

# RIVERSIDE LAWYER

February 2019 • Volume 69 Number 2

MAGAZINE

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What Changes in the Laws  
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A Challenge to the Legal Community**

**Active Shooter and Public Protection**

**Can You Trust a Gun?**

**Have the Conversation**

**Can the No-Fly List Double  
as a No-Gun List?**

## 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.



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MAGAZINE

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# MISSION STATEMENT

## Established in 1894

The Riverside County Bar Association, established in 1894 to foster social interaction between the bench and bar, is a professional organization that provides continuing education and offers an arena to resolve various problems that face the justice system and attorneys practicing in Riverside County.

## RCBA Mission Statement

The mission of the Riverside County Bar Association is:  
To serve our members, our communities, and our legal system.

## Membership Benefits

Involvement in a variety of legal entities: Lawyer Referral Service (LRS), Riverside Legal Aid, Fee Arbitration, Client Relations, Dispute Resolution Service (DRS), Barristers, Leo A. Deegan Inn of Court, Mock Trial, State Bar Conference of Delegates, Bridging the Gap, and the RCBA - Riverside Superior Court New Attorney Academy.

Membership meetings monthly (except July and August) with keynote speakers, and participation in the many committees and sections.

Eleven issues of *Riverside Lawyer* published each year to update you on State Bar matters, ABA issues, local court rules, open forum for communication, and timely business matters.

Social gatherings throughout the year: Installation of RCBA and Barristers Officers dinner, Law Day activities, Good Citizenship Award ceremony for Riverside County high schools, and other special activities.

Continuing Legal Education brown bag lunches and section workshops. RCBA is a certified provider for MCLE programs.

*The Riverside Lawyer is published 11 times per year by the Riverside County Bar Association (RCBA) and is distributed to RCBA members, Riverside County judges and administrative officers of the court, community leaders and others interested in the advancement of law and justice. Advertising and announcements are due by the 6<sup>th</sup> day of the month preceding publications (e.g., October 6 for the November issue). Articles are due no later than 45 days preceding publication. All articles are subject to editing. RCBA members receive a subscription automatically. Annual subscriptions are \$25.00 and single copies are \$3.50.*

*Submission of articles and photographs to Riverside Lawyer will be deemed to be authorization and license by the author to publish the material in the Riverside Lawyer.*

*The material printed in the Riverside Lawyer does not necessarily reflect the opinions of the RCBA, the editorial staff, the Publication Committee, or other columnists. Legal issues are not discussed for the purpose of answering specific questions. Independent research of all issues is strongly encouraged.*

# CALENDAR

## February

- 6 Mock Trial – Round 1**  
5:30 p.m. – 8:00 p.m.  
Regional Competition  
Riverside, Indio, Murrieta Courthouses
- 8 Bridging the Gap**  
A free program for new admittees  
8:00 a.m. – 4:00 p.m.  
RCBA Gabbert Gallery
- 13 Criminal Law Section**  
Noon – 1:15 p.m.  
RCBA Gabbert Gallery  
Speaker: Greg Estevane, Gang Expert & Private Investigator  
Topic: “Gang Defense and Investigations”  
MCLE – 1 hour General
- Mock Trial – Round 2**  
5:30 p.m. – 8:00 p.m.  
Riverside HOJ
- 19 Family Law Section**  
Noon – 1:15 p.m.  
RCBA Gabbert Gallery  
Speaker: Judge Dale Wells, Family Law Court  
Topic: “State of the Family Law Court”  
MCLE – 1 hour General
- 20 Estate Planning, Probate & Elder Law**  
Noon – 1:15 p.m.  
RCBA Gabbert Gallery  
Speakers: Judge Thomas Cahraman & Judge Kenneth Fernandez  
Topic: “Probate Court Update: Change to Law/ Rules”  
MCLE – .75 hour General
- Mock Trial – Round 3**  
5:30 p.m. – 8:00 p.m.  
Riverside HOJ
- 21 Solo and Small Firm**  
Noon – 1:15 p.m.  
RCBA Gabbert Gallery  
Speaker: Joseph Jones, Bosco Legal Services  
Topic: “Ethical Use of Social Media Investigations”  
MCLE – 1 hour Legal Ethics
- 22 General Membership Meeting**  
Noon – 1:30 p.m.  
RCBA Gabbert Gallery  
Speaker: Presiding Judge John Vineyard  
Topic: “State of the Riverside Superior Court”  
MCLE - .75 hour General
- 23 Mock Trial – Round 4**  
8:30 a.m. – 11:00 a.m.  
Riverside HOJ
- 26 Appellate Law Section**  
Noon – 1:15 p.m.  
RCBA Gabbert Gallery  
Speaker: Justice Richard T. Fields, Court of Appeal, 4th District Division 2  
Topic: “Trial Lawyers, Prepare Your Cases for Appeal Under the Appropriate Standard of Review”  
MCLE – 1 hour General

### EVENTS SUBJECT TO CHANGE.

For the latest calendar information please visit the RCBA's website at [riversidecountybar.com](http://riversidecountybar.com).



# BARRISTERS PRESIDENT'S MESSAGE

by Megan G. Demshki



On a Friday in January, the Barristers met up for a movie night. After a busy work week, I was looking forward to relaxing and enjoying some popcorn and comradery with my peers. Little did I know that *On the Basis of Sex* would leave me so fired up that I would hardly sleep that night.

*On the Basis of Sex* is a movie that tells the story of Ruth Bader Ginsburg in her struggle for gender equality under the law and the cases and career that led to her nomination and confirmation as an associate justice of the United States Supreme Court.

Ruth Bader Ginsburg was sworn into office on August 10, 1993, about one month before my third birthday. On that day, she became the second female associate justice of the Supreme Court, following Sandra Day O'Connor, who was appointed in 1981. To date, there have been 114 total Supreme Court justices, 110 of them have been male. On the current panel, 3 of the 9 justices are female.

I am a notorious planner. I enjoy the order and structure that a well-organized plan fosters. It is no secret that when I try to imagine and plan how I will someday "balance" my career and a growing family, it causes me a great deal of stress. "How will I ever manage to do it all when my family responsibilities grow?" I wonder to myself as I squeeze one more meeting on to my calendar. Even with the support of a spouse that epitomizes the idea of an equal division of labor when it comes to our current household, it weighs heavy on my mind.

Recently as I listened to the clerk read back a favorable jury trial verdict, amidst the poignant joy of watching my client quietly shed a tear in happiness, I wondered how I will ever be able to do this demanding and all-encompassing job I love while raising children.

But watching this movie alongside some of the fierce, young female attorneys of the Barristers, gave me hope, inspiration, and reignited a passion. I am not alone. I am not the first woman to experience these struggles and these worries. I live in a community with incredible examples in both the bench and the bar. I am fortunate to work for a firm that values both family and equality. I have a husband and a family that are my biggest supporters and my rock.

I have been privileged to grow up in a time with both genders on the panel of the Supreme Court and throughout the lower courts. I have had the opportunity to stand on the shoulders of giants in the battle for gender equality in the world and in our legal community. And while the work is not over in the battle for gender equality, I am so fortunate to benefit from the women, and men, who came before me and paved a smoother path.

Perhaps talking about this concern instead of bottling it up will allow for the kind of dialog that is necessary for continued change and will generate support for one another as we work to develop fulfilling lives, both in our careers and in our families. I hope I am playing my own role in making our world a little more equal for us all.

## Upcoming Events:

- Meet up with the Barristers at Romano's Downtown Rooftop for Happy Hour on **Friday, February 8** at 5:30pm. This event is graciously sponsored by Varner & Brandt LLP.
- Keep your eye out for registration for **Motion to Strike** bowling night with the Barristers on **Friday, February 22!** This event is kindly sponsored by Melissa Baldwin Settlements.
- Learning more about upcoming events by following @RCBABarristers on Facebook and Instagram or visiting our website, [www.riversidebarristers.org](http://www.riversidebarristers.org).

## Looking to get involved?

Whether you are eager to start planning the next great Barristers gathering or just looking to attend your first event, please feel free to reach out to me. I would love to meet you at the door of a Happy Hour so you don't have to walk in alone or grab coffee to learn more about how you want to get involved. The easiest ways to get ahold of me are by email at [Megan@aitkenlaw.com](mailto:Megan@aitkenlaw.com) or by phone at (951) 534-4006.

*Megan G. Demshki is an attorney at Aitken Aitken Cohn in Riverside where she specializes in traumatic personal injury, wrongful death, and insurance bad faith matters. Megan can be reached at [megan@aitkenlaw.com](mailto:megan@aitkenlaw.com) or (951) 534-4006.*



# WHAT DOES A GUN DEALER DO AND WHAT CHANGES IN THE LAWS ARE WE ANTICIPATING?

*by Felix Martin*

Buying and selling a gun in California requires several steps, a little patience, and good record keeping. The first step to acquiring a gun in California is to obtain a Firearm Safety Certificate (FSC). The potential gun owner needs to acquire the FSC card before he can buy a firearm. This certificate identifies you as having at least some small amount of knowledge regarding gun safety.

