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Toy Guns Don't Kill People - People Kill People Who Play with Toy Guns: Federal Attempts to Regulate Imitation Firearms in the Face of Toy Industry Opposition

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**TOY GUNS DON'T KILL PEOPLE—PEOPLE KILL
PEOPLE WHO PLAY WITH TOY GUNS: FEDERAL
ATTEMPTS TO REGULATE IMITATION
FIREARMS IN THE FACE OF TOY
INDUSTRY OPPOSITION**

*Robert H. Wood**

I. INTRODUCTION

During class, a fifteen-year-old middle school student pulled out what appeared to be a Beretta nine-millimeter handgun and terrorized his classmates, who thought they were going to die in a Columbine-style rampage.¹ When police officers arrived and confronted him, however, he fled to a bathroom and raised his handgun as the officers approached. Reacting to the brandished firearm, one of the officers fired, fatally wounding the boy. It was later discovered that the handgun the student used was a non-firing toy replica.² This scenario is just one of the many instances in which toy weapons have been used in the commission of a crime, and while the specific facts may differ, they often end with similarly devastating results.³

The issue of the use of toy firearms first came to national attention in August of 1987, when a disturbed man displaying a weapon interrupted a live news broadcast on the set of KNBC-TV in Los Angeles.⁴ The man forced television reporter David Horowitz to read a statement regarding “space creatures and the

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¹ *Shot Student is Brain Dead*, NEWSDAY, Jan. 15, 2006, at A38 (describing Christopher Penley, Florida middle school student, as holding a pellet gun in a school bathroom when SWAT police officer fatally shot him).

² *Id.*

³ See, e.g., Dennis Hevesi, *Boy, 16, With Pellet Gun Is Killed by Officer*, N.Y. TIMES, March 25, 1995, at 29; Chris Conley, *FBI Investigating Case in Child's Killing, 12-year-old Boy Was Shot by West Memphis Officer*, MEMPHIS COMMERCIAL APPEAL, June 26, 2007, at B1; Jack Leonard & Ari Bloomekatz, *Inglewood Officers Identified, Eight are Named In the Fatal Shooting of a Homeless Man*, L.A. TIMES, Sept. 6, 2008, at 3.

⁴ BUREAU OF JUSTICE STATISTICS, TOY GUNS: INVOLVEMENT IN CRIME AND ENCOUNTERS WITH THE POLICE I (1990) [hereinafter BJS SURVEY].

CIA.” The weapon was later determined to be a toy pneumatic pistol known as an “air soft” gun.⁵ This incident led Horowitz to launch a campaign that resulted in legislation banning or regulating toy guns in California, New York, and twelve other states.⁶ Congress also responded by enacting marking requirements for toy weapons to assist in distinguishing them from genuine weapons.⁷

Despite these efforts, toy gun incidents continue to occur and state and federal lawmakers continue to grapple with legislative solutions, including prohibiting toy firearms in vehicles and banning their sale at convenience stores, in their efforts to limit tragic occurrences like those described earlier.⁸ In fact, twenty-one laws limiting fake guns have been enacted since 1990 and more are pending.⁹

The purpose of this Article is to examine existing and proposed federal law regulating the use of toy weapons and to discuss analyses of the limited studies addressing the issue. Part II reviews federal legislation and its implementation by federal agencies. Part III addresses federal court decisions interpreting the use of toy and replica weapons. Part IV discusses the few studies on the toy and replica gun issues. Part V presents the author’s analysis of the effectiveness of the legislation. Finally, Part VI questions the sufficiency of existing data that support the flurry of legislative efforts, and offers the author’s conclusions regarding additional research that may be required to identify whether a persistent problem is presented.

II. FEDERAL LEGISLATION & REGULATIONS

A. *The Federal Toy Gun Law*

Just over a year after the David Horowitz toy gun scare was aired on national television,¹⁰ the first federal toy gun law was tacked onto the end of the Federal Energy Management Improvement Act of 1988.¹¹ Section 4 of this Act created 15 U.S.C. § 5001, with the title “Penalties for entering into commerce of imitation

⁵ *Id.*

⁶ Fight Back! With David Horowitz, <http://www.fightback.com/about/history/history.html> (last visited Oct. 23, 2008).

⁷ 15 U.S.C. § 5001 (2000).

⁸ Lucas L. Johnson II, *Fake Guns Draw New Laws in Some States*, ORLANDO SENTINEL, May 4, 2008, at A17.

⁹ *Id.*

¹⁰ See *supra* note 6 and accompanying text.

