a means of limiting legitimate gun purchases, Chapter 128 may be a success, assuming dealers and authorities properly maintain the background-check system.[161] If the law is followed, no purchaser will be able to obtain more than one handgun every thirty days.

D. *Conclusions on Chapter 128*

The problem of the one-time arsenal shopping spree for handguns has been solved, partially. Chapter 128 prevents criminals from using a single strawman for their shopping trips. Though "smurfing" is still a means for circumvention of the law, the increased cost of hiring multiple strawmen and the tedious process of managing numerous handgun orders will at least discourage the misuse of legitimate firearms transactions.

V. BANNING SATURDAY NIGHT SPECIALS: CHAPTER 248

A. *Introducing the Saturday Night Special*

In California, more deaths occur due to firearms than from auto accidents.[162] Among firearms, though, Saturday Night Specials are considered to be the most dangerous, both because of their design and because of their prevalence.[163] Saturday Night Specials are firearms characterized by "short barrels, light weight, easy concealability, low cost, cheap quality materials, poor manufacture, inaccuracy, and unreliability."[164] The name "Saturday Night Special" originated in the City of Detroit when the connection was made between weekends and an increasing rate of crime.[165]

Besides their use in criminal activities, Saturday Night Specials are unsafe to the user and innocent bystanders because of their shoddy manufacture.[166] They create problems for law enforcement because of their concealability, their difficulty

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159. *See supra* notes 87-90 and accompanying text (giving information on the background check methods in place in California).

160. *See* SENATE RULES COMMITTEE, FLOOR ANALYSIS of AB 202, at 8 (June 30, 1999) (describing Chapter 128 as legislation designed to prevent "multiple purchases of handguns through *legitimate* channels" (emphasis added)).

161. *Cf. supra* note 103 and accompanying text (providing examples of FFL misconduct).

162. Myron Levin, *New Orleans Is Expected to Sue Gun Manufacturers; Lawyers Who Fought Tobacco Firms Are Now Helping Cities Take on a New Industry with Liability and Negligence Suits*, L.A. TIMES, Oct. 30, 1998, at C1.

163. Kelley v. R.G. Indus., Inc., 497 A.2d 1143, 1153 n.9 (Md. 1985).

164. *Id.* at 1153-54.

165. *Id.* at 1153 n.8.

166. *Id.* at 1153 n.9.

to trace, and their increasing use by younger criminals, particularly children.[167] These weapons have caused one court to state that "the Saturday Night Special [is] particularly attractive for criminal use and virtually useless for the legitimate purposes of law enforcement, sport, and protection of persons, property and businesses."[168]

1. Buy American: The Only Way to Get Saturday Night Specials in the U.S.

Because of a legislative loophole, a number of domestic companies have seized control of the domestic market of Saturday Night Specials absent competition from similar foreign-made handguns.[169] A particularly successful group of these companies has a family connection.[170] George Jennings began a family legacy in 1970 when he founded Raven Arms.[171] Raven filled the vacuum created by the passage of federal regulation of foreign Saturday Night Specials.[172] The Raven, Jennings, and Davis companies, all owned by members of the Jennings family, annually produce 400,000 firearms that market for as low as $35 apiece.[173] Because of their location around the Los Angeles area, these companies have been labeled the "Ring of Fire" companies.[174] In thirty years, Raven Arms and other Jennings-family-owned companies have seized control of this niche market;[175] these and other Los Angeles companies produce eighty percent of the Saturday Night Specials made in the United States.[176]

Jim Waldorf, chief executive of Lorcin Engineering Co., one of the Ring of Fire manufacturers, has described his product as "the blue-collar gun of America."[177] The gun is definitely a worker; for four years in the mid-1990s, the federal Bureau of Alcohol, Tobacco and Firearms reported that Lorcin's highest-selling model was the firearm most often found at crime scenes.[178] However, while this type of handgun may be popular, it is not always safe. In a review of the Lorcin L-25, one

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167. *Id.*

168. *Id.* at 1154.

169. *Cf.* Myron Levin, *Legal Claims Get Costly for Maker of Cheap Handguns; Firearms: Liability Actions Trigger Bankruptcy, Public Scrutiny of Southland Firm and Its Enterprising Owner*, L.A. TIMES, Dec. 27, 1997, at A1, *available in* 1997 WL 14014085 (noting that Congress regulates the importation of Saturday Night Specials but has exempted from such regulation domestic manufacturers).