Buying a new gun starts with a trip to the local gun shop. The buyer will pick the firearm they desire and start the California and federal steps to purchase the firearm. The dealer may swipe the buyer's California driver's license or they may fill out the computerized screens with the personal information from the buyer. Additionally, the parties must also meet to acquire the information on its Form 4473. The California forms are called "DROS" forms.

Once the initial documents are partially completed, they are stored for at least 10 days and no more than 30 days. This period allows sufficient time for the state to determine the background search results. If the 30-day period is exceeded, the transfer cancels. After the DROS and ATF 4473 forms are completed, a few questions still must be obtained by the dealer, including where the firearms will be stored, how the item must be stored, and signed affidavits to verify the initial answers.

## **The California Roster of Guns for Sale, Microstamping and New Law Summary**

On the top of the list for crazy gun laws is the grossly restrictive "Roster of Firearms Certified for Sale" (hereinafter, "Roster"). This Roster requires gun manufacturers to pay for costly testing of gun safety for specified firearms. The problem is the testing duplicates or unreasonably exceeds the manufacturer's testing, is opposed by industry as being unnecessary, and sets an unrealistic level for a failure point. No long-term benefit has been shown to exist by the testing and the current manufacturers are required to pay high testing fees.

From my understanding, the firearms already on the Roster conflict with the purported requirements for the microstamping. The conflict between microstamping and the Roster requirements, have caused a gridlock for purported sales. Microstamping was voted into law several years ago and required that any new hand gun being sold

in California must have laser etched codes on the hammer or striker. These etchings will purportedly leave a mark on the expended ammunition casing that is unique for that specific gun. Notably, the University of California, Davis tested the process and found it unreliable. One problem is that the current technology does not exist to rely upon the current stamping techniques. Quite simply, the engraving does not last, costs too much, and is not easy to replace because a separate die or laser must be used to recreate the failed marking.

From a law enforcement prospective, the stamping would be simple to obliterate. A few seconds with a file would remove any etching stamping. The statutes also prohibit the retesting of any previously tested firearm or etched firing mechanism. Because the legislature has required that any future gun on the Roster must meet the microstamping requirements, and no such gun can effectively show this is reasonable, no firearms are being staged for stamping on guns designated under the rules regarding either Roster issues or Microstamping. Presently, there are approximately 38 firearm vendors on the Roster, and from those 38, a couple hundred different models.

## **Private Party Transactions**

The private party transfer is a procedure that allows the parties in a gun sale, purchase, or transfer to avoid the prohibitions of the California Roster; and in order to use this exception, the buyer and seller must first find each other. Often the participants connect on websites for these types of transactions. The buyer and seller find a local firearms dealer and the sale basically operates normally. The ten-day hold and the 30-day rule allow the purchaser to leave with the firearm. All the basic requirements exist, but the type of hand gun is not limited to the models found on the California Roster. This transfer also limits the buyer to one purchase per month, with the dealer reporting all multi-gun sales to the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF).

## **Single Action Firearms**

This exemption allows for any single action revolver to be sold or transferred using either a dealer transfer or a Private Party Transfer. The size or caliber is not relevant, but is prohibited for a 50 Browning Machine Gun (BMG).

## Contingent Fiduciary Transfers

In a circumstance where a fiduciary is entering a contingency based gun transfer, the transfer can be reversed. Normally, if the gun is transferred to a dealer, the dealer takes the gun subject to the Roster rules. Basically, he has to re-sell the gun to law enforcement or out of state. However, if the transaction is contingent as with a fiduciary, the gun or guns can be reclaimed and can be transferred back to the original selling party. From that point, the guns can be transferred by private party transfers to any reasonable person after appropriate time limits, etc.

## Restricted Ammunition Sales

Starting in 2019, all persons must obtain their ammunition from in state ammunition vendors. These transfers must occur in person "face to face," with few exceptions. Additionally, no person may purchase ammunition outside the state of California and send it into California. The goal is ultimately to track the ammunition sales. I question the ultimate cost of this legislation, as I do not understand how the new laws will either assist law enforcement or address safety concerns.

## Gun Ownership Age Requirement 21

Recent legislation has allowed all gun ownership to be raised to 21 regardless of gun type. All prior ownership ages of 18-20 are invalid.

## Involuntary Mental Commitment

If a person has been involuntarily committed twice in one year, his/her right to possess or control firearms is extinguished for life. (AB1968.)

## Domestic Abuse Charges as a Basis for Loss of Gun Rights

If a person is found to be guilty for various charges related to domestic abuse, his/her firearm rights can be extinguished for ten years. (AB1968.)

If you wish to receive any information discussed in this article, please let me know. I would welcome comments if they are relevant to the topic.

*Felix M. Martin is an attorney and gun dealer in the Inland Empire and can be reached at 562-673-9742 or [FMartin@FMartinLaw.com](mailto:FMartin@FMartinLaw.com).*



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# SECOND AMENDMENT RIGHTS: A SUMMARY OF SUPREME COURT JURISPRUDENCE

by Charles S. Doskow

The power of governmental units at all levels to regulate firearms has become an increasingly divisive political issue. That regulation takes place under the Second Amendment to the United States Constitution, the interpretation of which has long been a matter of intense debate.

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.”

From 1791, when the Second Amendment was ratified as part of the Bill of Rights, until eight years into the Twentieth Century, it was undecided, as a matter of Constitutional law, whether the Amendment’s introductory phrase was intended to limit the Amendment’s meaning to protecting the states and their militias from the federal government, or whether it created an individual right to maintain firearms.

The first interpretation was consistent with the divisions in political belief existing at the time, when the federal government was new, and considered by many to be an existential threat to state sovereignty.

In 2008, the Supreme Court addressed the problem for the first time and ruled, in the *Heller* case, that the proper interpretation was that an individual right existed. Two years later, in *McDonald*, the Court ruled that the *Heller* decision applied to the states.

**Heller:** The District of Columbia’s laws made it virtually impossible for a civilian to obtain a license to purchase and keep a handgun. The ordinance contained provisions that any handgun in the home must be maintained in a nonfunctional condition.

The ordinance was challenged as a violation of the Second Amendment. The plaintiff, a District special policeman, wished to keep a handgun in his home and argued that the intent of the amendment was to create such a right.

Justice Antonin Scalia agreed with him and wrote the Court’s opinion for a five justice majority (including Chief Justice Roberts and Justices Alito, Thomas, and Kennedy). The Court held that the Second Amendment did in fact protect such a right; that the District’s total ban on handguns was unconstitutional, as was the requirement that firearms in the home be kept in a nonfunctional condition.<sup>1</sup>

<sup>1</sup> *Heller v District of Columbia*, 554 U.S. 570 (2008).

The opinion found that the introductory clause represented one purpose, that of protecting the rights of state militias, but did not exclude the second (“operative”) clause from protecting the rights of citizens. Since the militia, at the time of the adoption of the Amendment included all males 17 to 45, the two phrases could be read in harmony.

The opinion relied on eighteenth century sources for definitions of the express terms. But it expressly recognized that rights could not be treated as absolute. Felons, the mentally ill, and the insane should obviously not be entitled to possess firearms, and certain venues could exclude guns: schools and government buildings are specifically mentioned. The opinion expressly states, “[The Second Amendment] is not a right to keep and carry any weapons whatsoever and for whatever purpose.” The rights of self-defense, particularly of the home, were recognized.

Four Justices (Stevens, Souter, Ginsburg, and Breyer) dissented, contending that the introductory phrase should control, and that no intent to create a personal right should be inferred. They investigated the same sources as had the majority, but also addressed the need of cities to minimize the presence of guns on the street.

The division on the Court was consistent with the alignment in other cases at the time. Five conservative justices, all Republican appointees, supported what we now call “gun rights,” and four more liberal justices (two of whom were Republicans who had adopted more liberal positions after their appointment), disagreed.

That division continues to this day.

**McDonald:** Despite its being thermonuclear in its effect, *Heller*, which addressed laws of the District of Columbia, a federal enclave, did not affect state laws. The Bill of Rights was originally intended to limit only the federal government, and did not control state governments.

But the Court has held, in a number of decisions since the 1920’s, that various parts of the Bill of Rights have been incorporated into the Fourteenth Amendment, and thus apply to state governments.

The Court has declined to incorporate the entire Bill of Rights, but has addressed individual provisions, most of which it has held to be incorporated. (The governing language of the Fourteenth Amendment is “...nor shall any State deprive any person of life, liberty or property without due process of law...”)