¹¹ Federal Energy Management Improvement Act of 1988 § 4, Pub. L. No. 100-615, 102 Stat. 3185 (1988).

firearms.”¹² This new statute provided: “It shall be unlawful for any person to manufacture, enter into commerce, ship, transport, or receive any toy, look-alike, or imitation firearm unless such firearm contains, or has affixed to it, a marking approved by the Secretary of Commerce.”¹³ The statute further required all imitation weapons to have a “blaze orange plug” permanently inserted and recessed no more than six millimeters from the end of the barrel.¹⁴ As is often true, the exceptions to the rule are more interesting than the rule itself. The statute’s first exception allowed the Secretary of Commerce to waive the marking requirement for weapons used in the entertainment industry.¹⁵ Additionally, the statute provided the Secretary with the discretion to alter the marking rule “after consulting with interested persons.”¹⁶

Further exceptions were made in the definition of “look-alike firearm.” This term was “limited to toy guns, water guns, replica non-guns, and air-soft guns firing nonmetallic projectiles,” the original of which was manufactured after 1898.¹⁷ As for replicas of firearms, the originals of which were developed before 1898, these were not defined as “look-alike firearms.”¹⁸ Lastly, the term was not applied to toy weapons that qualified as BB guns, pellet guns or paintball guns, all of which use air pressure to fire a projectile.¹⁹

Importantly, the new statute required the Director of the Bureau of Justice Statistics to conduct a study of the use of such firearms in criminal enterprises and to review police reports regarding their use.²⁰ The Director of the National Institute of Justice was also required to study the effectiveness of the required blaze-orange markings in combat situations.²¹ In an effort to enhance consistent applications, the statute contained a supremacy clause invalidating state and local laws that were inconsistent with the marking requirements provided by federal law or that prohibited the sale of pre-1898 replicas or the traditional BB guns, pellet guns

¹² *Id.* Clearly, Congress had to tie its regulation of toy weapons to its federal power under the Commerce Clause, as the commission of a crime using a toy weapon would fall under the jurisdiction of state law.

¹³ 15 U.S.C. § 5001(a) (2000).

¹⁴ *Id.* § 5001(b)(1).

¹⁵ *Id.* § 5001(b)(2).

¹⁶ *Id.* § 5001(b)(3).

¹⁷ *Id.* § 5001(c).

¹⁸ *Id.* § 5001(c).

¹⁹ *Id.*

²⁰ *Id.* § 5001(d).

²¹ *Id.* § 5001(e) (mismarked as a duplicate “c” in original).

or paintball guns.²²

B. Department of Commerce Regulations

Pursuant to its statutory authority, the Department of Commerce instituted a rulemaking proceeding on the issue of the appropriate markings.²³ The Department of Commerce Technology Administration held an open workshop attended by representatives from trade associations, manufacturers and federal agencies, among others, and also received written comments on the issue.²⁴ Interestingly, the two most frequent comments were (1) that the blaze orange recessed plug marking should be eliminated as ineffective, and (2) that realistic toy weapons should be banned entirely.²⁵ The Department of Commerce declined to act on either suggestion. The Technology Administration noted that it was awaiting the results of the technical evaluation of marking systems by the National Institute of Justice, and would not eliminate the plug requirement until reviewing that study.²⁶ As to a complete ban on toy weapons, it was noted that the statute did not provide the Secretary of Commerce with that authority.²⁷ The result was a final rule set forth in the Federal Code of Regulations requiring look-alike weapons to have either: (1) a blaze orange plug recessed no more than six millimeters from the end of the barrel,²⁸ or (2) for look-alike firearms that emitted water, light or projectiles, a blaze orange stripe around the circumference of the barrel,²⁹ or (3) construction of transparent or translucent materials so the contents of the weapon could be identified,³⁰ or (4) the entire exterior surface coated in bright colors such as red, orange, yellow, green or blue,³¹ or (5) the entire exterior surface coated predominately white in combination with another bright color such as red, orange, yellow, green or blue.³² With relatively minor changes, this is how the regulations read today.³³

²² *Id.* § 5001(g)(i–ii).

²³ Marking of Toy, Look-Alike and Imitation Firearms, 54 Fed. Reg. 19,356 (May 5, 1989) (codified at 15 C.F.R. pt. 1150) [hereinafter Commerce Regulations].

²⁴ *Id.*

²⁵ *Id.* at 19,356–57.

²⁶ *Id.* at 19,357.

²⁷ *Id.*

²⁸ 15 C.F.R. § 1150.3(a) (2008).

²⁹ *Id.* § 1150.3(b).

³⁰ *Id.* § 1150.3(c).

³¹ *Id.* § 1150.3(d).

³² *Id.* § 1150.3(e).

³³ *Id.* § 1150.3(a–d). However, see Marking of Toy, Look-Alike, and Imitation Fire-

C. *Additional Legislative Efforts to Control Toy Guns*

Despite the enactment of the Federal Toy Gun Law and the promulgation of the marking regulations, the problem continues to be discussed in Congress. The most recent effort was a bill requiring the Consumer Product Safety Commission (“CPSC”) to again address the issue of markings on toy and imitation firearms.³⁴ Representative Edolphus Towns, who also triggered a General Accounting Office investigation in 2003,³⁵ sponsored the legislation, which was subsequently referred to the Committee on Energy and Commerce.³⁶ The bill is very similar to the existing language in 15 U.S.C. § 5001, but would place the onus of regulating the markings on the CPSC rather than the Secretary of Commerce,³⁷ and would supersede the Federal Energy Improvement Act of 1988, which established 15 U.S.C. § 5001.³⁸ This focus on transferring the regulation of toy guns to the auspices of the CPSC can also be found in the Committee on Energy and Commerce’s comments on the Consumer Product Safety Modernization Act, where the CPSC was asked to conduct a study regarding injuries and deaths caused by toy guns and urged to adopt a rule providing for more distinctive markings.³⁹

III. FEDERAL DECISIONS REGARDING TOY GUNS

Approximately five months prior to the enactment of the federal regulations requiring identifying hues and markings for toy weapons, the Ninth Circuit Court of Appeals reasoned that a toy gun may be indistinguishable from a dangerous weapon and found that replica or simulated weapons fall within the federal armed bank robbery statute.⁴⁰ Although the toy did not satisfy the definition of a firearm pursuant to 18 U.S.C. § 921(a)(3), the Ninth Cir-

arms, 57 Fed. Reg. 48,451 (Oct. 26, 1992), for an explanation of additional rule changes that are not relevant to this discussion.

