

ADDRESSING GUN VIOLENCE THROUGH LOCAL ORDINANCES



*A Legal Resource Manual
For California Cities and Counties*

LCAV

**LEGAL COMMUNITY AGAINST VIOLENCE
A COMMUNITY FUND OF THE SAN FRANCISCO FOUNDATION**

Addressing Gun Violence Through Local Ordinances A Legal Resource Manual for California Cities and Counties

Legal Community Against Violence

A Community Fund of the San Francisco Foundation

The Epidemic of Gun Violence: A Growing Public Health Crisis

Gun violence has reached epidemic proportions in California and nationally. Each year in the United States, more than 38,000 people are killed with firearms.¹ In California, firearms have surpassed motor vehicle accidents as the leading injury-related cause of death.² In 1993, more Californians under the age of 24 died from firearm injuries than from motor vehicle injuries, AIDS, heart disease and cerebrovascular disease combined.³ Faced with slow progress by federal and state legislatures in the struggle to reduce firearm violence, cities and counties throughout California are increasingly looking for local solutions to this growing problem.

Local Authority to Regulate Firearms and Ammunition

Local governments often misunderstand the extent to which they are free to regulate firearms. The Legal Resource Manual seeks to clarify this issue by analyzing the four primary legal challenges to local regulatory authority over firearms: the Second Amendment to the U.S. Constitution, the Due Process Clause of the U.S. and California Constitutions, the Equal Protection Clause of the U.S. and California Constitutions, and state-law preemption. Uniform judicial interpretation makes clear that the Second Amendment addresses the right to keep and bear arms only in the context of service to a "well-regulated militia," which the U.S. Supreme Court has defined as the National Guard. Accordingly, the Second Amendment poses no barrier to local violence prevention ordinances. Due Process problems can generally be avoided by careful drafting. Under the Equal Protection Clause, neither firearms dealers nor users of firearms are protected classes, and a local government need only demonstrate a rational basis for imposing regulations upon them. Finally, state law preemption of local firearms regulation is more narrowly circumscribed than many people believe. Consequently, local governments in California appear to have considerable power to impose restrictions designed to reduce access to firearms and ammunition in their communities.

The Legal Resource Manual provides a legal analysis of several types of ordinances which have been considered or enacted by cities and counties statewide.

The complete Legal Resource Manual is available to California cities and counties free of charge, and to others for \$12.00. To order a copy, please contact Legal Community Against Violence, 268 Bush Street, #555, San Francisco, CA 94104, (415) 433.3550. Publication and dissemination of the Manual are made possible through the generous support of The California Wellness Foundation and Van Loben Sels Foundation.

Note: The views expressed in the Legal Resource Manual are those of Legal Community Against Violence. The Manual is not intended as legal advice to any person or entity, and should not be regarded as such.

Endnotes:

¹ Hudson, B.L. and Kochanek, K.D., Advance Report of Final Mortality Statistics, 1992. Centers for Disease Control and Prevention, National Center for Health Statistics Monthly Vital Statistics Report. (Mar. 1995) Dept. of Health and Human Services Publication PHS 95-1120:58.

² Fingerhut, et al., Centers for Disease Control and Prevention, *Firearm and Motor Vehicle Injury Mortality—Variations by State, Race, and Ethnicity: United States, 1990-91*, 242 Advance Data 1 (1994).

³ California Department of Health Services Vital Statistics Section (unpublished data).

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*THIS MANUAL IS DEDICATED TO THOSE WHO WERE KILLED OR
INJURED DURING THE 101 CALIFORNIA STREET MASSACRE AND
TO ALL OTHER VICTIMS OF GUN VIOLENCE AND THEIR LOVED ONES.*

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FOREWORD

This manual is designed as a legal resource guide for city and county attorneys, city council members, county supervisors and community leaders wishing to address the problem of gun violence on a local level. The manual has two goals: to provide information regarding local ordinances which can be enacted to regulate firearms and ammunition, and to outline the legal context in which such ordinances will coexist with federal and state law. Because this manual is intended primarily for individuals with a legal background, a basic knowledge of general legal principles is assumed.

Legal Community Against Violence ("LCAV") was created as a community fund of The San Francisco Foundation in the aftermath of the senseless July 1, 1993 massacre at 101 California Street. On that date, eight people were murdered and six more wounded. Now with over 300 active members, LCAV is dedicated to organizing the legal community to reduce gun-related injuries and deaths.

LCAV recognizes there is no single, easy solution to the problem of gun violence. LCAV approaches the issue with a 3-pronged strategy: educating the public about gun violence, promoting effective legislation limiting access to firearms and ammunition, and providing litigation assistance to individuals and local governments.

Since its inception, LCAV has provided financial and *pro bono* legal support for ground-breaking litigation filed by the Center to Prevent Handgun Violence on behalf of several survivors of the 101 California Street massacre against the manufacturers and sellers of the guns and accessories used in the shootings. Working with groups like Handgun Control, Inc., LCAV has also mobilized the legal community to advocate for federal gun control legislation, contributing to the enactment of the Brady Law and the assault weapons ban.

LCAV has also helped to educate Californians about the need for state gun control legislation, contributing to the passage of state laws denying minors access to firearms and ammunition, requiring firearms dealers to register with the California Department of Justice and allowing judges to order persons subject to domestic restraining orders to temporarily relinquish their firearms to law enforcement officials.

LCAV is currently working with The Center to Prevent Handgun Violence to place the Straight Talk About Risks ("STAR") curriculum in our schools, so children can learn to say "no" to guns and resolve conflicts through peaceful means. LCAV is also expanding its Second Amendment education project to demonstrate that reasonable firearms regulations are constitutional.

LCAV has worked closely with local governments throughout California to draft and defend firearms ordinances. For example, beginning in 1994, LCAV provided *pro bono* legal assistance to the City of Lafayette when a lawsuit was brought challenging an ordinance which regulated local gun dealers. With LCAV's help, the City of Lafayette obtained a trial court judgment upholding the ordinance and dismissing the complaint. An appeal is expected.

LCAV embarked upon the Local Ordinance Project after receiving many similar requests for information and assistance from other local officials seeking to reduce firearm-related violence in their communities. The central component of the project is the creation and distribution of this manual, free of charge, to cities and counties throughout California. In addition, LCAV will: 1) provide ongoing assistance to local governments regarding the issues discussed in the manual; 2) coordinate *pro bono* legal services for localities faced with legal challenges to firearms ordinances; and 3) maintain a library of local ordinances passed by cities and counties throughout the state, together with legal briefs and other pleadings filed in connection with any challenge to the ordinances. Copies of these materials are available to local officials upon request.

LCAV understands that not all of the information provided in this manual will be useful to every community. However, we hope this manual presents a wide range of possible means to a very important end: ensuring a safer and better life for all community members through a reduction in gun violence.

John R. Heisse, II, Esq.
LCAV Chair

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This manual is intended for public use. Copies may be obtained by contacting LCAV.

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CHAPTER I

THE EPIDEMIC OF GUN VIOLENCE: A PUBLIC HEALTH CRISIS

The statistics regarding gun-related injuries and deaths in our society point to one frightening conclusion: gun violence has reached epidemic proportions. Each year in the United States, approximately 38,000 men, women and children are killed with firearms.¹ According to the National Center for Health Statistics, on an average day 14 American children under the age of 19 are killed in handgun homicides, suicides and unintentional shootings.²

More Americans were murdered with firearms in the four years between 1988 - 1991 than were killed in battle in the 8.5 years of the Vietnam War.³ By 2003, the number of firearm-related deaths is expected to surpass motor vehicle-related deaths as the number one cause of injury-related deaths in the United States.⁴ As stated by U.S. Secretary of Health and Human Services Donna Shalala: "The truth is that gun violence is not just a criminal problem. It's a public health epidemic."⁵

¹ KD Kochanek & BL Hudson, *Advance Report of Final Mortality Statistics, 1992*. Centers for Disease Control and Prevention, National Center for Health Statistics Monthly Vital Statistics Report. (Mar. 1995) Dept. of Health and Human Services publication PHS 95-1120:56.

² Obtained from the National Center for Injury Prevention and Control, Center for Disease Control, based on National Center for Health Statistics mortality data tapes (1992).

³ F.B.I., *Crime in the United States* 17 (1991); *Statistical Abstracts of the United States* 361 (1994).

⁴ *Deaths Resulting From Firearm and Motor-vehicle-related Injuries in the United States From 1968-1991*, 43 *Morbidity and Mortality Weekly Report* 37 (1994).

⁵ The Campaign to Prevent Handgun Violence Against Kids, *A Report on the February 11, 1995 Statewide Videoconference*, at i.

A. GUN VIOLENCE IS THE LEADING CAUSE OF INJURY-RELATED DEATH IN CALIFORNIA

Firearms already surpass automobiles as the leading cause of injury-related death in this state.⁶ One of the most disturbing facts about gun violence in California is the number of young lives it shatters every day. In 1993, more Californians under the age of 24 died from firearm injuries than from motor vehicle injuries, AIDS, heart disease and cerebrovascular disease combined.⁷ Not surprisingly, most Californians believe that violent crime is the single most important problem facing our state today.⁸

Gun violence takes a tremendous financial, as well as emotional, toll on Californians. The average cost of hospitalization for a gunshot wound is \$33,000.⁹ Eighty percent of this cost is borne by taxpayers.¹⁰ In 1993, gunshot fatalities and care of gunshot victims cost California hundreds of million of dollars in direct medical costs.¹¹

B. PUBLIC SUPPORT FOR RATIONAL GUN CONTROL LEGISLATION

Although the problem of gun violence may seem overwhelming, it is not insurmountable. For example, the Brady Law (establishing a background check and waiting period for all handgun buyers) prevented tens of thousands of felons from purchasing guns over the counter within its first year.¹² In addition, studies have shown that the rate of youth suicide is lower in populations that have fewer guns due to more

⁶ Fingerhut, et al., Centers for Disease Control & Prevention, *Firearm and Motor Vehicle Injury Mortality – Variations by State, Race, and Ethnicity: United States, 1990-91*, 242 *Advance Data* 1 (1994).

⁷ California Department of Health Services, Vital Statistics Section (unpublished data).

⁸ Campaign to Prevent Handgun Violence Against Kids, *Preventing Handgun Violence, A Survey of California and National Opinion* (Feb. 1995) at 1.

⁹ D.P. Rice, E.J. McKenzie, and Assoc., *Cost of Injury in the United States: A Report to Congress* 53 (1989). (Sponsored by the San Francisco Institute for Health and Aging, University of California, and Injury Prevention Center, Johns Hopkins University.)

¹⁰ G.J. Wintemute & M.A. Wright, *Initial and Subsequent Costs of Firearm Injuries*, 33 *J Trauma* 556 (1992).

¹¹ M. Nieto, R. Dunstan & G. Koehler, California Research Bureau, *Firearm-Related Violence in California: Incidence and Economic Costs* 1 (1994) (\$703 million in 1993); see also Dr. Wendy Max, Testimony Before the California Assembly Select Committee on Gun Violence (Nov. 29, 1994) (over \$329 million in 1991).

¹² Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, *One-Year Progress Report: Brady Handgun Violence Prevention Act* (Feb. 28, 1995).

restrictive gun control laws,¹³ and that liberalized firearm-carrying laws may increase the firearm homicide rate.¹⁴ Finally, statistics have shown that when access to high-capacity assault weapons is strictly limited, the number of crimes involving those weapons decreases.¹⁵

Public opinion polls show that the vast majority of Americans support common sense gun control laws. According to a November 1994 Harris Poll, the most frequently cited reason for this country's soaring homicide rate was that "It is easier for people to buy guns here than in other countries."¹⁶ The Times Mirror Center, polling in December of 1994, found that 71% of Americans believed "stricter control of handguns" should be a top priority for President Clinton and Congress in 1995.¹⁷ California voters also favor reasonable handgun control measures. This support crosses political party affiliation and even gun ownership status.¹⁸

Despite the public's overwhelming support for reasonable gun control legislation, such legislation has repeatedly faltered at the federal and state levels. Although the Brady Law and assault weapons ban were finally enacted by the U.S. Congress in 1994, new Congressional leadership has vowed to repeal these common sense laws. In addition, state legislation often fails due to geographic variations in firearm violence across California. These differences frequently result in votes split along urban and rural lines.

Given the political and demographic obstacles to gun control legislation on the federal and state levels, local regulation has become an increasingly significant means of addressing the public health crisis of gun violence. However, because state law preempts certain local regulations of firearms and ammunition, cities and counties are often unsure of what they can do legally to reduce the violence. Chapter II discusses

¹³ D.A. Brent et al., *The Presence and Accessibility of Firearms in the Home and Adolescent Suicides: A Case Control Study*, 266 J. Am. Med. Ass'n. 2989 (1991).

¹⁴ D. McDowall, C. Loftin and B. Wiersema, Violence Research Group, Department of Criminology and Criminal Justice, University of Maryland, *Easing Concealed Firearm Laws: Affects on Homicide in Three States* (Jan. 1995).

¹⁵ Handgun Control, Inc., *Cops Under Fire* (1995).

¹⁶ See *supra* note 8, at 4 (citing Harris Poll).

¹⁷ *Id.*, at 4 (citing Times Mirror Center Poll).

¹⁸ *Id.*, at 1-4 (citing EDK Associates Poll).

preemption and other potential legal challenges to local regulation of firearms and ammunition.

