

# Government, Law and Policy Journal



A Publication of the New York State Bar Association  
Committee on Attorneys in Public Service, produced in cooperation with the  
Government Law Center at Albany Law School



## Firearms, Public Safety and the Law

- The Sullivan Law at 100
- Advocate's View of New York Gun Laws
- Regulating Guns in New York
- Microstamping Guns
- Does the Second Amendment Apply in New York?
- Gun Law, Policy, and Politics
- Federal Shield Law
- Q&A on Firearms Availability, Carrying, and Misuse
- Gun Control Movement Reinvigorated
- Fort Hood and Its Aftermath
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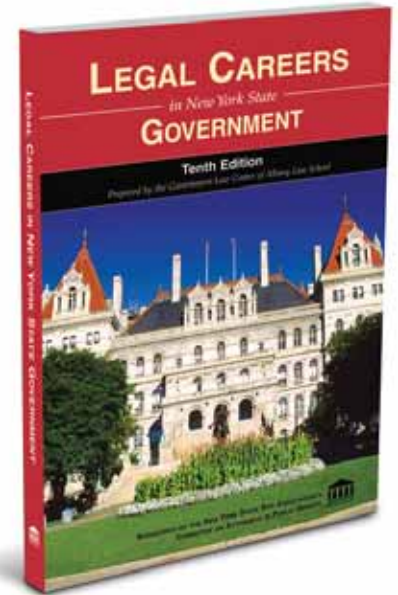
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# Message from the Chair

By Peter S. Loomis

It does not seem possible that it has been three years since my appointment as Chair of the Committee on Attorneys in Public Service by then NYSBA President Michael Getnick, and that this is my last Message to our readers of the *Government, Law and Policy Journal*. The time has flown by quickly and my term will end at the end of May. I recall that when



I first assumed this position, I reflected that I was succeeding then-Chair Patty Salkin of Albany Law School's Government Law Center, an extraordinary leader of this Committee who no sane person would want to follow. I continue to salute Patty's ongoing work for this Committee and this Association. Indeed, it has been a challenging three years for me, with successes of which I am very proud, frustrations and disappointments that I continue to ponder and which require thought and consideration by this Committee's future leadership if it is to remain viable and vibrant.

As to our successes, there can be no question but that this publication continues to be one of our committee's crowning achievements. With each issue, the *Journal* continues to impress, and we are indebted to our partner in this endeavor, the Government Law Center at Albany Law School, our editor, Rose Mary Bailly, our guest editors over the years, and the students at Albany Law School. This publication is a true collaborative effort. Without the ongoing work and dedication of many individuals it simply could not exist.

I am also extraordinarily proud of the Annual Meeting programs we have presented over the last three years, and of our Awards for Excellence in Public Service and our Citations for Special Achievement in Public Service, which were first presented under my tenure. We have mounted programs that have zeroed in on relevant issues to New Yorkers, and have appropriately honored those whose public service contributions have been truly exemplary. These events exemplify what this Committee is all about.

As a former Chief Administrative Law Judge prior to my retirement, I will admit to some bias, but promulgation during my tenure of our Model Code of Judicial Conduct for State Administrative Law Judges, a product of the Committee's Subcommittee on the Administrative Law Judiciary, and which was adopted by the House

of Delegates in 2009, stands as the Committee's single unique achievement of which I will always remain most proud.

Now for the frustrations and disappointments, I have previously written about the challenge of attracting more public sector attorneys to bar membership and then actively involving them in bar activities. Our committee, of course, is dedicated to attorneys in public service, and it is clear to me that there are still many impediments facing these attorneys, both external and internal. Public sector attorneys must pay their own yearly membership fees, and there is currently no program which would offer public sector attorneys reduced dues across the board and thereby make membership more attractive. It has been argued that public sector attorneys, in some cases, earn more than those in private practice, so perhaps a reduced membership fee should simply be income based. I am convinced that the current cost of membership stands as a major reason why the Association does not attract a higher percentage of lawyers working in public service. A second and most unfortunate reason, having nothing whatsoever to do with money, is that some offices employing public sector attorneys are simply not at all supportive of their staff being active in bar activities. Rather than taking pride in such activities by their staff, some offices see bar work as detracting from the time these lawyers devote to their jobs. I have personally experienced frustrating situations during my tenure when attorneys on this committee stated that not only did they not receive support from their employers, but that they actually felt at risk if they were more active and took on additional committee responsibilities. Volunteer work on one's own time for self improvement and to benefit one's profession should never be viewed in a negative context.

While a majority of our committee's members have been active and vital to our work, it is also frustrating that many have not. In any organization, motivating members to become involved is a continuing challenge for leadership. Given the initial difficulty of first attracting the public sector member, however, the challenge becomes even greater. The Committee on Attorneys in Public Service is now in its 12th year of existence, and perhaps it is time for a fundamental review and analysis of the Committee's work and mission, an examination aimed at discovering ways to still accomplish our important core functions—publication of the *Journal*, presenting the Annual Meeting program and our Awards and Citations—but yet significantly broaden our appeal to attorneys who are not yet bar members. In July 2010, former President Stephen Younger appointed a Special Committee on Strategic Planning, and which presented its final report for approval by

*(Continued on page 3)*

# Editor's Foreword

By Rose Mary K. Bailly

In this issue of the *Government, Law and Policy Journal*, Dan Feldman, our Guest Editor, invites our consideration of gun law with a series of articles by well known and well regarded experts. The articles examine issues of public policy, public health and safety, and politics and the resulting laws that govern the sale and ownership of guns. We are grateful to Dan for assembling these authors to offer us their thought provoking ideas.

I would like to thank our Student Executive Editor for 2011-2012, Daniel Levin, Albany Law School, Class of 2012, for his professionalism, enthusiasm and organizational skills. He and his Albany Law School colleagues, Alaina Bergerstock, Oriana Carravetta, Stefan Eilts, Jennifer Jack, Kevin Rautenstrauch, Stephanie Sciandra, Adam Staier, Catherine Van Auken, all of the Class of 2012, worked efficiently to produce this final product. As always, we were in the capable hands of the staff of



the New York State Bar Association, Lyn Curtis and Wendy Harbour, for their expertise and enduring patience. And last, my thanks to Patty Salkin for her inspiration and support.