³⁴ H.R. 5471, 110th Cong. (2008).

³⁵ See *infra* Part IV(C).

³⁶ Rep. Towns also introduced a more drastic measure in 1999, H.R. 1280, 106th Cong. (1999), which sought to declare “any toy which in size, shape, or overall appearance resembles a real handgun” as a banned hazardous product within the meaning of the Consumer Product Safety Act. *Id.* This bill died in committee. In 2007, Rep. Towns tried again to institute a ban on realistic-looking toy handguns as a “hazardous product” within the meaning of the Consumer Product Safety Act. H.R. 428, 110th Cong. (2007). This bill was also referred to committee.

³⁷ H.R. 5471(a), 110th Cong. (2008).

³⁸ H.R. 5471(d).

³⁹ H.R. Rep. 110-501, at 47 (2007).

⁴⁰ *U.S. v. Martinez-Jimenez*, 864 F.2d 664, 667–68 (9th Cir. 1989).

cuit held that it did qualify as a “dangerous weapon or device” prohibited by 18 U.S.C. § 2113(d), thereby subjecting violators to enhanced penalties.⁴¹

Neither Martinez-Jimenez nor his accomplice carried a genuine weapon during the commission of the bank robbery for which they were indicted.⁴² Three eyewitnesses testified, however, that the object Martinez-Jimenez carried by his side as he ordered the employees and customers to lie down on the floor appeared to be a handgun.⁴³ While the defendant’s accomplice admitted that the accused had purchased the toy gun at a department store a few hours before the robbery, neither he nor the defendant wanted the employees to believe that the toy was a genuine weapon nor did either wish for the employees to fear for their lives.⁴⁴ Rather, the defendant testified that he carried the toy weapon because it made him feel more secure.⁴⁵ As proof of this assertion, the defendant explained that he held the toy weapon down toward his leg to hide it from view of the employees and customers.⁴⁶

Notwithstanding the testimony of the defendant and his accomplice, the judge presiding over the bench trial found them both guilty of armed bank robbery and sentenced them accordingly.⁴⁷ On appeal, the defendant argued unconvincingly that the toy gun was a “harmless instrumentality of a crime” and not a “dangerous weapon or device.”⁴⁸ He reasoned that because the plastic toy gun was not an inherently dangerous weapon and because the defendant had never brandished it as such, the toy would not have instilled fear in an average citizen and would not have created a danger of a violent response.⁴⁹ The Ninth Circuit disagreed.⁵⁰

The appellate court relied almost exclusively on *McLaughlin v.*

⁴¹ *Id.* at 666. The federal armed bank robbery statute provides in pertinent part: Whoever, in committing or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a *dangerous weapon or device*, shall be fined under this title or imprisoned not more than twenty-five years, or both.

18 U.S.C. § 2113(d) (2000) (emphasis added) [hereinafter Armed Bank Robbery Statute].

⁴² *Martinez-Jimenez*, 864 F.2d at 665.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 667.

⁴⁹ *Id.*

⁵⁰ *Id.* at 667–68.

United States,⁵¹ the U.S. Supreme Court's resolution of the evidentiary conflict among the federal circuits regarding whether unloaded weapons were "dangerous" within the meaning of section 2113(d) of the Armed Bank Robbery Statute.⁵² In *McLaughlin*, the Supreme Court held that an unloaded handgun satisfied the definition of "dangerous weapon or device" contained in the statute.⁵³ Prior to *McLaughlin*, many circuits, including the Ninth Circuit, interpreted "dangerous weapon or device" to include only loaded operable weapons.⁵⁴

McLaughlin placed greater emphasis on the burden that a device used in a bank robbery imposes upon its victims and law enforcement personnel.⁵⁵ The Supreme Court reasoned that whether a weapon or device is dangerous encompasses more than just the object's potential to injure people directly.⁵⁶ The result is that when a robber creates the appearance of physical danger, the robber has acted sufficiently to subject himself to the more stringent punishment.⁵⁷

The *Martinez-Jimenez* Court adopted this reasoning and analogized the defendant's employment of a toy weapon to Congress's debate over the use of a wooden gun referenced by the *McLaughlin* Court.⁵⁸ Consequently, if an inoperable wooden gun possessed the potential to create a high-risk atmosphere when used in the commission of a crime, the *Martinez-Jimenez* Court reasoned the same would be true of an inoperable plastic weapon.⁵⁹ By defining a toy gun as a dangerous weapon, the *Martinez-Jimenez* Court expanded the class of dangerous weapons encompassed by the Armed Bank Robbery Statute—a liberal interpretation which was arguably within the intent of Congress.⁶⁰

⁵¹ 476 U.S. 16 (1986).