CHAPTER II

LEGAL CHALLENGES TO LOCAL REGULATION OF FIREARMS AND AMMUNITION

Under the California Constitution, a city or county "may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." Cal. Const. art. XI, § 7. Although cities and counties have broad police power, including the power to impose certain restrictions on firearms and ammunition, local governments are subject to various constraints.

Opponents of local gun control ordinances have raised several constitutional challenges, including alleged violations of: 1) the Second Amendment to the United States Constitution; 2) the Due Process Clause of the United States and California Constitutions; and 3) the Equal Protection Clause of the United States and California Constitutions. Legal challenges have also been brought on the ground that local efforts to regulate firearms and ammunition are preempted by state law.

As discussed below, the three constitutional challenges are very unlikely to overturn a carefully drafted local ordinance. The fourth challenge, preemption, poses a greater obstacle, but does not bar local action in many areas of firearms and ammunition regulation.

A. THE SECOND AMENDMENT

"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. Constitution, Amendment II

According to the National Rifle Association ("NRA") and other opponents of rational firearms control measures, the Second Amendment guarantees the absolute right of every American to privately possess firearms without restriction. Although this

interpretation is accepted as fact by many Americans, it has absolutely no basis in law. To the contrary, nearly 100 years of uncontradicted legal precedent make clear that the Second Amendment only protects the right to keep and bear arms in connection with service to an organized state militia.

In support of its interpretation, the gun lobby focuses exclusively on the words of the second half of the Second Amendment - "the right of the people to keep and bear arms shall not be infringed" - omitting all reference to the first phrase - "A well regulated Militia, being necessary to the security of a free State" - even though that language clearly links the right to bear arms to a "well regulated Militia". Based on this distortion of the constitutional text, the gun lobby insists that the Second Amendment is a barrier to virtually all proposed firearms regulations.

The gun lobby has led many Americans to believe that rational gun control regulations are unconstitutional, significantly undermining efforts at the federal and state level to address the national epidemic of gun violence. As discussed below, however, the Second Amendment is not a barrier to laws regulating the private use, sale or ownership of firearms, whether enacted by federal, state or local governments. As stated by former U.S. Supreme Court Chief Justice Warren Burger, the NRA's interpretation of the Second Amendment is "one of the greatest pieces of fraud, I repeat the word *fraud*, on the American public by special interest groups that I have ever seen in my lifetime ."¹⁹

1. Historical Context

When analyzing the Second Amendment, it is useful to understand the historical context in which it was written. Prior to the adoption of the U.S. Constitution, each of the states operated independently under the Articles of Confederation. Each state had its own "militia" composed of ordinary citizens serving as part-time soldiers to protect against external threats and internal insurrection. Individuals serving in the militia were required to supply their own equipment, including horses and guns, for militia use.²⁰

¹⁹ Burger, *The Right to Bear Arms*, Parade Magazine, Jan. 14, 1990.

²⁰ W. Riker, *Soldiers of the States: The Role of the National Guard in American Democracy* 11-12 (1957).

The U.S. Constitution, as originally drafted, established a permanent army of professional soldiers controlled by the federal government. When the Constitution was sent to the states for ratification in 1787, the continued existence of the militia was in question. Many colonial leaders, with the memory of British tyranny fresh in their minds, mistrusted centralization of power. Although they saw the continuation of the state militia as an effective counterpoint to the power of the standing army, these leaders were concerned that the federal government had excessive control over the militia.²¹

In *The Federalist* #46, James Madison, the principal author of the Bill of Rights, defines the militia as a military force "conducted by [state] governments". This state-run militia, he argued, would counterbalance the power of the federal army. Similarly, during the Virginia debates on the ratification of the Constitution, Patrick Henry argued vigorously for each state's right to arm its own militia. Henry felt that because the original Constitution gave the federal government the exclusive power to arm state militias, the federal government could simply destroy the state forces by refusing to supply arms. "When this power is given up to Congress without limitation or bounds," he argued, "how will your militia be armed?"²²

Thus, the Second Amendment was written to ensure that every state would have the ability to maintain its own militia. It was not, as the gun lobby argues, intended to establish an unlimited, private right of gun ownership or possession. If the drafters of the Bill of Rights had intended to guarantee such an individual right, they could (and would) have done so.²³

²¹ Ehrman & Henigan, *The Second Amendment in the Twentieth Century: Have you Seen Your Militia Lately?* 15 V. Dayton L. Rev. 5, 14-15 (1989).

²² Debates on the Ratification of the Constitution, Virginia Legislature.

²³ The Second Amendment has actually become an anachronism, since National Guard weapons are currently supplied by the government and not by individual National Guard members. Accordingly, possession of a weapon by an individual no longer bears any relationship to the militia contemplated by the Second Amendment.

2. Judicial Interpretation

No federal court has ever struck down a gun control law as violating the Second Amendment.²⁴ In *U.S. v. Miller*, 307 U.S. 174 (1939), the U.S. Supreme Court considered a Second Amendment challenge to the prosecution of two individuals who transported a sawed-off shotgun in violation of the National Firearms Act. The court held that the "obvious purpose" of the Second Amendment was "to assure the continuation and render possible the effectiveness" of the state militia, and that it "must be interpreted and applied with that end in view." *Miller*, 307 U.S. at 178. Because there was no evidence that possession or use of a sawed-off shotgun had any "reasonable relationship to the preservation or efficiency of a well regulated militia," the court found that the Second Amendment had not been violated. *Id.* Subsequent cases have held that the modern equivalent of the "militia" is the National Guard.²⁵

In *U.S. v. Hale*, 978 F. 2d 1016 (8th Cir. 1992), the Eighth Circuit read *Miller* as protecting only those weapons which are actively being used by a militia member for a legitimate, militia-related purpose. A weapon is not constitutionally protected simply because it is "susceptible to military use." Indeed, as observed by the court, it would be difficult to find a lethal weapon which does *not* have a "potential military use." *Hale*, 978 F. 2d at 1020. Instead, a plaintiff must prove that "his or her possession of the weapon was reasonably related to a well regulated militia." *Id.* Membership in an unorganized militia, or a private, nongovernmental military organization, is not enough to satisfy the "reasonable relationship" test. *Id.*

In *Quilici v. Village of Morton Grove*, 695 F. 2d 261 (7th Cir. 1982), the Seventh Circuit upheld a local ordinance banning the possession of handguns. The court rejected the appellants' Second Amendment challenge:

Construing this language according to its plain meaning, it seems clear that the right to bear arms is inextricably connected to the preservation of

²⁴ Twice in American history a state court has struck down a gun control law on Second Amendment grounds, most recently in 1902. *Nunn v. State*, 1 Ga. 243 (1846); *In re Brickey*, 8 Idaho 597, 70 P. 609 (1902). These cases were decided before the U.S. Supreme Court's decision in *U.S. v. Miller*, *infra*. In light of *Miller*, they are inconsequential. In any event, they have not been followed.

²⁵ *Maryland v. United States*, 381 U.S. 41 (1965) and *Perpich v. Dept. of Defense*, 496 U.S. 334 (1990). In the *Perpich* case, the NRA filed an *amicus curiae* brief asking the court to find that the National Guard is not the "militia", as that term is used in the Constitution. The court rejected the NRA's request, holding that, when not in federal service, members of the National Guard "continue to satisfy [the] description of a militia." Although neither of these cases directly addressed the Second Amendment, they shed light on the meaning of the term "militia."

a militia....[W]e conclude that the right to keep and bear handguns is not guaranteed by the second amendment.

Quilici, 695 F. 2d at 270.

The Supreme Court declined to hear an appeal in *Quilici*, allowing the Circuit Court's decision to stand.

The eleven U.S. Circuit Courts of Appeals which have analyzed the Second Amendment have uniformly adopted this narrow view.²⁶ In addition, while the courts have chosen to apply many other provisions of the Bill of Rights to the states through the Fourteenth Amendment, they have explicitly declined to do so with the Second Amendment. See, e.g., *Quilici*, *supra*, and *Fresno Rifle and Pistol Club, Inc. v. Van de Kamp*, 965 F. 2d 723 (9th Cir. 1992) (the Second Amendment limits only federal action).

In short, the Second Amendment is not an obstacle to rational gun control laws. As discussed above, the Second Amendment only guarantees the right to bear arms in the context of service to a state's "well regulated Militia" i.e., today's National Guard; it does not preclude federal, state or local regulation of the sale, use or ownership of guns for private purposes.

B. THE DUE PROCESS CLAUSE

Both the state and federal constitutions provide that no person shall be deprived of "life, liberty or property, without due process of law." U.S. Const. amend's V and

²⁶ See *United States v. Hale*, 978 F.2d 1016, 1018-20 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 1614 (1993); *Farmer v. Higgins*, 907 F.2d 1041, 1045 (11th Cir. 1990) (dismissing as without merit appellee's claims that the Second Amendment provides a right to possess machine guns), *cert. denied*, 498 U.S. 104 (1991); *United States v. Toner*, 728 F.2d 115, 128 (2d Cir. 1984) (holding that the right to possess a gun is not a fundamental right); *Quilici v. Village of Morton Grove*, *supra* (7th Cir. 1982), *cert. denied*, 464 U.S. 863 (1983); *United States v. Oakes*, 564 F.2d 384, 387 (10th Cir. 1977) (finding that the Second Amendment does not guarantee an individual right to bear arms even though appellant was technically a member of the state militia), *cert. denied*, 435 U.S. 926 (1978); *Marchese v. California*, 545 F.2d 645, 646 (9th Cir. 1976) (finding that the "compelling state interest" standard does not apply to the "right" to bear arms); *United States v. Warin*, 530 F.2d 103, 106 (6th Cir. 1976) (finding that possession of a weapon must bear a reasonable relation to the preservation of a well-regulated militia), *cert. denied*, 426 U.S. 948 (1976); *United States v. Johnson*, 497 F.2d 548 (4th Cir. 1974) (same); *United States v. Johnson*, 441 F.2d 1134, 1135, (5th Cir., 1971) (same) *Cases v. United States*, 131 F.2d 916, 921-22 (1st Cir. 1942) (finding that the Second Amendment prevents only the federal government from infringing on the possession of weapons, though even the bar on federal action is not absolute); *United States v. Tot*, 131 F.2d 261, 266 (3d Cir. 1942) (finding that possession of a weapon must bear a reasonable relationship to the preservation of a well-regulated militia), *rev'd on other grounds*, 319 U.S. 463 (1943).

XIV; Cal. Const. art. I, § 7. In order to meet the requirements of due process, a law must be "sufficiently clear as to give a fair warning of the conduct prohibited...and must provide a standard or guide against which conduct can be uniformly judged." *Morrison v. State Bd. of Educ.* (1969) 1 Cal. 3d 214, 231. A statute which requires those subject to its provisions to guess at its meaning is inherently violative of due process. *Citizens for Responsible Behavior v. Superior Court* (1991) 1 Cal. App. 4th 1013.

The recent experience of the City of Lafayette provides some insight into the requirements of due process. In 1994, Lafayette adopted an ordinance requiring local firearms dealers to obtain a land use permit and local license. The ordinance restricts firearm sales to commercially zoned districts, establishes standards for approving the location of new businesses through land use permits and imposes security requirements for such businesses.

One provision of the ordinance prohibits gun dealers from allowing minors on the premises if firearm sales are "the primary business performed," unless the minor is accompanied by a parent or guardian. Several local gun dealers and other individuals filed suit against the City, arguing, among other things, that this provision was void for vagueness.²⁷ Plaintiffs argued that the ordinance created confusion because it provided no guidance regarding the meaning of the word "primary," i.e., it did not explicitly advise gun dealers how to determine whether the sale of firearms is the "primary business performed" on the premises.

The City of Lafayette filed a demurrer to the complaint, asking the court to dismiss the action on the ground that it failed, as a matter of law, to state a viable cause of action against the City. In response to the plaintiffs' due process claim, the City argued that the term "primary," when read in the context of the ordinance as a whole, clearly meant "main use." The Contra Costa County Superior Court agreed with the City and on November 3, 1995, dismissed the complaint without leave to amend.

C. THE EQUAL PROTECTION CLAUSE

The state and federal constitutions also guarantee the right of equal protection of the laws. Cal. Const. art. I, § 7; U.S. Const. amend. XIV. For purposes of equal

²⁷ *Suter v. City of Lafayette* No. C-94-0544 (Contra Costa County Superior Court, Dec. 21, 1994).

protection, a law will be judged according to how it classifies people. Where the law does not involve a suspect class or the curtailment of a fundamental interest, the classification will be upheld if it bears a rational relationship to a legitimate governmental purpose. *Kim v. Dolch* (1985) 173 Cal. App. 3d 736.²⁸

Under the rational basis test, a law will be upheld if "any set of facts may reasonably be conceived to show that it is rationally related to some legitimate government purpose." *Broadmoor Police Protection Dist. v. San Mateo Local Agency Formation Comm.* (1994) 26 Cal. App. 4th 304, 312. A court will not invalidate a statute on equal protection grounds unless it finds that the legislation is irrational, or the purposes promoted are illegitimate legislative concerns. *Id.*

Moreover, an ordinance need not attempt to solve the entire problem it addresses. A law "is not unconstitutional because it might have reached other evils, so long as there is a rational basis for the Legislature's decision to go no further than it did." *Berry v. Hannigan* (1992) 7 Cal. App. 4th 587, 592.

