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FORM OR SUBSTANCE? DEFINATIONAL ASPECTS OF ASSAULT WEAPON LEGISLATION

THOMAS R. THOMPSON

ON JANUARY 17, 1989 in Stockton, California, Patrick E. Purdy dramatically altered the national gun control debate. Using an AK-47 purchased in Oregon to avoid disclosure of his California criminal record,1 a seventy-five-round-capacity drum magazine, and a thirty-five-round-capacity banana clip, Purdy fired 110 rounds of 7.62 millimeter bullets across an elementary school playground, killing five children and wounding twenty-nine others and a teacher.2 Purdy quickly became a symbol of the failure of gun control legislation to both sides of the gun control debate. Pro-gun control organizations viewed the episode as an example of the dangers of unregulated firearms;3 anti-gun control forces regarded the incident as an example of the failure of the criminal justice system to deal effectively with criminals.4

Immediately after the incident, many persons and organizations began calling for restrictions on the sale and purchase of “assault” weapons.5 Gun control advocates had focused their attention on handguns or ammunition; consequently, there had been little attempt to restrict such weapons separate from other rifles or shotguns. Following the Purdy incident, however, in 1989 at least eighteen states, the District of Columbia, and the federal government addressed the issue of assault weapon control.6

Members of the Florida Legislature proposed four bills relating to the control of assault weapons during the 1989 Regular Session. After much publicity and debate, one bill passed both houses and was approved by the Governor.

2. Id. at A10, col. 3; Washington Post, Jan. 18, 1989, at A1, col. 6.
6. Telephone interview with Eric Ellman, Staff Member, National Coalition to Ban Handguns (June 28, 1989); Tallahassee Democrat, April 23, 1989, at B1, col. 4.
This Comment reviews Florida's current law relating to assault weapons and discusses the bills proposed during the 1989 Session. It also discusses the manner in which other states and the federal government have approached this issue. This Comment focuses on the various approaches to defining assault weapons used in legislation throughout the nation, and examines the operation of one such federal statute. Finally, this Comment assesses the definitional forms the Legislature should use in any future assault weapon legislation. Neither the constitutional right to bear arms nor the issue of a waiting period for the purchase of firearms is addressed.

I. Federal Law

The federal government has expressly not preempted the field of firearms legislation. Federal law does, however, prohibit the sale of firearms or ammunition to a person under indictment for or convicted of a felony, a fugitive from justice, an unlawful user of controlled substances, or a mental defective. Federal law also requires that certain weapons be registered with the Bureau of Alcohol, Tobacco, and Firearms (BATF), and that purchasers of these weapons undergo a background check. Any transfer of a destructive device, machine gun, short-barreled shotgun (barrels under nineteen inches), or short-barrelled rifle (barrels under sixteen inches) requires prior authorization through the BATF. Such authorization is given only after the BATF has completed a comprehensive background check of the purchaser and the purchaser has paid a transfer tax (generally $200.00).

The BATF also prohibits the importation of firearms regulated by 26 U.S.C. § 5845(a) and not "generally recognized as particularly suitable for or readily adaptable to sporting purposes."

II. Florida Law as of 1988

The Florida Legislature has expressly preempted the field of firearms and ammunition. The only regulation counties may impose is

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8. Id. § 922(d).
10. See id. §§ 5811-5812.
an optional three-working-day waiting period for the purchase of firearms.\textsuperscript{14}

Under existing Florida law, the use of a firearm or other weapon in the commission of a felony results in an increase of severity of the penalty by one degree.\textsuperscript{15} The possession of a firearm in the commission of a violent crime results in a mandatory minimum sentence of three years with no gain time.\textsuperscript{16} The possession, while hunting, of a center-fire semiautomatic rifle having a magazine capacity of more than five rounds, or a shotgun capable of holding more than three shells at once, is also prohibited.\textsuperscript{17}

III. THE LAW IN OTHER JURISDICTIONS

No state statutes distinguishing between assault weapons and hunting rifles or shotguns existed as of January 1989. The only state differentiating among rifles is West Virginia.\textsuperscript{18} The West Virginia statute requires citizens to obtain a permit from the superintendent of public safety and approval by the governor before they can possess or transport any "machine gun, submachine gun, or what is commonly known as a high powered rifle," as well as ammunition for those weapons.\textsuperscript{19} The statute does not define any of these terms.

In the aftermath of the Stockton tragedy, at least eighteen state legislatures have considered bills imposing bans, background checks, or waiting periods on purchases of assault weapons.\textsuperscript{20} Virginia was the first state to pass such a statute. Virginia's statute does not use the term "assault weapon,"\textsuperscript{21} but instead imposes a mandatory criminal record check on purchasers of pistols or semiautomatic, center-fire rifles which are provided by the manufacturer with a magazine capacity of more than twenty rounds; designed by the manufacturer to accommodate a silencer or bayonet; or equipped with a bipod, flash suppressor or folding stock.\textsuperscript{22} The Maryland legislature has enacted a

\begin{itemize}
  \item \textsuperscript{14} See \textit{id.} § 790.33(2)(a).
  \item \textsuperscript{15} Id. § 775.087(1).
  \item \textsuperscript{16} See \textit{id.}; see also \textit{id.} § 944.277.
  \item \textsuperscript{17} \textit{FLA. ADMIN. CODE R.} 39-12.002(3) (1987). Hunting at night is also illegal. \textit{Id.} 12.002(2).
  \item \textsuperscript{18} See \textit{W. VA. CODE} § 61-7-8 (1988).
  \item \textsuperscript{19} \textit{Id.}
  \item \textsuperscript{20} Assault weapon legislation has passed in California, Virginia, Maryland, and Massachusetts. It is pending or has failed in Colorado, Connecticut, Delaware, Illinois, Michigan, Minnesota, New Jersey, New York, Ohio, Oregon, Rhode Island, Tennessee, Texas, and Washington. Interview with Eric Ellman, \textit{supra} note 6.
  \item \textsuperscript{21} See \textit{VA. CODE ANN.} § 18.2-308.2:2 (1989).
  \item \textsuperscript{22} See \textit{id.}
\end{itemize}
statute requiring a seven-day waiting period and a background check for those purchasing one of thirty semiautomatic weapons.\textsuperscript{23}