Finally, I take full responsibility for any flaws, mistakes, oversights or shortcomings in these pages. The errors are entirely my own. Your comments and suggestions are always welcome at [rbail@albanylaw.edu](mailto:rbail@albanylaw.edu) or at Government Law Center, 80 New Scotland Avenue, Albany, New York 12208.

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## Message from the Chair

*(Continued from page 2)*

the Executive Committee in November 2011. While that Committee looked at the Association as a whole, perhaps a similar but narrower look at CAPS would be beneficial and identify strategies to improve our committee. There are lasting and meaningful personal rewards that come from participating in groups such as ours, and we need to let others know what they are missing.

I have taken enormous pride in our committee and I want to finally thank those with whom I have worked over the last three years. We have had some extraordinary committee coordinators and subcommittee co-chairs, whose work has made our accomplishments possible, and I am deeply indebted to them all. I salute our mem-

bers for their interest and participation in the work of this committee. I have made great friends through CAPS, and because of the relative isolation in which many public sector attorneys work, I would likely never have met most of these people absent the bar association and our committee. Lastly, CAPS simply could not function without the continuing support of our tireless team from the bar staff. Pat Wood and Maria Kroth have made life much easier not only for me but for all of the committee chairs who have preceded me. Their dedication is simply without equal. This year, Megan O'Toole, our new staff liaison, has stepped in and been a great partner. Thank you all for your devotion and work on our behalf. I wish my successor all the best.

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# Guest Editor's Foreword

By Daniel L. Feldman

As far as I can tell, this issue of the *Government, Law and Policy Journal* presents the first major published symposium on firearms, public safety, and the law since the second issue of *Albany Government Law Review* in 2008. It brings together cutting-edge thoughts on these matters from some of the most prominent scholars, advocates, and government officials currently active in the field. They do not always agree with each other, but together they provide solid facts and analysis upon which judges, legislators and executives should be able to base sound and informed decisions. I am deeply grateful to the authors of these articles for their outstanding contribution to the public interest.



David D. Jensen, a prominent Second Amendment solo practitioner who often represents defendants accused of firearms possession violations, leads off our discussion of legislation with a masterful history of New York's Sullivan Law at its 100th anniversary. Jackie Hilly, executive director of New Yorkers Against Gun Violence, addresses the legislative picture in New York from what is of course the opposite perspective, explaining why and how gun control laws need to be strengthened, especially at the federal level. Laura Cutiletti and Julie Leftwich, of Legal Community Against Violence, experts in state gun control laws across the country, deem New York's gun laws relatively strong and effective, but suggest that New York could nonetheless benefit from the examples of some other states' initiatives. New York State Assembly Member Michelle Schimel (who happens to represent my own neighborhood, and quite well at that) and State Senator José Peralta lead the effort in our State to advance one legislative initiative strongly urged by Hilly, Cutiletti and Leftwich: requiring "microstamping" of bullets. They have each given us an article on the subject. Interestingly, they offer somewhat different rationales.

I asked my friend Tom King, president of New York's Rifle & Pistol Association, to find an appropriate expert who could represent the views of his organization. Stephen P. Halbrook, another prominent Second Amendment solo practitioner, who has also published extensively on the subject of gun owner rights, answered Tom's call with a fine submission in that regard on constitutional and statutory interpretation. Robert Spitzer, Distinguished Service Professor at SUNY Cortland and the author of *The Politics of Gun Control*, among other books, provides an equally fine opposing submission on the same subject.

Three leading attorneys at the Brady Center to Prevent Gun Violence's Legal Action Project, Daniel R. Vice, Jonathan E. Lowy, and Robyn Long have performed the impressive feat in their article of giving litigators a practical road map that may enable them to win civil lawsuits against culpable gun merchants despite the 2005 federal Protection of Lawful Commerce in Arms Act.

Philip Cook, Senior Associate Dean for Faculty and Research at Duke University's Sanford School of Public Policy and a leading national expert on the costs of gun violence, gives us answers to important questions on the basis of empirical and statistical research.

Richard Aborn, the president of New York's Citizens Crime Commission and a longtime gun control activist, with his associate at the Constantine Cannon law firm, Marlene Koury, offer an insightful overview of the current politics of firearms control. From a different but comple-

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*"[T]his issue of the Government, Law and Policy Journal presents the first major published symposium on firearms, public safety, and the law since the second issue of Albany Government Law Review in 2008."*

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We have a truly stellar group of contributors. We have contributors from the most prestigious gun control organizations: the Brady Center, New Yorkers Against Gun Violence, the Violence Policy Center, the Center to Prevent Youth Violence, and the Legal Community Against Gun Violence. The head of New York's Citizens Crime Commission has given us an article. We have a prominent contributor recruited for us by New York's premier gun rights organization, the New York Rifle and Pistol Association. Another of the most prominent gun-rights legal scholars has given us a history of New York's Sullivan Law. The Assembly Member and State Senator respectively leading the charge for the most cutting-edge gun control legislation in New York have each given us a contribution. One of the foremost experts on the overall costs of gun violence, another on the medical costs, and a third on the politics of gun control, have each authored articles for us. (That makes thirteen, and we will have only twelve articles, but I double-counted—one "foremost expert" is also a contributor from a "prestigious gun control organization.")

mentary perspective, centered on the massacre of fellow soldiers by Major Nidal Hassan at Fort Hood in 2007, using a high-capacity personal handgun, Tom Diaz does the same. Diaz, the author of *Making a Killing: The Business of Guns in America*, among other publications, serves as senior policy analyst at the Violence Policy Center.

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*“With the publication of this issue of the Government, Law and Policy Journal, we have advanced the front lines of thinking about the relationships among firearms, law, and public safety.”*

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Finally, Dan Gross and Alison Dickin, of the Center to Prevent Youth Violence, suggest that if public safety advocates are frustrated by political and statutory barriers to gun control, they may nonetheless achieve important goals by employing appropriate messaging in social action.