In the Lafayette case, the plaintiffs argued that several provisions of the City's firearms sales ordinance, including those requiring all firearm sales businesses to purchase liability insurance and banned gun dealers in residential areas, violated their equal protection rights. The Superior Court rejected each of the plaintiffs' equal protection arguments, finding that the sale of firearms is not a fundamental right and the City had a rational basis for imposing restrictions on gun dealers.

D. THE PREEMPTION DOCTRINE²⁹

1. General Principles of Preemption

The doctrine of preemption provides a set of guidelines for resolving conflicts arising from the existence of overlapping sovereignty. Local governments acquire all of their regulatory power from the state. The state, therefore, can limit local power as it

²⁸ A "suspect class" is one into which the class member is born, involving an immutable trait such as race, gender or lineage. *Merideth v. Workers' Compensation Appeals Bd.* (1977) 19 Cal. 3d 777.

²⁹ Portions of this discussion are excerpted from Gorovitz, *California Dreamin': The Myth of Preemption of Local Firearm Regulation*, 30 U.S.F. L.Rev. (forthcoming March 1996).

sees fit.³⁰ Accordingly, when a local ordinance covers an area already addressed by state law, the local ordinance may be preempted.³¹

Preemption can occur in four ways: duplication, contradiction, express preemption or implied preemption. Some cases, most involving criminal law, have held that a local government cannot adopt a regulation which duplicates state law, because to do so would create a conflict of jurisdiction between the locality and the state. *Pipoly v. Benson* (1942) 20 Cal. 2d 366. Nor can a local government adopt a regulation which contradicts, or "is inimical to," state law. *Ex Parte Daniels* (1920) 183 Cal. 636. In either of these circumstances, the invalidity of local action arises not from any specific intention of the state legislature that local governments be barred from regulating, but from the effect the local action would have on the state's ability to exercise its sovereignty.

The other two types of preemption, however, are quite different in character from duplication and contradiction. Express and implied preemption arise when the state indicates a desire to prevent local governments from taking regulatory action in a given field. While preemption by duplication or contradiction occurs incidentally to the presence of competing sovereigns, implied and express preemption result from affirmative assertions by the state of its intent to bar local regulation in a given area. The state may make such an assertion expressly, by passing legislation which says, in so many words, that the state intends to preempt local regulation in a given area. Or the state may imply its preemptive intent through the adoption of a comprehensive regulatory scheme which leaves no room for local action. By occupying a field of regulation in this manner, the state suggests that any gaps in its regulatory scheme are intentional, and therefore nothing remains for local governments to regulate.

When the state adopts a statute expressing preemptive intent, the courts must determine the breadth of the field which the legislature intends to preempt. Traditional

³⁰ The federal Constitution does not recognize the sovereignty of local governments. However, state constitutions and legislatures generally confer some sovereign power on local governments because the state government cannot adequately monitor and address the specific health and safety needs of localities. Teret & Christoffel, *Protecting the Public: Legal Issues in Injury Prevention* 88 (1993). Article XI, § 7 of the California Constitution gives local governments some sovereignty over such matters.

³¹ Charter cities, but not counties, also have exclusive control over "municipal affairs". Cal. Const. art. XI, § 5. Ordinances enacted under this power take precedence over conflicting state law. *California Fed. Savings & Loan Ass'n. v. City of Los Angeles* (1991) 54 Cal. 3d 1, 5-6. However, firearms regulations are unlikely to constitute "municipal affairs." See *Doe v. City and County of San Francisco* (1982) 136 Cal. App. 3d 509.

rules of statutory construction guide the analysis of express preemption statutes. The courts generally read the preemption statute, compare its terms to the terms and effect of the ordinance in question, and simply decide whether the two involve the same regulatory field.

Implied preemption cases, on the other hand, present much more complicated issues, because the courts must draw inferences from the legislative scheme about the nature and breadth of the state's preemptive intent. Every statute fully occupies some regulatory field, i.e., the field directly covered by the statute's terms. In implied preemption cases, however, the courts must determine how far *beyond the terms of the relevant statute(s)* the occupied field extends.

Judicial analysis of implied preemption derives from principles outlined by the California Supreme Court in *In re Hubbard* (1964) 62 Cal. 2d 119 (overruled on other grounds in *Bishop v. City of San Jose* (1969) 1 Cal. 3d 56). In *Hubbard*, the court prescribed a three-pronged test for evaluating whether state law implies a legislative intent to preempt local regulation. The court said that implied preemption occurs where:

(1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the municipality.

Hubbard, 62 Cal. 2d at 128.

The *Hubbard* test continues to be followed today. See *Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal. 4th 893.

2. The *Galvan* Case

In *Galvan v. Superior Court* (1969) 70 Cal. 2d 851, the California Supreme Court considered a preemption challenge to a San Francisco ordinance requiring the registration of most firearms within the city limits. Before concluding that the ordinance was not preempted by state law, the court analyzed the state's regulatory scheme regarding firearms.

The primary relevant legislation was the California Dangerous Weapons Control Act (Penal Code Section 12026 *et seq.*), which expressly barred the imposition of any permit or licensing requirement on citizens wishing to keep a concealable firearm in their homes or businesses.³² The court thus faced the question of whether San Francisco's registration requirement constituted a "permit or license" under the Penal Code. Noting that other sections of the Code recognized a difference in meanings of the words "registration" and "licensing," the court held that the ordinance did not conflict with the Act. The court noted that if the Legislature had intended to prevent local bodies from adopting registration requirements, it could easily have said so.

The court proceeded to consider implied preemption, beginning with an analysis of whether the array of statutes dealing with guns and other weapons occupied the entire field of weapons control.³³ The court concluded that the state's regulatory scheme left various areas of weapons control open to local regulation. The court stated that "[t]he fact that there are numerous statutes dealing with guns or other weapons does not by itself show that the subject of gun or weapons control has been completely covered so as to make the matter one of exclusive state concern." *Galvan*, 70 Cal. 2d at 861.

The *Galvan* court then analyzed the second prong of the *Hubbard* test, i.e., whether the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action. The court observed that the issue of "paramount state concern" involves the question of whether "substantial, geographic, economic, ecological or other distinctions are persuasive of the need for local control, and whether local needs have been adequately recognized and comprehensively dealt with at the state level" (quoting *Robins v. County of Los Angeles* (1966) 248 Cal. App. 2d 1, 9).

The court noted that state laws are often inadequate to meet the demands of densely populated municipalities, making it necessary for local governments to add to state regulation. The court stated, "[t]hat the problems with firearms are likely to require

³² Penal Code Section 12026 was subsequently amended, most recently in 1995 (see discussion *infra* at 21). However, the prohibition on permit or licensing requirements has remained in the statute.

³³ The plaintiff in *Galvan* cited provisions of the California Fish and Game, Health and Safety, Penal, Public Resources, and Vehicle Codes. *Galvan*, 70 Cal. 2d at 861, n.4.

different treatment in San Francisco County than in Mono County should require no elaborate citation to authority." *Galvan*, 70 Cal. 2d at 864.³⁴

Finally, the court held that the San Francisco ordinance did not place an undue burden on transient citizens because it included a seven-day exemption for non-residents who brought firearms into the jurisdiction. The court concluded:

[W]e find that the Legislature has not adopted a uniform statutory scheme governing gun registration, that the absence of provisions governing registration does not reflect a legislative intent to prohibit local registration, that the San Francisco gun law imposes no undue burden on transients, and that the differing community needs for gun registration within the state justify local regulation of the subject.

Id. at 866.

The *Galvan* decision sent three clear signals to the Legislature. First, the state's regulatory scheme regarding firearms would be read narrowly, in deference to the needs of local governments to address local problems related to the possession and use of firearms. Second, *Galvan* raised the very real possibility of extensive local regulation of firearms, particularly in light of the court's explicit conclusion that the state's regulatory scheme was not sufficiently comprehensive to occupy the broad field of gun or weapons control. Third, the decision impliedly invited the Legislature to instruct the judiciary with an express statement of any intent by the state to occupy either the narrow field of firearm registration and licensing, or the broad area of weapons control.

3. Preemption After *Galvan*

a. Express preemption

A few months after the *Galvan* decision was published, the Legislature adopted what is now Government Code Section 53071. That statute reads as follows:

³⁴ See also *Fisher v. City of Berkeley* (1984) 37 Cal. 3d 644, 707 ("We will be reluctant to infer legislative intent to preempt a field covered by municipal regulation when there is a significant local interest to be served that may differ from one locality to another"); *Gluck v. County of Los Angeles* (1979) 93 Cal. App. 3d 121, 133 ("[I]f there is a significant local interest to be served which may differ from one locality to another then the presumption favors the validity of the local ordinance against an attack of state preemption.").

It is the intention of the Legislature to occupy the whole field of regulation of the registration or licensing of commercially manufactured firearms as encompassed by the provisions of the Penal Code, and such provisions shall be exclusive of all local regulations, relating to registration or licensing of commercially manufactured firearms, by any political subdivision as defined in section 1721 of the Labor Code.

This statute clearly responded to *Galvan's* invitation to the Legislature to express its preemptive intent. Significantly, the Legislature did not express any intent to occupy the entire field of gun control, but rather chose the much narrower path suggested by *Galvan*.

Without exception, the California courts have read Government Code Section 53071 to occupy precisely the field which the statute claims on its face to occupy: the registration or licensing of firearms. The first case to examine preemption of local firearm regulation following the adoption of Government Code Section 53071 was *Olsen v. McGillicuddy* (1971) 15 Cal. App. 3d 897. *Olsen* arose from an evidentiary ruling in a civil tort action brought by a minor plaintiff who was shot with a BB gun by his friend, the defendants' son. Olsen sought to introduce evidence that the McGillicuddys had violated a Petaluma ordinance prohibiting parents from allowing a minor in their care to possess or use a BB gun. The trial court, finding that the ordinance was preempted by state law and therefore invalid, excluded the evidence.

The Court of Appeal reversed. Citing *Hubbard*, the court stated the question before it as "whether the state has so completely covered the matter of firearms generally that it has become exclusively a matter of state concern." *Olsen*, 15 Cal. App. 3d at 901. The court decided that the 32 state statutes dealing with firearms failed to indicate "that the state wished to exclude regulations by a municipality which considered more stringent regulation necessary in its particular community." *Id.* at 902. The court also found that the ordinance would not unduly burden transient minors when compared to the local interest and safety of all minors. In short, the court held that the state had not impliedly preempted local regulation of firearms.

The court turned next to express preemption under Government Code Section 53071. After examining the legislative history of the statute, the court concluded that "[d]espite the opportunity to include an expression of intent to occupy the entire field of firearms, the legislative intent was *limited* to registration and licensing. We infer from this limitation that the Legislature did not intend to exclude municipalities from enacting

further legislation concerning the use of firearms." *Id.* at 902 (emphasis in original). Because the Petaluma ordinance did not involve registration or licensing, the court found that the statute did not preempt the ordinance.³⁵

Similar reasoning led the Court of Appeal in *Sippel v. Nelder* (1972) 24 Cal. App. 3d 173 to strike down a San Francisco ordinance requiring anyone seeking to purchase a concealable firearm within the city to first get a permit from the city's police chief. The court found that although Section 53071 preempted only the narrow field of licensing and registration, the San Francisco ordinance entered this field by imposing an additional permit requirement. Consequently, the court concluded "that the ordinance here involved, *insofar as it purports to regulate the licensing or registration of firearms*, is invalid." *Id.* at 177 (emphasis added). By linking the invalidity of the ordinance to its relation to licensing or registration, the court reinforced *Olsen's* narrow interpretation of the preemptive effect of Section 53071.

The same appellate division which decided *Olsen* revisited the question a decade later in *Doe v. City of San Francisco* (1982) 136 Cal. App. 3d 509. This time, San Francisco had enacted an ordinance which banned possession of handguns, with certain exceptions. One exception exempted anyone with a state license to possess a handgun under Penal Code Section 12050.³⁶ However, as noted above, Penal Code Section 12026 provides that "no permit or license ... shall be required" of anyone possessing a handgun in his residence or place of business. The court determined that San Francisco's ordinance, by exempting state licensees under Section 12050, but not residential or business possessors under Section 12026, imposed a *de facto* licensing requirement upon people wishing to possess handguns in their homes or businesses.

³⁵ The Legislature subsequently enacted Government Code Section 53071.5, which provides that the Legislature occupies the whole field of regulation pertaining to "imitation firearms" as defined in Penal Code Section 417.2, including the regulation of BB guns. Although this amendment overruled *Olsen*, it did so in a very limited way, indicating the absence of a legislative intent to preempt the broad field of firearms regulation.

³⁶ At the time, Penal Code § 12050 read as follows:

§12050. Issuance: (a) The sheriff of a county or the chief or other head of a municipal police department of any city or city and county, upon proof that the person applying is of good moral character, that good cause exists for the issuance, and that the person applying is a resident of the county, may issue to such person a license to carry concealed a pistol, revolver, or other firearm for any period of time not to exceed one year from the date of the license, or in the case of a peace officer appointed pursuant to Section 830.6, three years from the date of the license. (b) A license may include any reasonable restrictions or conditions with the issuing authority deems warranted, including restrictions as to the time, place and circumstances under which the person may carry a concealed firearm. (c) Any restrictions imposed pursuant to subdivision (b) shall be indicated on any license issued on or after the effective date of the amendments to this section enacted at the 1970.