California also has enacted an assault weapon statute.\textsuperscript{24} The statute creates a new class of firearms known as "assault weapons," which are described generally as firearms having "such a high rate of fire and capacity for firepower that [their] function as a legitimate sports or recreational firearm is substantially outweighed by the danger that [they] can be used to kill and injure human beings."\textsuperscript{25} The statute lists as assault weapons and regulates fifty-four makes and models of rifles, pistols, and shotguns as well as similar and modified models.\textsuperscript{26}

Those possessing weapons considered assault weapons before June 1, 1989 were required to register the weapons by January 1, 1991, and could sell the weapons to non-gun dealers only until January 1, 1990.\textsuperscript{27} After June 1, 1989, the statute requires Californians to obtain a permit to purchase assault weapons and keep the weapons beyond January 1, 1990.\textsuperscript{28}

The California law also creates a procedure to designate additional types of firearms as assault weapons.\textsuperscript{29} The attorney general in a county with more than 1,000,000 people may file a petition asking a court to temporarily suspend the manufacture or sale of a particular weapon which is identical to or only slightly altered from a listed assault weapon.\textsuperscript{30} A hearing to consider permanently designating the weapon an assault weapon follows.\textsuperscript{31} To so permanently designate the weapon, the attorney general must show by a preponderance of the evidence that the weapon at issue is an assault weapon. The court's final decision is appealable.\textsuperscript{32} Interestingly, the court has no power to declare completely new weapons assault weapons, because a designation of an assault weapon must be based on the characteristics and design of a previously named assault weapon.\textsuperscript{33}

\textsuperscript{24} \textit{Cal. Penal Code} § 12275.5 (West 1990).
\textsuperscript{25} Id.
\textsuperscript{26} Id. §§ 12276-12276.5. Other slight modifications listed include, but are not limited to, case deflectors for left-handed shooters, larger magazine capacity, different caliber (in excess of .22 caliber) and bayonet mounts. Id.
\textsuperscript{27} Id. § 12285.
\textsuperscript{28} Id. § 12286.
\textsuperscript{29} See id. § 12276.5.
\textsuperscript{30} Id.
\textsuperscript{31} Id.
\textsuperscript{32} Id.
\textsuperscript{33} Id.
IV. Florida's 1989 Legislative Session

During the 1989 Regular Session, Senator Jack Gordon,\(^{34}\) and Representatives John Cosgrove\(^{35}\) and David Flagg,\(^{36}\) each sponsored bills banning the sale or transfer of ownership of defined assault weapons. Additionally, Senator Howard Forman\(^ {37}\) sponsored a bill creating a commission to study assault weapons.

A. Senate Bill 400 and House Bill 1117

Senate Bill 400,\(^ {38}\) sponsored by Senator Gordon, and House Bill 1117,\(^ {39}\) sponsored by Representative Cosgrove, both banned the sale or transfer of ownership of assault weapons.\(^ {40}\) Using identical language, the bills defined assault weapons as any center-fire gun with the ability to accept a detachable magazine or clip of ten rounds of ammunition or greater.\(^ {41}\) These bills also banned specific weapons and prohibited the transfer of ownership of any weapon readily restorable to an operating assault weapon as well as any clips capable of holding more than ten rounds of ammunition which were compatible with assault weapon use.\(^ {42}\) These identical bills met similar fates. Senate Bill 400 died in the Committee on Judiciary-Criminal and House Bill 1117 died in the Criminal Justice Committee.\(^ {43}\)

B. Senate Bill 831

The purpose of Senate Bill 831 was not to ban any particular firearms, but rather to create an ongoing Commission on Assault Weapons.\(^ {44}\) Every two years this Commission was to submit to the Governor and Legislature a report categorizing firearms as either assault weapons or legitimate sports and recreational firearms.\(^ {45}\) The

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34. Dem., Miami Beach.
35. Dem., Miami.
36. Dem., Gainesville.
40. Id.; see also Fla. SB 400 (1989).
41. Fla. HB 1117, § 1 (1989); Fla. SB 400, § 1 (1989).
42. Fla. HB 1117, § 1 (1989); Fla. SB 400, § 1 (1989). The listed weapons specifically banned were: AR-15; all Uzi models; Ingram MAC-10 and MAC-11; Heckler and Koch series 91, 93 and 94; Armalite AR-180; AK-47; AKM-47; all Avtomat Kalashnikov weapons; M1-A; M-14; all Auto Ordinance semiautomatic carbines; and "Street Sweeper" type shotguns.
44. See Fla. SB 831, § 1 (1989).
45. Id.
Commission's membership was to be balanced between pro- and anti-gun control groups, with two members from both the National Rifle Association (NRA), an anti-gun control lobby, and Cool-It, Florida, a pro-gun control lobby.46 Two members also would be chosen by the President of the Senate and the Speaker of the House, and one citizen member would be appointed by the Governor.47

The bill also proposed a minimum eight-year term of imprisonment for the use of an assault weapon during the commission of a felony.48 The provision defining assault weapons listed several weapons by name, including: firearms readily convertible into assault weapons; any parts capable of being used for such a conversion; any semiautomatic center-fire rifle capable of accepting at least a ten-round magazine; any semiautomatic center-fire pistol capable of accepting at least a twenty-round magazine; and shotguns with a barrel of less than nineteen inches long and a folding stock, or a magazine capacity of more than twenty rounds.49 The definition recognized a long list of exceptions, including semiautomatic firearms built before 1954, rimfire weapons, antiques or relics, and those guns permanently incapable of firing.50 Finally, Senate Bill 831 required the registration of all assault weapons in Florida and banned advertisement of the sale of the weapons after October 1, 1991.51

Committee Substitute for Senate Bill 831 limited the Commission to a one-year existence and required, by March 1, 1990, a report to the Legislature and Governor cataloging the types of weapons used in crimes in Florida.52 The membership of the Commission was to remain the same, except that two members would be drawn from both the pro- and anti-gun control groups as a whole,53 rather than exclusively from the NRA and Cool-It Florida organizations. The substitute bill provided no definition of an assault weapon and limited the crimes to which the eight-year mandatory prison term applied to violent or drug-related crimes committed with a machine gun or a semi-

46. Id. § 1(1)(a), (b).
47. Id. § 1(1)(d), (e), (f).
48. Id. § 2(2)(b).
49. Id. § 3(2)(a).
50. Id. § 3(2)(c).
51. Id. § 3(3).
automatic firearm with a twenty-round or greater capacity magazine.\textsuperscript{54}