With the publication of this issue of the *Government, Law and Policy Journal*, we have advanced the front lines of thinking about the relationships among firearms, law, and public safety. If our contributing authors reap the reward their efforts merit, they will have advanced the front lines of public policy as well.

Daniel L. Feldman is Associate Professor of Public Management at John Jay College of Criminal Justice, a college within the City University of New York. He teaches Ethics and Accountability, Oversight and Investigation, and Policy Analysis.

After practicing securities litigation at a major law firm, in 1974 he became executive assistant to then-Member of Congress Elizabeth Holtzman, and in 1977, he became investigations counsel to then-New York State Assembly Member Charles Schumer.

Elected to the State Assembly from the 45th district in Brooklyn in 1980, between 1981 and 1998, Mr. Feld-

man authored over 140 laws, including New York's Organized Crime Control Act and New York's Megan's Law. As Correction Committee chair for twelve years, he led some of the first efforts to repeal the Rockefeller drug laws.

From 1999 to 2005, on the senior staff of Attorney General Eliot Spitzer, he initiated or contributed significantly to litigation against handgun manufacturers, a major real estate fraud investigation, and significant settlements with prominent banking and insurance companies, while advising the Attorney General on criminal justice legislation and election reform. Subsequently, as Executive Director and General Counsel to the New York State Trial Lawyers Association, he oversaw research, lobbying, finance, legal education, business relationships, a \$5 million annual budget and a 22-member staff. Then, as Special Counsel for Law & Policy from 2007 to 2010, Mr. Feldman advised the New York State Comptroller, Thomas P. DiNapoli, on a wide range of issues including investment policy, economic development, supervision of outside counsel, Retirement System hearings, and the administration of the unclaimed funds program.

A graduate of Columbia College and Harvard Law School, since 1977 Mr. Feldman has taught law, government, and political philosophy at various prominent universities in the Northeast, and lectured on jurisprudence at Oxford University in 1982 and 1990. His first book, *Reforming Government*, was published in 1981, and his second, *The Logic of American Government*, in 1990, both by William Morrow & Company. He was Legislative Editor and co-author of a third book, *New York Criminal Law*, published by West Publishing Company in 1996. He wrote his fourth book, *Tales from the Sausage Factory*, with co-author Gerald Benjamin, published by the State University of New York Press in September 2010. Feldman's articles on American law and government have appeared in numerous scholarly and professional journals, and he served as a member of the Editorial Board of *Public Administration Review* from 1992 to 2000.

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# The Sullivan Law at 100: A Century of “Proper Cause” Handgun Licensing in New York State

By David D. Jensen

New York’s “Sullivan Law”—unofficially named for Timothy Sullivan, the Tammany Hall politician who sponsored it in 1911—created a requirement that handgun owners obtain licenses, even just to keep handguns in their homes.<sup>1</sup> Prior to the Sullivan Law, New York law had prohibited the unlicensed carry of *concealed* handguns, but people did not need licenses to merely possess handguns, or to carry them in open view.<sup>2</sup> The Sullivan Law made it unlawful for a person to have a handgun “in his *possession*...without a written license therefor.”<sup>3</sup> This requirement was, and is, relatively unique in the American landscape. The only other U.S. jurisdictions that currently require licenses to keep handguns at home are Illinois, Chicago, and the District of Columbia.<sup>4</sup>



The Sullivan Law’s second defining characteristic is the manner in which it regulates the possession of handguns away from the home. The Sullivan Law established two types of licenses for private citizens: a license for “a householder, to have such weapon in his dwelling,” and a license “to have and carry concealed.”<sup>5</sup> The only way for an ordinary private citizen to possess a handgun away from his or her “dwelling”—for *any* purpose—was, and is, to obtain a “have and carry concealed” license. However, the Sullivan Law gave officials broad discretion to grant or deny these licenses.<sup>6</sup> This basic approach continues to underpin handgun licensing in New York today.<sup>7</sup>

This article attempts to track the development of the discretionary “proper cause” standard that governs the issuance of licenses to “have and carry concealed.” While the “proper cause” requirement remains the same, its implementation has changed considerably and varies widely between different localities in New York State.

## I. Enactment, Revision and Near-Repeal

The original Sullivan Law legislation of 1911 did not set *any* standard for the issuance of handgun licenses. Instead, it reiterated the operative language that had governed the old (repealed) concealed handgun law, which authorized localities to issue licenses “in such manner as may be prescribed by ordinance.”<sup>8</sup> An amendment in 1913 created the basic issuance standards that remain today.<sup>9</sup> First, the amendment made it the “duty” of licens-

ing officers to issue licenses “to have and possess...in [a] dwelling” to “householders” who were of “good moral character” and for whom “no other good cause exists for...denial.”<sup>10</sup> However, people could obtain licenses “to have and carry concealed” only if the licensing officer found “that proper cause exists for the issuance thereof.”<sup>11</sup>

There have been many proposals to change this basic framework, and the legislature has come close both to making the Sullivan Law much more severe, and also to essentially repealing it. But for two gubernatorial vetoes, separated by almost fifty years, the two essential characteristics discussed above would both have been repealed.