It was inevitable after *Heller* that the Court would soon consider whether the Second Amendment, with its new interpretation, would be incorporated into the Fourteenth, and thus have national scope. And almost equally inevitable what the decision would be.

Two years later, in *McDonald v. City of Chicago, Ill.*, (561 U.S. 742 (2010)), the Court held that the right to keep and bear arms for self-defense was a right fundamental to this country's scheme of ordered liberty. It was therefore incorporated into the due process clause of the Fourteenth Amendment (usually referred to as "substantive due process" in this context). The Court cited language from *Heller* that the right of self-defense is a "central component" of the Second Amendment right.

The opinion found that the right was "deeply rooted in this Nation's history and traditions."

There were dissents from the same four Justices.

**Certiorari.** It is one thing for the Supreme Court to declare what the Constitution requires, but the laws that actually carry out firearms regulation in this country are made by states, counties, and municipalities.

Among the important issues left unresolved by *Heller* was the standard by which local gun regulations would be judged. A searching inquiry into their necessity under strict scrutiny could result in a finding of invalidity, limiting local power to regulate; a more lenient standard of requiring only a rational basis for the law would discourage gun ownership.

When local laws are challenged, the first line of decision is at the trial court level. If appealed, these holdings will be decided by the appropriate appellate court, which may be either a federal Circuit Court of Appeals or, less often, a state court, either the Supreme Court or intermediate appellate court.

The Supreme Court has not decided a gun control case since 2010, which means that the decisions on the hundreds (thousands?) of local laws adopted annually will be made by these courts.

These decisions will vary from one federal Circuit to another and from one state to another. Details of these decisions are beyond our scope. But one clue to the effect of *Heller* may be found in the Supreme Court's certiorari practice.

The United States Supreme Court now has complete control over its docket. It receives about 7000 requests to review lower court decisions each term; it publishes about 70 full opinions.

It takes four votes by justices to accept review of a case. In the usual run of cases, the results of the vote to grant certiorari are not published. Neither the number nor the identity of the justices voting to accept the cases are publicly known.

But sometimes a justice will feel strongly enough that a case should have been taken that he/she will write and publish a dissent from the denial of certiorari.

Justice Clarence Thomas believes that the Court is neglecting its duty in Second Amendment cases, and (usually with only one other justice joining him) has published dissents protesting denial of certiorari in cases upholding gun regulation. Many of these cases result in a lower court decision sustaining a local regulation limiting or burdening firearm ownership being sustained.

Dissenting from the denial of cert in *Peralta v California* (No. 16-894 June 26, 2017), Thomas points out that during a time period that the Court agreed to decide 35 First Amendment cases and 25 Fourth Amendment cases, it took none involving the Second Amendment. He wrote, "The Constitution does not rank certain rights above others and I do not believe the Court should impose such a hierarchy by selectively enforcing its preferred right." Part of his message is that the lower federal courts are not carrying out the Supreme Court's mandate.

He believes that gun rights are as important as free speech rights, but apparently to date cannot persuade more than three of his brethren to accept that proposition. The addition of two new justices since the 2016 election may enhance his chances of persuading the Court to accept cases deciding on the Constitutionality of gun control legislation.

**In Conclusion.** *Heller* was indeed a tsunami, but it left a host of unanswered questions, many of which have been and are currently being litigated. Open carry, concealed carry, the disqualification of certain individuals, and the extent of the areas of permitted regulation expressly noted in the decision are among them. Those cases are being litigated with, to date, intense partisan division and no further guidance from the Supreme Court.

**Editor's Note:** After this article was submitted to the *Riverside Lawyer*, and shortly before this issue went to press, the Supreme Court granted certiorari to *New York State Rifle & Pistol Assn v. New York*, a case involving a Second Amendment challenge to a New York City gun regulation. We anticipate that Professor Doskow will comment on that case in a future issue.

*Charles Doskow is Dean Emeritus and Professor of Law at the University of La Verne College of Law in Ontario. He is past president of the Inland Empire Chapter of the Federal Bar Association. Professor Ken Rudolf provided editorial assistance.*



# FIREARMS AND SUICIDES IN THE UNITED STATES: A CHALLENGE TO THE LEGAL COMMUNITY

by Augustine J. Kposowa, PhD

## Introduction

After a period of nearly consistent decline in suicides in the United States from 1986 through 1999, suicide rates increased almost steadily from 1999 through 2014, with the age-adjusted rate increasing by 24 percent between 1999 and 2014; it went from 10.5 to 13.0 per 100,000 population, with the pace of increase greater after 2006.<sup>1</sup> When the period is extended to cover more years, the U.S. national suicide rate increased by 25.4 percent between 1999 and 2016, and during this period, every state, except Nevada experienced a positive increase.<sup>2</sup> Suicide, therefore, remains a major social and public health problem in the United States. It was the 10th leading cause of death for the entire U.S. population in 2015 and 2016.<sup>1</sup> It was responsible for 44,193 deaths in 2015 and almost 45,000 in 2016.<sup>1,2,3</sup> Many more people are hospitalized as a result of nonfatal suicidal behavior (suicide attempts) than are fatally injured, and an even greater number are either treated in ambulatory settings (e.g., emergency departments) or not treated at all.<sup>1,2</sup> Among adults aged 18 years and older, for each suicide there are about 30 adults who reported making a suicide attempt.

Suicide and nonfatal self-directed violence result in an estimated \$69 billion in combined medical and work loss costs.<sup>1</sup> However, because that estimate does not include other societal impacts (like those on families), the true cost of suicide is likely much higher.

From 2001 to 2015, suicide rates were consistently higher in rural areas than in metropolitan areas for both sexes.<sup>3,4</sup> Although rates for all racial/ethnic groups typically increased in all counties, non-Hispanic American Indian/Alaska Natives had the highest rates in rural counties and non-Hispanic whites had the highest rates in metropolitan counties. Rates also increased for all age groups across all counties, with the highest rates and greatest increases in more rural areas.<sup>3</sup>

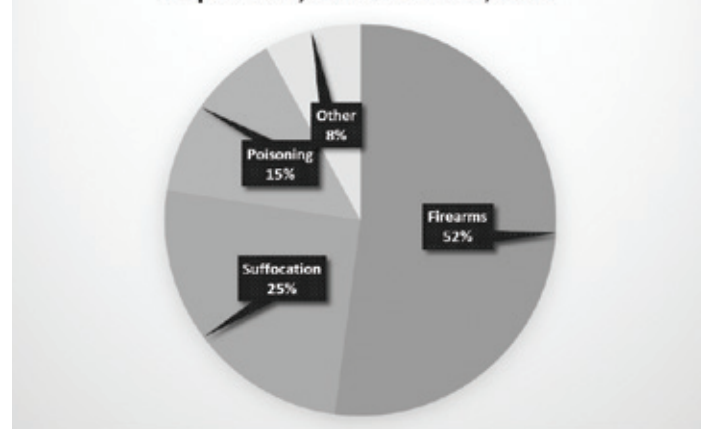
## Methods of Suicide

There is overwhelming evidence that firearms and firearm ownership are major risk factors for suicide and are the primary mechanisms of suicide mortality.<sup>6,7,8</sup> So strong is the effect of firearms on suicide that some analysts have argued that restricting access to guns is one

of the most effective suicide prevention strategies.<sup>6,7,9,10</sup> Kposowa et al. for example, found that household gun ownership in any shape or form is a serious risk factor for suicide in the home.<sup>7</sup> Having guns in the home increased suicide risk, having the guns loaded was an added risk, and the loaded guns being unlocked constituted an additional risk. The danger posed by guns in the home partly stems from the fact that attempted suicide is most often an impulsive act stemming from moments of crisis, including job demotion, job loss, loss of love, a sudden deterioration in mental or bodily health condition. In these and related circumstances ready access to firearms can make the difference between life and death.

An examination of figure 1 shows the distribution of suicides by mechanism of death in 2016 for both sexes combined.

Figure 1. Suicides by Method of Death, Total Population, United States, 2016



Source: National Center for Health Statistics<sup>11</sup>

As may be seen, 52 percent of all suicides in 2016 were completed with firearms. The next mechanism (suffocation, hanging, and strangulation) was 25 percent, while poisoning was 15 percent.

