

## Criminal Use of Firearm Silencers\*

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**Abstract:** *Both the public and sentencing judges regard silenced firearms as more dangerous than ordinary unsilenced firearms, and the federal penalty for possession of a silenced firearm during crime is a 30-year mandatory minimum. The assumption that silenced firearms are more dangerous than ordinary firearms has never been empirically researched. This study examines federal and state court data to compile statistics on who is being prosecuted for possession of silencers and what crimes they are used to commit. This data indicates that both on the federal and state level those prosecuted for crimes involving silencers are far less likely to have a criminal record, and are far less likely to actively use their weapon than those people convicted using ordinary unsilenced firearms. The data indicates that use of silenced firearms in crime is a rare occurrence, and is a minor problem. Moreover, the legislative history of silencer statutes indicates that these provisions were adopted with little or no debate.*

*The silencer penalty has been justified by a need to crack down on “professional criminals” or to punish people using “dangerous weapons.” The evidence suggests that 30-year minimum sentences make no sense. Mandatory minimums should be repealed and sentencing judges permitted to treat each case on an individualized basis.*

**Keywords:** firearm; silencer; suppressor; sentencing; gun crime

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### Introduction

One of the harshest penalties in the federal system is a 30-year mandatory minimum sentence for possession of a silencer (used to reduce the noise of a gunshot) during a “crime of violence”<sup>1</sup> or drug trafficking:

Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for enhanced punishment if committed by the use of a deadly weapon or device) for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years, and if the firearm is a short-barreled rifle, short-barreled shotgun to imprisonment for ten years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to imprisonment for thirty years (emphasis added) (18 U.S.C. § 924(c)(1)).

This can result in lengthy prison sentences for otherwise minor crimes. Consider the case of Edward

Thompson who received three years for drug trafficking but additionally was convicted of possessing a firearm equipped with a silencer and possession of an unregistered silencer (*U. S. v. Thompson*, 82 F.3d 849 (9th Cir. 1996)). Possession of a firearm with a silencer increased Thompson’s penalty for drug trafficking from three years to forty years. This is a more severe penalty than is received by many defendants convicted of homicide or rape.

The basic assumption behind the statute appears to be that 1) firearms with silencers attached are more deadly than ordinary, non-suppressed firearms, and 2) silencers are likely to be used by professional criminals who deserve to be severely punished. This paper seeks to examine those assumptions and explore exactly how silencers are, or are not, used by criminals.

### Legal and Technical Overview of Firearm Silencers

#### *Silencer Statutes*

Federal statutes in the United States have required a permit for ownership of a silencer since 1934. In addition to the penalty for possessing a silencer during another crime, the possession of a silencer without a federal permit is a felony. Most prosecutions in the federal system

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\* The author would like to thank Professor Bernard Harcourt, and my colleagues Sarah Sulkowski and Hilary Ayers at University of Chicago for their helpful suggestions.

are for possession of an unregistered silencer, or possession without a permit. The maximum sentence is 10 years, although the recommended sentence range under the sentencing guidelines is 27 to 71 months.<sup>2</sup> This is significantly longer than the penalty imposed by state law in states that ban silencers. For example, the Michigan statute banning silencers carries a maximum sentence of five years (Mich. Code 750.224), and nonviolent possessors of silencers are unlikely to receive any jail time (see *People v. Goldy*, 2004 WL 1392404 (Mich. App. 2004)). In federal prosecutions, a defendant can be charged with possession of a silencer during a crime, which carries a 30-year sentence, and if the silencer is homemade and not licensed or serial numbered, persons convicted of these offenses can receive up to 10 years as well (*U. S. v. Frazier*, 213 F.3d 409 (7th Cir. 2000)). People often make or possess silencers with no intention to use them for a nefarious purpose. In one case, the court found that a father and son had tried to make a silencer just as an experiment, and clearly had no intention of trying to use it to commit a crime (*U. S. v. Webb*, 1998 U.S. Dist. LEXIS 4711 (D. Kan. 1998)).

Only about a third of the states ban possession of firearm silencers. Most of the large states ban silencers, among them California, Illinois, Michigan, New Jersey, New York and Texas. In some European countries, firearm silencers are legal and not regulated in any way—both in countries with widespread gun ownership, such as France, and countries where firearms themselves are strictly regulated, such as Sweden (Paulson, 1996:9). The approach of various jurisdictions to silencers runs the gamut from prohibition to regulation to complete legalization, and such laws follow no predictable pattern. Silencers are illegal in Texas, but legal in Sweden (Tex. Penal Code § 46.05(a)4 (2004)). One possible explanation for this is that firearms are so rare in Sweden that silencers are simply beneath the radar of lawmakers, but that does not adequately explain the kind of diversity that is found across various Western jurisdictions.

Despite numerous laws on the books regarding both possession and use of silencers there has been virtually no attention focused on them by legal scholars. There does not appear to have ever been a study done on what sorts of crimes or people are prosecuted under these statutes. Basic questions such as “How often are silencers used in crime?” “What sorts of crimes are committed with silencers?” “Does possession of a silencer make discharge of a firearm more likely, and hence more dangerous?” have never been addressed.

Without any evidence about how silencers are actually used it seems impossible to determine *a priori*

whether prohibition, regulation or legalization is the best system. As one court noted, “possession of unregistered silencers is a victimless crime” (*U. S. v. Ritsema*, 89 F.3d 392, 395 (7th Cir. 1996)). As with all victimless crimes, we need to inquire what societal harm the law is intended to address. The term “victimless crime” is not intended as a value judgement; it merely describes a crime in which there is no “victim” to report the alleged offense. For most victimless crimes, such as drug abuse, some societal harm is the justification for making the activity a crime. Obviously, we want to know what harms may be associated with silencers.

One also wonders why there is such a high penalty for the use of a firearm under federal statutes, and what type of criminal is targeted. This is an important question for prosecutors and judges in deciding whether a person should be charged, convicted and sentenced. For example, should a person who makes a silencer and uses it to hunt in a national park receive the same 30-year enhanced sentence as a professional killer who successfully uses a commercially-manufactured silencer in an execution-style murder? Because the sentencing guidelines and statutory minimum are so severe, many judges have departed downwards from sentencing guidelines under the theory that kids with homemade silencers, or people who use them for “legitimate purposes,” were certainly not the sort of criminal that Congress had in mind. In *U.S. v. Webb*, 49 F.3d 636 (10th Cir. 1995), the district court departed downward from the sentencing guidelines for a man who made two primitive silencers out of foam and toilet paper rolls, which were used to shoot animals on his property; but the Appeals Court required a longer sentence, saying the guidelines, which were then mandatory, did not permit downward departure. Similarly, in *U.S. v. Stump*, 1997 U.S. App. LEXIS 842 (4th Cir. 1997), the trial judge found that the two silencers had been used by the defendant for legitimate “sporting purposes” and characterized the offense as a technical, “bare-boned” violation. The trial court thus sentenced the defendant to only two months imprisonment; but the Appeals Court ruled that the judge could not depart from the guidelines which required a minimum sentence of 27 months for illegal possession.