At the committee hearing, this substitute bill was presented as a means of gathering further information on the issue and determining the effect an assault weapons ban would have.\textsuperscript{55} Senator Robert Johnson\textsuperscript{56} voiced objections to the mandatory penalty arrangement; he preferred the eight-year term to be in addition to, rather than included within, a prison term for a violent or drug-related crime.\textsuperscript{57}

Committee Substitute for Senate Bill 831 passed the Judiciary-Criminal Committee,\textsuperscript{58} but was withdrawn when House Bill 573 passed as an identical substitute.\textsuperscript{59}

\textbf{C. House Bill 573}

House Bill 573 sought to prohibit possession of assault weapons, which it defined in almost the same manner as Senate Bill 831. However, House Bill 573 allowed semiautomatic center-fire rifles a magazine capacity of nineteen rounds, instead of nine, and shotguns a magazine capacity of ten rounds, instead of nineteen.\textsuperscript{60} The exceptions listed in the two bills were identical.\textsuperscript{61}

After being assigned to the House Committee on Criminal Justice and House Appropriations Committee,\textsuperscript{62} the bill was referred by the Committee on Criminal Justice to its Subcommittee on Prosecution and Punishment,\textsuperscript{63} which added four amendments to the bill and favorably recommended it to the full Committee.\textsuperscript{64} One amendment altered the original intent of the bill by allowing possession of an assault weapon properly registered with the state.\textsuperscript{65} Another amendment also banned the sale or transfer of ownership of assault weapons, but ex-

\textsuperscript{54} Id.
\textsuperscript{55} Fla. S., Comm. on Judiciary-Crim., tape recording of proceedings (May 15, 1989) (available at Fla. Dep't of State, Bureau of Archives & Records Management, Fla. State Archives, Tallahassee, Fla.).
\textsuperscript{56} Repub., Sarasota.
\textsuperscript{58} Fla. Legis., History of Legislation, 1989 Regular Session, History of Senate Bills at 198, SB 831.
\textsuperscript{59} Id.
\textsuperscript{60} Fla. HB 573, § 2(a)(4), (5) (1989).
\textsuperscript{61} See id. § 2(c).
\textsuperscript{63} Id.
\textsuperscript{64} Id.
\textsuperscript{65} Tallahassee Democrat, April 26, 1989, at B4, col. 12.
cepted sales or transfers to a law enforcement agency.\textsuperscript{66} Another amendment made the bill more type specific by providing a list of approximately two dozen semiautomatic weapons affected by the bill.\textsuperscript{67}

In the Committee on Criminal Justice, Representative R.Z. Safley\textsuperscript{68} proposed an amendment that would have substituted a limit on magazine capacity for the registration requirements and ban on sales.\textsuperscript{69} The amendment, which limited handgun clips to twenty rounds and rifle clips to five rounds,\textsuperscript{70} failed in a vote of the Committee.\textsuperscript{71}

Representative Charles Canady\textsuperscript{72} then proposed another amendment limiting the capacity of gun clips.\textsuperscript{73} This amendment required the registration of all detachable box magazines capable of being loaded with more than twenty rounds of center-fire ammunition possessed before October, 1989.\textsuperscript{74} The amendment also banned sales of these magazines after that date.\textsuperscript{75} The Committee adopted Representative Canady's amendment as a substitute for the entire language of the bill.\textsuperscript{76}

Representative Ron Glickman\textsuperscript{77} then proposed an amendment requiring assault weapons to be secured and fitted with a trigger lock when not being used for target shooting or hunting, or when being transported for the purpose of same.\textsuperscript{78} This amendment was defeated on a voice vote of the Committee.\textsuperscript{79}

The final amendment was introduced by Representative Canady. He proposed increasing minimum mandatory prison terms for the use of machine guns or semiautomatic weapons in crimes involving vio-

\textsuperscript{66} Id.
\textsuperscript{67} Id.
\textsuperscript{68} Repub., Clearwater.
\textsuperscript{70} Id.
\textsuperscript{71} Id.
\textsuperscript{72} Dem., Lakeland.
\textsuperscript{74} Id.
\textsuperscript{76} Fla. H.R., Comm. on Crim. Just., tape recording of proceedings (May 2, 1989) (available at Fla. Dep't of State, Bureau of Archives & Records Management, Fla. State Archives, Tallahassee, Fla.).
\textsuperscript{77} Dem., Tampa.
\textsuperscript{79} See id.
DEFINING ASSAULT WEAPONS

ence or drug trafficking to five years from the present three years. This amendment was approved by the Committee on a voice vote. As passed by the Committee on Criminal Justice, Committee Substitute for House Bill 573 was so completely altered that it merely made possession of high capacity detachable magazines illegal and increased the penalties for the use of automatic or semiautomatic weapons in some crimes.

Committee Substitute for House Bill 573 was next addressed by the House Appropriations Committee, where Representative Flagg attempted to restore the bill to its original form, which provided for the banning of listed assault weapons. However, as the Appropriations Committee generally considers only fiscal and not substantive changes to a bill, the proposal was deferred to consideration by the full House. After determining that the bill would require $354,223 in start-up costs and $551,647 in recurring costs, for a total first year cost of $905,870, the Appropriations Committee approved the measure and sent it to the full House.

On the House floor, Representative Flagg again introduced the amendment to ban six specific assault weapon types, stating that "these weapons are designed to kill human beings and kill them quickly," and reminding his colleagues that "guns don't die, people do." Representative Ron Johnson also proposed a substitute amendment providing for the creation of a temporary commission on assault weapons and a mandatory minimum prison term of eight years for felonies involving violence or drug trafficking committed while in possession of a semiautomatic rifle with a high capacity detachable magazine or machine gun. This amendment was designed to