## Conclusion

In view of the overwhelming evidence that firearm ownership is a significant risk factor for suicide, and that over half of all suicides in the United States are completed with firearms, why has the nation chosen not to take gun control or even gun elimination seriously? Part of

the problem regarding serious gun control or gun ban is the often heard expression that the framers allowed citizens to bear arms. Accordingly, many Americans believe rightly or wrongly that they have some constitutional right to bear firearms. This is a rather dubious approach to law or the Constitution. The framers could never have foreseen the emergence of Kalashnikov weapons, M16 rifles, semi-automatic or even automatic guns. They were men of their times. The document they wrote was not perfect, and it was never designed to be immutable across history and centuries. Thus, within the constitution itself, they made provision for amendments, and sure enough, it has been amended several times since its first release. History is never static; the world evolves, new technologies emerge along with new challenges. If over time, there is clear evidence that firearms are leading to the deaths of thousands of Americans, is this an acceptable or tolerable situation? Should the constitution not be amended to have guns registered, severely restricted, or even banned?

There are way too many products heavily controlled or regulated in the United States. Take the automobile, for example. In addition to federal laws, there are numerous state laws regulating ownership and operation of automobiles. Yet cars and other automobiles were not made purposefully to kill. If states can control the operation of automobiles, which were not designed to kill, what about firearms whose sole purpose is to kill, not animals, but humans, and do it so efficiently?

In the U.S., there are liability laws that accompany many everyday products that consumers use. If a citizen were to use a product as directed and he or she is harmed by it, the manufacturer could be held liable for the product. Likewise, malpractice laws exist in many professions that could be used by citizens in the event that they suffer abuse at the hands of the professionals concerned. Why are firearms which are specifically designed to kill somehow protected? Why could their manufacturers not be held accountable for their death carrying products?

Suicide rates continue to rise in the United States, affecting persons in both rural and metropolitan areas. Research findings have consistently shown that firearm ownership in the home is one of the strongest predictors of completed suicide. What is the nation waiting for? Baby steps such as reasonable gun control laws and background checks are not enough. It seems appropriate at this time in history that firearms be severely controlled or out rightly banned.

*Augustine J. Kposowa, PhD, is a professor of Sociology at the University of California, Riverside. Dr. Kposowa can be reached at [kposowa@ucr.edu](mailto:kposowa@ucr.edu).*



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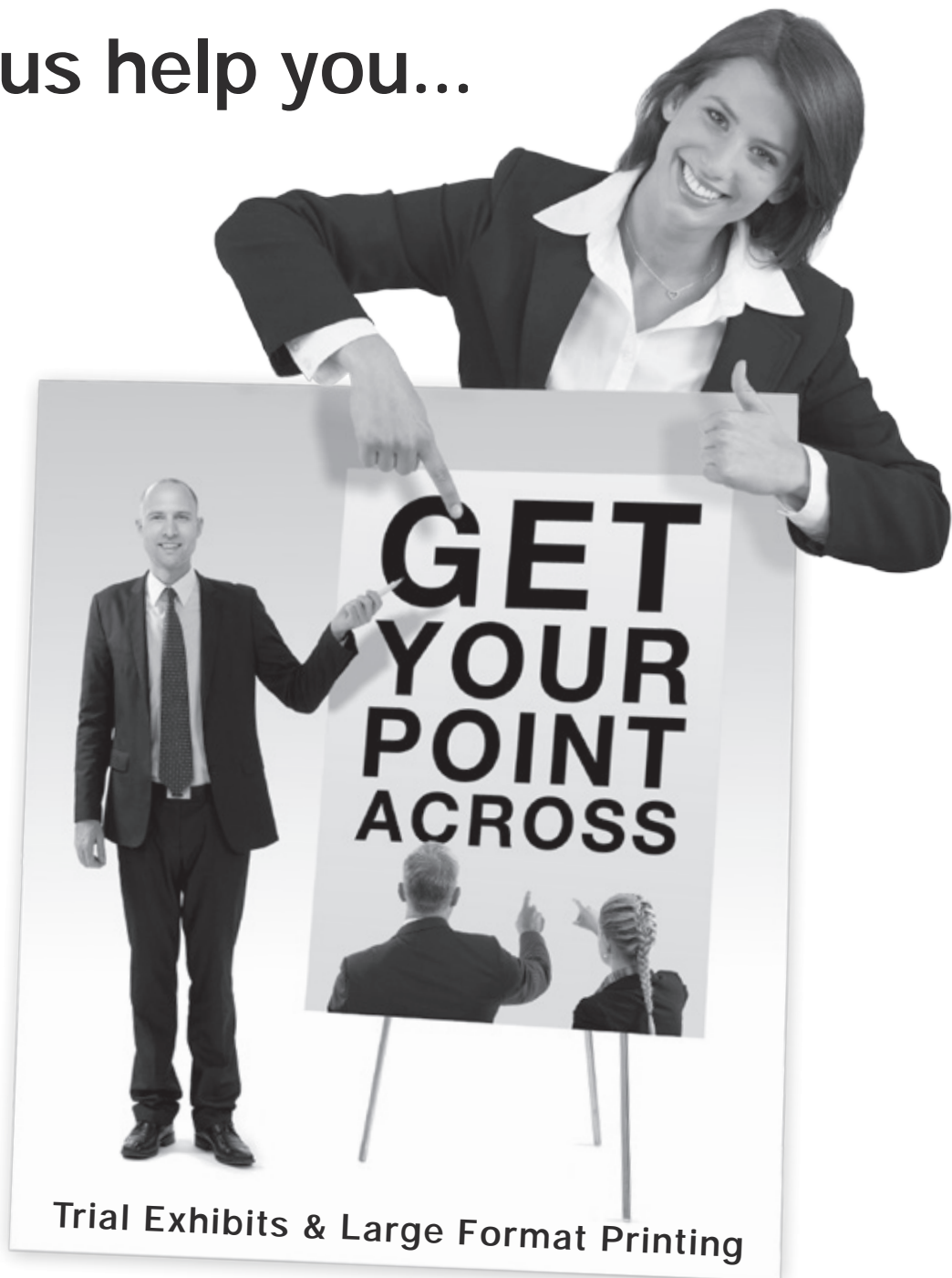
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# ACTIVE SHOOTER AND PUBLIC PROTECTION

by Boyd Jensen

On October 1, 2017, over 22,000 people were gathered after 10:00 p.m. for an open-air Las Vegas music festival, when from the 32nd floor of the Mandalay Bay Resort and Casino – for 11 minutes – gunfire poured down upon them – over 1,000 rounds. Hundreds were injured and 58 killed. The shooter killed himself, as law enforcement officers assembled in the hallway outside his door – making the total dead 59.

Days before this issue of the *Riverside Lawyer* was published, the U.S. Department of Justice, Federal Bureau of Investigation, Behavioral Analysis Unit, released their report on the shooting. After enumerating the breadth of their expertise in “threat assessment, psychology, psychiatry, research, cyber behavioral analysis, law, and child sexual exploitation...and familiarity with targeted violence and behavioral analysis,...” and after 12 months of “comprehensive” analysis, concluded there was “**no single or clear motivating factor**” behind the attack.<sup>1</sup>

Really? Was the worst mass shooting<sup>2</sup> in “modern U.S. history” inexplicable? The two and a half page report, essentially, just stirred the murky waters with information explanations, excuses, hypothecations and interdisciplinary expostulations. Perhaps he just wanted to kill people...because he wanted to? Too primal...homicidal? Not the twenty-first century acknowledgement we prefer, but when we analyze our role as counsel and advisors to clients in this very real world of public, employee, familial, patron, and customer everything must be considered.

## Law Enforcement

On November 14, 2018, law enforcement agencies in Riverside went through drills to prepare law enforcement in the event of an active shooter. This exercise involved four actors as gunmen who opened fire on a dozen police officers. The simulation was effective in showing the police department what still needed improving, such as locating all the victims. The drill was also valuable as further training for police, firefighters, and paramedics working together, while “shooting victims” were treated outside for injuries as police entered the building to confront shooters. This drill which took place one week after the bar shooting in Thousand Oaks, was designed

1 See US Department of Justice, Federal Bureau of Investigation, “Key Findings Of The Behavioral Analysis Unit’s Las Vegas Review Panel” (LVRP) January 28th, 2019.  
2 The documented conclusion of multiple media outlets, eg. AP, CNN, ABC etc.

to prepare law enforcement for a once-in-a-lifetime type of scenario . . . but it’s not a once-in-a-lifetime possibility anymore.<sup>3</sup>

## Client – Public Awareness: RUN – FIGHT – HIDE

Following the Newtown, Connecticut school shooting in December 2012, the FBI and the Department of Justice’s Bureau of Justice Assistance partnered with the *Advanced Law Enforcement Rapid Response Training* (ALERRT) to help prevent and respond to active shooters. ALERRT was developed in Texas and has been adopted by many other states:

**RUN:** If there is an escape path, attempt to evacuate. Evacuate whether others agree or not. Leave your belongings behind. Help others escape if possible. Prevent others from entering the area. Call 911 when you are safe.