170. *Id.*

171. *Id.*

172. *Id.*

173. Alix M. Freedman, *Fire Power: Behind the Cheap Guns Flooding the Cities Is a California Family; The Volatile Jennings Clan Makes the Pistols Favored by Criminals and Kids*, WALL ST. J., Feb. 28, 1992, at A1.

174. Levin, *supra* note 169, at A1.

175. Freedman, *supra* note 173, at A1.

176. Eva H. Shine, Comment, *The Junk Gun Predicament: Answers Do Exist*, 30 ARIZ. ST. L.J. 1183, 1197 (1998).

177. Levin, *supra* note 169, at A1.

178. *Id.*

critic stated, "We wouldn't pay any amount of money for a gun that self destructs in a couple of hundred rounds. Stay away from this one."[179]

2. *Saturday Night Specials: A Threat to the Public and Law Enforcement*

Cheap guns mean more sales, and regretfully, they also allow children to purchase weapons.[180] Black market operations funnel weapons to teenagers and gang members in urban America.[181] In the words of one gun dealer, "Here where I live, every young kid has a .22 or a .25. It's like their first Pampers."[182] Statistics supporting this proposition give the frightening example of a five-year-old taking a handgun to his kindergarten class.[183] Most children cannot afford the hundreds of dollars needed for a "higher-priced" firearm, but they can probably raise money for a cheaper Saturday Night Special.[184]

Aside from being a low-cost, easily available firearm, the Saturday Night Special also poses serious problems for both the user and law enforcement. When testing a Raven handgun, the federal Bureau of Alcohol, Tobacco and Firearms noted that the gun failed the "drop test"; it discharged when dropped.[185] A firearm owner, in a tragic moment of clumsiness, could kill himself or herself with such a weapon. Saturday Night Specials are also made of lower-quality metal alloys that have a remarkably low melting point when compared with those of other handguns.[186] The metal used most often for Saturday Night Special manufacture is a zinc alloy.[187] Zinc alloys begin to melt at 700 degrees Fahrenheit.[188] Higher-quality firearms are made of stainless steel and melt at 2,400 degrees Fahrenheit.[189] The zinc alloy also frustrates police efforts to identify and trace Saturday Night Specials through ballistics and serial numbers.[190] The serial number can easily be melted away; in addition, every time a Saturday Night Special is fired, the gun's barrel is altered.[191] However, most frightening of all are the dangers associated with the product itself. In testimony before Congress, the then–General Counsel of the

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179. Shine, *supra* note 176, at 1187.

180. *See* Freedman, *supra* note 173, at A1 (providing examples of Saturday Night Special use by children).

181. *Id.*

182. *Id.*

183. *Id.*

184. *See id.* (providing the example of one handgun selling for as low as $45); Shine, *supra* note 176, at 1185 (reporting that some Saturday Night Specials sell for as little as $35).

185. Shine, *supra* note 176, at 1185.

186. Freedman, *supra* note 175, at A1.

187. *Id.*

188. *Id.*

189. *Id.*

190. *Kelley v. R.G. Indus., Inc.*, 497 A.2d 1143, 1153, n.9 (Md. 1985).

191. *Id.*

Washington, D.C., Metropolitan Police stated concerning Saturday Night Specials, "They misfire, fire accidentally, and backfire with some degree of regularity."[192] Aside from the dangers, this type of firearm is a criminal's dream: cheap, easy to get, and hard to trace.[193] As an official from Lorcin Engineering stated, "Cheap is synonymous with volume."[194] The larger the volume, the larger the threat from these weapons. The fact that many Americans are fed up with this threat has led cities to file lawsuits against gun manufacturers, including the Ring of Fire companies.[195]

B. *Existing Law*

1. *Existing Federal Law*

In a country where the consumer is king, the United States regulates most everything bought and sold—except for handguns.[196] The federal government does not regulate the safety of domestically manufactured handguns, weapons which by their design are deadly.[197] Firearms manufacturers set their own industry standards for gun safety.[198] Even the Consumer Product Safety Commission (CPSC) is not allowed to regulate firearms.[199] This freedom from regulation has resulted in the ironic occurrence that children's toy guns are more heavily scrutinized than the real thing.[200] Early in the CPSC's history, when the interest group Citizens for Handgun Control initiated a letter-writing campaign to the CPSC calling for such regulation, consumer product safety commissioners actually received death threats from people opposed to gun safety regulation.[201]

However, federal legislation of a very limited effect does exist. For example, the Gun Control Act of 1968[202] was passed in the wake of the assassination of presidential candidate Robert F. Kennedy,[203] who was killed with a Saturday Night

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192. *Id.*

193. Levin, *supra* note 169, at A1.

194. Freedman, *supra* note 173, at A1.

195. Myron Levin, *Chicago Sues Gun Makers and Sellers*, L.A. TIMES, Nov. 13, 1998, at A1; Levin, *supra* note 162, at C1.