That is, the ordinance effectively banned residential or business possession unless the possessor brought himself within the exception by obtaining a state license. Noting that "in substance, [the statute] creates a licensing requirement where one had not previously existed," the court found the ordinance expressly preempted by Government Code Section 53071. *Doe*, 136 Cal. App. 3d at 517. The court also found that the *de facto* licensing requirement contradicted Section 12026. As in *Sippel*, the link to licensing was a necessary precursor to a finding of preemption.

The three cases interpreting Government Code Section 53071 reached the same conclusion about the breadth of the preemptive intent expressed in the statute: Section 53071 preempts exactly what it claims to preempt. *Galvan* presented the Legislature with two regulatory choices and the Legislature unambiguously chose the narrower of the two. That the Legislature has never altered the language of the express preemption provision suggests that it concurs with the unanimous interpretation of the courts.

b. Implied preemption

No California court has ever found a local gun control regulation to be impliedly preempted. However, in a paragraph at the end of the *Doe* opinion, the court expressed its belief that the San Francisco ordinance banning handgun possession was impliedly preempted. *Doe*, 136 Cal. App. 3d at 518. The court's support for this belief was its assertion that Penal Code Section 12026 indicated an intention "to occupy the field of residential handgun possession to the exclusion of local governmental entities." *Id.* The court went on to note that "it strains reason to suggest that the state Legislature would prohibit licenses and permits but allow a ban on possession." *Id.* Having already decided that the ordinance was preempted by both Government Code Section 53071 and Penal Code Section 12026, the court's unnecessary comments about implied preemption are *dicta*. More importantly, however, the *Doe* court reached this conclusion without performing any of the analysis required by the *Hubbard* test.

Two Attorneys General have rendered opinions stating their beliefs that certain types of firearm regulation would be impliedly preempted. 65 Op. Att'y. Gen. 457 (1982); 77 Op. Att'y. Gen. 147 (1994). These opinions, which are not binding on the courts, suffer from serious legal and logical flaws which render their analyses unpersuasive.

In the first opinion, Attorney General George Deukmejian opined that an ordinance banning possession of handguns within the city would fail each of the three *Hubbard* tests. 65 Op. Att'y. Gen. at 464-65. Although the *Doe* court agreed with the Attorney General's conclusion that such an ordinance was invalid, the court's reasoning differed dramatically from that of the Attorney General. As discussed above, the *Doe* court found the San Francisco ordinance to be expressly preempted by Government Code Section 53071 and contradictory to Penal Code Section 12026. However, the Attorney General concluded, through faulty reasoning, that the ordinance was impliedly preempted by state law.

Despite the obvious inconsistency, Deukmejian found that the state statutory scheme *fully* occupied the field of handgun possession, and that the *same field* was *partially* covered by state law "couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action." *Id.* at 464. He reached the first conclusion after noting that several state statutes prohibit the possession of specific types of weapons, but did not include handguns. On this basis alone, Deukmejian asserted that the field of possession has been "fully, completely and comprehensively covered by general state law." *Id.* However, California courts have repeatedly refused to find preemption solely because of the existence of several state statutes, particularly where there is a significant interest to be served which may differ from one locality to another.³⁷

Deukmejian reached the second, incompatible conclusion by simply asserting, without citation to authority, that handgun possession could only be regulated by the state. Because the accuracy of this statement is precisely the issue which Deukmejian was attempting to resolve, the fact that he assumed its truth invalidates his conclusion.

Finally, Deukmejian concluded that an ordinance banning possession would fail *Hubbard's* third test by imposing a burden on transient citizens. However, Deukmejian apparently overlooked the fact that the third *Hubbard* test requires that such a burden be weighed against any local benefit. Preemption under this test occurs only when the burden on transient citizens *exceeds* the benefit to the local population. Noting only

³⁷ *Gluck v. County of Los Angeles* (1979) 93 Cal. App. 3d 121, 133; see also *People v. Butler* (1967) 252 Cal. App. 2d Supp. 1053 (no implied preemption of local regulation of alcohol consumption despite comprehensive statewide scheme); *Galvan* (1969) 70 Cal. 2d 851 (no implied preemption of local firearm registration requirement despite numerous state statutes dealing with firearms).

that a possession ban would place a burden on transient citizens, Deukmejian simply ignored the possible benefit of such a ban for local citizens, and pronounced the ordinance preempted under the third *Hubbard* test as well.³⁸ In its internal inconsistency and legal inaccuracy, Deukmejian's opinion indicates a fundamental misunderstanding of the basic principles of preemption.

In the second opinion, issued twelve years later, Attorney General Dan Lungren addressed the permissibility of a proposed Pasadena ordinance that would have banned the sale of common handgun ammunition and required local ammunition vendors to record and maintain information regarding the purchasers of other types of ammunition. 77 Op. Att'y. Gen. 147 (1994). Lungren concluded that the ammunition sale ban was impliedly preempted, but the record keeping requirements were not.

Lungren based his conclusion regarding the ammunition sale ban on the residential possession provision of Penal Code Section 12026. Quoting the *Doe dicta* on implied preemption, Lungren reasoned that a ban on the sale of handgun ammunition would "thwart the Legislature's recognition of the right to possess handguns on private property." *Id.* at 152. With respect to the record keeping duties of the proposed ordinance, on the other hand, the Attorney General observed that those duties "would not materially affect handgun possession. No statute appears to prohibit directly or indirectly, a City from requiring ammunition purchasers to provide identification information." *Id.*

Before reaching these conclusions regarding the provisions of the Pasadena ordinance, however, Lungren provided an opinion on a subject not before him: whether state law preempts local regulation of firearm sales. In sweeping terms, the opinion declares that "[t]he state has so thoroughly occupied this field that we have no doubt that regulating firearms sales is beyond the reach of local governments...Cities and counties have been charged with the execution of the State's program for the licensing of firearms dealers, but their role is ministerial in nature." *Id.* at 150.

The Attorney General's gratuitous statements regarding local regulation of firearm sales are not legally supportable. In fact, they are contrary to numerous provisions of the Penal Code which explicitly authorize local regulation in this area. See

³⁸ 65 Op. Att'y Gen. 464 (1982).

Pen. Code § 12071 *et seq.* (discussed *infra* at 24). Implied preemption will not be found when the Legislature has expressed its intent to permit local regulation. *Candid Enters., Inc. v. Grossmont Union High Sch. Dist.* (1985) 39 Cal. 3d 878.

Opinions of the Attorney General have no precedential value and will be disregarded by a court where the analysis underlying the opinion is faulty. *Candid*, 39 Cal. 3d 878 (criticizing Attorney General analysis regarding preemption issue). In the Lafayette case, plaintiffs argued that the Lungren opinion supported their claim that state law preempted Lafayette's ability to require firearms dealers to sell "trigger locks" with each firearm. The court rejected this argument and upheld the trigger lock requirement. (See discussion of trigger locks *infra* at 43-45.)

4. A Note About Penal Code Section 12026

As discussed in Chapter III, Penal Code Section 12026 continues to play a pivotal role in the preemption analysis of local firearms regulations. Amended in 1995, the statute's key provisions have now been bifurcated into subsections (a) and (b). Subsection (a) provides an exemption to the concealed weapons permit requirement (set forth in Penal Code Section 12025) for those possessing concealed weapons in their homes or places of business. For preemption purposes, the relevant portion of Section 12026 is subsection (b). That subsection provides that no permit or license shall be required to:

purchase, own, possess, keep, or carry, either openly or concealed, a pistol, revolver, or other firearm capable of being concealed upon the person within the citizen's or legal resident's place of residence, place of business, or on private property owned or lawfully possessed by the citizen or legal resident.

Certain classes of persons, such as felons and minors, are excepted from the statute.

CHAPTER III

LOCAL ORDINANCES REGULATING FIREARMS AND AMMUNITION

This Chapter discusses several types of ordinances California cities and counties are considering to regulate access to firearms and ammunition in their communities. The ordinances are classified according to subject matter under the following general headings: (A) Dealer Qualifications and Accountability; (B) Restrictions on Sales; (C) Safe Storage; and (D) Other Public Health and Safety Measures.

Some of the ordinances discussed in this Chapter have already been enacted by California cities and counties, either alone or as part of broader firearms control measures. Those ordinances have been tailored to meet the specific goals and needs of the communities in question.

A discussion of the policy goals of each ordinance, as well as the potential legal challenges which may be raised with respect thereto, is also included. Ultimately, of course, the legality of a particular ordinance must be determined by a court in accordance with applicable statutory and case law.

A. DEALER QUALIFICATIONS AND ACCOUNTABILITY

As of January 1996, California had more than 11,000 Federal Firearms License ("FFL") holders.³⁹ In 1995, for every McDonald's restaurant in California there were *eighteen* federally-licensed gun dealers.⁴⁰ Once licensed, FFL holders can buy as many guns as they wish at wholesale prices, without having to comply with background checks or waiting periods at the time of purchase.

Studies have shown that most California firearms dealers operate outside the law. A 1994 study conducted by the Contra Costa County Health Services Department revealed that 66% of FFL holders in that county had not complied with state licensing laws.⁴¹ In addition, according to the California Department of Justice, less than half of the FFL holders in this state have a Certificate of Eligibility ("COE") as required by state law.⁴² Without a COE, a gun dealer is unable to perform a background check as required by Penal Code Section 12076. Moreover, because the vast majority of FFL holders operate out of their homes,⁴³ weapons are frequently delivered to doorsteps in residential areas, often without the knowledge of the dealers' neighbors.

1. Existing Federal and State Regulation of Firearms Dealers

Firearms dealers are currently subject to regulation at the federal, state and local level. In order to obtain a federal firearms license, a prospective gun dealer must, among other things, complete Form 7 of the Bureau of Alcohol, Tobacco and Firearms ("BATF"), undergo a background check, be photographed and fingerprinted, and pay a \$200.00, three-year fee. 18 U.S.C. § 923; 27 C.F.R. § 178.1 *et seq.* An applicant for a firearms license must also certify that:

- the business to be conducted is not prohibited by state or local law;

³⁹ Interview with Dennis Anderson, Public Information Officer, Regulatory Enforcement, Bureau of Alcohol, Tobacco and Firearms, Western District, in San Francisco (Jan. 9, 1996).

⁴⁰ Women Against Gun Violence, *Taking Action* (1995), at 4.

⁴¹ Contra Costa County Health Services Department Prevention Program, *Resources for a Public Health Response to Gun Violence in Local Communities* (1994).

⁴² See *supra* note 40, at 6.

⁴³ Bureau of Alcohol, Tobacco and Firearms, Firearms and Explosives Division, *Operation Snapshot* (July 12, 1993) at 3.

- the applicant will comply with local and state laws within 30 days after the application is approved;
- the business will not be conducted until the requirements of state and local laws have been met; and
- the applicant has notified the local chief law enforcement officer in writing of his/her intent to apply for the federal license.⁴⁴

Due to staffing limitations, BATF must, to a great extent, rely upon an applicant's representation regarding his or her eligibility for a federal license. In California, a staff of 40-45 inspectors is responsible for more than 11,000 federal firearms license holders.⁴⁵

On the state level, firearms licenses are governed by California Penal Code Section 12071. Subsection (a)(1) of that statute defines a firearms "dealer" or "licensee" as a person who:

(A) has a valid federal firearms license, (B) has any regulatory or business license, or licenses, required by local government, (C) has a valid seller's permit issued by the State Board of Equalization, (D) has a certificate of eligibility issued by the Department of Justice...(E) has a license issued in the prescribed format...and (F) is among those recorded in the centralized list specified in subdivision (e) [of Section 12071].

Dealers must use Dealer Record of Sale forms provided by the Department of Justice in order to impose background checks and waiting periods on firearm dealers. Penal Code § 12073 *et seq.*

The provisions of Penal Code Section 12071 make clear that the Legislature has authorized cities and counties to regulate the sale of firearms within their borders. The statute grants local authorities discretion over the issuance of dealer licenses (Section (a)(2)); provides for the imposition of local fees (Section (a)(7)); and permits dealers in jurisdictions which do not "restrict or regulate the sale of firearms" to use a letter stating that fact as their local license (Section (a)(6)(C)).

⁴⁴ 18 U.S.C. § 923 (d)(1).

⁴⁵ See *supra* note 39.

As discussed below, local governments can take a variety of steps, consistent with the authority granted by the California Legislature, to reduce the number of gun dealers in their communities and ensure that those who continue in operation are doing so in a responsible manner.

2. Banning Dealers in Residential and Other Sensitive Areas

a. Policy goals

According to the Bureau of Alcohol, Tobacco and Firearms, 74% of federally licensed firearms dealers operate out of their homes in residential areas.⁴⁶ The June 1994 survey of the Contra Costa County Health Services Department revealed that 82 percent of the County's 700 gun dealers operated in residentially-zoned areas.⁴⁷ In the City of Richmond, where more than 90 percent of all homicides in 1993 were caused by firearms, 36 of the City's 37 firearms dealers operated in residential neighborhoods as of December 1994.⁴⁸

These residential or "kitchen table" dealers pose a potential threat to others living in the community for several reasons. First, the dealers' homes are typically not as secure as storefront gun shops, even if the homes are equipped with locks or alarms. A storefront shop is normally equipped — and is often required by law to be equipped — with bars on the windows and doors, a state of the art alarm system, security personnel and bulletproof glass. Guns are kept in locked cases, inaccessible to the general public. A kitchen table gun dealer, on the other hand, often lacks such safeguards. Accordingly, the risk of theft to a residential gun dealer is generally much greater than the risk of theft at a storefront gun shop.