**HIDE:** Lock and/or blockade the door. Silence your cell phone. Hide behind large objects. Remain very quiet. Your hiding place should: Be out of the shooter’s view; Provide protection if shots are fired in your direction; Don’t trap or restrict your options for movement.

**FIGHT:** Attempt to incapacitate the shooter. Act with physical aggression. Improvise weapons. Commit to your actions.

When law enforcement arrives remember to remain calm and follow instructions. Keep your hands visible at all times. Avoid pointing or yelling. Know that help for the injured is on its way.<sup>4</sup>

During these events and others we learn, about the profile of active shooters. An active shooter is an individual engaged in killing or attempting to kill people in a confined and populated area; in most cases, active shooters use firearms(s) and there is apparently no pattern or method to the selection of victims. Active shooter situations are unpredictable and evolve quickly. Typically, the immediate deployment of law enforcement is required to stop the shooting and mitigate harm to victims. Yet, active shooter situations are often over within 10 to 15 minutes, before law enforcement arrives on the scene. Thus, **individuals must be prepared both mentally and**

3 “Active Shooter Drill in Riverside” (**Emboldening** added.) (November 14, 2018), Article: Rob McMillan (abc7.com).  
4 FBI.gov.

**physically** to deal with an active shooter situation before they arrive.

- (1) Be aware of your environment and any possible dangers.
- (2) Take note of the two nearest exits in any facility you visit.
- (3) If you are in an office, stay there and secure the door.
- (4) If you are in a hallway, get into a room and secure the door.
- (5) As a last resort, attempt to incapacitate the active shooter. When the shooter is at close range and you cannot flee, your chance of survival is much greater if you resist.<sup>5</sup>

There are handgun training courses in Riverside County. The California State Carry Conceal Weapon (CCW) permit is approved, if authorized by the Sheriff's Department or city in which one resides. Each individual county or city has its own requirements. Once a county or city authorizes a CCW permit, that permit is valid in every city and county in California; even if that city/county does

<sup>5</sup> US Department of Homeland Security. "Active Shooter How To Respond." [www.otis3.riversidehealthcare.net](http://www.otis3.riversidehealthcare.net).

not allow their residents to have a CCW permit.<sup>6</sup> Note that California banned the sale of assault weapons July 1, 2016.<sup>7</sup> Also beginning July 1, 2019 there will be a background check for anyone buying ammunition.<sup>8</sup>

As a lawyer who has advised and defended large entertainment facilities with thousands of patrons, it was a revelation, when after 9/11 we were advised that in the case of an emergency, watch the exits, as that may be where your patrons are *most vulnerable*....easily accessible to assailants hidden outside, and while patrons are tightly squeezed together. The notion of movement toward an exit was assumed as movement to safety, but not always. It may be necessary to advise your clients to utilize local training events and easily available online recommendations, while recognizing that experts do not know it all and **nothing is off the table**. Nothing!

*Boyd Jensen, a member of the RCBA Bar Publications Committee, is with the firm of Jensen & Garrett in Riverside.*



<sup>6</sup> [www.riversidesheriff.org](http://www.riversidesheriff.org).

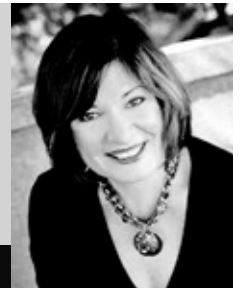
<sup>7</sup> Penal Code § 27590.

<sup>8</sup> Ryan Sabalow. "New Gun Restrictions Are Coming To California In 2018. Here's What They Mean To You." December 11, 2017. [www.sacbee.com](http://www.sacbee.com).

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# CAN YOU TRUST A GUN?

by Andrew Gilliland

Recently, I watched the 1950 James Stewart movie, *Winchester '73*, which is essentially a love fest for the Winchester 1873 rifle. In the opening scenes a paragraph is displayed wherein the filmmakers applaud the significant role in the battle for the West the 1873 Winchester played and boldly claimed that a Native-American would have sold their soul to have owned one. The basic plot of the movie is that there is a shooting contest in Dodge City, Kansas, with the winner receiving a coveted Winchester '73 rifle. James Stewart wins the Winchester '73, but it is stolen from him leading to a twisting tale of shootouts that follow the ownership of the rifle as it changes hands multiple times (usually through the death of the previous owner). In the end, James Stewart gets the rifle back (through shooting the previous owner with another rifle) and all is well again in Dodge City. *Winchester '73* depicts the historic culture of firearm ownership in the United States and connects the freedom of the West to the ownership of a firearm.

Over the years, there has been an online debate over whether there are more people or firearms in the United States. One website claims that there are approximately 270 million firearms owned by civilians in the United States.<sup>1</sup> The current population of the United States is estimated at close to 325 million people. Overall the actual number of firearms is hard to verify because not all firearms are registered. Of those firearms that are registered in the United States, Texas had the most in 2018, while California had the third highest number with 358,223.<sup>2</sup>

When dealing with the ownership, transfer, and registration of firearms, the owner must deal with both federal and state statutory schemes and agencies. At the federal level, the National Firearms Act ("NFA") was enacted in 1934 and designed to impose a significant tax<sup>3</sup> on the registration and ownership of certain types of firearms. The original categories of firearms known as "NFA firearms" consisted of:

- machine guns
- short-barreled rifles (less than 18 inches)
- short-barreled shotguns (less than 18 inches)
- suppressors/silencers

1 <https://americangunfacts.com/>.

2 <https://www.statista.com/statistics/215655/number-of-registered-weapons-in-the-us-by-state/>.

3 The original tax imposed was \$200 which is roughly \$2,500 in today's dollars.

- any other weapons

According to the NFA, all firearms that fell within the above categories were required to be registered upon being transferred and by anyone possessing such a firearm. The NFA, however, contained a glaring constitutional flaw challenged by Niles Edward Haynes. Mr. Haynes argued that as a convicted felon, he was not allowed to own a firearm and that requiring him to register his firearm violated his Fifth Amendment right against self-incrimination. The United States Supreme Court agreed with Mr. Haynes in a 7-1 decision,<sup>4</sup> which virtually made the NFA unenforceable. Congress fixed the constitutional violation by amending the NFA with the Gun Control Act ("GCA") of 1968. The GCA essentially removed the requirement that possessors of an unregistered firearm register the firearm (while still requiring the registration of firearms being transferred), and prohibited the use of registration information from a NFA registration application as evidence in a subsequent criminal proceeding. This amendment cured the constitutional flaw as determined in *United States v. Freed*, 401 U.S. 601 (1971).

There have been other amendments to the NFA, to expand the provisions covered by federal law such as adding destructive devices and armor piercing bullets to the list of firearms regulated by federal law. The end result is that if a firearm falls within the definition of a firearm in the NFA, as amended, the firearm must be registered prior to a transfer taking place with the National Firearm Registration and Transfer Record ("NFRTR"), which is the central registry for NFA firearms.

Possession of an NFA firearm, without being identified on the NFRTR, is a federal crime with penalties ranging from a maximum of 10 years and a fine up to \$10,000, along with forfeiture of the firearm. The NFRTR contains the following basic information with respect to firearm registration:

- the identification of the firearm
- the date of registration
- and the identification, including the address, of the person entitled to possession of the firearm

Transfer of an NFA firearm is equally penalized if the transfer is not done correctly. A transfer is defined broadly in 26 U.S. Code § 5845(j) as "selling, assigning, pledging, leasing, loaning, giving away, or otherwise disposing of"

4 *Haynes v. United States*, 390 U.S. 85 (1968).

an NFA firearm. This broad definition would apply to an heir taking an NFA firearm without properly notifying the Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF”) of the transfer. Thus, in the estate planning context, if the client owns a NFA firearm, care must be taken to assure that their “transfer” does not trigger the penalties of the NFA. The heir or beneficiary must be certain that they do not commit a felony by possessing a NFA firearm that they are not entitled to possess.

In California, the Bureau of Firearms, a part of the California Department of Justice, oversees the regulation and registration of firearms. Section 16.520 of the California Penal Code defines a firearm as “a device, designed to be used as a weapon, from which is expelled through a barrel, a projective by the force of an explosion or other form of combustion.” If the item falls within this very broad definition, it must be registered with the California Department of Justice in its Automated Firearms system, with criminal penalties should the possessor of the firearm fail to do so or the transferor of the firearm fail to comply with the California background, training, and registration requirements.

With state and federal regulations to comply with for the transfer and possession of a firearm, the estate planner should not simply wait for a simple post-mortem transfer of a firearm, as the case may be with the other personal property of the decedent. Doing so might result in the post-mortem transferor and transferee committing an accidental felony. Should this occur, the estate planner might find themselves subject to a visit from the State Bar and perhaps a process server with a summons for a malpractice lawsuit. A properly drafted, executed, and funded “Gun Trust” helps avoid the accidental felony and the subsequent malpractice/ethical defense the estate planner might be undertaking should they not follow the proper procedures.