⁵² *Martinez-Jimenez*, 864 F.2d at 666–67.

⁵³ *Id.* at 666.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 667.

⁵⁹ *Id.*

⁶⁰ See *McLaughlin v. United States*, 476 U.S. 16, 18 (1986); see also Melissa Ellen Dyan, Case Comment, *Criminal Law—Dangerousness Is in the Eye of the Beholder—United States v. Martinez-Jimenez*, 864 F.2d 664 (9th Cir. 1989), 23 SUFFOLK U. L. REV. 1141, 1145–46 (1989) (asserting that expansion of the dangerous weapon category to include apparently dangerous weapons violated defendant's due process rights by relieving prosecution of burden of proving all elements of the crime).

IV. STUDIES CONSIDERING TOY GUN ISSUES

A. *The Toy Guns Report by the Bureau of Justice Statistics*

The Bureau of Justice Statistics ("BJS"), an agency within the Department of Justice, was identified in 15 U.S.C. § 5001 as the administrative unit charged with conducting the "study of the criminal misuse of toy, look-alike and imitation firearms, including studying police reports of such incidences and reporting on such incidences relative to marked and unmarked firearms."⁶¹ To that end, the BJS awarded a cooperative agreement to the Police Executive Research Forum to conduct the study with the following goals defined: "document[ing] (a) the number of crimes committed by persons using imitation guns and (b) the number of confrontations by police with persons who had imitation guns which were either thought to be or purported to be real."⁶²

The investigators began framing the methodology for the study by reviewing news stories reporting toy gun incidents.⁶³ Based on the trends appearing in these reports, the investigators were able to develop a basis for data collection through two methods: a survey and site visits at police agencies.⁶⁴

The researchers distributed the questionnaire on police experiences with toy guns to police departments serving populations in excess of 50,000 people, sheriffs' departments with sworn employees numbering in excess of 100, and the primary state police agencies.⁶⁵ The survey resulted in a usable response rate of 65.5%.⁶⁶ The survey questions targeted police experiences with imitation weapons in situations requiring an officer's use of force, as well as robberies and assaults.⁶⁷ The survey defined three categories of imitation weapons: toy guns, replica guns, and BB/pellet/starter guns.⁶⁸ The investigators also conducted site visits at twenty-seven separate law enforcement agencies for the purpose of examining imitation weapons incidents in detail to establish trends and characteristics of such encounters.⁶⁹

The report found that over a four-year period between 1985 and 1989, 65.5% of the study population reported 5654 robberies

⁶¹ 15 U.S.C. § 5001(d) (2000).

⁶² BJS SURVEY, *supra* note 4, at vii.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at vii-viii.

using imitation guns; robbery investigators interviewed have estimated that approximately fifteen percent of all robberies are committed using imitation guns.⁷⁰ During the same period, 8128 assaults were committed using imitation guns, and 31,650 imitation guns were confiscated as a result of their involvement with a crime or other incident.⁷¹ Further, 1128 incidents were reported where an officer threatened to use force, and 252 reported cases involving actual use of force where the officer was confronted with an imitation weapon.⁷² Although the site interviews and survey comments indicated that some incidents involved imitation guns with markings, there was insufficient data either to establish the proportion of marked imitation guns versus unmarked imitation guns, or to distinguish between types of imitation weapons.⁷³

With regard to the blaze orange recessed plug required by 15 U.S.C. § 5001, every officer interviewed by the investigators believed that it was inadequate.⁷⁴ Some (officers and investigators) expressed the view that the blaze orange markings could be easily altered with paint.⁷⁵ Others noted that the inherent circumstances of a gun-related incident were so stressful for an officer and involved so many factors that a blaze orange plug would not command attention.⁷⁶ Finally, standard police firearms training taught all officers to assume that any weapon held by a suspect was real and should be treated as life-threatening.⁷⁷

The report concluded that it was difficult to precisely evaluate the seriousness of the problem because the proportion of incidents where an imitation gun was used was relatively small in comparison to the nationwide number of violent crimes and officer-involved shootings, notwithstanding the often tragic circumstances surrounding toy gun incidents.⁷⁸ The researchers quoted a police chief participant who suggested that the best solution to the problem was education: the use of violence and threats of force were not acceptable ways to resolve the issues presented.⁷⁹

⁷⁰ *Id.* at viii.

⁷¹ *Id.* at viii–ix.

⁷² *Id.* at ix.

⁷³ *Id.* at x.

⁷⁴ *Id.* at 37.

⁷⁵ *Id.*

⁷⁶ *Id.* at 38.

⁷⁷ *Id.* at 39–40.

⁷⁸ *Id.* at 41.