In other cases, courts need to decide if an accomplice can be convicted of possessing a silencer. An accomplice can only be charged with use of a silencer by a co-conspirator if the person could reasonably have expected one to be employed; determining that question depends on how common silencers are and what they are used to accomplish. In one such case (*U.S. v. Friend*, 50 F.3d 548 (8th Cir 1995)) the court acquitted the defendant of ac-

complice liability for the silencer possession (but not the attached gun) noting:

The police officers who discovered the well-hidden firearm testified that they were surprised to find it equipped with a silencer. . . . Nor did the government present any evidence describing how a silencer-equipped firearm might generally be used to further a drug distribution conspiracy. The police officer who testified that “over 80 percent of the investigations involving narcotics reveal some type of weapons” gave no testimony concerning the prevalence or use of silencers. And the prosecutor in closing argument admitted that “[a] gun with a silencer, however, is unusual.”

Lack of any statistical evidence makes ruling on such issues difficult.

Another question is whether possession of a silencer should be considered a crime of violence. One would imagine that determining whether possession of a silencer qualifies as a crime of violence should be based upon similar statistical evidence about how often silencer possession results in injury. Courts have assumed that firearms with silencers attached are much more likely to be discharged (with potentially lethal consequences). The court in *U. S. v. Willett*, 90 F.3d 404, 405 (9th Cir. 1996), declared that commission of a crime with a silencer “poses a greater risk than does the commission of the same crime with only a gun.” The court in *U.S. v. Dunlap*, 209 F.3d 472, 478 (6th Cir. 2000) described silencers as “extremely dangerous.” Neither court explained the basis of these conclusions or made any attempt at statistical analysis to support these assertions. Before now, no such study has been done.

The purpose of this paper is to try to answer these questions and provide some analysis of how silencers are used in crime, and who is being prosecuted. Initially, however, it is also important to try to discover why these statutes are on the books. If it can be determined what legislators thought they were accomplishing in passing them, or at very least what the various arguments are for punishing possession of silencers, then we will have a better theoretical framework in which to consider the statistical evidence presented in the second half of the paper.

#### *What is a Firearm Silencer?*

Some knowledge of how silencers work is necessary

to understand the issue. A “silencer” does not silence a firearm, but it muffles the sound. A good silencer can reduce the noise of a firearm by 20 decibels (Paulson, 1996:14-16).<sup>3</sup> This makes it less likely to be heard by potential witnesses or if it is heard the sound will not be recognized as a gun shot.

The less gunpowder there is in a cartridge, the less noise there is to reduce; hence, small caliber guns (such as a .22 caliber rimfire) are the easiest to “silence.” Also, most guns fire supersonic ammunition, and because of the ballistic crack (called a sonic boom for larger objects) a gun can only effectively be silenced if it fires subsonic ammunition.

All else being equal, a slower-moving bullet has less energy and is less deadly than a faster bullet. In purely physical terms a “silenced” firearm which fires subsonic ammunition is less dangerous than a gun that fires supersonic ammunition.

For comparison, a .22 rimfire bullet weighs about 30 grains (or 2 grams) and at 1000 feet-per-second has muzzle energy about 75 foot pounds. High powered hunting rifles have power in the range of 2,000 to 5,000 foot pounds—literally enough kinetic energy to lift an automobile a foot in the air, or fifty times more powerful than a .22. A small-caliber, low-velocity bullet typically used in conjunction with silencers is not nearly as deadly as high-powered rifles or shotguns. Low-velocity bullets also have a much shorter effective range. A subsonic round has an effective killing range of about 200 yards, as opposed to 1000 yards for a high-velocity bullet traveling three times the speed of sound (Paulson, 2002:14). Slower-moving bullets also have less penetrating power, making them less likely to penetrate walls, car doors or body armor. Paulson (2002:26-27) notes that hostage rescue teams often use subsonic ammunition precisely to avoid risk to bystanders. Since most homicide shootings occur at close range this probably would not matter to criminals, but low-velocity bullets present much less danger of a stray bullet injuring a third party.

A silencer always extends the length of the overall weapon, as well as increasing the barrel diameter. The increased difficulty of concealment may make silencers less appealing to criminals than they might be otherwise.

A silencer works by trapping the noise of the explosion inside the silencer. As the hot gases escape from the end of the barrel, the gases are trapped inside the silencer which muffles the sound. Many common everyday objects such as pillows, towels and comforters can be draped over a gun barrel and function as a silencer. One case describes how a murderer wrapped his gun in a towel and this was so effective it did not wake people

who were asleep in the house (*People v. Morris*, 2002 WL 1303412 (Cal. Ct. App.)).

Most silencers that result in prosecution are simply improvised devices that fit over the end of a barrel. Professionally-made silencers may screw into a threaded barrel, and continue to allow the use of the gun's sights (which is not possible with things like pillows).

If a criminal is more likely to actually discharge a silenced firearm than otherwise, then the firearm with a silencer may in fact be more dangerous than one without. For example, even though knives are considerably less deadly than guns, statistical evidence indicates that knives used in armed robbery are about three times more likely to be actually used to injure the victim than guns (Wright, Rossi, and Daly, 1983:209-212).<sup>4</sup> The accepted explanation for this is that when confronted with a firearm the victim is less likely to resist and hence less likely that the firearm will need to be discharged. Marvell and Moody (1995:249-50) note that "[W]ith robbery, criminals use weapons to deter victim resistance, and firearms are the most effective weapon for that purpose." However, if the silent nature of a knife makes knife-wielding assailants more likely to actually use their weapon than gun-wielding assailants then that would tend to confirm the view that silenced firearms present a greater threat to society than an ordinary firearm. Conversely, however, if it is the perceived danger of the weapon which makes resistance (and therefore discharge) less likely (and since most people view a silenced weapon as "more threatening" than one without) silenced weapons would be the least likely to actually be fired in the context of an armed robbery. At least one pair of defendants explained their use of a silencer in precisely this way. They thought that "[t]he silencer would make them seem professional and their threat to kill [the target] therefore more credible than it would otherwise be" (*U. S. v. Ienco*, 92 F.3d 564, 566 (7th Cir. 1996)). This seems to be a common motive; criminals think victims will fear them more if the threat to use the gun is credible. In another case, a rapist told his victim he had a gun with a silencer in his pocket so if he shot her no one would hear (*People v. White*, 2003 WL 157525 (Cal. Ct. App.)). The rapist was lying, but the crime helps demonstrate that criminals will appear more threatening with a silencer. This provides a plausible answer to the question, "Why would a criminal carry a silencer unless he intended to fire the gun?"