Second, a kitchen table gun dealer may operate in secret, without the knowledge of its neighbors. Parents who might normally instruct their children to avoid the gun dealer's property will be denied that opportunity. In addition, concerned citizens who might object to the dealer's activities, and be inclined to contact their city councilperson or county supervisor to seek restrictions on residential dealers, would not take steps to

⁴⁶ See *supra* note 43, at 3.

⁴⁷ Contra Costa County Health Services Department Prevention Program, *Taking Aim at Gun Dealers: Contra Costa's Public Health Approach To Reducing Firearms in the Community* (March 1995) at 5.

⁴⁸ *Id.*

prevent the dealer's operation in the neighborhood. Because kitchen table dealers are, for all practical purposes, invisible, they are able to bring the threat of firearms into residential neighborhoods.

Third, many residential gun dealers operate in violation of federal or state laws by failing to keep adequate records, conduct background checks or properly identify customers, or by selling prohibited weapons. For example, the Contra Costa County study revealed that 66 percent of the gun dealers countywide had not obtained Certificates of Eligibility from the State Department of Justice. Accordingly, those dealers were not reporting their sales to the state and were unable to perform the necessary background checks on prospective purchasers.

In response to this problem, some California cities and counties, including Oakland, San Francisco and Lafayette, have enacted ordinances to eliminate residential gun dealing. Some of these ordinances address the problem through the requirements of a local dealer's license, i.e., the license will only be issued upon proof that the dealer is not operating in a residential neighborhood or within a specific distance of other "sensitive" areas, such as schools, day care centers, parks, liquor stores, bars or other firearms dealers.

Other ordinances, such as that enacted by Lafayette, restrict firearms dealers to commercial areas through provisions of the zoning code. Under the terms of the Lafayette ordinance, a firearms dealer must apply for and obtain a land use permit before commencing operations in a commercial area. Thus, a dealer cannot operate in a commercial area as a matter of right. A hearing before the Planning Commission provides an opportunity for public input regarding the issuance of the permit. Under the Lafayette ordinance, an approved land use permit is not valid until the applicant also obtains a local police permit and establishes compliance with federal and state licensing requirements.⁴⁹

Either type of ordinance should serve to reduce the number of residential gun dealers in a community and enable law enforcement officials to concentrate their

⁴⁹ The Lafayette ordinance includes a nonconforming use provision which exempts pre-existing residential dealers who are in compliance with federal and state law and obtain a police permit and business registration within 60 days of the effective date of the ordinance. For a discussion of issues relating to nonconforming uses, see D.G. Hagman et al., *California Zoning Practice* (1969).

enforcement efforts on the remaining dealers who operate out of commercial storefronts. Since Oakland passed its comprehensive gun dealer ordinance in 1992, the number of local gun dealers has dropped from 115 to six.⁵⁰

b. Legal challenges

Existing authorities indicate that a legal challenge to a local ordinance prohibiting residential gun dealers would be unsuccessful. Zoning ordinances flow from a local government's police power, asserted for the public welfare. *Euclid v. Ambler Co.*, 272 U.S. 365 (1926). A municipality may use its legislative power to regulate and even prohibit uses which are inconsistent with the residential nature of a neighborhood. *Miller v. Bd. of Pub. Works* (1925) 195 Cal. 477; *Ewing v. City of Carmel-by-the-Sea* (1991) 234 Cal. App. 3d 1579. *Euclid*, 272 U.S. 365. Zoning ordinances are presumptively valid. *Goldblatt v. Hempstead*, 369 U.S. 590 (1962).

i. Preemption

Because an ordinance prohibiting residential gun dealers does not involve firearm registration or licensing, it would not be expressly preempted by Government Code Section 53071. In addition, the ordinance would not contradict Penal Code Section 12026 because it does not impose any permit or licensing requirement on individuals wishing to purchase firearms or possess them in their homes or places of business, or otherwise materially affect handgun possession.

A challenge made on the basis of implied preemption should also fail. The Legislature has not so completely covered the matter of firearms generally that it has become exclusively a matter of state concern. *Olsen*, 15 Cal. App. 3d 897. On the contrary, Penal Code Section 12071 makes clear that the Legislature *intended* for local governments to regulate firearms dealers. Preemption will not be implied when the legislative scheme either permits or recognizes local regulation. *People ex rel. Deukemejian v. County of Mendocino* (1984) 36 Cal. 3d 476; *Candid Enters., Inc. v. Grossmont Union High Sch. Dist.* (1985) 39 Cal. 3d 878. In the Lafayette case, the plaintiffs' preemption challenge to the City's ban on residential dealers was rejected by the Superior Court.

⁵⁰ See *supra* note 40, at 12 (quoting a March 10, 1992 Memo from Oakland City Manager to Mayor Elihu Harris and City Council members).

ii. Equal protection

As discussed in Chapter II, an ordinance which does not involve a suspect class or fundamental right will be upheld if it bears a rational relationship to a legitimate governmental purpose. In *Ewing*, 234 Cal. App. 3d 1579, plaintiff homeowners argued that their equal protection rights were violated by an ordinance which prohibited transient commercial use of residential property for remuneration for less than 30 days. The Court of Appeals rejected this argument, finding that the ordinance was rationally related to its stated goal of enhancing and maintaining the residential character of the affected district.

Similarly, in the City of Lafayette case, the Superior Court rejected the plaintiffs' equal protection challenge to the City's ordinance banning residential dealers. The court's November 3, 1995, "Order Re Demurrer By Defendants," provides:

The sale of firearms is not a fundamental right. There is a rational basis for a ban on gun dealers in residential areas and, accordingly, there is a justifiable exercise of police power.

iii. Inverse condemnation

An ordinance banning residential gun dealers might be challenged by an existing residential dealer on the ground that the regulation will have an adverse economic impact on the dealer and, as such, will constitute a "taking" without "just compensation" in violation of the state and federal constitutions.⁵¹

This argument should also fail. A zoning ordinance "does not constitute a taking simply because it narrows a property owner's options." *Ewing*, 234 Cal. App. 3d at 1592. A property owner will only have a right to damages for inverse condemnation where the ordinance has the substantial effect of depriving the owner of any reasonable

⁵¹ "No person shall be...deprived...of...property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V., "Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner." Cal. Const. art. I, §19.

or beneficial use of the property. *Eldridge v. City of Palo Alto* (1976) 57 Cal. App. 3d 613.

An ordinance banning residential firearms dealers does not deprive a homeowner of all beneficial use of his or her property. The dealer may still live in the home, or rent or sell the home as the dealer wishes. The dealer is simply prevented from selling firearms from the home. Under the circumstances, a cause of action for inverse condemnation should fail.

3. Dealer Licenses

a. Policy goals

Some cities and counties have attempted to reduce the number of gun dealers in their communities through the adoption of ordinances which require all dealers to obtain a local license. The license is typically obtained from the Chief of Police after the prospective dealer establishes that it has fulfilled certain requirements. Pursuant to Penal Code Section 12071(a)(6), the license is valid for not more than one year.

As discussed previously, one possible licensing requirement would be that the applicant prove it operates in a district zoned for commercial use and not within a specified distance of a residential district or other sensitive areas. Other possible requirements could include proof of the following:

- Compliance with all applicable federal, state, and local laws, e.g., those requiring the dealer to obtain a local land use permit, state-issued certificate of eligibility and a federal firearms license.
- Payment of a non-refundable fee (Penal Code Section 12071 (a)(7))
- Proper age (21 years or older) for owner and all agents and employees.
- No previous permit revocation or application denial for cause within a specified period of years.
- No previous false or misleading statements or material omissions in application.
- No disqualifying offenses (e.g., crimes as specified by federal, state, or local laws, offenses involving guns, use of force against another person, theft or fraud).

- The applicant is not a user of controlled substances or excessive user of alcohol such that his or her judgment would be impaired, does not suffer from mental illness and has not been committed to a mental institution.
- Secure locks, windows and doors, adequate lighting, alarms, and storing of all firearms in secure, locked facilities, out of the reach of customers, with access controlled at all times by the owner or employees.
- A liability insurance policy with specified minimum limits of liability.

b. Legal challenges

A local ordinance requiring gun dealers to obtain a local license should withstand legal scrutiny. Because such an ordinance does not involve the regulation or licensing of firearms (but of firearms *dealers*) it would not be expressly preempted by Government Code Section 53071. Moreover, such an ordinance would not be preempted by Penal Code Section 12026 because it does not impose a permit requirement on individuals wishing to purchase firearms or possess them in their homes or places of business, or otherwise materially affect handgun possession.

An ordinance establishing a local dealers' license would not be impliedly preempted by state law because Penal Code Section 12071 *explicitly authorizes* cities and counties to impose licensing requirements on dealers. Indeed, Penal Code Section 12071 (a)(6)(c), which describes the form of a local license, states that if "the jurisdiction does not require any form of regulatory or business license or does not otherwise restrict or regulate the sale of firearms," a prospective dealer must obtain a letter from local authorities to that effect. Under the circumstances, a preemption challenge to such an ordinance should fail.

In the Lafayette case, the plaintiffs moved for a preliminary injunction, arguing, among other things, that state law preempted the city's ability to require firearms dealers to install certain security devices in addition to those required by the Penal Code.⁵² The court rejected this argument, finding that the provisions of the ordinance did not "duplicate nor contradict state law, and the State had not expressly or impliedly occupied the field." (March 1, 1995, "Order Denying Plaintiffs' Motion for Preliminary Injunction".)

⁵² See Penal Code § 12071 (b)(14),(15).

The Lafayette plaintiffs also argued that their rights of equal protection were violated by the provision of the ordinance requiring dealers to prove liability insurance with limits of at least \$1 million for property damage and bodily injury. The City contended that the insurance requirement was rationally related to the City's interest in ensuring that its residents are compensated in the event of a firearms dealer's negligence. The court agreed, finding that the equal protection rights of the dealers had not been violated.

4. Employee Background Checks

a. Policy goals

In order to purchase a gun in the United States, a gun purchaser must currently undergo a background check. The purpose of the background check is to prevent disqualified purchasers — convicted felons, mental incompetents, drug and alcohol abusers — from buying dangerous weapons. But while gun *buyers* are presently scrutinized for any history of disqualifying behavior, gun *sellers* are not. The danger exists that a disqualified purchaser may use employment with a firearm vendor as a means of obtaining firearms. In addition, if such an individual is not competent to *own* a firearm, his or her reliability regarding compliance with federal and state laws relating to gun sellers may also be in question.

San Diego has addressed this issue in an ordinance requiring firearms dealers to obtain a permit from the Chief of Police. The permit will be issued unless the applicant is found to be disqualified due to certain conduct (e.g., false statements in the application, noncompliance with federal or state law, prior conviction of enumerated offenses, etc.). The ordinance provides further that the Chief of Police may revoke or suspend the permit if the Chief finds, among other things, that the dealer failed to remove an employee within five days of receiving written notice that the employee had been convicted of certain criminal offenses.

A San Francisco ordinance requires gun store employees to certify that they are not disqualified from purchasing firearms. However, those employees are not currently subject to the same background check as gun purchasers.

b. Legal challenges

i. Equal protection

An opponent of an ordinance requiring employee background checks might challenge the ordinance on equal protection grounds, arguing that the ordinance imposes an unfair burden on gun store owners and employees. This argument is unlikely to prevail. Although the ordinance would only apply to employees of gun stores (pet store clerks, for example, would not be subject to the same background checks), this classification does not violate the equal protection rights of gun store employees because it is rationally related to an important public policy objective: ensuring that prohibited purchasers do not gain access to firearms through gun store employment.

ii. Preemption

An opponent of the ordinance might also make a preemption argument, contending that the state has occupied the field of "firearms background checks." Because federal and state law require background checks only for the *purchase* of firearms, however, this argument should fail. Nothing in the relevant statutes suggests that the federal or state government has intended to occupy the field of regulation of gun store employees. On the contrary, because Penal Code Section 12071 authorizes local regulation of firearm dealers, local regulation of the dealers' employees would appear to be authorized as well.

The ordinance would not be preempted by Penal Code Section 12026 because it does place any restrictions on gun purchases or possession in an individual's home or place of business; it merely regulates gun store employees. Nor would the ordinance be preempted by Government Code Section 53071 because it does not impose any firearm licensing or registration requirements. Far from either restricting or enlarging the circumstances in which a *buyer* can purchase a firearm, the ordinance simply narrows the class of people permitted to *work* in gun stores.