80. Id.
81. Id.
83. Id.
85. Fla. H.R. Jour. 782 (Reg. Sess. May 30, 1989). The types listed were Uzi firearms, TEC-9, TEC-22, AK-type firearms, MAC-10 and MAC-11, AR-15, and shotguns with revolving cylinders known as the "Street Sweeper" and "Striker 12." Id. Rep. David Flagg chose these weapons based on an informal poll which asked state representatives to name the most dangerous firearms available. Interview with Robin Hassler, Staff Dir., Fla. H.R. Comm. on Crim. Just., Tallahassee, Florida (August 11, 1989).
88. Dem., Panama City.
90. See id.
make the provisions of Committee Substitute for House Bill 573 parallel the provisions of Committee Substitute for Senate Bill 831. After a short debate, the House approved Representative Johnson's substitute amendment by a vote of 63-51.\textsuperscript{91} After adopting an amendment to the title, the full House approved the bill by a vote of 112-3 and certified it to the Senate.\textsuperscript{92} On the Senate floor, Senator John Grant\textsuperscript{93} brought Committee Substitute for House Bill 573 up for a vote as a substitute for the pending Committee Substitute for Senate Bill 831; the bill passed unanimously, 40-0.\textsuperscript{94} Governor Martinez approved the measure on July 5, 1989.\textsuperscript{95}

V. THE ACTIONS OF THE BUREAU OF ALCOHOL, TOBACCO, AND FIREARMS

The Bureau of Alcohol, Tobacco, and Firearms (BATF), through the Treasury Department, is responsible for enforcing federal firearms laws,\textsuperscript{96} including restrictions on the importation of weapons. One such restriction limits importation to weapons generally recognized as having sporting purposes.\textsuperscript{97} Any dealer seeking to import weapons must apply to the BATF, which evaluates the weapons for their sporting suitability.\textsuperscript{98} Up until 1989, only two firearms were denied importation permits,\textsuperscript{99} which suggests that the evaluation process was not overly rigorous.

Following the Stockton slayings, newly inaugurated President Bush asserted that no new firearms laws were needed because the "laws on the books" provided adequate protection.\textsuperscript{100} He concluded that stricter enforcement of existing laws would be sufficient.\textsuperscript{101} To that end President Bush directed William Bennett, Director of the Office

\textsuperscript{91} Id.
\textsuperscript{92} Id. at 784.
\textsuperscript{93} Dem., Tampa.
\textsuperscript{94} Fla. S. Jour. 897 (Reg. Sess. June 2, 1989).
\textsuperscript{95} Ch. 89-306, 1989 Laws of Florida 1994.
\textsuperscript{96} 18 U.S.C. § 925(d) (1982).
\textsuperscript{97} Id.; see supra note 12 and accompanying text.
\textsuperscript{98} Id.
\textsuperscript{99} In 1986, the BATF found the Striker 12 shotgun to have only military or law enforcement uses, and consequently denied its importation. Later that year, the BATF found the USAS-12 shotgun unsuitable for recognized sporting purposes. See Bureau of Alcohol, Tobacco, and Firearms, Report and Recommendation of the ATF Working Group on the Importability of Certain Semi-Automatic Rifles (1989) 4-5 [hereinafter BATF Report] (available at Fla. Dep't of State, Bureau of Archives & Records Management, Fla. State Archives, Tallahassee, Fla.). The BATF's decision on the USAS-12 shotgun was upheld. See Gilbert Equipment Co. v. Higgins, 709 F. Supp. 1071 (S.D. Ala. 1989).
\textsuperscript{100} 25 Weekly Comp. Pres. Doc. 210 (Feb, 16, 1989); id. at 222 (Feb. 21, 1989).
\textsuperscript{101} Id.
of National Drug Control Policy, to determine how the proliferation of AK-47-type weapons could be abated without infringing on the rights of legitimate sportsmen.\textsuperscript{102}

Mr. Bennett and Stephen E. Higgins, Director of the BATF, determined that the spread of such weapons could be curtailed without infringing on the rights of sportsmen by using the "sporting purpose" requirement of importation.\textsuperscript{103} Bennett and Higgins decided that the BATF would reevaluate the suitability of importing previously approved AK-47 types.\textsuperscript{104} During this reevaluation, the BATF would not consider pending applications for the importation of AK-47-type weapons and would disallow further importation under already approved permits.\textsuperscript{105} This initial suspension of importation applied to five weapon types: the AKS-type weapons, Uzi Carbines, FN/FAL-type weapons, FN/FNC-type weapons, and Steyer AUG semiautomatic weapons;\textsuperscript{106} together these weapons accounted for eighty-four percent of the semiautomatic rifles imported in 1987.\textsuperscript{107}

Within two weeks, the BATF added to this list other weapons generally indistinguishable in terms of design, appearance, and function to close a loophole in the initial suspension.\textsuperscript{108} In total, the BATF suspended pending applications and outstanding permits for 700,000 weapons,\textsuperscript{109} a number seven times higher than the number of imports of the same weapons in 1988.\textsuperscript{110}

\begin{itemize}
\item[102] Id. at 294 (March 7, 1989); see also id. at 359 (March 16, 1989).
\item[103] See Memorandum from Stephen Higgins, Dir., Bureau of Alcohol, Tobacco, and Firearms, to Assistant Secretary (Enforcement) (March 14, 1989) (available at Fla. Dep't of State, Bureau of Archives & Records Management, Fla. State Archives, Tallahassee, Fla.) [hereinafter Memorandum of March 14, 1989] (relying on 18 U.S.C. § 925(d) (1982)).
\item[104] Id.
\item[105] See Memorandum from Stephen Higgins, Dir., Bureau of Alcohol, Tobacco and Firearms, to Assistant Secretary (Enforcement) (March 29, 1989) (available at Fla. Dep't of State, Bureau of Archives & Records Management, Fla. State Archives, Tallahassee, Fla.). This action was upheld in Gun South, Inc. v. Brady, 877 F.2d 858 (11th Cir. 1989).
\item[106] See Memorandum of March 14, 1989, supra note 103.
\item[107] Of 83,695 semiautomatic weapons imported into the United States in 1987, AKS weapons totalled 57,758, Uzi types 7,166, FN/FNC types 5,192, Steyer AUG types 293, and FN/FAL types 0. Therefore, 70,409 of the 83,695 semiautomatic weapons imported in 1987 were temporarily banned. Importation data from BATF Public Affairs Division (available at Fla. Dep't of State, Bureau of Archives & Records Management, Fla. State Archives, Tallahassee, Fla.).
\item[108] These firearm types were: Algimec AGM1; AR180; Australian Automatic Arms SAR; Beretta AR-70 and BM-59; CIS SR88; Heckler Koch 91, 93, and 94; G3SA; K1; K2; AR-100; M14S; MAS-223; SIG 550SP and 551SP; SKS with detachable magazine; AK-22; AP74; Galil/22; M-16/22; Unique F11; and the Erma EM1.22. BATF Press Release (April 5, 1989) (available at Fla. Dep't of State, Bureau of Archives & Records Management, Fla. State Archives, Tallahassee, Fla.). These firearms accounted for 8,786 imported firearms in 1987, bringing the total to 79,195, or 95% of the semiautomatic firearms imported in 1987.
\item[109] BATF Press Release (July 7, 1989) (available at Fla. Dep't of State, Bureau of Archives & Records Management, Fla. State Archives, Tallahassee Fla.).
\item[110] Id.
\end{itemize}
A. Applicability of Listed Firearms to Class of Assault Rifles