### *Uses of Silencers*

One court has blithely declared that "A silencer is used only for killing other human beings" *People v. Pen*

2004 WL 859311 (Cal. Ct. App. 2004)). Other courts have found that there are legitimate sporting purposes for silencers (*U.S. v. Stump*, 1997 U.S. App. LEXIS 842 (4th Cir. 1997)). Actually, silencers are used for a number of lawful purposes. They are often used by police to shoot animals in residential areas. In addition to police, grounds-keepers, janitors and private security may use silencers to shoot rabid animals or rats inside buildings. Silencers can be used for hunting small animals such as rabbits or squirrels. Since a loud report from a gun will likely cause all the animals in field to run away or run into holes, a silenced weapon will allow a hunter to shoot many animals in field without scaring away others. The most common use of silencers is for target practice. Those who compete in competitive shooting practice every day. Use of a silencer allows a person to set up a shooting range in his or her basement without making noise to disturb the neighbors. It is also said that using a silenced firearm is helpful for first-time shooters to get used to firing a weapon, because first-time shooters often are disturbed by the loud noise (Paulson, 1996:14).

At least some people who have been found with unregistered silencers have claimed that they needed them for personal protection (*U.S. v. Taylor*, 1995 U.S. App. LEXIS 6314 (4th Cir. 1995)). Other people simply collect exotic weapons, and many people seem to make them for the same reason people build model airplanes and ships in bottles. In one case, the defendant and his son built a silencer as a kind of science project. Fortunately for the defendant, the two "silencers" they made did not work and he was acquitted, thus avoiding years in prison (*U. S. v. Webb*, 1998 U.S. Dist. LEXIS 4711 (D. Kan. 1998)).

One can quibble over whether any of the above are good reasons to own a silencer, and one can dispute whether the danger from silencers is too great to justify such uses.<sup>5</sup> However, all of the above uses are perfectly legal with a permit. To own a silencer a person must apply for a \$200 federal permit and undergo a criminal background check. The federal government issues about 2,000 silencer permits each year (U.S. Congress, 1984:121). It is estimated that more than 60,000 Americans legally possess and use silencers (Paulson, 1996:2). Tens of thousands of Americans each year use silencers for perfectly harmless activities (such as target shooting) or even beneficial activities (such as shooting rats and rabid animals). In any case, the fact that the federal government and most states permit the private ownership of silencers would seem to represent the judgement of law-makers that silencers have a legitimate civilian use. Perhaps a question to ask is how many people by comparison misuse silencers each year. As will be discussed below, there only appear to be about

30 federal prosecutions involving silencers each year, and it is very unlikely that there are more than 200 state and federal prosecutions per year involving silencers. It is possible that there is much more illegal use going on which is not prosecuted, but these numbers certainly suggest that silencers are a minor law enforcement problem.

### **Legislative History of Federal Silencer Regulation**

The history of silencer regulation is complicated, and the documentation of why various provisions were passed is sparse. Courts that have tried to determine the legislative history of some of these provisions have expressed dismay at the paucity of information in the legislative record (*U.S. v. Hall*, 171 F.3d 1133, 1139-40 (8th Cir. 1999)). Scholars who have examined the history of gun control statutes in general have concluded that they tend to be the result of complex compromises and determining legislative purpose is difficult (Hardy, 1986: 585).

In 1934, the federal government began to regulate machine guns, sawed-off shotguns and silencers by placing a \$200 tax on such weapons to discourage their sale (U.S. Congress, 1986b:219-220). The 1934 congressional debates provide no explanation about why silencers were licensed. Paulson (1996:10) opines that during the Great Depression, poaching game was thought to be a problem and silencers were licensed because of this concern.

In 1968 the federal government passed the first major federal gun control provisions. Anyone committing a felony which could be prosecuted in federal court received an additional one to ten years if a firearm was used (88 Stat. 1214, 1225 (Oct 22 1968)). The statute did not distinguish among different types of firearms, or include silencers.

In 1986 Congress adopted a 20-year enhanced sentence for crimes committed with a silencer—and this was increased to 30 years in 1988.<sup>6</sup> Congressional debates contain no clear statement of reasons why the additional penalty for use of silencers was enacted. The House report on the legislation says little about silencers but describes them as “used in assassinations and contract murders” (U.S. Congress, 1986b: 4). The most thorough article on the 1986 Act, of which the silencer provision was one small part, does not even mention the silencer provision (Hardy, 1986:585). However, looking at the congressional hearings held on the bill, it is clear that the silencer provision was a reaction to the murder of a Jewish talk-show host by white-supremacists. Alan Berg was a well-known radio personality in Denver, whose outspoken criticism of hate groups resulted in his murder in June of 1984. He was ambushed outside his home and

riddled with bullets from a .45 caliber sub-machine gun. The murder was widely publicized and resulted in a book being written about it (Singular, 1987).

In December of 1984, the FBI raided the home of their prime suspect, Gary Yarbrough: When agents searched the home, they found the MAC-10 [.45 caliber sub-machinegun] and four cross-bows, 100 sticks of dynamite, plastic explosives, hand grenades, semi-automatic rifles, infrared night vision scopes, gun silencers, booby traps, police scanners and 6,000 rounds of ammunition (“Aryan Group, Jail Gangs Linked,” *Washington Post*, Dec. 18, 1984, cited in U.S. Congress, 1986a:158).

It was assumed that the silencer had been used in the attack, because silencers were found in the same place as the apparent murder weapon. Witnesses testifying before the Judiciary Committee called attention to this possession of a silencer by the prime suspect. Sam Rabinove, Legal Director of the American Jewish Committee told the House Judiciary Committee:

I have with me several news articles, all of which in some way relate to the kind of racist violence [which] saw the death of Allen [sic] Berg in Denver, with the Aryan Nations, the Order, and other such racist extremist groups. In each of these articles, there is always the mention of a silencer, or a 9mm handgun (U.S. Congress, 1986a:142).

It turned out that Yarbrough was not involved in the murder. In 1987 (long after the silencer provision had been adopted), two other members of the neo-nazi group were convicted of the murder and given 150-year prison sentences (“150-Year Sentences Given to Two Killers of Radio Show Host,” 1987). There is no evidence that a silencer was used. The murder was reported by neighbors who heard gunshots, making the silencer theory unlikely (Singular, 1987:19-20).