5. Taxation

a. Policy goals

All California cities and counties have some power to impose taxes. However, that power is limited by various Constitutional and statutory constraints. Charter cities

and counties may be subject to additional limitations imposed by their charters. Nonetheless, taxation can be a powerful tool for local governments concerned about firearm violence. The extent to which a local government can use this tool depends upon the nature of the governmental entity and the kind of taxation mechanism adopted. The following discussion raises the fundamental issues which local governments must consider before adopting a firearm-related tax. Each locality must evaluate its own power to tax, and must carefully consider the various mechanisms available to it.

i. Regulatory fees

The home rule provisions of the state Constitution encompass the power to tax. Under the police power of Article XI, section 7, all cities and counties may impose *regulatory* fees. Regulatory fees generally must be limited to the cost incurred by the city in regulating the activity in question. *Carlsbad Municipal Water Dist. v. OLC Corp.* (1992) 2 Cal. App. 4th 479.

ii. Revenue-generating taxes

Charter cities possess additional taxation powers, including the ability to impose revenue-enhancing taxes. This power derives from Article XI, section 5, which gives charter cities plenary control over "municipal affairs." *West Coast Advertising Co. v. San Francisco* (1939) 14 Cal. 2d 516. The Legislature has also granted to all counties and incorporated cities the authority to impose business taxes within their boundaries. Bus. & Prof. Code §§ 16000, 16100. The limitations imposed by Article XIII A of the Constitution, adopted in 1978 as Proposition 13, require approval of two-thirds of the qualified electorate for any "special tax." A "special tax" is any tax levied for a specific purpose rather than a levy placed in the general fund and used for general government purposes. *San Francisco v. Farrell* (1982) 32 Cal. 3d 47, 57. Taxes raising general revenue must be approved, prior to enactment, by a simple majority of the voters. Gov't Code §§ 53723, 53724; see *Santa Clara County Local Transportation Authority v. Guardino et al.* (1995) 11 Cal. 4th 220, modified by 1995 WL 744945 (Cal.).

The most powerful taxation device available to local governments is the business tax. Under Business and Professions Code Section 16000, all incorporated cities, regardless of whether they have charters, may "license legal businesses, and may fix the license fee and provide for its collection." Counties possess the same power under

Business & Professions Code Section 16100. License fees imposed under this power are not subject to the voter approval requirements of Article XIII A. Moreover, "short of being confiscatory or prohibitory, there is no rule of law that requires that a tax be reasonable in amount..." *Fox Bakersfield Theatre Corp. v. City of Bakersfield* (1950) 36 Cal. 2d 136, 139.

Cities often use this power to impose gross receipts taxes on various businesses.⁵³ The City and County of San Francisco imposes a gross receipts tax on dealers of firearms or firearm ammunition which, although adopted pursuant to powers enumerated in San Francisco's charter, exemplifies the steps available to cities under the Business Code. San Francisco Muni. Code §§ 1004.17, 1004.18. Under the ordinance, any business which sells firearms or firearms ammunition must pay an annual tax of \$300.00 on the first \$10,000 of gross receipts, and \$30.00 on each \$1,000 thereafter. *Id.* This tax is the subject of a lawsuit filed in January of 1996.

Other jurisdictions have considered applying an admission tax to gun shows. Charter cities can impose such taxes under their home rule powers, while general law cities are empowered to do so by Government Code Sections 37100.5 and 50075. Although such taxes have been upheld (see, e.g., *Fox Bakersfield Theatre Corp.*, *supra*), they may be invalid if they primarily burden activities protected by the First Amendment. See *United Artists Communications, Inc., v. City of Montclair* (1989) 209 Cal. App. 3d 245.

b. Legal challenges

Because local governments derive their taxation powers from specific Constitutional and statutory provisions, preemption is not generally a viable challenge. Rather, taxes are most likely to be challenged as either *de facto* bans or as "special taxes" adopted without proper voter approval. If a locality can demonstrate that the tax is not confiscatory or prohibitive, the tax should not be characterized as a *de facto* ban. *Fox Bakersfield Theatre Corp.* (1950) 36 Cal. 2d at 139. If the tax provides general revenues which can be used for any purpose, it should not require super-majority voter approval. Gov't Code §§ 53722 *et seq.*

⁵³ See Rev. Code § 6012 (defining "gross receipts tax").

Similarly, a challenge based on equal protection, claiming that the tax is based upon an inappropriate classification, can generally be overcome if the locality can demonstrate a reasonable basis for taxing one activity while not taxing others. *Fox Bakersfield Theatre Corp.* (1950) 36 Cal. 2d at 142; *Weekes v. City of Oakland* (1978) 21 Cal. 3d 386, 396. An inappropriate classification has alternatively been described as one which is "capricious, arbitrary and discriminatory." *City of Los Angeles v. Shell Oil Co.* (1971) 4 Cal. 3d 108, 123, citing *Security Truck Line v. City of Monterey* (1953) 117 Cal. App. 2d 441, 454.

B. RESTRICTIONS ON SALES

1. Saturday Night Specials

a. Policy goals

As part of the Gun Control Act of 1968, the federal government banned the importation of "Saturday Night Specials" — poorly made, easily concealable, inexpensive handguns such as the one used in the murder of Robert Kennedy. Congress did not, however, ban the domestic manufacture, sale or possession of Saturday Night Specials.

In 1993, Saturday Night Specials accounted for eight out of every 10 guns confiscated by police in California.⁵⁴ The greater Los Angeles area is home to six firearms manufacturers known as the "Ring of Fire" companies.⁵⁵ Those companies produce 80% of all Saturday Night Specials manufactured in the nation and 34% of all American-made handguns.⁵⁶ According to data supplied by the Bureau of Alcohol, Tobacco and Firearms, nearly 700,000 Saturday Night Specials were produced in California in 1992 alone.⁵⁷ Seven of the ten most frequently traced guns nationwide in 1994 were manufactured by the Ring of Fire companies.⁵⁸

⁵⁴ See *supra* note 8 (citing EDK Associates Poll).

⁵⁵ G.J. Wintemute, Violence Prevention Research Program, *Ring of Fire: The Handgun Makers of Southern California* (1994).

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Zawitz, Bureau of Justice Statistics Selected Findings, *Guns Used In Crime* (July 1995) at 5.

For the handgun makers of Southern California, the key to success has been keeping the price of their guns as low as possible. For example, the Phoenix Arms .25 ACP Model Raven costs its manufacturer only \$19 per handgun, and can be assembled in just a few minutes.⁵⁹ Keeping costs down means shortcuts in quality of design, materials, and performance. Many of these guns are made with metal so soft it can be shaved with a knife.⁶⁰

An article in the magazine *Gun Tests* (the equivalent of Consumer Reports for gun purchasers) notes that Saturday Night Specials are kept inexpensive through the use of inferior metals, most notably zinc, and through the omission of safety features:

Such simplicity keeps prices down, but is not without its down side. This is most often found in three areas: unsophisticated safety systems, few convenient features, and limited durability. Few of these inexpensive guns have such niceties as slide hold-open devices, and none should be carried with a round in the chamber. The *Gun Tests* editorial staff personally knows an individual who routinely carried one of these budget pistols "cocked and locked." After several months of doing so, the safety inadvertently disengaged while riding in his front pants pocket and he ended up shooting himself in the leg.⁶¹

In fact, Saturday Night Specials are made of such inferior metal that one Sacramento recycler refuses to take them for scrap.⁶²

Two problems are presented by the poor quality of Saturday Night Specials. First, because of low production costs, manufacturers can produce these weapons in large numbers. This low production cost leads to an extremely low market price.

Second, the poor quality of these weapons renders them unreliable as a means of self-defense. The guns are promoted primarily for self-protection, but their shoddy design and unreliability may provide a gun owner with nothing more than a false sense of security. A May, 1994 installment of the ABC News program *Day One* discussed this

⁵⁹ J. Mintz, *Producing the Handguns of Choice is Mostly a Family Affair*, Washington Post, Jan. 16, 1994, at H4.

⁶⁰ A. Freedman, *Fire power: Behind the Cheap Guns Flooding the Cities is a California Family*, Wall Street Journal, Feb. 28, 1992, at A1.

⁶¹ See *supra* note 55, at 19 (quoting Alloy Semi-Auto Pocket Pistols: .25 ACP Single Actions, *Gun Tests*, June 1993, V(6): 24-28).

⁶² *Id.*, at 19.

problem. At one point in the program, a Colorado police officer mentioned that while he has investigated "countless" homicides committed with California handguns, he cannot recall a single instance of this type of gun being effectively used for self-protection.⁶³

According to a 1995 poll of California voters, 78% percent of Californians support a ban on the manufacture, sale, and possession of Saturday Night Specials.⁶⁴ Like support for gun control generally, this support crosses political party lines. Moreover, 76% of gun owners support the ban. When asked if they would be more or less likely to vote for a lawmaker who voted for such a ban, 70% of those polled said they would be more likely to do so, while only 14% said they would be less likely to support that official.⁶⁵

Despite broad public support for a ban on Saturday Night Specials, state legislators have repeatedly defeated efforts to enact such a ban. As a result, many cities and counties are considering ordinances to effect a local ban on these firearms. The City of West Hollywood adopted a Saturday Night Special sales ban in January of 1996.

b. Legal challenges

i. Preemption

Government Code Section 53071 does not preempt a local sales ban on Saturday Night Specials. Such a ban does not constitute a "licensing or registration" requirement, and therefore does not intrude upon the narrow field occupied by Section 53071.

The outcome of a preemption challenge made on the basis of Penal Code Section 12026 is more difficult to predict, but we believe this challenge should fail as well. Section 12026 (b) prohibits the imposition of any permit or license requirement to purchase, own or possess a concealable firearm within one's residence or place of business. Preemption proponents may argue that this provision eliminates a locality's power to ban the sale of Saturday Night Specials, on the theory that if a local

⁶³ *Id.*, at 20.

⁶⁴ See *supra* note 8 (citing EDK Associates Poll).

⁶⁵ *Id.*

government cannot impose a license or permit requirement, it also cannot prevent ownership altogether.

However, a ban on the sale of Saturday Night Specials does not prevent ownership. Anyone who already owns a Saturday Night Special could continue to do so and would not be prohibited from possessing the firearm at his or her residence or place of business. Moreover, the purchase of any other handgun would remain unaffected by a narrowly tailored ban on the sale of Saturday Night Specials. Accordingly, such an ordinance would not materially limit the ability of citizens to purchase handguns, or to possess them at home or at work.⁶⁶

A sales ban ordinance could also be challenged on the ground that it interferes with the ability of private citizens who already own Saturday Night Specials to transfer them. Penal Code Section 12082 provides that any transfer of a firearm between two nondealers must take place through a licensed dealer. An ordinance barring dealers from selling Saturday Night Specials would also prevent these nondealer transfers, because the dealer facilitating the transfer would be barred from completing it. Section 12082, however, expressly contemplates circumstances in which the completion of a proposed nondealer transfer is barred by law, and directs the dealer in such cases to return the firearms to the prospective seller. An argument can be made that this provision contemplates only transactions which are illegal because the prospective buyer is a prohibited purchaser (i.e., a felon, a minor, etc.), though the language of the statute is sufficiently broad to suggest otherwise. The effect of Section 12082 on the legality of a sale ban has not been tested in court. The West Hollywood ordinance exempts nondealer transfers.

ii. Equal protection

Findings demonstrating the dangers to users of Saturday Night Specials, their disproportionate use in crime and their unsuitability for sporting or self-defense

⁶⁶ A November 30, 1995 opinion of the Legislative Counsel of California, written in response to a request from Pasadena Senator Bill Hoge, concluded that West Hollywood's proposed ordinance would be preempted by state law. However, this opinion relies primarily on the implied preemption *dicta* in *Doe*. The opinion ignores the fact that *Doe* involved a *complete* ban on the *possession* of any handgun, which differs significantly from a ban on the *sale* of a specific type of particularly problematic handgun. Because the opinion was not prepared to assist the Legislature in its consideration of pending legislation, the Legislative Counsel's opinion has no bearing on the legality of the West Hollywood ordinance. See *Bravo Vending v. City of Rancho Mirage* (1993) 16 Cal. App. 4th 383, 399, n. 9.

purposes should provide a rational basis for a local sales ban. Accordingly, a challenge made on equal protection grounds should be unsuccessful.

iii. Due process

In order to avoid a due process challenge, any ordinance seeking to ban the sale of Saturday Night Specials must specifically and clearly define the guns to be banned. The definition which the federal government applies to imported handguns, and which was outlined in California Senate Bill 933 (introduced by Senator Richard Polanco in 1995), outlaws any firearm that fails to achieve an adequate score on a multi-variable test. The test looks at various safety factors. For example, if the gun's barrel is not at least 4" long, the firearm scores no points. In addition, the gun frame must be constructed of forged steel or a forged alloy. The heavier, and thus more stable, the weapon is, the more points it scores. Larger caliber weapons also score more points, as do those with safety features — a loaded chamber indicator, a locked breach mechanism, grip and magazine safeties, or trigger or firing pin locks.

Another potentially valid method for defining this type of handgun was outlined in California Assembly Bill 629 (introduced by Assemblyman Louis Caldera in 1995). That bill proposed a nine-factor test for determining the legality of a firearm. The judging criteria included: concealability, ballistic accuracy, weight, quality of materials, quality of manufacture, reliability as to safety, caliber, ability to be detected by standard security equipment and utility for legitimate sporting, self-protection or law enforcement purposes. Additionally, no gun could qualify for sale unless it had: (1) a positive manually operated safety device; and (2) a combined length and height of not less than ten inches, with the height being at least four inches and the length at least six inches.

West Hollywood's ordinance defines "Saturday Night Special" to include any handgun with key components constructed of zinc alloy or castable aluminum. These materials are commonly used in cheap handguns. Another approach is to ban any handgun which melts below a certain temperature (e.g., 1000 degrees F). Minn. Stat. § 624.712 (West 1995). This test approximates the construction test but runs the risk of banning high-quality handguns made of plastic polymers.

2. Ammunition

a. Policy goals

Because certain types of ammunition are particularly lethal or of particular use to criminals, some localities have banned the sale or possession of such ammunition. For example, in 1995 San Francisco adopted an ordinance banning the sale of ammunition which fragments after penetrating the body, causing greater tissue damage than the average bullet.