The basic requirements for a Gun Trust are similar to other trusts in that you need a properly executed writing with a grantor, trustee, beneficiary, property, and a purpose. A Gun Trust differs, however, from a typical trust because it contains specific provisions related to the uniqueness of owning a firearm and compliance with the state and federal requirements discussed above. The complexity or simplicity of a Gun Trust will depend on the type of firearm (NFA or non-NFA), the number of firearms, and the client’s desires for final disposition. Regardless of the Gun Trust complexity, a typical Gun Trust would provide for:

- Holding legal title of all regulated (state and federal) and non-regulated firearms.
- Providing legal benefits for the use and possession of a firearm by beneficiaries.

- Allowing for transfers of the firearm to be made by gift, sharing, or selling.
- Permitting the grantor to serve as the trustee and a beneficiary.
- Permitting the grantor to appoint successor trustee(s).
- Allowing the grantor the right to amend the Gun Trust to comply with changing federal and state firearm laws as well as for removing or adding beneficiaries.
- Providing firearm specific guidance for successor trustees and beneficiaries to help them avoid accidental felonies.

Of course other provisions can and should be added depending on the client’s needs and desires.

Funding and registering the firearm(s) in the name of the Gun Trust is critical to effectuate the purpose of the Gun Trust, because failure to transfer the firearm to the Gun Trust would render its purpose virtually useless. Gun Trust assets are usually listed on a schedule to the Gun Trust and can be divided into separate schedules with NFA firearms and non-NFA firearms. A general assignment of the firearms to the Gun Trust should be part of the Gun Trust plan as well as a Bill of Sale for specific firearms that are purchased by the Gun Trust after its formation.

A transfer of a NFA firearm requires registration using the Application for Tax Paid Transfer and Registration of Firearm (ATF E-Form 4) with the ATF. ATF E-Form 4 requires the name of the Gun Trust, as the owner of the NFA firearm, and allows for including “Responsible Persons” who have rights to possess the NFA firearm. Each Responsible Person must submit an additional Form 5320.23 National Firearms Responsible Questionnaire to determine if the Responsible Person is permitted to possess a NFA firearm. Once the application is approved by the ATF and the appropriate tax is paid, the transfer of ownership to the Gun Trust will be placed in the NFRTR and the transfer can formally take place.

California has no designated process for transferring a firearm to a Gun Trust and there has been debate as to what is the proper manner to transfer a firearm to the Gun Trust. California law requires a transfer of a firearm (using its broad definition) take place using a Federal Firearm Licensee who is required to conduct background checks of the transferee(s) and make sure the proper paperwork is filed. Some practitioners have argued that if the grantor is the sole owner of the firearm and the sole grantor of the Gun Trust, no transfer has taken place since the owner remains the same and no notification of the transfer is required. Other practitioners rely on the California intra-

family transfer exception to the requirement that the transfer of a firearm must be through a Federal Firearm Licensee, provided that the transfer is infrequent and that the beneficiaries of the Gun Trust are immediate family members defined as a spouse, child, grandparent, or grandchild. If the Gun Trust has only immediate family members as beneficiaries, these practitioners would simply file a Report of Operation of Law or Intra-Familial Firearm Transaction BOF 4544A within 30 days of the transfer to the Gun Trust along with firearm safety certificates for the beneficiaries to transfer the firearm to the Gun Trust. However, the surest way to comply with California transfer requirements is to transfer the firearm to the Gun Trust using a Federal Firearm Licensee, who then has the burden of conducting background checks on the beneficiaries and filing the transfer paperwork with the California Bureau of Firearms.

The good news is that after the initial transfer to the Gun Trust, the Gun Trust can continue to own a firearm in perpetuity subject to the terms of the Gun Trust. No more registrations would be needed unless there is a distribution of a firearm to a beneficiary or a change in a beneficiary. The beneficiaries would have free use of the firearm and there would be no accidental felony situations.

As the movie *Winchester '73* and other similar movies represent, the United States has a culture of firearm ownership that has been reinforced through the mass media and advertising. The goal of the registration of firearms is to make sure that firearms do not end up in the wrong hands as well as to keep track of the firearm. A Gun Trust can help a client from running into trouble trying to comply with the complex federal and state schemes. The deceased member of the Beatles, John Lennon, raised in a culture without firearm ownership, allegedly came up with the title to the Beatles' song "Happiness is a Warm Gun," after George Martin showed him a gun magazine cover claiming that "Happiness is a Warm Gun." Lennon thought that the concept of having a warm gun leading to happiness so absurd that he used the title for the lesser known Beatles' song. For Lennon, as an outsider to United States culture, he did not understand that the history of the United States has been intertwined with firearm ownership.

*Andrew Gilliland is a solo practitioner and the owner of Andrew W. Gilliland Attorney-at-Law with offices in Riverside and Temecula. Andrew is the co-chair of the RCBA's solo and small firm section and a member of the RCBA's publications committee.*



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# HAVE THE CONVERSATION

by Jessica Empeño, MSW

## Dementia.

The sheer mention of this word can bring a flurry of things to mind. For many, it reminds us of family members who are living with the condition or maybe those who have already lost their battle with it. It may bring up thoughts of someone you love developing the condition or worse yet, fear that you yourself may one day be coping with the loss of your treasured memories.

For most, it probably does not conjure up thoughts of gun safety. But it should.

Adults over the age of 65 are the largest group of gun owners in the United States and they are also at the highest risk of developing dementia. In fact, a recent study showed that 27 percent of adults over the age of 65 own one or more firearms and 37 percent live in a home where a firearm is present.<sup>1</sup> Even more notable is the study that found as many as 60 percent of people with dementia live in a household with a firearm.<sup>2</sup>

## Why is this a concern?

Dementia is much more than just simple memory loss. Dementia has a significant impact on a person's ability to interpret situations, adapt to changing environments, make sound decisions and learn new information. Alzheimer's, the most common cause of dementia, is a fatal disease that impacts the brain by slowly killing neurons and gradually destroying a person's ability to function safely. What may start as mild forgetfulness can progress into disorientation, language and communication challenges, personality and behavior changes, even getting lost in familiar environments.

Someone living with these symptoms and brain changes who also has access to firearms can place family members, neighbors, professional caregivers, and even themselves at great risk. It is not uncommon for someone with Alzheimer's disease or another type of dementia to mistake the identity of a family member, become overwhelmed, or misunderstand a situation. At Alzheimer's San Diego, we see this often.

1 "Few laws to address growing issue of elderly gun owners with dementia." American Osteopathic Association. November 26, 2018.

2 "Firearms and Dementia: Clinical Considerations." Betz, McCourt, Vernick, Ranney, Maust, Wintemute. *Annals of Internal Medicine*, 5/8/18.

Shortly after Tom's diagnosis of Alzheimer's disease, he agreed to move in with his daughter, Jane. The two were always close and it was a good plan for everyone. One afternoon Jane could hear Tom rustling around in his bedroom, making noises she did not recognize. Jane knocked on the door to make sure he was okay -- only to be shot in the leg by her father.

It was not clear what Tom was doing in his bedroom or why he had his old hunting rifle out. But when first responders arrived, it was clear that Tom had no understanding that he had shot Jane. He was distraught at the sight of his daughter hurt and being put in an ambulance. The commotion and questions from police overwhelmed him further. Jane tried to explain that her father had Alzheimer's disease. Adhering to the law, Tom was taken into custody.

Fortunately, Jane recovered and the family was able to advocate for the quick release of Tom. The District Attorney understood the situation and did not file any charges. This situation could have easily been much worse.

Too many families do not talk about firearms, because either they are afraid to ask, or they did not realize it was a conversation that they should have had. Many doctors do not think about a patient with dementia's access to firearms and in the end, no one addresses it until something happens.

When a person is living with dementia, it is important to have an honest conversation about access to guns as early as possible, not only where he/she resides, but also in other homes the loved one regularly visits. It can be helpful to start by understanding what guns mean to that person. For example, have guns always been a part of the loved one's life? Are the guns present in the home for personal safety and security? Are the firearms part of their identity, maybe a symbol of his/her time in the service? Allow this understanding to guide the conversation regarding the next steps.

While there are a number of options to securing firearms in this situation, there is no one solution that will work for everyone. Here are a few possibilities to consider:

- **Remove firearms from the home.** The safest option is to remove firearms from the home

when someone is diagnosed with dementia and/or changes in their functioning are evident. Some law enforcement agencies will accept weapons or have buyback programs, many federally licensed firearm dealers will purchase weapons and ownership of firearms can be legally transferred to other members of the family.