In any event, a number of witnesses assured the House Committee that machine guns and silencers were “basic tools of racketeers, drug traffickers and professional killers” (Statement of American Academy of Pediatrics, U.S. Congress, 1986a:167). There was no statistical evidence cited as to the incidence of silencers in crime. The Bureau of Alcohol, Tobacco and Firearms was asked to provide information on the incidence of machine guns in crime, but no one bothered to ask for any

such data about silencers (U.S. Congress, 1986a:221; see also Hardy, 1986:673).<sup>7</sup>

Unfortunately, that is all the legislative record contains as far as silencers are concerned. Silencers were declared to be the tools of professional killers with no legitimate purpose. There are a number of other reasons one might advance for the silencer provisions which do not seem to have been considered. One might think that silencers are inherently more dangerous than other firearms. At least one court has declared that it is the dangerous nature of silencers which lead to their control (*U. S. v. Dunlap*, 209 F.3d 472, 478 (6th Cir. 2000)). Yet there is nothing in the legislative record to indicate the inherent danger of silencers was an issue. One congressman, before being corrected by the expert witness, thought silencers were used “to transform a gun into an automatic weapon” (U.S. Congress, 1986a:75). Otherwise, despite numerous people testifying against silencers at the hearings, no one actually claimed they were dangerous. Congressman Hughes, for example, in discussing the provisions regarding machineguns and silencers, began by declaring: “To have an operating machinegun in somebody’s house, it is a dangerous weapon. It is extraordinarily dangerous. It really is.” He then went on to discuss silencers in a totally different vein, merely declaring that there was no reason “why a sportsman would want a silencer” (U.S. Congress, 1986a:759-60). One might think that silenced firearms are more likely to be discharged than a normal firearm, or that they make it easier for a criminal to get away with a crime. No reasons for punishing use of silencers were advanced; the constant refrain was that these devices were used exclusively by professional criminals.

Whether the provisions are intended as punishment or deterrence is an important question for evaluating enhanced penalty provisions. The evidence suggests that enhanced penalties for use of a firearm in a crime do not deter their use in crime (Marvell and Moody, 1995:247).<sup>8</sup> There are a number of reasons this may be true. First, potential criminals often do not know what the penalties are and hence will not be deterred by them; second, the criminal may think “I will never be caught” and so does not think the potential penalty matters; third, the criminal may decide the advantage of using the weapon is greater than the risk of additional penalty. All of these factors are probably more true with silencer use than other firearms. The silencer provision is very obscure, and the average criminal has no idea that there is a 30-year enhanced sentence for their use in the commission of a crime. Even if the “professional criminal” is more likely to know the penalty than others, the result could simply be that professional criminals will use disposable objects for silencers

to avoid being caught, and so the law will most likely affect non-professionals who lack knowledge of both the law and the ease with which it can be avoided. It may be that people who consider using silencers think that if they do they will not be caught, or that their chances of being apprehended are so greatly reduced by using a silencer that it is worth the risk. So despite the harsh sentence attached to silencer use, the statute may still have little or no deterrent effect.

### Data on Silencer Use and Conviction

The rest of this paper will be devoted to analyzing court data involving prosecutions involving possession and use of silencers. There are three basic provisions governing silencer use in federal law. First is use of silencer during commission of a federal crime (18 U.S.C. § 924(c)(1)); second is possession of silencer by felon or other prohibited person<sup>9</sup> (18 U.S.C. § 922(g)); and third is possession/manufacture of an unregistered silencer and possession of silencer without a serial number (26 U.S.C. §§ 5822, 5841 5861, 5871). One goal of this research is to know how many convictions fit into each of these categories.

Additional questions that will be addressed include, first, how many federal convictions over the last 10 years involve mere possession of an unregistered silencer by otherwise law-abiding citizens? Second, how many convictions involve prohibited persons in possession, and what were the prior felonies or acts which caused them to be on the list? For example, were they previously convicted of violent or non-violent offenses, did the prior conviction involve firearms, and so forth. (A felon who had previously been convicted of first degree murder with a firearm is probably more dangerous than an illegal alien with a silencer who has no criminal record, or someone whose felony involved non-violent actions.) Third, how many people have actually been convicted of using silencers in violent crimes, and what were those crimes? For example, do people use silencers for murder and robbery, or simply carry them when they buy drugs?

### Methods

#### Data Source

Lexis and Westlaw databases were used because they permit complete text searching of cases. However, these databases do not include every federal court case. There are about 75,000 federal criminal prosecutions in the United States each year (see Table 1), and only about 25

**Table 1. Federal Criminal Prosecutions**

Year	Total criminal cases	Criminal defendants	Firearm prosecutions	Firearm defendants
2000	62,745	83,963	5,387	6,223
2001	62,708	83,252	5,845	—
2002	67,000	88,354	7,382	—
2003	70,642	92,714	9,075	—
2004	71,022	93,349	9,352	10,481
2005	69,575	92,226	9,207	—

*Source* : Administrative Office of US Courts - year end reports  
<<http://www.ojp.usdoj.gov/bjs/>>.

percent are reported by Lexis and Westlaw. Both Lexis and Westlaw have informed the author that they do not know exactly what percentage of total cases is reported. However, a simple Westlaw search for criminal cases indicated Lexis and Westlaw report about 15,000 criminal sentences or appeals each year.<sup>10</sup> In other words, the ten-year span of court case data used for this study conservatively contains 150,000 federal criminal prosecutions.<sup>11</sup>

Another way to estimate the extent to which the Lexis database covers the “universe” of court cases is to use criminal filings, or indictments. The Lexis database for criminal filings appears to be complete. Looking solely at cases involving silencers, Lexis lists 65 federal criminal filings over the last two years, suggesting that the 15 cases a year reported in the Lexis cases database account for about half of all prosecutions. Some people charged will never go to trial, but the number of criminal filings confirms that there are relatively few silencer prosecutions.

Because many offenses do not result in court cases, the data do not include all offenses committed during that time. Also, between commission of the crime and final disposition of the case it may be two or three years, so offenses that occurred towards the end of the ten-year period, even if they resulted in a court case, might not be included in the data.

*Decision Rules for Including Cases*

The search parameters included all federal cases reported by Lexis or Westlaw in which the word “silencer” appears in the opinion between January 1, 1995 and January 1, 2005. This search included all court cases (convictions or acquittals) over these ten years. The fewer than 100 cases per year which the search turned up were examined to see in which of those cases possession of a silencer was actually an issue. Every federal prosecution

in which there was a credible accusation of silencer use was included in the database. As shown in Table 2, this database includes 136 convictions for silencer possession, eight enhanced sentences for silencer possession, two cases in which possession a silencer was initially charged but the charge was dropped on a plea bargain, and seven cases in which a silencer was found during an illegal search and the charges were dismissed. In addition to these 153 cases there also were seven cases in which a defendant was accused by a witness of having a silencer, but the allegation did not result in any enhanced sentence or charge. There were also seven reported cases of defendants who were acquitted of possession of a silencer.