Other jurisdictions, such as the City of Pasadena and Contra Costa County, have adopted ordinances requiring the registration of all ammunition purchases. Under this type of ordinance, vendors of ammunition are required to take the name of each customer. This information is kept on file by the dealer.⁶⁷

Some local governments have considered passing an ordinance permitting retailers to sell only ammunition for the guns the retailers stock. Most ammunition vendors sell ammunition for handguns, but many do not sell the guns themselves. In fact, many retailers — particularly larger department stores such as WalMart — sell only long guns. Retailers who have made the decision not to carry handguns are already helping to keep those guns off the streets. A ban on nonconforming ammunition could help to limit the use of handguns that criminals purchase elsewhere.

Finally, some cities and counties have banned the sale of ammunition around certain holidays due to the high incidence of gun violence during those times. For example, Los Angeles, Inglewood, and Compton have all passed laws banning the sale of ammunition during the weeks prior to the Fourth of July and New Year's Eve.

b. Legal challenges

The plain language of Government Code Section 53071, which expressly preempts local regulation "relating to registration or licensing . . . of commercially manufactured firearms," is inapplicable to the regulation of ammunition. Section 53071 prohibits any local registration or licensing of firearms "as encompassed by the provisions of the Penal Code." The Penal Code defines "firearm" as "any device,

⁶⁷ A provision of the Contra Costa County ordinance which would have required fingerprinting of ammunition purchasers was deleted prior to adoption.

designed to be used as a weapon, from which is expelled through a barrel a projectile by the force of any explosion or other form of combustion." Penal Code § 12001(b). Clearly, this definition does *not* encompass ammunition. Thus, a local ordinance which requires the registration of ammunition would not be expressly preempted by state law.

The ordinances discussed above should also withstand a challenge brought on the basis of implied preemption. The California Legislature has enacted relatively few laws pertaining to ammunition. Such laws pertain primarily to the sale of ammunition to minors, the sale, possession, manufacturing of armor-piercing handgun ammunition and certain large caliber handgun ammunition.⁶⁸ These limited restrictions on ammunition probably do not amount to the type of detailed, comprehensive state regulation required to impliedly preempt all local laws. Indeed, much more extensive state regulation of *firearms* was insufficient to convince the *Galvan* court that all local regulation of firearms was impliedly preempted. *Galvan*, 70 Cal. 2d at 861. Accordingly, a challenge made on the basis of implied preemption should also fail.

Finally, these ordinances should not contradict Penal Code Section 12026, because they would not materially affect an individual's right to possess a concealable firearm in the individual's home or place of business. Even Attorney General Lungren concluded that ammunition registration requirements are not preempted by state law.⁶⁹

3. Accessories

a. Policy goals

A city or county could also consider an ordinance banning the sale of items which can increase the rate of fire of semi-automatic weapons and folding stocks which make semi-automatic weapons more compact and concealable. The policy goals and rationale behind such an ordinance are straightforward. Both California and the federal government have banned weapons capable of a high rate of fire. Similarly, it is unlawful in California to carry a concealed firearm in public without a permit. Penal Code § 12025. An accessory ban simply restricts items which can transform lawful firearms into prohibited firearms and items which make it easier to conceal weapons

⁶⁸ See e.g., Penal Code §§ 12316, 12320, 12321 and 12304.

⁶⁹ 77 Op. Att'y Gen. 147 (1994).

which would otherwise be nonconcealable due to their size and shape. As such, the ordinance would complement existing, established law.

b. Legal challenges

An ordinance banning the sale of accessories is most likely to be challenged on an implied preemption theory. But while ammunition is regulated at least somewhat by the state, there are very few state regulations devoted to firearm accessories.⁷⁰ This lack of regulatory action by the Legislature demonstrates that the state has not adopted the sort of "comprehensive scheme" needed for implied preemption. Given the current state of the law, local accessory regulations should survive a preemption challenge.

C. GUN SAFETY REQUIREMENTS

Federal law regulates the safety of many consumer products, including automobiles, pharmaceuticals and toys. Guns, on the other hand, are subject to virtually no safety regulations. No federal agency exists to ensure that domestically manufactured firearms are safe to use. Nor does any California state agency fill this role.

Studies have shown that 85% of Californians support safety standards for handguns, including 83% of Republicans and 89% of Democrats.⁷¹ Among gun owners, 75% agree that firearms should be subject to safety controls.⁷² As a voting issue, 64% of California voters would be more likely to vote for a candidate who supported gun safety standards, as opposed to 18% who would be less likely to support such a legislator.⁷³

Some California cities and counties have moved to fill the void left by federal and state inaction through the enactment of local gun safety ordinances such as those discussed below.

⁷⁰ See e.g., Penal Code § 12020.

⁷¹ See *supra* note 8, at 3 (citing EDK Associates Poll).

⁷² *Id.*

⁷³ *Id.*

1. Trigger Locks

a. Policy goals

There are more than 222 million firearms in private possession in the United States.⁷⁴ Those firearms, however, are commonly sold without a reliable safety device to prevent unintended discharge of the gun. The absence of such a safety device presents a particular danger to children.

According to a 1990 study, elementary school-aged, latchkey children have access to guns in more than 1.2 million homes.⁷⁵ Most children under 5 are strong enough to pull the trigger of many handguns.⁷⁶ Even a child who is aware that guns are lethal objects may pull the trigger because he or she believes the gun is unloaded, or may do so accidentally. A child may also use a gun in response to a threat at school or in the child's neighborhood.

Several California jurisdictions (including the counties of Contra Costa and San Francisco and the City of Lafayette) have adopted ordinances requiring that every firearm sold be accompanied by a safety device called a "trigger lock". Trigger locks are accessories which immobilize the trigger or hammer of the firearm to which they are attached. Several types of trigger locks, of varying degrees of complexity, are currently on the market.

Some local legislators have raised the possibility of requiring that all semi-automatic firearms be equipped with a load indicator. A load indicator is a simple device which tells the user whether the gun is loaded or empty. Studies have shown that in 36% of unintentional shootings by children, the record contained a clear statement that the child did not know the gun was loaded or did not know it was real.⁷⁷ The presence of a load indicator could alert a child to the fact that the gun was loaded and was not a toy.

⁷⁴ Bureau of Alcohol, Tobacco and Firearms (Nov. 1994).

⁷⁵ Lee & Sacks, *Latchkey Children and Guns at Home*, 264 J. Am. Med. Ass'n. 2210 (1990).

⁷⁶ Naureckas, et al., *Children's and Women's Ability to Fire Handguns*, 149 Arch. Pediatric Adolescent Med. 1318 (1995).

⁷⁷ G. J. Wintemute, et al. *When Children Shoot Children: 88 Unintended Deaths in California*, 257 J. Am. Med. Ass'n. 3107-9 (1987).

A recent Government Accounting Office study found that the use of trigger locks and load indicators could reduce unintentional firearm deaths by approximately 31%.⁷⁸

An additional technology currently under development is the personalization of firearms. In October of 1994, Sandia National Laboratories received a \$620,000 U.S. Department of Justice grant to create a prototype of a "smart gun" that can be fired only by its intended user.⁷⁹ Some of these guns already exist, including a model developed by Fulton Arms, Inc. of Houston.⁸⁰ The Fulton Arms gun is designed to fire only if the owner uses a special magnetic ring and his or her hand fits the specially designed handle. A New York inventor has developed a gun with a combination lock; the gun does not discharge unless a three- or four-digit combination is set, which takes between three and five seconds.

b. Legal challenges

A preemption challenge to a trigger lock sale ordinance should be unsuccessful. The ordinance would not be expressly preempted by Government Code Section 53071, since it does not involve the registration or licensing of firearms. In addition, the ordinance would not be preempted by Penal Code Section 12026 because a trigger lock requirement does not prohibit gun ownership or impose any permit or licensing requirements on individuals wishing to purchase guns or possess them in their homes or places of business. Because trigger locks are relatively inexpensive, it would also be difficult to attack a trigger lock requirement as a *de facto* ban on gun sales.

In the Lafayette case, plaintiffs argued that state law preempted a provision of the City's ordinance which required firearms dealers to sell trigger locks or similar locking devices with each gun sold. The Contra Costa Superior Court rejected this argument, finding that the ordinance did not duplicate or contradict state law and "the state has not expressly or impliedly occupied the field." (March 1, 1995, "Order Denying Plaintiffs' Motion for Preliminary Injunction".)

⁷⁸ *Accidental Deaths: Many Shootings and Injuries Caused by Firearms Could be Prevented*. U.S. General Accounting Office, 3 Pub. No. GAO/PEMD-91-9 (1991).

⁷⁹ Rex Graham, *Lab Working on 'Smart' Guns*. Albuquerque Journal, October 14, 1994, at A1.

⁸⁰ *Id.*

A stronger preemption argument could probably be made regarding an ordinance requiring the sale of load indicators or "smart guns". Unlike trigger locks, these safety features must be incorporated into the design of the firearms and cannot be added later. Few firearms are currently designed with effective load indicators and we are aware of only a few "smart guns" in production. Consequently, an ordinance requiring such devices could constitute a *de facto* ban on the sale of firearms.

2. Warning Labels

a. Policy goals

Although household cleaning products, cigarettes and children's toys bear labels warning of potential health hazards, no federal or state law mandates that similar warnings be affixed to firearms. In October 1994, Fulton County, Georgia passed an ordinance requiring warning labels on all firearms sold in the county. The required label is in the form of a hang tag, attached to the firearm, which identifies guns as a leading cause of murder and suicide. In addition, the label includes facts concerning the increased chance of harm to family members and friends associated with residential handgun possession.⁸¹

The Fulton County ordinance also requires warning bulletins — with substantially the same facts as the hang tags — to be posted in the windows and display cases of retail gun stores. The annual cost of the ordinance to the county was estimated prior to passage at under \$10,000, which included the printing and delivery of about 115,000 tags and posters to the 231 gun dealers then operating in Fulton County. Failure to comply with the Fulton County ordinance is a misdemeanor that carries a maximum fine of \$500 and the possibility of 60 days in the county jail for every violation.

In addition to warning against the public health consequences of gun ownership, a warning label could also advise the prospective gun owner of the potential civil and criminal liability associated with owning a gun. The warning could also inform the purchaser that a felony conviction makes a person forever ineligible to own a gun.

⁸¹ See e.g., Kellerman, et al., *Gun Ownership as a Risk Factor for Homicide in the Home*, 329 New Eng. J. Med. 1084 (1993) (demonstrating increased risk of homicide and suicide in houses in which guns are kept).

b. Legal challenges

Warning labels are most likely to be challenged on a preemption theory. As with a preemption challenge to trigger lock sale requirements, such a challenge should also fail.

3. Safe Storage in the Home

a. Policy goals

Easy access to firearms is a major problem contributing to unintentional shootings of children. Studies have shown that in at least 48% of residential shootings, children gained access to firearms that were stored loaded, but were not locked away.⁸² An ordinance requiring safe storage of firearms would directly address this problem.

In 1989, Florida became the first state to pass a Child Access Prevention (CAP) law. The Florida law requires gun owners either to store loaded guns in places that are reasonably inaccessible to children, or to use a device to lock the gun. If a child obtains an improperly stored, loaded gun, the owner is criminally liable. The owner is not penalized if the firearm is stored in a locked box, secured with a trigger lock, or if the minor gains access through unlawful entry. If the minor merely gains access to the gun, the violation is punishable as a misdemeanor. If the minor injures himself or someone else, the crime is a felony. Gun dealers are required to provide purchasers with a written warning about the law, and to place a warning sign at the counter of their stores.⁸³

In 1991, California passed Penal Code Section 12035, creating the offense of "criminal storage of a firearm." The crime is committed when a person "keeps any loaded firearm within any premise which is under his or her custody or control and he or she knows or reasonably should know that a child is likely to gain access to the firearm without the permission of the child's parent or legal guardian and the child obtains access to the firearm". Criminal storage of a firearm is a first degree offense when the

⁸² See *supra* note 77.

⁸³ Fla. Stat. ch. 784.05; Fla. Stat. Ch. 790.174. Since passage of Florida's landmark legislation, other states - including Iowa, Virginia, Maryland, Connecticut, New Jersey, Wisconsin, Maine, Hawaii, Minnesota, North Carolina and Delaware - have passed CAP laws.

child causes death or great bodily injury either to himself, herself, or another person. The crime is a second degree offense when the child causes injury, other than great bodily injury, to himself, herself, or another person or "exhibits the firearm . . . in a public place" The term "child" is defined in the statute as a person under 14 years of age.

Penal Code Section 12035 is narrower than the Florida CAP statute, because it makes no provisions for punishment if a child merely gains access to a gun due to the owner's unsafe storage practices. Moreover, the statute does not address incidents involving children over 13 years of age.

b. Legal Challenges

An opponent of a safe storage ordinance which builds upon the provisions of Penal Code Section 12035 could argue that Section 12035 impliedly preempts the ordinance. An opponent might also argue that the ordinance runs afoul of Penal Code Section 12026 by placing conditions on residential handgun possession.