The weapons reevaluated by the BATF generally were chosen based on the following criteria: military appearance, large magazine capacity, and status as a semiautomatic version of a machine gun. To complete the evaluation, the BATF established an internal "Working Group," which initially decided to designate the class of weapons examined "semiautomatic assault rifles." Such rifles would be distinguished by certain characteristics common to modern military assault weapons—in addition to their ability to fire at, kill, or disable an enemy.

1. Distinguishing Physical Characteristics

In evaluating semiautomatic assault rifles and comparing them to illegal fully automatic military assault weapons, the Working Group found that semiautomatic assault rifles have a variety of physical features and characteristics which, taken together, distinguish them from traditional sporting rifles. These features and characteristics include: ability to accept detachable magazines, folding stocks, pistol grips, bayonet mounts, flash suppressors, bipods, the ability to launch grenades, and night sights.

(a) Large Capacity Magazines

Virtually all military weapons have the ability to accept large capacity magazines, which provide the capacity to fire and reload rapidly. While some traditional sporting firearms use detachable magazines, they generally have relatively small magazine capacities. In addition, many states, including Florida, have limits on magazine capacity for hunting purposes. Consequently, the Working Group determined that the design or sale of a firearm with a large magazine would be a factor in evaluating the purpose of the weapon.

(b) Folding Stocks

Many military weapons also have folding stocks, which allow greater concealability and portability. While such guns may be fired

111. BATF REPORT, supra note 99, at 1.
112. Id.
113. Id. at 6.
114. Id. at 6-8.
115. Id. at 6.
116. Id.
118. See BATF REPORT, supra note 99, at 7.
119. Id.
with the stocks folded, to do so sacrifices accuracy. Although folding stocks might make weapons more suitable for a sporting purpose such as backpacking, most traditional sporting rifles do not have this feature. Accordingly, the Working Group found the presence of folding stocks indicative of a military, rather than a sporting, purpose.

(c) Pistol Grips

The straight-line design of many military weapons dictates the use of a well-defined pistol grip beneath the action of the gun. Without a pistol grip, holding and firing the weapon would be difficult. A pistol grip also allows for one-handed firing and greater control during automatic firing. By contrast, traditional sporting rifles use a grip built into the wrist of the stock; in addition, one-handed firing is not usually used in hunting or target competitions. Therefore, the Working Group determined that well-defined pistol grips had no sporting purpose.

(d) Flash Suppressors

Flash suppressors serve two functions. By dispersing a flash from the muzzle, they help conceal a shooter's position, especially at night. Flash suppressors also help control the muzzle climb of a rifle fired at fully automatic. Suppression of a muzzle flash does not enhance the performance of a sporting firearm. While controlling muzzle climb is beneficial in reacquiring a target, other attachments exist to achieve this result. Therefore, flash suppressors were found to have no traditional sporting purpose.

(e) Bipods

Bipods or bipod mounting points are integral parts of many military weapons. They provide stability and support when firing in a

120. Id.
121. Id.
122. Id.
123. Id.
124. Id.
125. Id.
126. See id.
127. Id.
128. Id. "Muzzle climb" is the tendency of the weapon's recoil to force the barrel up, and off target, during continuous automatic fire.
129. Id. at 8.
130. See id.
131. Id.
prone position. Though bipods are available for use by many traditional sporting rifles, sporting rifles generally are not equipped to accommodate them. Instead, such bipods simply clamp onto the rifle itself. The Working Group therefore determined that under-wire bipods or bipod mounts are military characteristics.

(f) Night Sights

Hunting is generally illegal at night. Consequently, the Working Group concluded that the use of night sights or their integration onto rifles serves no sporting purpose.

(g) Bayonet and Grenade Launching Capability

Finally, the Working Group determined that the ability to mount a bayonet or a grenade launcher onto a rifle is a purely military trait with no sporting use.

2. Semiautomatic Versions of Machine Guns

Next the Working Group examined the origins of each weapon. Most military weapons are selective fire, that is, they are able to fire in an automatic or semiautomatic mode. Because automatic fire weapons may not be imported into the United States, manufacturers of such weapons converted them to semiautomatic for the sole purpose of marketing them in the United States. Obviously, the original purpose of such weapons was military, not sporting. Therefore, the Working Group examined the origin of each weapon and whether the weapon was a semiautomatic version of a machine gun to determine the original use of each weapon.

3. Cartridge Size

Finally, the Working Group considered the size of the cartridge case accepted into the rifle’s chamber. It determined that modern military

132. Id.
133. Id.
134. Id.
135. See id.
136. Id. In Florida, hunting is allowed only from one half hour before sunrise to one half hour after sunset. FLA. ADMIN. CODE R. 39-12.002(2) (1987).
137. BATF REPORT, supra note 99, at 7-8.
138. Id. at 8.
139. Id.
141. BATF REPORT, supra note 99, at 8.
142. Id.
143. Id. at 6, 8.
assault weapons generally accept center-fire cartridge cases of 2.25 inches or less. While some traditional sporting firearms also accept cartridges of this size, such weapons do not have the features listed above. Hence, the Working Group determined that cartridge size is a possible characteristic of weapons not used for sporting purposes.

The Working Group acknowledged that none of the traits discussed above was determinative when considered individually. Accordingly, the Working Group considered all relevant traits in determining whether a specific type of rifle should be classified as a semiautomatic assault rifle. As a result of its findings, the Working Group determined that most firearms on the suspension list were properly included in the semiautomatic assault weapon list. The only exceptions to this were six types of .22 caliber rimfire rifles and the Valmet Hunter.