Since a conviction must prove possession or use of a silencer beyond a reasonable doubt, the vast majority of the cases are quite certain. Until recently, aggravating factors which were not charged but could result in an enhanced sentence did not need to be proved beyond a reasonable doubt but only by a preponderance of the evidence. In other words, the defendant received a sentence enhancement rather than a conviction because the possession of the silencer could not be proved beyond a reasonable doubt. Although the eight enhanced sentences are thus not quite as certain, they have also been included in the data as the existence of the silencer is more likely than not. The number of such cases is fairly small and their inclusion does not significantly alter the overall findings of this study. Of the eight enhanced sentences only one involves a serious crime (extortion), and three of the eight offenders had prior records. The two cases of plea bargaining in which the silencer charge was dropped were included because again it seems more likely than not that a silencer was actually present. In any case, there were only two instances and both involved minor drug trafficking offences.

When there is testimony to the existence of a silencer but insufficient evidence even to allow an increased sentence for an aggravating factor, such cases were not included in the data. Because possession of a silencer was not used by the court in sentencing as an aggravating

**Table 2. Federal Silencer Cases Reported Lexis/Westlaw 1995-2005**

Convictions for silencer possession	136
Enhanced sentence for silencer possession	8
Silencer charge dropped on plea	2
Evidence excluded to due to illegal search	7
Defendant acquitted	7
Allegation of silencer but no charge or enhancement	7
<b>Total</b>	<b>167</b>

factor, the judge must not have believed a silencer was actually possessed. Even though there are relatively few such cases, those few cases include one armed robbery, one assault, two racketeering, and a gang style murder. Because there are so few serious crimes in the database, inclusion of this handful of crimes would alter the final data with respect to serious crimes. Murder with a silencer is so rare that if the doubtful murder case were included it would increase the number of homicides committed with a silencer by 50 percent, from two to three reported cases in ten years. In the discussion of statistical use of silencers which follows, cases where there is only an unsubstantiated allegation of silencer use have not been included.

### Results

The Lexis/Westlaw database contains 153 cases over the past ten years in which the evidence suggests a silencer was used for a criminal purpose — including unlawful possession of a silencer where no other crime was committed. That gives an average of about 15 reported cases each year, and assuming this represents close to half of all prosecutions, one can assume 30-40 total cases per year. This is out of 75-80,000 federal criminal prosecutions each year. Overall numbers certainly suggest that silencers are a very minor law enforcement problem.

Moving from the overall numbers and looking at more specific offences, it appears that use of silencers in truly violent crime is even more rare. Thirty-six of the 153 defendants (23%) had prior criminal records, although many were for relatively minor offenses. For 17 of those the prior offense was not listed. The 19 whose prior records were listed broke down as follows (if there was

more than one prior then the most serious prior conviction is listed): 4 drug trafficking, 3 misdemeanors (disorderly conduct, domestic violence, possession of marijuana), 2 felony possession of drugs (but not trafficking), 2 assault, 1 murder, 1 arson, 1 rape, 1 burglary, 1 attempted grand larceny, 1 DWI, 1 carrying concealed weapon, 1 (previous) possession of silencer. So even for the 23 percent of defendants with a prior record, almost half of them (8 out of 19 reported) had fairly trivial, non-violent prior crimes (see Table 3).

There were 20 cases (13%) in which possession of silencer was the only charge (state or federal). These would not be subject to the 30-year enhanced sentence. Thirty-seven cases (24%) included other illegal weapons charges (such as possession of “short barrel” rifle, or an automatic weapon), but by a person who had no criminal record and no apparent intention to use the weapons for a violent purpose. Not surprisingly, many people who manufacture silencers also manufacture other firearms, which is illegal without a permit.

There were 50 cases (32%) in which silencers were found during drug raids, and in which drug trafficking was the most serious charge. Almost without exception the silencer was simply found on the premises when the residence was searched for drugs. In these 50 cases there is no evidence that the silencer found during the drug raid was ever used to injure anyone.

In 32 cases (21%) some crime other than drug trafficking was charged: 7 RICO or Continuing Criminal Enterprise, 6 robbery, 5 illegal sale of weapons, 4 murder, 2 attempted murder, 2 conspiracy to murder, 2 extortion, 1 sexual assault (state crime), 1 bank robbery, 1 assault and 1 burglary (state crime).

If we include sale of weapons in the victimless category (along with possession of illegal weapons, drug trafficking, and mere non-violent possession of weapons by a felon), then more than 80 percent of federal silencer charges are for non-violent, victimless crimes. If we consider all those convicted of RICO, CCE, extortion, robbery and conspiracy as “professional” criminals, these still represent less than 20 percent of defendants prosecuted.

In 14 cases of 160 silencer prosecutions (about 9%) the defendant was acquitted of all charges (7 cases) or the case was dismissed due to illegal search (7 cases). It should also be noted that there were 3 other acquittals in which the defendant was acquitted of use of a silencer during a crime but convicted of simple possession of an unregistered silencer.

The guns found with silencers were overwhelmingly small caliber, low power semi-automatic pistols. Of the

**Table 3. Criminal Record for Federal Silencer Defendants**  
n = 19\*

Most serious prior offense	Percentage
Drug trafficking or possession	32 %
Misdemeanor	16
Assault	11
Burglary/larceny	11
Weapons charge	11
Drunk driving	5
Murder	5
Arson	5
Rape	5

\* Prior offense was given for only 19 of 36 defendants with prior records.

reported cases, 46 listed the caliber of the firearm associated with the silencer. For those cases in which caliber is noted, 52 percent were .22, 32 percent were 9mm (.354 caliber), 10 percent were .38, 2 percent were .25 caliber, 2 percent were .45 caliber, and 2 percent were either 9mm or .22.<sup>12</sup> So of the 46 cases with listed calibers we have only one large caliber handgun—the .45. While a 9 mm could make up for its small caliber by using a higher-velocity bullet, a silenced 9mm would need to fire a subsonic round and thus would not be as deadly as a non-silenced 9mm.