A city or county faced with a challenge to a safe storage ordinance might argue that the ordinance is a reasonable health and safety measure which merely imposes requirements that are more stringent than, but not inconsistent with, those established by Penal Code Section 12035. In other words, a court could find that Penal Code Section 12035 sets a *floor*, but not a ceiling, with respect to the safe storage of residential firearms. A local government could also argue that the ordinance does not contradict Penal Code Section 12026 because it does not impose significant obstacles to residential firearm possession; it merely provides penalties for gun owners who allow children to gain access to firearms due to the owner's unsafe storage practices.

D. OTHER PUBLIC HEALTH AND SAFETY MEASURES

1. Discharge Bans

a. Policy goals

Many California cities and counties have enacted ordinances which prohibit the discharge of firearms. These ordinances commonly include exceptions for peace officers and those acting in self-defense. In addition, local governments typically retain

the authority to issue permits allowing for the discharge of firearms on special occasions.

The unrestrained discharge of firearms creates an obvious risk of physical danger. Indeed, the result can often be deadly. King/Drew Medical Center in Los Angeles recently released a study citing random firearm discharge in 38 deaths and 118 injuries in the Los Angeles area between 1985 and 1992.⁸⁴ According to a *Los Angeles Times* report, most of the injuries were sustained during "raucous Independence Day and New Year's Eve celebrations."⁸⁵ Seventy five percent of the 118 injuries involved severe long-term disabilities, such as paraplegia, quadriplegia, seizures, and chronic pain. These victims were taken totally by surprise; they did not hear a gun fired, did not see anyone nearby with a weapon, and suffered wounds consistent with a bullet falling from the sky — usually striking them on top of the head, or on the shoulders or upper back.

b. Legal challenges

A legal challenge to an ordinance banning the unnecessary discharge of firearms should be unsuccessful. Such an ordinance would not be preempted by state law. Indeed, Government Code Section 25840 explicitly authorizes discharge bans at the county level:

The Board of Supervisors may prohibit and prevent the unnecessary firing and discharge of firearms on or into the highways and other public places and may pass all necessary ordinances regulating or forbidding such acts.

No grounds exist for a legal challenge to a discharge ban enacted by a city, assuming the ordinance included exceptions for firearm discharges made in self-defense and by law enforcement personnel.

⁸⁴ Örgod et al., *Spent Bullets and Their Injuries: The Result of Firing Weapons Into the Sky*, 37 J Trauma 1003 (1994).

⁸⁵ T.H. Maugh, *Bullets Fired at Sky Cited in 38 Deaths*, Los Angeles Times, June 30, 1995, at B1.

2. Gun Shows

a. Policy goals

There is some evidence that illegal gun sales regularly take place at gun shows. For example, a May 8, 1989, article of the Los Angeles Times reported that firearms vendors made illegal, on-the-spot, handgun sales to a Times reporter at gun shows from San Diego to San Francisco. The guns were purchased without identification or waiting periods.

Some local governments are considering ways to limit gun shows. In 1995, San Mateo County modified its contract with the company that operates the county-owned Expo Center to prohibit gun shows. In January of 1996, Santa Clara County approved a similar contractual prohibition on gun shows at the county fairgrounds. The same result can be achieved by ordinance.⁸⁶

Cities or counties wishing to continue hosting gun shows, while curtailing illegal sales, may choose simply to outlaw firearm and ammunition sales at gun shows, while allowing the display of firearms and distribution of literature. A city or county could also impose fees against gun show promoters who are permitted to conduct business within the locality. Finally, an ordinance banning all gun shows in a locality (whether on private or public property) could be considered.

b. Legal challenges

i. Equal protection

Although an ordinance prohibiting use of public property for gun shows might be challenged on an equal protection theory, such a challenge is unlikely to succeed. As discussed in Chapter II, an ordinance will be sustained if it bears a rational relationship to a permissible policy goal. Clearly, a reduction in illegal firearm sales is a permissible policy goal. Accordingly, if a locality presents evidence that illegal firearm sales occur at gun shows, a court should find that an ordinance banning gun shows on public

⁸⁶ A local government can also regulate the use of state-owned property, so long as "the activities which are conducted thereon by private operators have no relation to the governmental function" of the state. *Bd. of Trustees of the California State University and Colleges v. City of Los Angeles* (1975) 49 Cal. App. 3d 45, 50.

property or prohibiting firearm and ammunition sales at gun shows is rationally related to that goal.

ii. Preemption

Gun shows are specifically addressed in the Penal Code. Penal Code Section 12071(b)(1)(B) provides that a person licensed to sell firearms under Section 12071(a) may "take possession of firearms and commence preparation of registers for the sale, delivery, or transfer of firearms at gun shows or events...if the gun show or event is not conducted from any motorized or towed vehicle." That section provides further that:

A person conducting business pursuant to this subparagraph shall be entitled to conduct business as authorized herein at any gun show or event in the state without regard to the jurisdiction within this state that issued the license pursuant to subdivision (a), provided that person complies with (i) all applicable laws, including, but not limited to, the 15-day waiting period specified in subparagraph (A) of paragraph (3), and (ii) *all applicable local laws, regulations, and fees, if any.* (emphasis added.)

Because Penal Code Section 12071(b)(1)(B) clearly envisions the existence of local laws pertaining to show guns, any argument that state law preempts an ordinance banning gun shows on public property should fail. *Candid Enters., Inc. v. Grossmont Union High Sch. Dist.* (1985) 39 Cal. 3d 878 (preemption will not be found where the Legislature has expressed its intent to permit local regulation). In addition, because Section 12071 (b)(1)(B) contemplates the imposition of local fees against gun show promoters, an ordinance imposing fees pursuant to that statute should also withstand legal challenge. Finally, we are unaware of any legal impediments to an ordinance banning gun shows altogether.

CHAPTER IV

OTHER APPROACHES TO REDUCING GUN VIOLENCE

Local governments should recognize that, in many cases, effective violence reduction efforts need not entail the passage of new laws. Reforms, for example, that bolster enforcement of existing laws, involve local businesses in their efforts, and reinforce non-violent behavior among our young people are all examples of effective, non-legislative means toward a common goal of reducing firearm-related injuries and deaths.

As discussed previously, the ability of law enforcement agencies to enforce existing firearms laws can be enhanced through the passage of new laws, such as those establishing a local permit process for all local firearms dealers. In addition, however, law enforcement officials could increase the rate of random inspections of firearms dealers, especially dealers at gun shows, to ensure compliance with all applicable laws. In Oakland, for example, the practice of inspecting firearms dealers is not limited to the Bureau of Alcohol, Tobacco and Firearms. The local Police Chief also assumes responsibility for dealer inspections.

Another method of enforcement has been instituted by the City of Richmond. After identifying, with the help of community leaders, particularly violent neighborhoods, Richmond police legally detained and searched individuals in those areas whom they suspected of having unlicensed firearms. Of course, if this type of program is attempted, it must be designed with sensitivity to the issues of discrimination and protection of civil liberties. Richmond managed to avoid complaints of racial targeting by soliciting the cooperation and input of local community groups in the design and implementation of the program.

Some local governments and businesses have created gun exchange programs to remove guns from the streets. A San Francisco Police Department program traded working computers with software for guns. A similar computer exchange program was

instituted by the City of Oakland, in cooperation with the Alameda County Bar Association and local business leaders. Another program, sponsored by Bass Tickets, exchanged concert tickets and gift certificates from local businesses for guns.

Groceries-for-guns programs have been extremely successful as well. For example, the Santa Rosa Police Department sponsored an exchange program with the local Food-4-Less store. Food-4-Less was prepared to give away \$5,000 worth of food, but the response was so enthusiastic the store ended up donating twice that amount. In all, over 600 firearms were exchanged for grocery packets worth between \$20 and \$30.

Finally, another strategy with long-term impact is the institution of violence-prevention curricula in our schools. The curricula can focus on conflict resolution training and finding concrete ways for young people to avoid getting hurt when they find themselves in range of a firearm. In San Diego, for example, public schools have implemented the STAR curriculum for kindergarten through 12th grade, using such tools as role-play exercises, videos, contests and visits from celebrity athletes and other role models.

CONCLUSION

Many cities and counties are considering local laws regulating firearms and ammunition because they are alarmed by rising gun violence rates and frustrated by the inaction of state and federal legislators. Although this area of the law is evolving, many of the local regulations currently being considered and enacted by cities and counties appear to be permissible under state and federal law. Local governments taking the initiative now are the legal pioneers in this arena. LCAV predicts that increased legislative and legal activity at the local level will produce clearer guidance for future community leaders wishing to curb gun violence in their jurisdictions.

LCAV is pleased to be able to provide this manual to cities and counties searching for answers to the growing problem of firearm violence against California's residents -- especially its young people. LCAV has been inspired by the courageous acts of community leaders and everyday heroes who subscribe to the principle so eloquently expressed by anthropologist Margaret Mead:

Never doubt that a small group of thoughtful, committed citizens can change the world; indeed, it is the only thing that ever has.

Appendix

ORGANIZATIONAL RESOURCES FOR CITIES AND COUNTIES

Legal Community Against Violence (LCAV)

268 Bush Street, #555

San Francisco, CA 94104

Phone: (415) 433-3550

Fax: (415) 433-3357

LCAV is a fund of The San Francisco Foundation. LCAV provides:

- Coordination of free legal assistance for cities and counties
- Regional workshops for attorneys on firearms issues
- A library of city and county firearms ordinances enacted throughout California and legal briefs filed in lawsuits challenging and defending local ordinances

Bureau of Alcohol, Tobacco and Firearms (BATF)

Public Information Office

Regulatory Enforcement, Western District

221 Main St., 11th Floor

San Francisco, CA 94105-1906

Phone: (415) 744-9416

BATF provides information and data regarding federal firearms issues, including the number of federally licensed dealers within California cities and counties.

California Police Chiefs Association (CPCA)

1455 Response Road, Suite 190

Sacramento, CA 95815

Phone: (916) 923-1825

Fax: (916) 236-6090

CPCA's membership includes police chiefs from California's major metropolitan areas.

CPCA provides:

- A comprehensive position paper on firearms issues
- Expertise in drafting and advocating for violence-related legislation
- Listings of police chiefs and regional police chiefs' associations

Californians for Responsible Gun Laws (CRGL)

2140 Shattuck Ave., Suite 1201

Berkeley, CA 94704

Phone: (510) 649-8946

Fax: (510) 841-5044

CRGL is a legislative advocacy organization promoting meaningful gun control measures. CRGL provides:

- Expertise on promoting city and county ordinances
- Expertise on issues surrounding state preemption of local ordinances
- Strategies for grass roots organizing and education

Campaign to Prevent Handgun Violence Against Kids

454 Las Gallinas Avenue, Suite 177

San Rafael, CA 94903-3618

Phone: (415) 331-3337

Fax: (415) 331-2969

The Campaign to Prevent Handgun Violence Against Kids is a public education campaign, funded by a grant from The California Wellness Foundation, which provides materials on preventing handgun violence against kids, including fact sheets, policy information sheets, posters, videos and a statewide resource directory of individuals and organizations. *Communities on the Move*, a project of The Campaign launched in 1996, will:

- Research which jurisdictions in California have introduced or enacted local ordinances
- Educate California opinion leaders, the media and the public on firearms and ammunition ordinances that can be enacted by cities and counties; and
- Provide a brochure with tips on how individuals can get involved in community efforts to prevent handgun violence

Center to Prevent Handgun Violence (The Center)

10951 West Pico Boulevard, Suite 100

Los Angeles, CA 90064

Phone: (310) 475-6714

Fax: (310) 475-3147

The Center is a national membership-based organization devoted to reducing gun violence through litigation and public education. The Center provides:

- Assistance with impact litigation against irresponsible firearms manufacturers and dealers
- Advocacy of non-glorification of violence by the entertainment industry
- STAR violence prevention curriculum for grades K through 12

Handgun Control, Inc. (HCI)

268 Bush Street, Suite 555
San Francisco, CA 94104
Phone: (415) 433-3535
Fax: (415) 433-3357

HCI is the nation's largest citizen-based gun control lobby. HCI advocates for reasonable gun control legislation. HCI provides:

- Information about legislative developments
- Technical assistance regarding ordinance drafting and enactment
- Relevant statistical information
- Assistance with organizing strategies

Jack Berman Advocacy Center

American Jewish Congress
121 Steuart Street, Suite 402
San Francisco, CA 94105
Phone: (415) 974-1287
Fax: (415) 974-1320

The Jack Berman Advocacy Center provides:

- A how-to guide for gun exchange programs
- Assistance with litigation against irresponsible firearms manufacturers and dealers
- Anti-violence educational activities for children

Pacific Center for Violence Prevention

San Francisco General Hospital

Building One, Room 300

San Francisco, CA 94110

Phone: (415) 285-1793

Fax: (415) 282-2563

Pacific Center for Violence Prevention is the policy center of The California Wellness Foundation's statewide Violence Prevention Initiative. The Center provides:

- A library containing statistical information regarding firearm-related injuries and deaths
- Media advocacy and policy training

Women Against Gun Violence

3012 Summit Avenue, Suite 3670

Oakland, CA 94609

Phone: (510) 444-6191

Fax: (510) 444-6195

(Offices are also located in Venice, Santa Barbara, and Los Angeles)

**Women Against Gun Violence
Los Angeles Campaign**

8758 Venice Blvd., Suite 302

Los Angeles, CA 90034

Phone: (310) 204-2348 Fax: 204-6643

The offices of Women Against Gun Violence provide:

- Organizational strategies designed to reduce gun violence
- Information about concerned women's organizations