- **Separate or remove ammunition.** Most gun experts recommend that firearms should be kept unloaded when not in use and ammunition should be stored in a separate location.
- **Secure with a lock and/or in a safe.** If the gun is especially important to the person with dementia or they are not ready to part with it yet, consider securing it with a lock and/or storing it in a safe. This allows the individual to keep their gun in a safe and secure way.
- **Gun Violence Restraining Orders.** A number of states, including California, have passed “red flag” laws that allow law enforcement to petition a judge to temporarily seize firearms from a gun owner who exhibits dangerous behavior.

While the person with dementia may not be able to make the final decision, allow them to have a voice and participate in the conversation as much as possible. But above all, have the conversation and don't be afraid to bring it up.

*Jessica Empeño, MSW is the vice president of program operations at Alzheimer's San Diego, a non-profit organization dedicated to supporting families coping with all forms of dementia. In addition to their many free programs and services, Alzheimer's San Diego partnered with local law enforcement and gun experts in 2018 to create the first and only gun lock program for people with dementia. Through this program, families receive free cable-style gunlocks, along with valuable safety information and support from the team of dementia experts. For more information, visit [www.alzsd.org](http://www.alzsd.org).*



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# CAN THE NO-FLY LIST DOUBLE AS A NO-GUN LIST?

by Mohammad Tehrani

## I. Introduction

On a crisp, sunny, Wednesday morning, ISIL-inspired shooters carrying modified AR-15 assault rifles targeted the San Bernardino County Department of Public Health's holiday party, killing 14 people and seriously injuring 22 others. Following the attacks, President Obama criticized the regulation of firearm sales:

"[F]or those who are concerned about terrorism, some may be aware of the fact that we have a no-fly list where people can't get on planes, but those same people who we don't allow to fly could go into a store right now in the United States and buy a firearm and there's nothing that we can do to stop them. That's a law that needs to be changed."<sup>1</sup>

The question arises: Would federal legislation prohibiting the purchase of firearms by all individuals on the No-Fly List survive a Second Amendment challenge?

## II. The Second Amendment

The Second Amendment reads: "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."<sup>2</sup>

In 2008, the Supreme Court held in *District of Columbia v. Heller* that the Second Amendment ensured "an individual right to keep and bear arms,"<sup>3</sup> ending speculation that the right was tied only to militia use.<sup>4</sup> The Court also determined that the right is not unlimited: "[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possessions of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms."<sup>5</sup> While suggesting limits, the Court did not address how lower courts should evaluate regulations, instead determining that the legislation challenged in *Heller* would "fail constitutional muster" under "any of

the standards of scrutiny."<sup>6</sup> Nonetheless, the Court indicated that rational basis review would be inappropriate.<sup>7</sup>

Following *Heller*, the Ninth Circuit, along with the majority of circuit courts, adopted a two-step analysis mimicking the analysis performed in *Heller*.<sup>8</sup> Under this method, courts will first conduct a historical analysis to determine whether the regulation limits conduct protected by the Second Amendment, and specifically how closely the regulation limits the core right of "law-abiding, responsible citizens to use arms in defense of hearth and home."<sup>9</sup> If the regulation infringes on historically recognized rights, courts then apply intermediate scrutiny, the strictness of which intensifies depending on how closely the regulation attacks the core right of the Second Amendment.<sup>10</sup>

## III. Application to the No-Fly List

The first question that must be answered, then, is whether a categorical bar on individuals placed on the No-Fly List is historically protected by the Second Amendment.

The No-Fly List is a subset of the Terrorist Screening Database, which is a consolidated watch list developed and maintained by the Federal Bureau of Investigation.<sup>11</sup> A person will be included in the database if there is a showing of "articulable facts which, taken together with rational inferences, reasonably warrant the determination that an individual is known or suspected to be, or has been engaged in conduct constituting, in preparation for, in aid of or related to, terrorism or terrorist activities."<sup>12</sup>

There is at least an argument that people on the No-Fly List do not have a historical right to bear arms. There is a longstanding history of the government's ability to categorically bar gun ownership from people it deemed dangerous. Under the 1689 English Declaration of Rights, the predecessor to the Second Amendment, the right to bear arms was limited to Protestants.<sup>13</sup> Further, under the 1662 Militia Act, even persons *suspected* to be dangerous were routinely disarmed.<sup>14</sup> These sorts of categorical bars based on perceived threats continued in early America as well, whether

1 Stephanie Condon, *Obama Responds to San Bernardino Shooting*, CBS NEWS (December 2, 2015, 4:50 PM) available at <http://www.cbsnews.com/news/obama-responds-to-san-bernardino-shooting/>.

2 U.S. CONST. amend II.

3 *District of Columbia v. Heller* (2008) 554 U.S. 570, 595 (*Heller*).

4 See *United States v. Miller* (1939) 307 U.S. 174, 178 [upholding regulation on sawed-off shot gun because its "possession or use failed to show some reasonable relationship to the preservation or efficiency of a well-regulated militia"].

5 *Heller*, 554 U.S. at p. 626-27.

6 *Id.*, at p. 628-629.

7 *Id.*, at p. 628 fn. 27.

8 *U.S. v. Chovan* (9th Cir. 2013) 735 F.3d 1127, 1136 (*Chovan*).

9 *Id.*, at p. 1138 (quoting *Heller*, *supra*, 554 U.S. at p. 635).

10 *Ibid.*

11 *Latif v. Holder* (D. Or. 2014) 28 F.Supp.3d 1134, 1141.

12 *Ibid.*, citation and internal quotation marks omitted.

13 *Heller*, *supra*, 554 U.S. at p. 593.

14 Patrick J. Charles, *Arms for Their Defence – An Historical, Legal and Textual Analysis of the English Right to Have Arms and Whether the Second Amendment Should Be Incorporated in McDonald v. City of Chicago*, 57 Clev. State L. Rev. 366-67 (2009).

it applied to those who refused to swear an oath of loyalty, Native Americans, slaves, free blacks, and Catholics.<sup>15</sup>

In applying part one of the *Chovan* analysis, then, a court may conclude that the right of people on the No-Fly List, determined to be engaged in terrorist activities and therefore dangerous people, do not have a historical right to bear arms. The regulation would then stand.

This argument, of course, excludes all historical evidence that many of those same groups, Catholics, Native Americans, etc., freely carried guns throughout early America. Similarly, due to competing evidence in other contexts, it has been difficult for courts to find clear historical exceptions to the right to bear arms.<sup>16</sup> Even the evaluation of the historical right of felons to bear arms has been deemed unclear.<sup>17</sup> In all likelihood, then, courts would be unable to establish a historical carve-out for people on the No-Fly List. In the absence of an exception, a court would need to evaluate the regulation under intermediate scrutiny.

A regulation survives intermediate scrutiny if it is substantially related to an important government interest.<sup>18</sup> Regulation barring individuals on the No-Fly List of the right to bear arms would probably fail intermediate scrutiny.

15 Allen Rostron, *The Continuing Battle Over the Second Amendment*, 78 Alb. L. Rev. 819, 826 (2015).

16 *Id.*, at p. 825.

17 See, e.g., *United States v. Skoien* (7th Cir. 2010) 614 F.3d 638, 641.

18 *Chovan*, *supra*, 735 F.3d at p. 1141.

The government would probably argue that the law takes guns out of the hands of terrorists, serving the governmental interest of preventing terrorist acts. But the No-Fly List adjudicates persons to be potential terrorists, and thus dangerous, under rational basis review. To deprive the rights of a group who has been adjudicated terrorists under a low standard of review would be a back-door to the entire framework. Courts would probably not allow that to happen.

Then again, intermediate scrutiny is also very flexible, and in light of the importance of the government interest, it's possible some courts would justify the regulation.

## V. Conclusion

While I find the question interesting, the passing of this regulation would not solve the problem. The perpetrators of the San Bernardino shooting were not on the No-Fly List. While perhaps it sounds ridiculous that people who are deemed too dangerous to fly on a plane are allowed to purchase firearms, such a regulation would not have prevented the murder of 14 people on December 2, 2015. However we proceed to try to make our community safer, we will always remember those in our community who lost their lives in a senseless attack during a small holiday office party on a Wednesday morning in San Bernardino.

*Mohammad Tehrani is with the firm of Duane Morris, LLP in Los Angeles.*



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# JUDICIAL PROFILE: JUDGE ERIC A. KEEN

by Juanita E. Mantz

On December 14, 2018, I attended the formal enrobement of newly appointed Judge Eric A. Keen. The courtroom was filled to the brim with a plethora of dignitaries (including Mayor Rusty Bailey), deputy public defenders, including Steve Harmon (Riverside County Public Defender), and deputy district attorneys. Also in attendance were Judge Keen's wife, Darla, of 23 years and his daughter, Sophia. There was also a large contingent of other family and friends, including students from the mock trial team Judge Keen coaches.