⁷⁹ *Id.*

B. *Technical Evaluation of Marking Systems by National Institute of Justice*

The second study required by Congress pursuant to 15 U.S.C. § 5001 was a requirement that the National Institute of Justice (“NIJ”) “conduct a technical evaluation of the marking systems provided for [in the statute] to determine their effectiveness in police combat situations.”⁸⁰

Upon receiving its statutory mandate, the NIJ began its study by hiring an independent researcher to design an experiment that would “evaluate the various toy gun markings using active police officers in simulated confrontations with armed assailants.”⁸¹ The FBI assisted by providing the use of its “Hogan’s Alley” training facility,⁸² participating in the design of the test and course, and recruiting volunteers from the academy classes. Additional test subjects were volunteers from police departments in the Washington, D.C., metropolitan area. In all, there were eighty-nine officers who participated in the study.⁸³

The experiment pitted each test subject police officer against an armed assailant who confronted the officer. The assailant would walk out of an alley onto the sidewalk, turn towards the police officer, raise a weapon and pull the trigger. These confrontations were staged at distances of fifteen and thirty feet.⁸⁴

The assailants were armed with any one of the following: an accurate replica 45-caliber pistol; an accurate replica 45-caliber pistol with a blaze orange plug in the barrel; a 45-caliber replica water pistol with a blaze orange band around the barrel; an orange and purple Berretta replica water pistol; a white Berretta replica water pistol; or a transparent green Ingram MAC 11 replica water pistol. These test pistols corresponded with the five marking options under the commerce regulations.⁸⁵

The test subject police officers were not told the objective of the experiment, but were instructed to behave as they normally

⁸⁰ 15 U.S.C. § 5001(e) (2000) (mismarked as a duplicate “c” in original).

⁸¹ NAT’L INSTITUTE OF JUSTICE, TEST OF THE VISIBILITY OF TOY AND REPLICA HAND-GUN MARKINGS I (1989) [hereinafter NIJ TEST].

⁸² Hogan’s Alley is a simulated village center complete with houses, a motel, a theater, a post office, a bank, etc., which is used for FBI Academy training in defensive tactics, investigative techniques, and firearm skills. *Id.* at 3.

⁸³ *Id.* at 1–2.

⁸⁴ *Id.*

⁸⁵ *Id.* at 3–4. The unmarked replicas were extremely realistic and firearms instructors from the FBI could not distinguish them from real weapons except by close examination.

would in a street confrontation, with the exception that they would not seek cover to protect themselves. The officers went through the course one at a time. They were instructed that the scenario called for them to be responding to a call from the dispatcher to investigate a report of an armed prowler. They were further told that the suspect would appear from an alleyway and point a weapon at the officer; the police officer was to fire his own revolver if he felt his life was in danger.⁸⁶

The people playing the role of assailant recorded the information on whether the officer fired and who fired first. The officers were escorted back to the classroom area for debriefing after undergoing eight separate confrontations with the assailants in both daytime and nighttime conditions.⁸⁷

The test results were fairly conclusive with respect to some of the markings and less conclusive as to others. Ninety-eight percent of the officers fired at the assailants holding the “real” weapon.⁸⁸ However, 96% fired at seeing the weapon with the orange plug.⁸⁹ Seventy-seven percent fired at the gun marked with the orange band around the barrel.⁹⁰ Fifty-nine percent fired upon seeing the white colored pistol.⁹¹ Fifty-six percent of the officers fired at the orange and purple pistol, while the clear green pistol had the lowest rate of firing response at thirty-three percent.⁹²

There were some additional remarks by the officers during the debriefing that were of great interest to the outcome of the study. Most alarming was the fact that 40% of the officers fired at every assailant irrespective of the markings on the weapon being held.⁹³ Some explained that they were primarily concerned about the aggressive behavior of the assailant and the failure to respond to orders not to move.⁹⁴ Some of these officers felt that they should fire on anyone who pointed a weapon and failed to obey commands, regardless of the markings on the weapon, because the assailant could have painted the gun to look like a toy.⁹⁵ Several of the officers never saw the orange plug or band during the nighttime

⁸⁶ *Id.* at 7.

⁸⁷ *Id.* at 9.

⁸⁸ *Id.* at 16.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* at 22.

⁹⁴ *Id.* at 22. During the exercise the police shouted “Police! Don’t move!” The assailants were instructed to disregard the order and raise the weapon as if to fire.

⁹⁵ *Id.* at 22–23.

tests.⁹⁶ Some officers who fired when confronted with the white-colored weapon stated that it looked like a stainless steel or nickel-plated handgun.⁹⁷

On the positive side, the study suggested that under more relaxed conditions or where the officers were permitted to take cover, the officers may have been less likely to fire.⁹⁸ Further, a “learning effect” produced lower shooting rates, which led researchers to conclude that increased familiarity of the officers with the marking systems would lead to fewer decisions to fire.⁹⁹

The report concluded that the orange plug marking was a complete failure, while the orange band was only a little better.¹⁰⁰ The other colored markings were somewhat more effective. However, the report observed that the effectiveness of the marking systems would be increased if the police were familiarized with them.¹⁰¹ Further, private citizens in “at risk” occupations, such as bank tellers, should also be familiarized with the markings.¹⁰²

C. GAO Report on Toy Gun Issues

In 2003, the General Accounting Office (“GAO”),¹⁰³ the investigatory agency for the Congressional branch, was asked by Representative Edolphus Towns to:

- (1) examine crime statistics showing the prevalence of crimes that involved toy guns in some capacity;
- (2) gather any available information on incidents involving toy guns that have resulted in injuries or deaths, whether or not related to criminal activity; and
- (3) determine from available literature whether there are any studies examining the long-term impacts that can be attributed to toy gun play by children.¹⁰⁴

⁹⁶ *Id.* at 24.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* The learning effect was demonstrated by the fact that the officers were more likely to shoot when confronted with a toy gun during the first trial, but less likely to fire after they became familiar with the setting and the possibility of the appearance of a toy gun. *Id.* at 27.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ The GAO Human Capital Reform Act of 2004 changed the name of the agency to the Government Accountability Office. *See* Pub. L. No. 108-271, 118 Stat. 814 (codified as amended at 31 U.S.C. §§ 702–83 (Supp. 2008)). The change was made to “better reflect our current role and mission in government.” U.S. GOV’T ACCOUNTABILITY OFF., GOA-07-1188CG, TRANSFORMING GOVERNMENT TO MEET THE DEMANDS OF THE 21ST CENTURY 7 (2007).

¹⁰⁴ U.S. GEN. ACCOUNTING OFF., GAO-03-1135R, INFORMATION GENERALLY NOT AVAILABLE ON TOY GUN ISSUES RELATED TO CRIME, INJURIES OR DEATHS, AND LONG-

The GAO began its analysis with the observation that the focus of its study was limited to imitation toy guns and excluded projectile firing toys such as BB, pellet and paintball guns.¹⁰⁵ The GAO also engaged in literature review, rather than conducting its own experiments. The study consisted of a review of internet and electronic resources to locate statistics, reports, studies and other publications, in addition to contacting federal agencies such as the Bureau of Justice Statistics, the Centers for Disease Control and Prevention, and the Consumer Product Safety Commission.¹⁰⁶ Various academic researchers were interviewed, as well as the counsel for the Toy Industry Association.¹⁰⁷

The GAO concluded that “scant data exist[s]” regarding either incidents involving toy guns or the long term effect that playing with imitation weapons have on children. Further, the sole study on crime and toy guns that had been conducted in 1989 by the Bureau of Justice Statistics was “dated and insufficient for providing a national perspective.”¹⁰⁸

With respect to the BJS study, the GAO noted that the information provided regarding the response rate, even though 65.5% did not include information “on whether the nonrespondents differed in significant ways from the respondents.”¹⁰⁹ In the absence of this information, it was impossible to conclude that the findings were not distorted by a lack of response from 34% of the police agencies.¹¹⁰

Further, it was considered problematic that police reporting systems were not coded to record the use of toy or imitation weapons in criminal activity.¹¹¹ The responses were therefore based on either manual records checks or on officer recall.¹¹² Accordingly, the GAO believed that there was either an underreporting or overreporting of incidents involving toy guns.¹¹³

Finally, the GAO observed that the BJS report itself noted its shortcomings when it admittedly could not answer the question regarding the seriousness of the problem, but instead stated that

TERM IMPACT 1 (2003) [hereinafter GAO REPORT]. For an explanation of the discrepancy in the name of the issuing agency, see note 103.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 11.

¹¹⁰ *Id.* at 2.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

“[t]he response is a value judgment based upon one’s ideology and experience.”¹¹⁴

V. DISCUSSION

Despite the flurry of legislative attempts to remedy the problem of toy guns, it continues to be an issue.¹¹⁵ People continue to either use them in the commission of crimes or to die or become injured when police mistake toy guns for the real thing. The Anti-Violence Campaign lists fifty-five incidents of toy gun usage between 1983 and 2008, many of which resulted in the death of the person carrying the toy weapon, however innocently.¹¹⁶ However, this information is merely anecdotal and does not reflect a scientific effort to evaluate the true magnitude of the problem.

The state of the law at the present point is quite clear. Toy manufacturers may make realistic-looking handguns that are available for sale to the general public, as long as the toys have a marking conforming to the Department of Commerce regulations: a blaze orange plug or band at the barrel, or the entire gun may be translucent, white or brightly colored.¹¹⁷ As previously noted, it is very easy to change the appearance of the weapon using a can of spray paint.¹¹⁸ Unlike real weapons, people can obtain toy guns without undergoing a criminal background check or waiting period as otherwise required under federal law.¹¹⁹ Accordingly, it is easier for a would-be bank robber to accomplish such a crime with a toy gun, instead of going to the expense and risk of obtaining a real handgun. It is of little comfort that use of even a toy gun in the commission of a bank robbery will result in the perpetrator being subjected to stiffer federal penalties under the Armed Bank Robbery Statute because the toy would be considered a “dangerous weapon” within the meaning of the statute.¹²⁰ What is problematic is that the Federal Toy Gun Law does nothing to address the issue of the ease with which would-be criminals can obtain toy weapons, many of which are realistic copies of actual weapons. Compounding the problem is that the marking system provided under

¹¹⁴ *Id.* at 11.

¹¹⁵ *See supra* notes 11, 13, and 34 and accompanying text.

¹¹⁶ International Health & Epidemiology Research Center, Fact Sheet About Toy Guns (2008), http://www.irol.com/avc/Fact_Sheet_About_Toy_Guns.html.

¹¹⁷ 15 C.F.R. § 1150.3(a)–(d) (2008).