*Use or Discharge of Guns to which a Silencer is Attached*

There are very few cases of the actual use of a silencer in a crime, that is, a firearm is discharged with a silencer attached. Of the federal court cases reported in the Lexis/Westlaw database between 1995 and 2005, there are only two cases of a silencer being used in a murder in the United States. One was a case of an armed robbery of a postal truck in which the driver was shot (*U.S. v. Gallego*, 191 F.3d 156 (2d Cir. 1999)). In the other case, best described as a gang style “hit,” one of the partners in the gang was murdered with a silenced firearm in 2000 (*U. S. v. Williams*, 372 F.3d 96 (2d Cir. 2004)). There is one case of attempted murder with a silencer found in the federal courts involving two servicemen in Germany (*U.S. v. Roeseler*, 55 M.J. 286 (2001)). It is difficult to know whether to count this case in the statistics since it occurred in Germany, but it has been included with the 153 cases in this study. In one other military case, the defendant used a silencer to shoot out his ex-girlfriend’s window and was tried for assault. Oddly, under military law they were not charged with silencer use, and apparently could not be charged under U.S.C. 924(c). The shooting the window incident does look like a case where the fact that the weapon was silenced may have made discharge more likely. One suspects that if he had not had a silencer on the gun he probably would have just thrown a rock through the window.

In addition to the four cases in which a silenced firearm was actually fired, there are eight more cases in which a silencer was actively used during commission of a crime but not used to physically injure anyone. In six cases offenders had silencers attached to their guns during armed robberies, but the firearm was never discharged. Westlaw reports more than 2,000 prosecutions for robbery on the federal level during the period covered by this study, so these six cases represent less than 0.3 percent. There was also one other attempted murder and one case

of poaching in which a silencer was actively used during a crime.

To summarize, for the federal silencer prosecutions there is an injury rate of 2 percent (even counting the attempted murder that occurred in Germany), and an active employment rate of less than 8 percent (12 cases). In more than 92 percent of cases the silencer involved in the prosecution was not actively used in any way, but was simply found in the possession of the defendant.

If we compare these figures to all federal firearm prosecutions, we find that ordinary firearms are far more likely to be actively employed, as well as used to injure a victim. For comparison purposes a survey of federal firearm prosecutions was run using the Westlaw database. This survey found that for a random sample of federal firearm prosecutions, 7 percent involved actual injury to a victim, while another 17 percent involved active use of the firearm (for example, brandishing a firearm during robbery), while 76 percent of federal firearm prosecutions involved no use.<sup>13</sup> This survey also found that 33 percent of people prosecuted for firearm possession had previously been convicted of a felony, while another 9 percent were otherwise prohibited from possessing a firearm (such as because they were subject to a restraining order). A survey limited to the Ninth Circuit had virtually identical results, with 34 percent prior felony conviction and 7 percent prohibited from possessing a firearm for some other reason. This 42 percent rate of prior conviction compares with only a 23 percent rate of prior conviction for silencer prosecutions (see Table 4).

Comparing the silencer conviction data with ordinary firearm conviction data shows that guns “equipped with a silencer” are only one-third as likely to be used to kill or injure, one-half as likely to be actively employed, and one-half as likely to be used by someone with a prior record. Guns equipped with a silencer, rather than being more dangerous and more likely to be used by professional criminals or repeat offenders, are far less dangerous and less likely to be employed by professional criminals.

**Table 4. Use of Silenced and Non-Silenced Firearms in Federal Prosecutions**

	All firearms (n = 300)	Silenced firearm (n = 153)*
Discharged	7 %	2 %
Actively employed	24	8
Defendant had prior record	42	23

\* Represents all cases within ten-year period of 1995 to 2004.

*Comparisons with California State Cases*

The vast majority of murder (and other violent crime) is prosecuted locally. Murder is not generally prosecuted on the federal level unless there is some special circumstance, such as that the victim was a federal employee, or the murder was economically motivated or part of organized crime. While only a small percentage of violent crime is prosecuted federally, in 1997 there were more than 3,000 homicides prosecuted in federal court, and that number has been increasing in recent years (American Bar Association, 1998:89). In the ten-year period of this study, there were approximately 40,000 homicides prosecuted in federal court and considerably fewer than .01 percent involved a silencer.

Still, federal data may not be representative and therefore it is worth examining data from state prosecutions. The state chosen is California, because it is a large and diverse state (and thus will provide a fairly large sample). Unfortunately, a far smaller percentage of state cases are reported than federal. Westlaw reports about 6,500 criminal cases per year in California courts. The number of California criminal cases reported is fairly small because a large number of criminal cases plead guilty in the California system—only 3 percent of criminal charges result in jury trials (Judicial Council of California, 2004:47). Some defendants who plead guilty can also appeal their sentence. Most convictions are appealed, and the vast majority has written opinions.<sup>14</sup> More serious crimes (such as homicide) are both contested and appealed far more often than minor crimes (such as possession of an illegal weapon). Westlaw reported about 1,700 murder or homicide prosecutions (on appeal) in California courts for the five years from 2000 to 2004. California prosecutes about 1,200 homicides each year (Morgan and Morgan, 2005: 26) so for five years data are available for 1,700 out of 6,000 cases (or 28%). The California data are skewed towards more serious crimes, and we would be unlikely to see many of the less serious crimes often reported in federal courts. Nevertheless, there are a fairly large number of serious crimes such as murder, rape and so forth. Despite the handicap of minor weapons charges being under-reported, the California cases confirm the data from the federal courts.

Unlike the federal system, California has no additional mandatory minimum for commission of a crime using a silencer, but possession of a silencer is a felony in California (Cal Pen Code § 12520 (2005)) carrying a normal penalty of a year or two in prison. Possession of a firearm or silencer by a felon is also a crime and it is presumed that if the defendant were a felon he would

have been so charged.

The California data were gathered just like the federal data. Lexis and Westlaw databases were used to identify available cases of prosecution involving silencers. One major difference between the state and federal datasets is that this part of the study will only look at California data going back five years, rather than the ten years as for the federal data. The reason for this is that the California data prior to 2000 are very sparse. Because there are so few cases reported prior to 2000 it makes little sense to include them in the data. The search, looking for the word “silencer” in the text of opinions, resulted in 18 cases in five years (out of a total reported caseload of about 25,000 criminal cases).

As expected, the state charges tend to be more serious than the federal ones, but there are a number of similarities. Only 4 of the 18 defendants (22%) apparently had prior records. This is almost identical to the 23 percent found to have criminal records in the federal courts. Only 4 or 5 defendants (22%-28%) actually used the silencer to commit a crime. While 9 of the 18 defendants committed serious crimes, the other half committed what can be characterized as “victimless crimes” involving drug or weapon possession. While this is a higher rate of non-victimless crime than found in federal prosecutions, it is explained by the fact that minor crimes are less often reported in the state system. In fact, if we look at reported cases of California prosecutions involving any type of firearm, only 12 percent of those cases were limited to victimless crimes (this is examined below in greater detail).