Judge Eric A. Keen

At 4 p.m., the courtroom was called to order and the Riverside County Superior Court judicial officers formally filed. After an introduction from Presiding Judge Becky Dugan, Justice Richard T. Fields began speaking. Justice Fields, who serves on the California Court of Appeal, Fourth District, Division Two, holds Judge Keen in high regard, evidenced by his praise and kind words. Justice Fields stated that he has known Judge Keen since he first started as a “baby lawyer” and deputy public defender in 1997. Justice Fields described Judge Keen as “smart, caring and kind” and as “one of the finest lawyers” he had ever met. Justice Fields further emphasized that Judge Keen was an “outstanding” person.

Public Defender Steve Harmon also had much praise for Judge Keen stating that he had “unrestrained optimism and joy in his soul” and that he was a “great leader” of lawyers. Judge O.G. Magno, who has known Judge Keen for two decades, then spoke and stated that he was confident that Judge Keen would “enrich the bench with his perspective and wisdom.” It was, in sum, a beautiful and celebratory occasion and many eyes teared up hearing those words and then again later, when hearing the uplifting speech of Judge Keen.

That Judge Keen inspires this kind of acclaim is not at all surprising once you know Judge Keen's history. What quickly becomes clear from his life story is that Judge Keen is the kind of person that we all aspire to be, someone who has strong roots in their hometown (of course, Riverside) and who gives back to the community that supported and created him. Moreover, Judge Keen, above all else, remains true to who he is, and despite all

of his accomplishments, remains responsible, humble, professional, a dedicated public servant.

Judge Keen grew up in Riverside and has lived in the area his entire life. He attended Notre Dame High School where he played football. He then attended Riverside Community College and transferred to U.C. Riverside, graduating in 1992. He knew at that time that he wanted to be a lawyer and after graduation, he attended law school at Western State in Orange County, California and during law school, he honed his skills by

working for the conflict defense panel.

After law school, Judge Keen worked for a solo practitioner doing civil and personal injury cases. In 1997, he was overjoyed to learn that the county hiring freeze had ended and soon, Judge Keen received an offer from the Law Offices of the Public Defender in Riverside (“LOPD”) which he quickly accepted. Judge Keen worked as a public defender for more than twenty years. In his tenure at the LOPD, he advocated tirelessly for his indigent clientele and worked in almost every department in the Riverside and Southwest courthouses, including the Death Penalty Unit.

As a deputy public defender, he was a workhorse and tried 98 cases to verdict, including seven death penalty cases. While at the LOPD, Judge Keen somehow also found time to receive a Master of Arts Degree in Management from the University of Redlands. He is a voracious reader, especially of anything related to management theory. For the final years of his time at the LOPD, Judge Keen supervised attorneys and then later, he was the supervisor of the newly revamped LOPD clerkship program.

At the time of my interview, Judge Keen presided over misdemeanor cases in Department 22, but will be moving to Department 53 in February to handle the vertical calendar department for felony cases.

I asked Judge Keen what the best part of being a judge is and he responded that he enjoys the opportunity to “have a meaningful impact” on defendant's lives. He elaborated that even misdemeanor cases can significantly impact a person's life and prospects and that he is overjoyed to be given the opportunity to help people.

Judge Keen sees his role to be the arbiter of justice and ultimately, he seeks to inspire criminal defendants to be better people, while also holding them accountable for their actions. Judge Keen wants them to know they can do better and reach greater heights.

He may be too humble to admit it, but this profile illustrates that Judge Keen is a grand example for all to follow. Judge Keen is our very own Riverside Renaissance man. And, as Public Defender Steve Harmon stated when I asked him for additional words regarding Judge Keen's character, "He always sees the good in others. He is always kind and patient with everyone. He always lifts people up and gives them courage and inspiration. He will be a great judge."

*Juanita E. Mantz has been a deputy public defender for over a decade and currently represents individual's incompetent to stand trial under PC 1368 in Mental Health Court Department 42. She is a creative non-fiction writer in her spare time, a member of Sandra Cisneros' Macondo Writers Workshop, and writes a blog about her life in the Inland Empire at <http://www.lifeofjemcom-jemmantz.blogspot.com>.*



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# OPPOSING COUNSEL: MEGAN DEMSHKI

by Betty Fracisco

It's not often that one can use the expression "Local girl makes good," but this euphemism clearly applies to this year's Barrister president, Megan Demshki. Megan was born in Riverside, the oldest of four children. She grew up in a house next door to her grandparents, the founders of Gless Ranch, and who had planted the first orange grove in Woodcrest when water became available there. Over the years she and her siblings worked at their grandparents' Christmas tree farm and their fruit stand in their spare time. After working as a CPA for Pricewaterhouse Coopers, her Dad became president of Corona College Heights Orange and Lemon Association, a citrus packing plant in Riverside, independent of her grandparents' business. Her mom worked for Gless Ranch.

Megan graduated from Poly High School in Riverside, where she was senior class president, a cheerleader, and member of the track team. She moved on to Chapman University, beginning a six year stay in Orange County. At Chapman she joined a sorority and was involved with various causes while serving as student body president. She advocated for student interests with the fraternity sorority political action committee in Washington, D.C., and was one of 16 student body presidents who served as a U.S. representative to the U.S.-Russian Bilateral Presidential Commission that dialogued with Russian government officials and university students. During this time, she met her mentor, Wylie Aitken, Orange County plaintiff attorney and a major benefactor of Chapman Law School, who encouraged her to attend Chapman Law School. At the age



Megan Demshki with her husband Brenton Burke and dog Zoey.

of seven, Megan had thought about being a lawyer, influenced by her aunt and uncle who had attended McGeorge Law School and a desire to advocate for those in need. Now it was time to take a chance.

During her time at Chapman Law School, Megan's volunteer activities were understandably curtailed. Between her first and second year she began clerking at Aitken, Aitken Cohn, and in her words, she worked for Wylie every hour she was not in class. Due to the firm's involvement, she had an opportunity to work on aspects of the Toyota unintended acceleration class action during her first summer clerking. Between her second and third year of law school, she was offered a job after she passed the Bar, which would allow her to work in both Riverside and Orange counties. She graduated from Chapman Law School in 2015, and passed the Bar the first time. The day after she completed the bar exam, she received a call from Wylie, asking her "Where are you?" Apparently, her employment at Aitken, Aitken & Cohn was to start as soon as she finished the Bar...literally.

Since that day, she has been busy at the firm, with Megan and Wylie vying for being the first person in the Santa Ana office at 6:30 am. She has second-chaired two trials to conclusion, the last one being a six-week medical practice trial in Orange County in November/December with partner Richard Cohn. Her preferences are cases that involve agency, course and scope, or government torts. She likes research and legal writing and prepares many motions for summary judgment. To date she has been spending fifty percent of her time in the Santa Ana office and the other half in the Riverside office, but she plans to increase her time in Riverside to between sixty and seventy-five percent of her time. She loves being back and practicing in Riverside, wants to focus on the Inland Empire, which has grown so much in recent years, and wants it to succeed in its challenges with its infrastructure, health care, care for the mentally challenged, roadways and parking lots, among other things.

On a personal note, Megan met her husband, Brenton Burke, when they were students at Chapman University, but they didn't marry until after she

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had passed the Bar. While she was finishing up law school, he worked in the Planning Department of Chapman University and helped restore 80 houses in Orange. In May 2015, they bought a foreclosure next door to her parents and grandparents and spent many hours making it livable. One of her brothers bought the house across the street. Currently, her husband is a general contractor with his own business in Riverside. Her grandparents are still working in the family business: the Christmas tree farm closed in 2000, but they maintain a growing agricultural business in Kern County, Coachella, and Thermal in addition to their Riverside groves. They also do farm and orchard care in areas like Victoria Avenue and the Citrus State Historic Park. They continue to maintain two fruit stands in Riverside, and during a busy weekend you can often find Megan working alongside her mother at the fruit stand. Basically, as a family business, everyone pitches in when needed.

Besides serving as Barristers president, Megan is involved in a wide range of volunteer activities. She is currently serving as Vice President of the Consumer Attorneys of the Inland Empire, treasurer of the Pick Group of Young Professionals, education chair of the Consumer Attorneys of California New Lawyers Division, a member of the board of directors of the Janet Goeske Foundation, member of the community leadership committee of the American Diabetes Association, and involved with the American Heart Association Go Red for Women-Inland Empire. There is no doubt about it, this local girl has “made good.”

*Betty Fracisco is an attorney at Garrett & Jensen in Riverside and a member of the RCBA Bar Publications Committee.*



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**Cheryl Singerton** – Office of the District Attorney, Riverside  
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