The .22 caliber rimfire weapons were very similar in appearance to the military assault weapons, but used different ammunition and firing mechanisms. The .22 caliber rifles also were not semiautomatic versions of a machine gun but were generally recognized as suitable for small game hunting.

The Valmet Hunter’s design was originally based on the operation mechanism of the AK-47, but was substantially changed to have characteristics more like those of a traditional sporting rifle. The Valmet Hunter’s receiver had been modified, and its bayonet, pistol grips, and flash suppressor had been removed. Also, the trigger was moved to the rear of the altered receiver to facilitate use of the trigger with a wrist grip built into the stock. The Working Group determined that the cumulative effect of these changes indicated that the Valmet Hunter should be removed from the semiautomatic assault weapon list.

B. Scope of “Sporting Purpose”

The Working Group next examined the meaning of “sporting purpose” as used in the statute. To do so the Working Group consulted
the statute's text, legislative history and relevant case law, as well as prior interpretations by the Firearms Evaluation Panel and the BATF.\textsuperscript{156}

The Working Group found the language of the statute to imply a narrow interpretation of "sporting purpose," as it provides for a general prohibition of the importation of firearms with limited specified exceptions.\textsuperscript{157} The legislative history of the Gun Control Act of 1968\textsuperscript{158} indicated that "sporting purpose" was intended to refer to target shooting, skeet and trap shooting, and hunting, but not to every conceivable activity involving the use of a firearm.\textsuperscript{159} Otherwise the "sporting purpose" limitation would be meaningless. Moreover, the Firearms Evaluations Panel of 1968 had previously determined that "plinking" (shooting at random objects such as cans) was not a sport, but rather a pastime or diversion.\textsuperscript{160}

Based on previous BATF interpretations, the Working Group also determined that reference to a "sporting purpose" was meant to contrast with military and law enforcement applications or competitions, therefore eliminating these activities from consideration as sporting purposes.\textsuperscript{161} Accordingly, the Working Group gave "sporting purpose" a narrow interpretation,\textsuperscript{162} which included hunting and competitive target shooting but not plinking and military or law enforcement competitions.\textsuperscript{163}

C. Suitability For "Sporting Purpose"

Applying this narrow interpretation of "sporting purpose" to weapons previously determined to be semiautomatic assault weapons, the Working Group investigated each weapon's suitability for use in recognized "sporting purposes."\textsuperscript{164} To accomplish this, it examined technical and marketing data, expert opinions, and the recommended and actual uses of the weapons.\textsuperscript{165} The Working Group also considered the advertisements and technical articles regarding these weapons

\begin{itemize}
\item 156. Id. at 10.
\item 157. Id.
\item 158. 18 U.S.C.A. § 921 (1982).
\item 159. Id.; see also 114 Cong. Rec. 27461-63 (1968).
\item 160. Firearms Advisory Panel, minutes of December 10, 1968; see also BATF Report, supra note 99, at 10.
\item 161. BATF Report, supra note 99, at 10-11; see Gun South, Inc. v. Brady, 877 F.2d 858 (11th Cir. 1989) (upholding interpretation).
\item 162. BATF Report, supra note 99, at 10.
\item 163. Id.
\item 164. See id. at 11.
\item 165. See id.
to see how each weapon was marketed, and for what uses each was recommended.\textsuperscript{166} Additionally, the Working Group sent questionnaires to hunting guides, state game and fish commissions, hunting associations, competitive shooting groups, and hunting/shooting magazine editors to determine the extent to which these weapons were used or recommended for use in a "sporting purpose."\textsuperscript{167}

The Working Group determined that the majority of advertising for the weapons did not indicate any sporting uses.\textsuperscript{168} Of fifty technical evaluations, only five contained recommendations for hunting use.\textsuperscript{169} The remainder of the advertisements and evaluations recommended uses such as self defense, "plinking" or military use.\textsuperscript{170}

The hunting associations responding to the questionnaires placed no restrictions on their members as to the use of weapons, the caliber of bullets, or the capacity of magazines.\textsuperscript{171} However, seventy-three percent of the 706 hunting guides responding indicated that their patrons used only bolt or lever action rifles for hunting.\textsuperscript{172} Only about two percent of the hunting guides indicated that their patrons had ever used any of the weapons on the temporarily banned list for hunting.\textsuperscript{173}

Editors of hunting and shooting magazines also supplied recommended uses. Eleven of fourteen recommended these weapons for target use, while nine of fourteen recommended the weapons be used in hunting.\textsuperscript{174} The Working Group found these recommendations to be inherently contradictory.\textsuperscript{175} The characteristics used by some editors to show that the weapons were good for hunting were used by other editors to demonstrate the firearms were totally unfit for anything but military use.\textsuperscript{176}

Finally, the responses by competitive shooting groups and state game and fish commissions indicated that while the temporarily suspended weapons were not prohibited from hunting or target shooting uses, such firearms were rarely used for these purposes.\textsuperscript{177} As a result of the survey's findings, the Working Group determined that while the semiautomatic assault weapons can be used for hunting or target

\textsuperscript{166} See id. at 12.
\textsuperscript{167} See id.
\textsuperscript{168} See id.
\textsuperscript{169} Id. at 13.
\textsuperscript{170} Id.
\textsuperscript{171} Id.
\textsuperscript{172} Id.
\textsuperscript{173} Id. The actual figures were 10 out of 706. Id.
\textsuperscript{174} Id. at 13.
\textsuperscript{175} Id. at 13-14.
\textsuperscript{176} Id.
\textsuperscript{177} Id. at 15.
shooting, they are not generally recognized as particularly suitable for these purposes. 178

D. Conclusions of the Bureau of Alcohol, Tobacco, and Firearms

The Working Group concluded that all of the weapons temporarily banned from importation, with the exception of the six types of .22 caliber rimfire firearms and the Valmet Hunter, were properly classified as semiautomatic assault weapons. 179 The Working Group also concluded that semiautomatic assault weapons were not generally recognized as particularly suitable for or readily adaptable to sporting purposes. 180 Therefore, the Working Group concluded that the weapons identified as semiautomatic assault weapons did not fall within the exception created by 18 U.S.C. § 925(d)(3), and therefore should not be importable. 181 These conclusions and recommendations were approved by both the Director of the BATF and President Bush. 182

Realistically, the actions taken by the BATF will not significantly affect the market for semiautomatic firearms in the United States. The BATF controls only the importation of firearms and has no authority over domestically produced firearms. As may be expected, domestic gun manufacturers, especially the smaller ones, immediately began to increase production of semiautomatic firearms, taking advantage of the opportunity to maximize profits in what had become a seller’s market. 183 The regulation of these domestic producers of semiautomatic assault weapons was therefore left to the states.