There are three cases in which a silencer was actually used in a murder, one more murder for which a silencer might have been used, and one attempted murder using a silencer (plus two more cases in which a murderer was found in possession of a silencer but it had not been used in the crime). Out of 1,700 recorded homicide prosecutions in California over the last five years, there were only three or four which involved silencers; and since the data include only about a quarter of reported homicide prosecutions, we can assume about three prosecutions per year for murder using a silencer in California.<sup>15</sup> This is higher than the rate found in federal prosecutions, but still it is an almost insignificant number: 3.5 out of some 1,700 murder prosecutions (0.2%). Out of 5,000 to 6,000 reported felony cases in California each year fewer than four involve silencers.

There is one case of armed robbery using a silencer. Armed robbery is a serious enough crime that it is frequently reported in the California cases—there are more than 1,000 reported cases of armed robbery involving

firearms from 2000 to 2005. Use of a silencer in armed robbery appears to be extremely rare, constituting fewer than 0.1 percent of reported cases involving firearms. Because the number of armed robberies involving silencers is so small, it is not possible to tell whether there could be a higher rate of actual discharge of firearms equipped with silencers. There is no evidence that guns equipped with silencers are more likely to be fired during armed robberies.

As with the federal data, a survey of state prosecutions involving firearms was done to compare with silencer crimes. A Westlaw search was done for 200 California prosecutions involving firearms.<sup>16</sup> Thirty-one percent involved murder or manslaughter; 32 percent involved attempted murder, assault or kidnapping; 16 percent involved armed robbery; and 10 percent involved different types of threats, such as threatening witnesses or reckless endangerment. Only 13 percent of California cases involve what would be called victimless crimes, such as narcotics violations, or possession of a firearm by a felon. This 13 percent victimless crime rate for ordinary firearms corresponds to a 49 percent victimless crime rate for those convicted of silencer possession in California courts.

In 55 percent of firearm cases the firearm was actually fired, in 26 percent more the firearm was actively used to threaten a victim, while in 19 percent of the cases the firearm was not used at all. With silencer prosecutions in 13 or 14 of the 18 prosecutions (72% or 78%) the silencer was not used in any way during the crime. Finally, 22 percent of defendants in silencer prosecutions had a criminal record, while 49 percent of those prosecuted in California for crimes involving ordinary unsilenced firearms had a criminal record (see Table 5).

This confirms that silencer use in crime looks to be extremely rare, and strongly suggests that there is no correlation between use of a silencer and gravity of the offense.<sup>17</sup>

## Conclusions and Recommendations

The above numbers suggest several important conclusions. First, use of silencers in crime is rare. Even when silencers are possessed they are even less frequently used. Silencer use is *not* primarily connected to organized crime. There were a few such cases, but in general, use of silencers appears to be a poor proxy for organized crime. Silencers probably are more threatening to their victims on a psychological level when used in crimes such as armed robbery. There is no evidence to suggest that criminals who possess silencers are more likely to be violent. For example, in the 50 cases of silencers found in drug raids, none of the defendants used a silencer to shoot at police, and in only a few of these cases was there any resistance at all.

Whether silencers should be illegal at all is a good question. While most of the federal cases examined here came from states where silencers are illegal (New York, Illinois, California), those also seem to be states where there is high crime. The number of silencer cases is not high enough to really determine if states where silencers are legal make their use in crime more likely. There is no real evidence that it does, but given the paucity of solid evidence all one is left with is a judgement about the comparative danger versus potential risk. The risk looks small, but the benefits appear fairly small too (given that there are readily available alternatives like air pistols or crossbows). One might conclude that if silencers were more common their use in crime would also increase, but there is no real way to tell.

A more telling criticism of laws against silencers is the ease with which they are avoided. Since one can effectively muffle a firearm by doing nothing more than wrapping it in a towel it is unlikely that laws banning professionally manufactured (or home-made) silencers are likely to have any real effect on crime. In one case, for example, the murderer used a towel as “a make-shift silencer” and yet because it was only a towel this was not an additional crime (*People v. Garcia*, 2006 WL 3307392, \*7 (Cal. Ct. App.)). True professionals, who know what the penalties are and who know how to muffle a firearm with improvised devices, can avoid the penalty quite easily. The laws are more likely to ensnare kids and hobbyists (or just common, dumb criminals) rather than professional killers. This suggests that laws banning silencers or even draconian sentencing enhancements are unlikely to have any effect on crime. Either the criminal will not know about it, or if he does he will simply use a pillow to avoid the risk of punishment.

With respect to lengthy mandatory sentences, there

**Table 5. Use of Silenced and Non-Silenced Firearms in California Prosecutions**

	All firearms (n = 200)	Silenced firearm (n = 18)*
Discharged	55 %	25 %
Actively employed (but not fired)	26	0
Used for violent crime	88	50
Used in victimless crime	13	50
Defendant had prior record	49	22

\* Represents all cases within five-year period of 2000 to 2004.

appears to be no justification at all for a 30-year minimum. There is no evidence that attaching a silencer to gun makes its discharge more likely. There are so few cases of silencers being used in armed robberies that one cannot conclude anything from that type of situation; however, it does appear overall that for federal prosecutions involving silenced versus non-silenced weapons, it is non-silenced weapons that appear proportionally more likely to be used. The only harm that seems to result from possession of a silencer is that the victim will likely feel more threatened when a silenced weapon is brandished in a robbery or kidnapping. That may be a reason for a slightly increased sentence. Addition of a year or two to a sentence for possession of a silencer during a serious crime (which is basically what California does) seems reasonable. Yet a 30-year sentence enhancement makes no sense at all. It makes no sense to treat a person who had a silenced .22 rimfire which is never brandished, much less fired, as more dangerous than a person with a .44 magnum or a shotgun which is fired and is used to injure a victim. Judges often try to find ways around invoking such harsh sentences, but the risk is that people guilty of very minor crimes may end up with draconian sentences. There is also a real danger of entrapment. There are many cases in which federal agents or informers ask a drug dealer to get them a silencer (and one case in which a defendant was framed when police planted a homemade silencer, *U.S. v. Epley*, 52 F.3d 571 (6th Cir. 1995)). This allows federal agents to manufacture extremely lengthy sentences for otherwise minor offenses.

A far better system would be to allow judges to add an enhanced penalty if the defendant is found to be a professional criminal. Possession or use of a silencer would be a factor which could be used to determine this. This sort of system would allow judges to target the professional criminals or “hit men” against whom the law is theoretically targeted.

## Endnotes

1. “Crime of violence” as defined by 18 U.S.C. § 3156 is fairly broad and includes any crime which involves a substantial risk of physical force against persons or property.