To begin with, there are substantial indications that the Sullivan Law turned out being largely ineffectual during its early years. In 1912 the *New York Times* reported lax enforcement of the Sullivan Law’s requirements,<sup>12</sup> as well as “a sudden increase in homicides by shooting,” and opined that the law “has not proved effective in Manhattan in the first year.”<sup>13</sup> A 1917 report by the New York City Commissioner of Accounts found that “uniformity of procedure” was lacking in the issuance of licenses, including both a lack of adequate investigation, and a lack of prompt notice to the police department.<sup>14</sup> The Commissioner found that judges were issuing licenses to known criminals, and that some people whose licenses had been denied or revoked were able to obtain new licenses from new judges.<sup>15</sup> (A 1964 State report made this same observation.<sup>16</sup>) The report concluded by recommending that “consideration be given, in view of existing conditions, to the advisability of repealing the so-called Sullivan Law,” or else that the law be amended to centralize licensing procedures.<sup>17</sup> Just the same, expectations for the Sullivan Law were high. Much of the contemporary press had hailed its passage as “a new and hard-hitting law...waging a war of extermination upon the carrying of pistols,” and one that made “New York State...the pioneer in a movement.”<sup>18</sup>

Perhaps this backdrop is some explanation for the competing amendments that the New York Legislature considered in the 1920s and 30s. First are a series of bills introduced by Assemblyman Burton Esmond, a Republican from Saratoga. Assemblyman Esmond introduced three bills from 1926 through 1928 that would have made the issuance of *any* handgun license—whether to “have and carry concealed,” or merely to “possess”—discretionary.<sup>19</sup> Known as both the “Esmond” and “Baumes” Pistol Bills (for Senator Caleb Baumes, who introduced some of the measures in the Senate), they provided that licensing officers would issue handgun licenses “only to persons



who, in the opinion of the licensing authorities, need such weapons for their protection.”<sup>20</sup> The 1926 and 1927 bills (barely) passed the Senate, but failed in the Assembly,<sup>21</sup> and the 1928 bill did not pass either body.<sup>22</sup> It is noteworthy that one early (1927) amendment created an exception for certain gun clubs.<sup>23</sup>

Assemblyman Esmond introduced the most extreme “Esmond Pistol Bill” in 1930, proposing to effectively *ban* the possession of handguns by private citizens, subject only to a narrow gun-club exception.<sup>24</sup> The Crime Commission report that accompanied the bill explained that the measure was necessary because “[t]he pistol is primarily a criminal’s weapon” that “is of little or no practical value as a weapon of defense in the hands of a law-abiding citizen,” at least those without adequate skill, training, and experience.<sup>25</sup> This Esmond Pistol Bill specified that handgun licenses would only be issued “to persons who, in the opinion of the licensing authorities, require such weapons for their protection or in the discharge of their duties as a policeman, member of the state constabulary, constable, sheriff, or deputy sheriff, guard or watchman, or person occupying a similar position and performing similar duties.”<sup>26</sup>

How were these proposals received? Articles in the *New York Times* were generally supportive, and many downplayed the extent to which the proposals would have prevented ordinary people from possessing or using handguns. For example, *Times* articles characterized the 1926 proposal as one to “put some teeth in the law” with a fingerprinting requirement<sup>27</sup> and a requirement “for a person desiring to carry or keep a revolver in his home to obtain a license before he could purchase a weapon.”<sup>28</sup> The *Times* characterized the 1930 bill as one that would have “limit[ed] the carrying of pistols to peace officers,” but failed to mention the (significant) detail that the proposal would also have limited the *possession* of pistols to peace officers—in other words, that it was a handgun ban.<sup>29</sup> *Times* articles aside, concerned individuals throughout the state directed a large volume of complaints towards Assemblyman Esmond’s office—so large that he ultimately withdrew the bill, remarking he was “more convinced than ever that the public will never give up its pistols.”<sup>30</sup>

Actually, the legislature soon moved in a much different direction. In 1932, the Assembly and Senate passed the Hanley-Fake Bill, which repealed one of the Sullivan Law’s core requirements—the requirement that one hold a license to “possess” a handgun.<sup>31</sup> Instead, the legislation adopted the Uniform Firearms Act’s approach of licensing only the carry of handguns in public.<sup>32</sup> However, (then) Governor Franklin Roosevelt vetoed the bill.<sup>33</sup> In his veto message, Governor Roosevelt explained that self-protection was “theoretical” and “very problematical,” and that to the extent people used handguns for hunting and target shooting, “it is necessary for them, under a sound State

public policy, to be subjected to some inconvenience.”<sup>34</sup> (It is noteworthy that, shortly thereafter, Eleanor Roosevelt began carrying a handgun for her own protection while traveling the country, and she later obtained a license to carry in New York City.<sup>35</sup>) The Governor also cited opposition, particularly from New York City-aligned interests.<sup>36</sup>

A gubernatorial veto came into play again in 1979, when the Senate and Assembly passed a bill that would have eliminated the practice of issuing “restricted” licenses.<sup>37</sup> The result would have been to mandate the issuance of carry licenses to qualified individuals who applied for them.<sup>38</sup> Governor Hugh Carey vetoed the measure, stating there was “no demonstration...that the issuance of handgun licenses without restriction is in the public interest,” and also noting that the New York City Police Commissioner and the Division of Criminal Justice Services had opposed the bill.<sup>39</sup>

The “proper cause” standard remains contentious today, and there are proposals to eliminate it, or define it in a way that requires authorities to issue licenses, every session.<sup>40</sup>

## II. Handgun Licensing Today

Handgun licensing remains primarily a local function in the state of New York. As a general proposition, people seeking licenses must apply in the county where they live or “principally” work.<sup>41</sup> While county judges are the “licensing officers” in most parts of the state, local police authorities are responsible for investigating applications.<sup>42</sup> There is no statutory basis for the practice, but police often provide a “recommendation” regarding whether or not a license should be granted, and on what terms.<sup>43</sup> While this recommendation is undoubtedly influential, a judge cannot deny an application solely on its basis.<sup>44</sup> In many counties, people submit their applications directly to a county clerk or law enforcement agency.<sup>45</sup> In Nassau and Suffolk counties, and in New York City, state law designates police agencies as the “licensing officers,” making those agencies (rather than local judges) responsible for licensing decisions.<sup>46</sup> So, while the precise role of particular officials varies, it is always the case that local-level officials control the issuance of handgun licenses.