196. Jeff Brazil & Steve Berry, *Federal Safety Law Targets 15,000 items, but Not Guns; Congress: For 25 years, Politics and Special Interests Have Kept Firearms out of Consumer Commission's Reach*, L.A. TIMES, Feb. 1, 1998, at A1.

197. *Id.*

198. *Id.*

199. *Id.*

200. *See id.* (noting that children's cap guns must meet safety requirements such as a certain decibel level and distinctive markings, while real firearms are not required to carry safety devices or meet safety standards).

201. *Id.*

202. Gun Control Act of 1968 (Safe Streets Law of 1968), Pub. L. No. 90-618, 82 Stat. 1213 (codified as amended at 26 U.S.C.A. §§ 5801, 5802, 5811, 5812, 5821, 5822, 5841-5849, 5851-5854, 5861, 5871, 5872 (West 1989 & Supp. 2000)).

203. Levin, *supra* note 169, at A1.

Special manufactured in Europe.[204] In response, Congress set high safety standards for such imported handguns, but neglected to regulate domestically manufactured Saturday Night Specials.[205] This left domestic companies with the market to themselves, free from foreign competition, and allowed the rise of the Ring of Fire companies and their domestic competitors.[206]

2. Existing Law in Other States

To fill the domestic void of Saturday Night Special legislation, in 1997 the Massachusetts Attorney General, acting under his authority to promulgate consumer safety regulation,[207] banned the guns' sale in that State.[208] Massachusetts law defined the banned Saturday Night Special as any firearm: (1) whose parts are made of a metal with a melting point of fewer than 900 degrees Fahreneit; (2) which fails a barrel pressure test of 55,000 pounds per square inch; or (3) which is made of a powdered metal with a density of fewer than 7.5 grams per cubic centimeter.[209] However, Massachusetts law allows such firearms to be sold if they pass a performance test comprised of an evaluation of the handgun after a series of test fires of 600 rounds.[210] The performance test also requires that the firearm pass a "drop test" by not discharging when dropped.[211] Massachusetts is not alone in its attempts to ban "junk guns." Four other states—Hawaii, Illinois, Minnesota, and South Carolina—have set similar safety standards for handguns.[212]

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204. *See* Freedman, *supra* note 173, at A1.

205. Brazil & Berry, *supra* note 196, at A1.

206. *Id.*

207. *See* MASS. GEN. LAWS ANN. ch. 93A, § 2 (West 1997) (bestowing upon he State Attorney General certain powers).

208. MASS. REGS. CODE tit. 940, §§ 16.02-16.06 (1997).

209. *Id.* §§ 16.00-16.09 (1997). *See generally* Benjamin Bejar, *Wielding the Consumer Protection Shield: Sensible Handgun Regulation in Massachusetts: A Paradigm for a National Model?*, 7 B. U. PUB. INT. L.J. 59, 71-73 (1998) (discussing the Massachusetts efforts to regulate firearms from a consumer safety standpoint).

210. MASS. REGS. CODE tit. 940, §§ 16.02-16.06 (1997).

211. *Id.*

212. *See* HAW. REV. STAT. §134-15(a) (1993) (banning the sale of firearms composed of a die cast zinc alloy with a melting point of fewer than 800 degrees Fahrenheit); 720 ILL. COMP. STAT. ANN. 5/24-3(h) (West Supp. 2000) (same); MINN. STAT. ANN. § 624.712(4) (West Supp. 2000) (following the Massachusetts example but requiring a higher melting point of 1000 degrees Fahrenheit); S.C. CODE ANN. §23-31-180 (West 1999) (setting the melting point test at 800 degrees Fahrenheit).