¹¹⁸ *See supra* note 75 and accompanying text.

¹¹⁹ *See generally* 18 U.S.C. §§ 921–31 (2000).

¹²⁰ Armed Bank Robbery Statute, *supra* note 41.

the Department of Commerce regulations is ineffective to alert law enforcement personnel or others to the presence of a toy.

The weakness of the commerce regulations was readily apparent to many of the persons or organizations that commented on the proposed regulations when they suggested eliminating the blaze orange plug.¹²¹ Interestingly, the Commerce Department deflected this criticism by stating that they were awaiting the results of the National Institute of Justice report on the effectiveness of the markings before taking that action.¹²² However, the Commerce Department did not wait to review the report before passing their final rule, which was effective May 5, 1989.¹²³ The National Institute of Justice had not been dilatory in conducting its testing of the markings; the report was issued in August 1989, four months after the issuance of the final regulations.¹²⁴ Even after the NIJ Study was issued, clearly concluding that the markings were ineffective, the Department of Commerce never amended the regulations to eliminate the ineffective markings. The Department even had the opportunity to do so in 1992, when they revised the regulations to permit additional bright colors as marking alternatives, among other changes.¹²⁵ Consequently, the Commerce Department failed to satisfy its statutory duty to adopt a rule providing for distinctive markings of toy guns.

With respect to the GAO Report, the agency did not really provide the information Representative Towns requested. The GAO was asked to examine crime statistics involving toy guns and gather information on injuries and deaths related to the use of toy guns.¹²⁶ However, they did nothing more than perform a literature review and contact other agencies to inquire about their knowledge of the issue. They were furnished the Bureau of Justice Statistics Report researching the number and type of incidents relating to criminal involvement with toy guns, which they criticized as un-

¹²¹ See Commerce Regulations, *supra* note 23; *supra* note 25 and accompanying text.

¹²² See Commerce Regulations, *supra* note 23; *supra* note 26 and accompanying text.

¹²³ Commerce Regulation, *supra* note 23.

¹²⁴ NIJ TEST, *supra* note 81, at vii. Although the Federal Toy Gun Law provisions were passed on November 5, 1988, they did not become effective until six months after passage. Federal Energy Management Improvement Act of 1988 § 4(f), Pub. L. No. 100-615, 102 Stat. 3185 (1988). Further, the Commerce Secretary was specifically authorized to make changes to the marking system "after consulting with interested persons." *Id.* § 4(b)(3). The Commerce Department issued their final rule after only hearing comments produced in response to their March 14, 1989 Notice of Proposed Rulemaking. 54 Fed. Reg. 19,356 (May 5, 1989). Many of these public comments were critical of the blaze orange plug. *Id.* at 19,356-57.

¹²⁵ 57 Fed. Reg. 48,451 (Oct. 26, 1992).

¹²⁶ GAO REPORT, *supra* note 104, at 1.

reliable due to response rate issues and the fallibility of officers' memories in recalling toy gun incidents.¹²⁷ They also concluded that there were no reliable databases to capture such information, including the National Electronic Injury Surveillance System, the Death Certificate System, or the Incident Database, administered by the Consumer Product Safety Commission.¹²⁸

What the GAO Report noticeably failed to do was make any suggestion on what could be done to revise the existing laws and regulations on toy guns to make them more effective, or to advise how data regarding toy guns could be more effectively captured. Interestingly, the GAO Report entirely omitted any mention of the National Institute of Justice test on the marking systems. It appears the GAO gave Representative Towns' request only passing interest and made the narrowest interpretation of its mission.

Despite its noted lack of reliability, the Bureau of Justice Statistics report is the only data available. Based on that report, in a four and a half year period, 458 police departments reported 5654 robberies (approximately fifteen percent of all robberies) and 8128 assaults committed with imitation weapons.¹²⁹ Further, 31,650 of these imitation guns were seized by police during this period of time because of their involvement in some kind of incident.¹³⁰ Finally, 1128 incidents were reported by 186 police departments in which officers threatened to use force in the belief that an imitation gun was real.¹³¹ There were 252 incidents where force was actually used against imitation weapons.¹³² Whether these figures represent underreporting or overreporting, as the GAO commented, they still represent a significant use of toy guns in crime within the country overall.¹³³

However, quibbling over the reliability of statistics is meaningless in the face of the true import of both the Bureau of Justice report and the National Institute of Justice testing: police officers are not trained to distinguish between real and toy weapons.¹³⁴ The police officers interviewed for the Bureau of Justice report

¹²⁷ *Id.* at 3.

¹²⁸ *Id.*

¹²⁹ BJS SURVEY, *supra* note 4, at viii.

¹³⁰ *Id.* at viii–ix.

¹³¹ *Id.* at ix.

¹³² *Id.*

¹³³ *Id.* According to the BJS Survey, the survey was sent to police departments covering over one-third of the nation's population, with a response rate of 65.5%. If the response statistics are reflective of the nation as a whole, the actual number of toy guns involved in crime would be substantial. *Id.* at 2.