Holding true to the 1911–1913 framework, current law authorizes licensing officials to issue two basic types of handgun licenses to private citizens. State law presumptively requires officials to issue licenses to “have and possess in his dwelling by a householder,” without any further showing, so long as applicants meet delimited statutory requirements (e.g., age and criminal background), and there is no “good cause” for denial.<sup>47</sup> However, officials can issue licenses to “have and carry concealed” only “when proper cause exists for the issuance thereof.”<sup>48</sup> Because a “householder” license authorizes possession only within one’s “dwelling,” a person

who seeks to possess a handgun *outside* the home for any reason—be it hunting, self-protection, target shooting, or traveling to a gunsmith—must hold a license to “have and carry concealed.” There is no other provision of law that would authorize the person to possess a handgun away from his or her “dwelling.”

### III. “Proper Cause” Means Little More Than “Exercise of Discretion”

Although the “proper cause” requirement remains in force, and has certainly been the subject of considerable debate, it is remarkable that the legislature has never defined the term, and the Court of Appeals has also never provided a positive construction. Judicial decisions often discuss “proper cause” as, simply, a “question [that] involves the exercise of discretion on the part of the local officials upon whom the Legislature has imposed the responsibility of making the determination.”<sup>49</sup> One Third Department decision that the Court of Appeals affirmed without opinion articulated “proper cause” in just this manner.<sup>50</sup>

The Court of Appeals’ memorandum decisions add little to the meaning of “proper cause.” For example, in 1994, the court upheld the authority of licensing officials to issue carry licenses that were “restricted” to the delimited purposes of hunting, fishing, and target shooting (an issue discussed *infra*).<sup>51</sup> The court explained that “the licensing officers’ power to determine the existence of ‘proper cause’ for the issuance of a license necessarily and inherently includes the power to restrict the use to the purposes that justified the issuance”—but the court did not otherwise articulate the parameters of “proper cause.”<sup>52</sup> When the Court of Appeals upheld localities’ authority to place restrictions on previously issued licenses two years later, it explained that its previously stated rationale “applies with equal force” to previously issued licenses.<sup>53</sup> The court observed that the licensee had been unable “to demonstrate a need—or much less, any reason—for an unrestricted license”—but the court did not articulate what “need” or “reason” might be sufficient.<sup>54</sup>

#### A. Hunting and Target Shooting

There is some consensus that the desire to use a handgun for a sporting purpose, such as target shooting or hunting, is “proper cause.” In 1945, Attorney General Louis J. Lefkowitz issued an opinion that concluded that the “proper cause” provision was “broad enough to permit a judge to issue a license for a pistol or revolver to be used for purely recreational purposes,”<sup>55</sup> and a 1977 decision from the Third Department described target shooting as a “legitimate practice” for which licensure “should not be withheld,” at least under proper circumstances.<sup>56</sup> Over the years, several trial courts have ruled similarly.<sup>57</sup> In 1964, the New York Commission of Investigation surveyed handgun licensing practices throughout the state and found that “hunting, and/or target practice” were

“the most frequent grounds for which pistol licenses are granted in New York State.”<sup>58</sup> According to the Commission of Investigation, “the general view of licensing officials [is] that an applicant’s bare statement of ‘hunting and target practice’ constitutes ‘proper cause’ for issuance of a license.”<sup>59</sup>

However, even this is not absolute. In *Moore v. Gallup*, an Albany County judge found (in 1939) that an applicant’s desire to engage in target practice was *not* “proper cause.”<sup>60</sup> Observing that police officials had recommended denial of the license, the Third Department affirmed and found that the decision had been within “the exercise of discretion” vested in local officials,<sup>61</sup> and the Court of Appeals affirmed without opinion.<sup>62</sup>

#### B. Self-Protection

Judicial decisions are less tolerant of the right of self-defense, and there are many examples of judicial decisions that have upheld denials of licenses sought for the purpose of self-protection.<sup>63</sup> However, selection bias plays some role in this, for outside of New York City appeals from decisions *granting* licenses are rare.<sup>64</sup> If a judge sitting as a licensing officer finds that self-protection is “proper cause,” then that decision is unlikely to be appealed, and also unlikely to make it into reported judicial decisions. The result is that there are a large number of cases that find that a licensing officer’s decision to deny a license sought for self-protection “was neither arbitrary and capricious nor an abuse of discretion.”<sup>65</sup>

Views on the validity of self-protection as “proper cause” vary widely between counties, and often even between individual licensing officers within a county. For many years, some licensing officers have taken the basic view that personal protection is not “proper cause.” The Commission of Investigation’s 1964 report, discussed previously, observed that some local authorities refused to issue licenses for the purpose of self-protection,<sup>66</sup> and there are also some judicial decisions that reference this practice.<sup>67</sup>

Today, most courts which apply a “restrictive” approach reason that an applicant is only entitled to a license for protection purposes if the person has “a special need for self-protection distinguishable from that of the general community.”<sup>68</sup> Perhaps it is not surprising that this “special need” standard originated in New York City in relatively recent times. The original source of this standard is a 1980 decision of the First Department captioned *Klenosky v. New York City Police Department*.<sup>69</sup> In *Klenosky*, the First Department reasoned (without citation) that the NYPD’s denial of an unrestricted license had not been arbitrary and capricious because the applicant “did not sufficiently demonstrate a special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession.”<sup>70</sup> The Court of Appeals affirmed without its own opinion,<sup>71</sup> and the

First Department began regularly applying this “special need” standard.<sup>72</sup> New York City rules for the issuance of handgun licenses, first published in 1991, provide that “proper cause” exists where a person has “[e]xposure... to extraordinary personal danger” either “by reason of employment or business necessity,” or else “by proof of recurrent threats to life or safety.”<sup>73</sup> Since then, officials in Westchester and Rockland counties have relied on this standard to deny licenses sought for self-protection,<sup>74</sup> and the Third Department affirmed a Chenango county judge who also relied on the standard.<sup>75</sup>

The result is somewhat anomalous. As detailed in the next section, people living in many parts of the state obtain licenses for personal protection with relative ease, while people living in other areas find it difficult or impossible to obtain licenses for self-protection. However, all people who are otherwise fit can obtain licenses for sporting pursuits—even though none of the licensure categories in the statute have any relation to sport. The Commission of Investigation’s 1964 report observed the curious result that “reasons not recognized specifically in law as grounds for a pistol permit (hunting and target practice) are accepted almost without question throughout the state, while enumerated reasons such as protection and employment, are often rejected.”<sup>76</sup>

#### IV. The Rise of the Restricted License

A “Restricted” handgun license is a § 400.00(2)(f) license to “have and carry concealed” that includes written conditions that limit carry to specified purposes, like hunting and target shooting.<sup>77</sup> In contrast, a license that is unrestricted—commonly known as a “Full Carry” license—authorizes its holder to “have and carry concealed” without regard to purpose.<sup>78</sup> In practice, a Full Carry license serves as a license issued for self-protection.