3. *Existing California Law*

In California, a 1996 poll found sixty-seven percent of Californians in favor of a ban on Saturday Night Specials.[213] In the last few years, more than thirty California cities and counties have banned the weapons.[214] In Sacramento, the city council enacted such a ban after statistics showed that forty-six percent of handguns confiscated by Sacramento police were Saturday Night Specials.[215] A recent study in that city noted that three of the top five guns confiscated by Sacramento police in 1995 were Saturday Night Specials manufactured by Ring of Fire companies.[216] Statistics in Sacramento also indicate that "nearly half" of these weapons were carried by young adults and children.[217]

In 1997 and 1998, the California Legislature heeded the citizens' call and made efforts to ban Saturday Night Specials in the 1998 legislative session.[218] The bills it passed banned handguns that did not meet size requirements, lacked safety devices, failed a drop test, or failed an accuracy scoring test.[219] However, former Governor Wilson vetoed this legislation, apparently relying on the argument that the law would deprive the poor of needed protection by banning the only firearms they could afford.[220]

C. *Chapter 248: Banning "Unsafe Handguns"*

Only a year after Wilson's veto, a similar ban on Saturday Night Specials and other inferior and unsafe handguns has passed into law. Chapter 248 calls for a series of tests and standards that all models of handguns sold in California must pass before being approved for sale in this State.[221] Violation of Chapter 248 will result in imprisonment for one year for each illegal handgun sold.[222] Manufacturers and dealers must show that the models they sell have passed tests conducted by an independent laboratory.[223] The tests are similar to those imposed in Massachusetts

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213. Mary Lynne Vellinga, *Crime, Gun Control Offer Ammunition for '98 Races: Key in Contests for Senate, Governor*, SACRAMENTO BEE, Mar. 1, 1998, at A1.

214. Bejar, *supra* note 209, at 75.

215. Tony Bizjak, *Threat of Saturday Night Specials Stressed: They're 46% of Guns Seized by City Police, Study Finds*, SACRAMENTO BEE, Oct. 17, 1997, at B1.

216. *Id.*

217. *Id.*

218. SENATE RULES COMMITTEE, FLOOR ANALYSIS of SB 15, at 7 (Aug. 8, 1999).

219. *Eg.*, SB 1500 (1998) (as introduced on Feb. 5, 1998, but not enacted); SB 500 (1997) (as introduced on Feb. 20, 1997, but not enacted).

220. *See* SENATE RULES COMMITTEE, FLOOR ANALYSIS of SB 15, at 7-8 (Aug. 8, 1999) (quoting former Governor Wilson as stating, "[N]ot only does SB 500 fail to keep guns out of the hands of criminals, it will deprive law-abiding, legitimate gun users of the needed protection of handguns).

221. CAL. PENAL CODE §§ 12126, 12127(a) (enacted by Chapter 248).

222. *Id.* § 12125(a) (enacted by Chapter 248).

223. *Id.* § 12127(a) (enacted by Chapter 248).

in that they include a drop test and a model firing qualification test of 600 rounds.[224] Chapter 248 also requires that handguns sold in California include a safety device to prevent accidental discharge.[225] A failure of any of these three tests will disqualify a model for sale in California.

The role that the California Department of Justice will play under Chapter 248 is one of overseer. The Department will certify laboratories eligible for testing firearm models, and will charge these laboratories a fee for the costs of this certification.[226] The Department will also maintain a roster of certified models that are considered safe, again supported by a fee charged to manufacturers.[227]
Chapter 248 will not apply to all handguns sold in California, however. Certain exemptions are granted for the sale of relics and curios.[228] Chapter 248 allows models that have not yet been certified to enter the State for the purposes of certification by laboratories in California.[229] Furthermore, the Legislature has chosen to exempt from Chapter 248's purview handguns used by law enforcement personnel.[230]

D. Analysis of Chapter 248

Chapter 248 is, simply stated, consumer protection legislation applied to firearms.[231] It is not gun regulation hiding behind the guise of consumer protection. If this were so, then one would probably expect to see a regulation including a melting point requirement, which would help law enforcement to track down weapons used primarily by criminals.[232] Furthermore, Chapter 248 is not limited in application to handguns that meet the description of Saturday Night Specials. The new law will apply to all handguns, including the higher-quality ones.[233]

The testing system imposed by Chapter 248 will require independent tests to corroborate the claims made by manufacturers that their products are safe.[234]

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224. *Compare* MASS. REGS. CODE tit. 940, §§ 16.02-16.06 (1997) (providing these drop tests and firing tests), *with* CAL. PENAL CODE §§ 12126, 12127, 12128 (enacted by Chapter 248) (same).