VI. An Analysis of Assault Weapon Legislation Definitions

By passing Committee Substitute for House Bill 573, the Florida Legislature has taken two steps toward the regulation of semiautomatic assault weapons: increasing mandatory minimum prison terms for the use of these weapons during the commission of certain crimes and creating a commission to study the problem. The purpose of the increased penalties is to deter the use of these weapons in crimes. 184 The purpose of the Commission on Assault Weapons is to make "re-
commendations to combat the unlawful use of assault weapons in the state." 185

Before the next legislative session, the Commission on Assault Weapons will issue a report recommending ways to combat illegal use of assault weapons. Assuming the Commission recognizes a need for further action, steps not taken in 1989 will require reexamination. As was true during the 1989 Session, crucial to any future legislation will be the following question: how does one define an assault weapon and pass effective legislation containing this definition without interfering with traditional hunting and sporting activities?

Regardless of the way in which future legislation restricts assault weapons—whether prohibiting their sale, requiring registration, mandating outright bans, or something else—a clear definition of assault weapons is necessary. Although future legislation could group all semiautomatic firearms together, such a classification seems overly broad to accomplish the intended purpose. Instead, the Legislature should consider several alternative approaches to this definitional problem: listing specific weapons, emphasizing characteristics of weapons, regulating all weapons except those specifically listed, or making a broad statement of purpose and leaving the task of working out the details to an administrative agency. Few bills or laws have relied exclusively on one of these approaches, but instead have used multiple approaches to close perceived loopholes.

A. Listing Regulated Firearms

California enacted the first law specifically regulating assault weapons: the Roberti-Roos Assault Weapons Control Act of 1989, 186 which regulates fifty-four listed weapons. Weapons on the market at the time of the law’s passage, but not listed by the Act, presumably are not affected by this law. A firearm can be added to the list only if it represents a "slight modification" of a listed firearm. 187

Specifically listing weapons, such as California did, is rather inflexible. Such an approach will be successful only if the types of weapons available on the market remain the same and retain the same characteristics. However, prudent manufacturers will produce different weapons that may be similar in some ways to a listed firearm, but not similar enough to be a "slight modification." 188 Because California

185. Id.
186. See Cal. Penal Code § 12275.5 (West 1990); see also supra notes 24-33 and accompanying text.
187. See id. § 12276.5.
188. Id.
law will not regulate such new weapons, bringing such weapons within the regulatory framework will require an addition to the list of covered weapons, through the legislative process, of every new or different weapon put on the market. While this form of regulation may achieve its goals initially, it will become less and less effective and require constant attention.

B. Emphasizing Characteristics of a Weapon

An alternative is to base a definition on one or more specific firearm characteristics such as the firearm’s ability to accept a magazine or clip with a capacity greater than a stated number of rounds of ammunition.\textsuperscript{189} Virginia’s background check law contains such a definition.\textsuperscript{190} By its express language, Virginia’s law applies to handguns with barrels of less than five inches, as well as to semiautomatic rifles capable of holding a magazine of twenty or more rounds or capable of being equipped with a bipod, flash suppressor, or folding stock.\textsuperscript{191} This form of definition often is used in combination with a short list of firearms,\textsuperscript{192} apparently as a catch-all for any new weapons.

This form of definition also appears more flexible than a list of regulated weapons. Basing illegality on one or two characteristics, however, may result in inconsistent application. For example, an arguably "traditional" hunting rifle such as a Ruger Mini-14 is sometimes used with a detachable magazine, in which case it becomes a "dangerous weapon" subject to further regulation and possibly prohibition. In such a case, it appears that the detachable magazine, and not the firearm, is the problem. Accordingly, a simpler course would be to regulate the magazine itself, rather than the whole gun.\textsuperscript{193} The same argument applies to laws focusing on folding stocks, flash suppressors, bayonets, or bipods.


\textsuperscript{190} See VA. CODE ANN. § 18.2-308.2:2 (1989).

\textsuperscript{191} See id.

\textsuperscript{192} See id.

\textsuperscript{193} This has been proposed as a middle course between no regulation and banning or registration. President Bush has supported legislation to limit magazines to 15-round capacities. 135 Cong. Rec. S6717-04; see also H.R. 1190, 101st Cong., 1st Sess. § 3 (1989). In addition, a group of arms manufacturers called the Sporting Arms and Ammunition Manufacturers’ Institute, Inc. (SAAMI) has chosen to support this course as well. SAAMI, Position Paper, at 3 (May 2, 1989) (available at Fla. Dep’t of State, Bureau of Archives & Records Management, Fla. State Archives, Tallahassee, Fla.). However, it is estimated that there are over 100 million detachable magazines in the United States, making any regulation of these a formidable task. 135 CONG. REC. H 1323-01 (daily ed. Apr. 18, 1989) (statement of Rep. Marlenee).
These individual items are not being regulated because they are not perceived to be the problem. Their presence on a firearm is seen as simply indicative of a firearm that may be a problem. Laws which emphasize characteristics rather than gun types may restrict the use of firearms that are not part of the problem. To avoid such a result, exceptions should be built into these laws. Therefore, while this form of definition may be more adaptable than a list of weapons would be to future market changes, such adaptability may come at some cost to accuracy and reasonableness.

C. Creating A List Of Acceptable Firearms

Another possible approach to the definitional problem is found in Maryland’s new handgun law. Approved by referendum in November 1988, this law creates a Handgun Roster Board, which is responsible for compiling a list of handguns useful for legitimate sporting, self protection, or law enforcement purposes. Only handguns on this list are permitted to be sold.

This law contains specific items the Board is to consider when appraising the legitimate purposes of weapons, such as concealability, ballistic accuracy, quality of product, and utility for legitimate purposes. The Board is authorized to place a handgun on the list by its own initiative, or when petitioned to do so. When petitioned, the Board has forty-five days to make a decision, or the petition is considered denied. The Board’s decision is appealable to the state court system.