The basic ramification of holding a Restricted license is that a person who carries a gun outside of his or her license restrictions faces potential suspension or revocation of his or her license—but generally does not face criminal liability.<sup>79</sup> In contrast, carrying a loaded handgun without *any* type license to “have and carry concealed” is a class C Felony that carries a 3½ year mandatory minimum sentence.<sup>80</sup>

##### A. Origin and Development

Although today’s New York gun owners are quite familiar with the concept of Restricted and Full Carry licenses, the terms appear nowhere in the statutory laws of New York State,<sup>81</sup> and the practice of “restricting” licenses arose well after the Sullivan Law’s enactment. Precisely when localities began issuing Restricted licenses is somewhat unclear. For example, the Albany County judge who in 1939 denied a license sought for the stated purpose of target shooting had reasoned that “a dangerous and unwelcome precedent would be established if all citizens of good moral character were to be licensed to carry pistols upon

a simple showing of a desire on their part to engage in unregulated and unsupervised target practice.”<sup>82</sup> Plainly, the notion of a Restricted license was far from the court’s mind. The first reference to the concept of Restricted licenses (that I can find) appears in the 1964 Commission of Investigation Report on handgun licensing in New York State.<sup>83</sup> The Commission observed that one (not identified) county among the 10 counties it surveyed had adopted a policy in 1961 of issuing “a so-called ‘restricted license.’ This is a license that is good only for hunting and target practice and the word ‘restricted’ is stamped on its face.”<sup>84</sup>

The first judicial reference appears in January 1972, when a New York County Supreme Court ordered the NYPD “to issue to petitioner a limited pistol permit which would allow him to carry a pistol only to and from the pistol range.”<sup>85</sup> Later in 1972, the Attorney General issued a formal opinion that gave a “green light” to the practice, finding that “local officers may exercise their discretion by restricting the purpose of a license.”<sup>86</sup> The Attorney General’s opinion indicated that, according to the State Police, “the majority” of licensing officials were then issuing Restricted licenses, and that the NYPD had likewise “authorized the issuance of a ‘Targeteer’ pistol license” with restrictive conditions.<sup>87</sup> The assertion that a *majority* of officials were then issuing Restricted licenses seems questionable, given that judicial references to the practice only *began* to appear in the 1970s.<sup>88</sup> In any event, by 1991, according to information set forth in a decision of the Third Department, about half of all licensing authorities in the state were issuing Restricted licenses.<sup>89</sup>

##### B. Current Practices

Current policies towards Restricted and Full Carry licenses vary widely. Some localities issue only Restricted licenses and publicly state that handgun licenses will only be granted for sporting purposes.<sup>90</sup> Officials in other localities routinely issue Full Carry licenses to private citizens who apply for them and appear to be otherwise qualified. Some counties presumptively issue Restricted licenses, but consider applications for Full Carry license on a case-by-case basis. Although issuance policies vary widely, once issued, a handgun license is valid throughout all of the state, excepting (for the most part) New York City.<sup>91</sup> So, a person who obtains a Full Carry license in Putnam county is free to carry a gun 20 miles South in Westchester County—even though Westchester County rarely issues Full Carry licenses. This creates some incentive for applicants to “shop” for a “friendly” county—a practice licensing officials often frown upon.<sup>92</sup>

One online New York firearms group has compiled and categorized the issuance policies of all of the state’s counties.<sup>93</sup> Numerically, 27 counties (nearly half) are coded “green,” meaning that authorities there generally issue Full Carry licenses to private citizens who request them and meet reasonable requirements.<sup>94</sup> Twelve counties, in-

cluding the five counties of New York City, fall at the other extreme and are “red,” meaning that authorities there almost never issue Full Carry licenses to private citizens.<sup>95</sup> The 23 remaining counties have policies that fall between these extremes.<sup>96</sup> Overall, counties’ policy choices have a rough correlation with population density—for example, seven of the ten least-densely-populated counties have “green” issuance policies, while nine of the ten most-dense counties are “red.”<sup>97</sup>

The simplicity of this categorization should not obscure the diversity of practices that actually exists between different localities and licensing authorities. For example, in some areas, including Broome, Chenango, and Putnam counties, officials normally issue Restricted licenses, but they will remove the restrictions (e.g., issue Full Carry licenses) for individuals who have held a Restricted license without incident and have completed adequate training.<sup>98</sup> In Broome County, Judge Cawley—the only judge issuing handgun licenses—instructs people receiving Full Carry licenses that they should not carry handguns in bars, and that they should advise any police officer they contact if they are carrying a gun.<sup>99</sup> Some counties, including Oneida and Putnam, require all new applicants for any type of license to complete a basic, eight-hour gun safety course.<sup>100</sup>

Few are likely to dispute that New York City has the most restrictive issuance policies in the state. In 1991, a New York County Supreme Court dismissed criminal charges filed against the holder of a “target pistol” license caught carrying a handgun in his car.<sup>101</sup> Soon thereafter, the City stopped issuing “Target” licenses,<sup>102</sup> and instead now issues a (denominated) “Residence Premises” license—the published conditions of which allow applicants to engage in hunting and target shooting.<sup>103</sup> Since at least the 1980s the City has made it increasingly more difficult to obtain (denominated) “Carry” licenses.<sup>104</sup> Judicial decisions reflect that doctors and lawyers, who previously had been able to obtain Full Carry licenses, were no longer able to do so as the 80s and 90s progressed.<sup>105</sup> Today, a frequent criticism is that the city will issue licenses to celebrities who seek them—but essentially refuses to license everyday working people.<sup>106</sup>

### C. Can the Results Be Harmonized?

It is difficult to harmonize the varying policies towards Restricted licenses throughout the state, but one notable attempt was Westchester County Judge Anthony Scarpino’s opinion in *In re O’Connor*.<sup>107</sup> Judge Scarpino reasoned that “variations in population density, composition, and geographical location provide ample grounds upon which to exercise the discretion provided by statute.”<sup>108</sup> The “circumstances...in New York City are significantly different than those which exist in Oswego or Putnam Counties,” and “licensing officers in each county are in the best position to determine whether any interest of the population of their county is furthered by the use of restrictions on pistol licenses.”<sup>109</sup>

There may be some correlative factors, but the standard is ultimately just “the exercise of discretion.”