225. CAL. PENAL CODE § 12126(a)-(b) (enacted by Chapter 248).

226. *Id.* § 12130(b) (enacted by Chapter 248).

227. *Id.* § 12131(a)-(b)(1) (enacted by Chapter 248).

228. *Id.* § 12125(b)(3) (enacted by Chapter 248); *see* 27 C.F.R. § 178.11 (1999) (defining the terms curio and relic as essentially being antique firearms).

229. *Id.* § 12125(b)(1)-(2) (enacted by Chapter 248).

230. *Id.* § 12125(b)(4) (enacted by Chapter 248).

231. "Senate Bill 15 is a common sense, responsible gun law. It requires that weapons fire when they are supposed to and that they not fire when dropped . . . .If a weapon is not reliable[,] . . . it has no business being sold in California." SENATE RULES COMMITTEE, FLOOR ANALYSIS OF SB 15, at 12 (Aug. 16, 1999).

232. *See supra* Part V.A.2 (discussing difficulties for law enforcement associated with Saturday Night Specials and efforts to regulate these weapons).

233. *See* CAL. PENAL CODE § 12125(a) (enacted by Chapter 248) ("[A]ny person in this state who manufactures or causes to be manufactured, imports into the state for sale, keeps for sale, offers or exposes for sale, gives, or lends *any unsafe handgun*" (emphasis added)).

234. CAL. PENAL CODE § 12127(a) (enacted by Chapter 248).

Finally, the gauntlet of three tests—a safety device, a drop test pass rating, and a model firing qualification test—will ensure a basic standard for safety.[235] Guns passing these tests should not discharge accidentally or explode unexpectedly after continued use.

This legislation was not enacted solely for the purpose of eliminating a type of firearm from criminals' arsenals.[236] It may have that effect, but it will also protect legitimate owners and innocent bystanders from a product that may inadvertently injure them.[237] It is a serious law with a penalty of imprisonment for importing or keeping for sale a Saturday Night Special,[238] a penalty not as easily ignored as a civil fine.

E. Conclusions on Chapter 248

Handguns are weapons that are designed to kill. This power needs to be treated responsibly and carefully. By requiring a certain level of quality from these firearms, Chapter 248 provides a measure of that safety.[239] Gun owners must bear the remainder of that responsibility by making sure that their weapons do not hurt the innocent. Firearms need to be secured safely when not in use and should be used only for proper purposes. Chapter 248 shoulders some of the burden of protecting Californians by shielding gun owners against an unknown danger from the weapon in their hands.

VI. CONCLUSION

California has seen its gun regulation expand in the most recent session of the Legislature. New laws have been promulgated to address problems that have not been met effectively or have never been addressed by previous administrations. Chapter 129 strives to enact a comprehensive assault weapons ban for California,[240] while Chapter 128 hopes to prevent criminals from using strawmen for one-time arsenal shopping sprees.[241] Chapter 248 promises safer guns for both gunowners and the public by enacting safety provisions designed to ban Saturday Night

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235. SENATE RULES COMMITTEE, FLOOR ANALYSIS of SB 15, at 3-4 (Aug. 16, 1999)

236. *Cf.* CAL. PENAL CODE §§ 12125-12133 (enacted by Chapter 248) (providing safety regulations, but having no prohibition on use by criminals).

237. *See id.* (enacting safety tests and standards to prevent accidental discharges and explosions).

238. *Id.* § 12125(a) (enacted by Chapter 248) (setting the punishment for violation as a misdemeanor with imprisonment for up to a year in a county jail).

239. *See supra* Part V.C-D (discussing the safety standards and efficacy of those standards as found in Chapter 248).

240. *See supra* Part III (discussing the provisions of Chapter 129 and its effect on the Roberti-Roos Act, California's assault weapons ban).

241. *See supra* Part IV (discussing the strawman purchase, a popular method used by criminals to acquire large arsenals of weapons from legitimate dealers, and the provisions of Chapter 128 enacting a one-handgun-a-month law preventing one-trip arsenal shopping).

Specials.[242] As with all newly enacted legislation, the success or failure of these policies is not clearly foreseeable, but the laws clearly strengthen rules governing firearms. Tragic accidents from defective firearms, and horrendous crimes committed with assault weapons that serve no need in modern society, no longer need occur.

242. *See supra* Part V (discussing the ever-present problem of Saturday Night Specials and Chapter 248's ban on these cheap and dangerous handguns).