2. Until 2005 the sentencing guidelines were mandatory. In *Booker v. United States* (2005) the Supreme Court declared that the guidelines were advisory only. This does not affect the 30-year mandatory minimum for use of a silencer in a crime, but it does allow federal courts discretion to sentence those possessing a silencer

without a permit to any sentence less than the maximum ten-year penalty.

3. For reference, here is the noise level (in decibels) of different kinds of guns: capgun (156), balloon pop (157), fireworks (162), rifle (163), handgun (166), and shotgun (170).

4. The authors conclude that a gunshot wound is approximately three times as deadly as a knife wound, but knives are used to kill or injure the victim in armed robberies three times as often as a gun. Hence the authors conclude that if knives were substituted for guns in armed robberies the result could be far more injuries and probably about the same number of deaths. In other words, for twenty armed robberies with a knife and twenty with a gun, we might see two people shot and six people stabbed. The shootings result in one killed and one wounded; the stabbing result in one person killed and five wounded. Other authors have found that the rate of death from knife wounds may be less than 33 percent of gun wounds. Zimring (1968) found that the rate of fatal injury with knives is anywhere from 20 percent to 40 percent of a gun depending on how one uses the statistics.

5. One judge has declared that no one “needs a silencer.” *U.S. v. Hall*, 171 F.3d 1133, 1555 (8th Cir. 1999) (Panner J., concurring). The world is full of unnecessary (but generally harmless) objects. The only reasonable question to ask is whether the benefits of the private ownership outweigh the dangers.

6. The 1986 bill was the “Firearm Owners Protections Act”; the 1988 bill was the Anti-Drug Abuse Act of 1988. The 1988 bill was more than 200 pages, and the increase from 20 years to 30 years for crimes committed with an automatic weapon or silencer was just one tiny part of this large bill; I have been unable to find any mention of silencers in the debates and reports on the Anti-Drug Abuse Act (P.L. 100-690).

7. The Bureau of Alcohol, Tobacco and Firearms was also contacted for this paper and informed the author that they kept no statistics on silencer use. E-mail on file with author.

8. To summarize their basic findings: enhanced penalties for use of firearms in crime were first adopted by the federal government in 1968 and were subsequently adopted in most states in the decade which followed, yet the rate of firearm use in crime is higher today than it was

in the late '60s. The authors also looked at a state-by-state basis and concluded that the same trend is true in almost every state that has adopted such enhanced penalties.

9. Persons prohibited from possessing a firearm under this section include (1) felons (2) fugitives from justice; (3) unlawful users of, or addicts to, any controlled substance (4) mental defectives (5) illegal aliens (6) dishonorably discharged veterans (7) renounced citizenship; (8) subject to a restraining order (9) misdemeanor convicts of domestic violence.

10. Federal Courts of Appeals heard about 60,000 appeals in 2004. Westlaw lists 24,000 cases reported. Written opinions of the federal courts of appeals are reported in Lexis and Westlaw, but some appeals are resolved in summary proceedings without a written opinion.

11. I have run similar searches for other years including a more narrow search for conviction for use of a weapon during crime. For example, we know that in 1997 there were 1830 defendants charged and 1305 defendants were convicted of possession of a firearm in commission of a crime under 18 U.S.C. § 924(c). Data from Administrative Office of the United States Courts (American Bar Association, 1998:87). I then ran a Lexis search for cases charging a violation of 18 U.S.C. 924(c) in 1997 and turned up 945 cases on both the district and appeals level. That number is somewhat inflated since there can be multiple appeals, but this suggests about 50 percent reported. To see if it would vary much from year to year of the study I ran the same search for 2004 and found 1065 cases, or about 10 percent more.

12. In the one case of "either 9mm or .22" we are told that there was a 9mm and a .22 one of which had a silencer attached but it is not clear which.

13. This search took the first 100 cases that turned up in Westlaw under "firearm" and involved 100 prosecutions involving firearms between July 5 and July 14, 2005. I then ran two longer term circuit specific cases, pulling the last 100 cases officially reported in both the Second and Ninth Circuits. These results were quite similar with respect to injury rates, though they found a fairly large difference in use rates. The Ninth Circuit cases found an 8 percent injury rate (6 murders and 2 assaults, plus one case of discharge into a building which did not result in injury), and an additional 29 percent rate

of active employment. The Survey of the Second Circuit yielded identical injury rates (8%) with six murders, one attempted murder and one assault with a firearm.

14. In 2004 there were 5,800 criminal felony convictions, *Court Statistics* at 47.1, 6500 appeals filed (since a case may have more than one appeal), *id.* at 28, and 5500 written opinions. All appear to be reported in Westlaw. All California prosecutions are entitled "People v. \*" so I ran a Westlaw search for California cases entitled "People v." This resulted in 6605 cases for 2005, 6236 for 2004, 6670 for 2003, 6446 for 2002.

15. This is counting the three definite, plus the one possible, as 3.5 multiplied by 4 (assuming a 25 percent reporting rate), or 14 in five years.

16. For comparison with the silencer prosecution data I compared 200 randomly selected prosecutions in California courts -- basically the first 100 prosecutions involving firearms reported by Westlaw for 2003 and for 2005. The statistics from 2003 and from 2005 were virtually identical, though the statistics cited are using all 200 cases.

17. It could be argued that if a gunshot is quiet that it will be less likely to be heard, and a crime will be less likely to be reported. However, if the silencer is used in a robbery or assault then the victim will be able to tell the police that a silencer was used. Even in murder cases with no witness, ballistics will normally be able to tell if a silencer was used. In *People v. Ewell* (Cal. Ct. App. 2004) the court explained :

Unusual scratches on the bearing surfaces of the six bullets recovered from the crime scene and autopsies led Allen Boudreau, a firearms expert, to determine that all six bullets were fired by the same weapon, that the weapon had a ported barrel (a barrel in which holes had been drilled), and that a homemade sound suppressor (silencer) was used. . . . He concluded that tennis ball particles, such as those found on Glee's clothing and in the piece of carpet which had been under Glee's body, would have been ejected had a bullet been fired through a sound suppressor made with tennis balls; and that steel wool particles, again such as those found on Glee's clothing, would also have been ejected from a homemade sound suppressor.

Police detectives from Chicago police department also have assured this author that unless the bullet passed through the victim and could not be recovered, ballistics reports would normally be able to tell of the bullet had gone through a silencer. The two individuals are Rudy Nimocks and James Malloy, interviewed March 17, 2005. They stated also that in their fifty years of detective work they could only recall one case in which a silencer might have been used to commit a crime. Thus it seems very unlikely that there is a lot of silencer use in crime which is simply undetected.

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