This unique approach, which has never been tried with respect to assault weapons, assumes that all types of firearms within a regulated class are illegal. To make a firearm legal, one must prove to the Board that a firearm falls within the exceptions intended by the law. This type of a built-in assumption should be used only against a class of firearms in which, given individual scrutiny, most if not all members of that class would be deemed illegal. To ban an entire class while providing for exceptions which conceivably could be applied to a majority of that class may grow to be cumbersome and unwieldy.

195. Id. § 36J.
196. Id. § 36J.
197. See id. § 36J(b)(2).
198. Id. § 36J(e).
199. Id. § 36J(f)(5); see Apalachee Regional Planning Council v. Brown, 546 So.2d 451 (Fla. 1st DCA 1989) (discussing the criteria such an approach must satisfy to comport with Florida’s “delegation doctrine”).
D. Broad Statement of Purpose

A final approach to defining assault weapons is to enact a broad statement of purpose which an administrative agency can use to determine the legality or illegality of specific weapons. An example of this process is found at 18 U.S.C. § 925(d)(3). In 1968, the United States Congress sought to limit the types of firearms entering the country. Rather than draw up a list of weapons or characteristics, Congress simply enacted a purpose statement.200 This statement, that a firearm must be "generally recognized as particularly suitable for or readily adaptable to sporting purposes"201 to be imported, has not been altered since its inception, but has proved to be resilient against changing market conditions.

The firearms market has changed considerably since 1968. The firearms that are typically targets of assault weapons laws were not commercially introduced until the mid-70s or later;202 the number of these weapons imported remained relatively low until very recently.203 However, once market conditions changed, the BATF was able to reevaluate semiautomatic firearms using the purpose statement made twenty-one years earlier. During this reevaluation, each weapon was examined thoroughly, from its origins, advertisements and recommended uses, to its characteristics and use on the target range or hunting ground.204 The results of these examinations were then reviewed and conclusions drawn upon these results.205 The conclusions of the BATF were met with widespread approval.206 The United States Congress is currently considering two bills that seek to employ another such purpose statement.207 Both bills state that semiautomatics "specifically or primarily designed as a military or law enforcement armament" may not be imported.208 The Secretary of the Treasury,

200. See BATF REPORT, supra note 99, at 3. The Senate report on the Gun Control Act of 1968 stated that "[t]he difficulty of defining weapons' characteristics . . . was a major reason why the Secretary of the Treasury has been given fairly broad discretion in defining and administering the import prohibition." S. REP. No. 1501, 90th Cong., 2d Sess. 38 (1968).
204. See BATF REPORT, supra note 99, at 14-19.
205. See id. at 22-25.
206. See Letter from Daniel Black to the Director of the BATF, supra note 182.
207. S. 733, 101st Cong., 1st Sess. (1989); H.R. 1154, 101st Cong., 1st Sess. (1989). Because these bills seek to restrict the importation of semiautomatic weapons, they may be unnecessary following the actions of the BATF.
through the BATF, is to determine which weapons fall within this category.209

While this type of statement may address a perceived problem of military style weapons on the market, it may not successfully differentiate among firearms being imported. Almost all semiautomatics were originally designed for military or law enforcement use, but some may have been altered for the commercial market.210 Therefore, this statement could result in an excessively broad barrier to importation.211 The authors of the federal legislation may have recognized these problems, because exceptions for firearms unable to hold more than nine rounds of ammunition are written into the bills.212 The bills also list approximately twenty firearms that are to be considered assault weapons.213 The weapons listed generally share a military origin, so it is unclear why the list was needed as they would have been banned from importation anyway.

The success of a law based on a purpose statement depends primarily on the statement itself, which must differentiate between types of firearms. If it does not do so, the addition of exceptions and/or further definitional forms will be necessary for an effective law.

VII. CONCLUSION

If the Commission on Assault Weapons determines that no problem with illegal assault weapon use exists in this state, less need for further legislation will exist. However, if the Commission recommends further legislation in this area, the broad purpose statement appears to offer the best hope for a reasonable, workable definitional form. Merely listing weapons to be regulated provides no explanation why those weapons are being regulated, and gives the impression that such weapons require further regulation simply because the Legislature says so.214 Additionally, a list is inflexible and would require repeated legislative action.

210. See BATF REPORT, supra note 99, at 8.
211. See id.
214. This can be seen by the manner in which the listed weapons were chosen for HB 573. Representative Flagg simply took the weapons, for the most part, from the California legislation. Compare supra note 85 (listing weapons covered by Fla. HB 573 (1989)) with CAL. PENAL CODE § 12275 (West 1990) (listing 54 types of weapons regulated by California).
Although the characteristic-based definitional form may be more flexible than a list, it poses additional problems. It may tend to have an effect broader than originally planned, and consequently may require many further exceptions to narrow the law's scope. In addition, there seems to be no reason not to regulate the characteristic upon which the illegality is based, rather than regulating the entire firearm.

Creating a board to list acceptable firearms would also prove difficult. Initially, the presumption of illegality would be unnecessary unless many or most weapons in a class are thought to be illegal. A board would have to make decisions based on technical data and create tests and parameters for these decisions, a function best performed by those with specialized knowledge of firearms. Perhaps most importantly, the members of such a board would be political appointees and have a vested political interest in the outcome of its deliberations.

Because the success of the purpose statement definitional form as a guide to detailed regulations will depend initially on the statement itself, such statement should be based on the purpose or intended use of the weapon. In this regard, the statement might reflect the reasoning of 18 U.S.C. § 925(d)(3) and require a true "sporting purpose" to be shown. On the other hand, the statement might be based on requiring an intended defensive, as opposed to offensive, use. Under this scenario, a weapon with a folding stock, a bayonet mount, night sight, flash suppressor, and a seventy-five-round drum magazine would seem to be built for offensive purposes, as opposed to a semiautomatic weapon with none of those features.

An additional advantage of this definitional form is the scrutiny given each firearm before a determination is made on its regulation. An administrative agency with expertise in firearms technology, such as the Florida Department of Law Enforcement, could be authorized to conduct this evaluation. Based on its expertise, this agency could develop criteria to determine the applicability of the law to a particular weapon, just as the BATF does on the federal level.

Because of the examinations required, this approach may take longer to implement than the other approaches. Speedy implementation, however, should not be the primary goal. The primary goal
should be meeting the needs of Florida’s citizens with effective legislation, while protecting traditional sporting rights.