## V. The Next 100 Years

Two developments in recent decades indicate a national trend away from the Sullivan Law’s approach. First, most states that had discretionary “cause”- or “need”-based gun-licensing statutes have amended or repealed these laws to eliminate their discretionary components. Second, there is growing support for the proposition that allowing private citizens who meet basic requirements to carry guns can actually *benefit* society at large. As a result, many states have revised their laws to make it easier to obtain licenses to carry guns. Will New York ultimately move in this direction?

### A. The Move Away from Discretionary Gun Licensing

New York did not invent gun licensing. Rather, in the American context, gun-licensing requirements date back to the post-Civil War Reconstruction Era, when southern states began enacting laws that licensed or forbade the carrying of firearms—for the purpose of preventing freedmen from using guns to protect themselves.<sup>110</sup> In a 1941 Florida Supreme Court decision that overturned a conviction for carrying a gun without a license, Justice Rivers Buford filed a concurring opinion that asserted that the gun-license law had been enacted and enforced for racist purposes:

I know something of the history of this legislation....[T]he Act was passed for the purpose of disarming the negro laborers[.]... *The statute was never intended to be applied to the white population and in practice has never been so applied.* We have no statistics available, but it is a safe guess to assume that more than 80% of the white men living in the rural sections of Florida have violated this statute. It is also a safe guess to say that not more than 5% of the men in Florida who own pistols and repeating rifles have ever applied to the Board of County Commissioners for a permit[.]<sup>111</sup>

Certainly, there are indications that antipathy towards immigrants, and particularly Italian immigrants (but later Italians and Jews), partially motivated the Sullivan Law, and animated its enforcement during early years.<sup>112</sup> On the other hand, it is believed (and hoped) that such considerations do not motivate handgun licensing in New York now.

Many other states adopted laws to regulate the act of carrying handguns *concealed* in the 1920s and 30s when they enacted versions of the Uniform Firearms Act, a model law from the National Conference of Commis-

sioners on Uniform State Laws.<sup>113</sup> Oftentimes, these laws granted local officials broad discretion to issue or deny licenses to carry concealed guns.<sup>114</sup> Beginning in the 1970s, many of these same states began amending their laws to make the issuance of carry licenses depend *not* on factors like “need” or “cause,” but instead on nondiscretionary factors, like training and background.<sup>115</sup>

The trend in favor of liberalized right-to-carry laws continued throughout the 2000s. At the time of this article, 40 states issue licenses to carry handguns on nondiscretionary terms, or else they do not require licenses at all.<sup>116</sup> Nine states have discretionary license-to-carry laws on their books, but three (Alabama, Connecticut, and Delaware) normally issue licenses to qualified private citizens.<sup>117</sup> It is interesting to note that in the states of California and Massachusetts (as in New York) local authorities control license issuance, and issuance policies vary widely from county to county.<sup>118</sup> In the remaining three discretionary states (Hawaii, Maryland, and New Jersey) there is an essentially uniform policy of *not* issuing licenses to private citizens.<sup>119</sup> The state of Illinois and the District of Columbia are the only U.S. jurisdictions that completely prohibit private citizens from carrying guns in public.<sup>120</sup>

## B. New Views on Guns in Public and Public Safety

The 1930 Crime Commission Report that accompanied the 1930 Esmond Pistol Bill—which had sought to effectively ban the civilian possession of handguns—explained that the measure was justified because a handgun “can only be of value as a weapon of defense when it is possessed by one trained,” and further, that “[f]ew have any such training or experience.”<sup>121</sup> In most cases, a handgun was not “anything more than an added risk.”<sup>122</sup> Although it was possible for people to obtain training and to develop skills, “[o]nly the most expert can hope to do more than bring disaster and destruction to themselves or innocent by-standers.”<sup>123</sup> In other words, negative externalities were associated with the carry of handguns in public. While individuals might feel safer with guns, their guns increased the danger that people around them faced. Certainly this rationale continues to figure prominently in the case for prohibitory gun controls.<sup>124</sup>

Economists John Lott and David Mustard dropped a bombshell on this rationale when they published research in 1997 that indicated that policies allowing private citizens to carry handguns had actually *decreased* violent crime in the states that had adopted them.<sup>125</sup> The timing of their research was keen, as between 1977 and 1992 a total of 10 states had adopted “shall issue” license laws, which made the issuance of licenses to carry handguns mandatory for individuals who met nondiscretionary statutory criteria.<sup>126</sup> This set the stage for a comparative statistical analysis, as some states already had “shall issue” laws on their books, while others issued licenses on a discretionary basis, and others completely prohibited

the carry of guns.<sup>127</sup> How did these policy choices impact crime rates?