¹³⁴ *Id.* at 39; NIJ TEST, *supra* note 81, at 22.

were questioned whether further training on the marking systems would be of assistance in encounters with toy weapons.¹³⁵ The uniform response was that police officers are trained to assume that all apparent weapons are real and represent a threat to the officer's safety, regardless of the age or sex of the person wielding the perceived weapon.¹³⁶ This view is supported by the data in the National Institute of Justice test, which found that forty percent of all officers fired at every pistol they encountered, regardless of markings.¹³⁷ Although one officer in the Hogan's Alley test remarked that he withheld fire because he had read a handout describing the marking system, others observed that "they fired even when they realized that the weapon was a toy because they felt that any suspect could paint a real handgun to look like a toy."¹³⁸ Clearly, markings will be of no use unless officers are trained to recognize them, but such training could also endanger the lives of the officers when encountering a painted handgun.¹³⁹

The logical conclusion to draw is that the only effective solution to the toy gun dilemma is a complete ban on realistic toy weapons, such as that proposed long ago by Representative Towns.¹⁴⁰ However, there is simply not enough hard data to justify such a ban. These toy gun incidents obviously do occur, but the frequency and severity of the incidents is unknown. A more rigorous study is required to assess the seriousness of the problem.

VI. CONCLUSION

Despite these further federal attempts to control toy gun safety, nothing has been successful. Clearly, the National Institute of Justice study on the effectiveness of the blaze orange plug or band markings demonstrate that they are virtually useless in police combat situations.¹⁴¹ Although the Department of Commerce regulations provide for alternative markings such as bright colors over the entire toy weapon, toy manufacturers are not required to adopt these measures and can opt for the less effective markings.¹⁴² Be-

¹³⁵ BJS SURVEY, *supra* note 4, at 39.

¹³⁶ *Id.* at 39–40.

¹³⁷ NIJ TEST, *supra* note 81, at 22.

¹³⁸ *Id.* at 24.

¹³⁹ This is not an unrealistic assumption as gun specialty stores will paint custom colors on guns, including hot pink, camouflage, and the American flag. *See, e.g.*, Jim's Gun Supply, <http://www.jimgunsupply.com/index2.html> (last visited Nov. 5, 2008).

¹⁴⁰ *See supra* note 34.

¹⁴¹ NIJ TEST, *supra* note 81, at 24.

¹⁴² 15 C.F.R. § 1150 (2009).

cause children want to play with the “real thing” toy manufacturers are more likely to use the most minimal markings.

As concluded by the Bureau of Justice Statistics Report, one’s view of the seriousness of the problem depends on the personal attitude of the individual.¹⁴³ On the one hand, it can be argued that the relatively few incidents where a toy is mistaken for a weapon, even if the result is the tragic death of a child, does not justify a complete ban on toy and imitation weapons that would deprive the rest of the child population of the pleasure of playing cops and robbers with realistic props.¹⁴⁴ Of course, the toy industry would lose a sizeable amount of revenue in the wake of such a ban, which may explain the active participation of toy industry representatives in the formation of the Commerce Department regulations that are so ineffective.¹⁴⁵

On the other hand, one can argue that the loss of even one life is sufficient to invoke a ban on imitation weapons.¹⁴⁶ Nothing is more precious than the safety of children. Further, even though there is scant literature on the subject, one study suggests that toy gun play among children is associated with increased real aggression in play settings.¹⁴⁷ Arguably, this increase in aggressive behavior can lead to increases in criminal behavior in later years. Another justification for such a ban is the reverse of a typical incident, where a child familiar with realistic toy weapons mistakes a real gun for a toy and shoots himself or a friend.¹⁴⁸ There have been many examples of this type of incident.

It is impossible to make an informed decision about this serious issue without sufficient information. First, changes in the injury and crime reporting databases should be made so that incidents involving toy guns can be tracked to determine the actual scope of the problem. If the data demonstrates a significant occurrence of toy weapon related crime or injury, a total ban of these toys may be

¹⁴³ BJS SURVEY, *supra* note 4, at 41.

¹⁴⁴ *Id.*

¹⁴⁵ The first public workshop held by the Department of Commerce in February 1989 was attended by forty “representatives of trade associations, manufacturers, importers, distributors, and Federal Agencies.” Commerce Regulations, *supra* note 23. See also Marking of Toy, Look-Alike, and Imitation Firearms, 57 Fed. Reg. 48,451, 48,452 (Oct. 26, 1992).

¹⁴⁶ BJS SURVEY, *supra* note 4, at 41.

¹⁴⁷ See GAO REPORT, *supra* note 104, at 5 (citing Malcolm W. Watson and Ying Peng, Brandeis University, *The Relation Between Toy Gun Play and Children’s Aggressive Behavior*, 3 EARLY EDUC. & DEV. 370, Oct. 1992).

¹⁴⁸ International Health & Epidemiology Research Center, Fact Sheet About Toy Guns (2008), http://www.irol.com/avc/Fact_Sheet_About_Toy_Guns.html.

advisable. Second, a study should be conducted regarding police weapons and tactical training procedures to determine whether there is any marking or warning system that will be sufficient to preserve the lives of the officers who are placed in the difficult position of deciding whether a gun is real or a toy. If not, there is arguably more justification for a complete ban. However, that is a decision that should not be made based on either anecdotal evidence or the financial interest of the toy industry.