Examining a multitude of factors over the 15-year period, Lott and Mustard concluded that “[w]hen state concealed handgun laws went into effect in a county, murders fell by 7.65 percent, and rapes and aggravated assaults fell by 5 and 7 percent.”<sup>128</sup> Even when accidental shootings were considered, “the net effect of allowing concealed handguns is clearly to save lives.”<sup>129</sup> The basic rationale was that people contemplating criminal acts were deterred from crimes involving personal contact by the fear that a victim or bystander would be carrying a concealed handgun.<sup>130</sup> Consistent with the hypothesis, Lott and Mustard found that property crimes, which generally did not involve actual contact with victims, increased.<sup>131</sup> In other words, rather than having negative externalities, concealed guns in public appeared to actually be providing a *positive* externality for society at large, reducing the likelihood that anyone would be the victim of a criminal attack.<sup>132</sup> Lott later expanded his research and published a book titled *More Guns, Less Crime*.<sup>133</sup>

Lott’s findings have certainly attracted controversy.<sup>134</sup> In 2004 the National Academy of Sciences conducted its own regressions and found (with one dissent) that “it is not possible to determine that there is a causal link.”<sup>135</sup> Nevertheless, it is clear that Lott’s research has been strongly influential in how contemporary Americans view the link between concealed-handgun licensing and crime.

## Conclusion

Will the “proper cause” standard endure another 100 years, and if it does not, what will replace it? Ultimately, the “proper cause” represents a legislative “duck” on an issue that has important public safety ramifications. Unable to agree on any consistent approach, the legislature has “punted” the issue to localities with little guidance, and the result is a patchwork of county-specific policies that have varying, and often quite different, parameters.

The result, at least in my opinion, is a loss to society at large. Because the “proper cause” standard does not consider training or competence, there is no assurance that people who are licensed to carry guns will do so safely—and there are many people who are licensed to carry guns in New York, who can carry guns throughout the state (excepting New York City). Just the same, there is no assurance that people who are denied licenses would in fact detract from public safety were they permitted to carry guns for protection. The opportunity lost is the chance to regulate the carry of firearms in a manner that prioritizes training and competence over the essentially moralistic question of whether people *should* or *should not* own or carry handguns. This is a societal dysfunction.

## Endnotes

1. See 1911 N.Y. Laws ch. 195, § 1897 (current version at N.Y. Penal Law §§ 265.01(1); 265.20(a)(3) (PL)).
2. See PL § 1897.
3. 1911 N.Y. Laws ch. 195, § 1897.
4. See 430 Ill. Comp. Stat. 65/2(a)(1); Chicago, Ill. Code § 8-20-110(a); D.C. Code § 7-2502.01(a). Massachusetts and New Jersey require licenses to “possess” handguns, but both exempt possession within the home. See MASS. GEN. LAWS ANN. ch. 269, § 10(a)(1)–(3); N.J. Stat. Ann. § 2C:39-6(e).
5. 1913 N.Y. Laws ch. 608, § 1897 (current version at PL § 400.00(2)(a), (f)).
6. See 1913 N.Y. Laws ch. 608, § 1897; 1911 N.Y. Laws ch. 195, § 1897.
7. See PL § 400.00(2)(f).
8. See 1911 N.Y. Laws ch. 195, § 1897; see also PL § 1897.
9. See 1913 N.Y. Laws ch. 608, § 1897.
10. *Id.*
11. *Id.*
12. See *The Registering of Pistols*, N.Y. TIMES, Mar. 3, 1912.
13. See *Murders Increase Despite Pistol Law*, N.Y. TIMES, Oct. 21, 1912.
14. N.Y.C. COMM’R OF ACCOUNTS, PISTOL PERMITS: THEIR ISSUANCE WITHIN THE CITY OF NEW YORK UNDER CHAPTER 195, LAWS 1911 AND AMENDMENTS (SO-CALLED SULLIVAN LAW) 4 (1917) [hereinafter 1917 COMM’R REPORT].
15. See *id.* at 5–6.
16. See STATE OF N.Y. COMM’N OF INVESTIGATION, REPORT BY THE NEW YORK STATE COMMISSION OF INVESTIGATION CONCERNING PISTOL LICENSING LAWS AND PROCEDURES IN NEW YORK STATE 23, 39 (1964) [hereinafter 1964 COMM’N REPORT].
17. 1917 COMM’R REPORT, *supra* note 14, at 13.
18. Charles E. Van Loan, *Disarming New York: What the ‘Gun Law’ Has Done to End a Reign of Terror in the Streets of the Metropolis*, 46 MUNSEY’S MAG. 687, 692 (1912).
19. See A.585, S.417, 151st N.Y. Leg Sess.; A.1671, S.1150, 150th N.Y. Leg Sess.; A.1920, S.1735, 149th N.Y. Leg Sess.; see also CRIME COMM’N OF N.Y. STATE, SPECIAL REPORTS TO THE COMMISSION ON FIREARMS LEGISLATION AND PSYCHIATRIC AND EXPERT TESTIMONY IN CRIMINAL CASES 5 (1928) [hereinafter 1928 CRIME COMM’N REPORT] (quoting § 1899-b of proposed legislation).
20. 1928 CRIME COMM’N REPORT, *supra* note 19, at 8 (quoting § 1899-b of proposed legislation).
21. See A.1671, S.1150, 150th N.Y. Leg Sess.; A.1920, S.1735, 149th N.Y. Leg Sess.; see also 1928 CRIME COMM’N REPORT, *supra* note 19, at 5; *Anti-Crime Bills in Peril at Albany*, N.Y. TIMES, Mar. 18, 1927; *Lawyers Oppose Anti-Crime Bills*, N.Y. TIMES, Apr. 23, 1926; *Assembly Kills Bill for Stiff Pistol Law*, N.Y. TIMES, Apr. 22, 1926.
22. See A.585, S.417, 151st N.Y. Leg Sess.; see also 1928 CRIME COMM’N REPORT, *supra* note 19, at 6; *Assemblymen Kill Baumes Pistol Bill*, N.Y. TIMES, Mar. 2, 1928; *New Baumes Bills Tighten Pistol Ban*, N.Y. TIMES, Jan. 26, 2008.
23. See 1928 CRIME COMM’N REPORT, *supra* note 19, at 6, 11 (quoting § 1899-n(3) of proposed legislation); see also *New Baumes Bills Tighten Pistol Ban*, N.Y. TIMES, Jan. 26, 1928; *Propose Changes in Baumes Bill*, N.Y. TIMES, Mar. 19, 1927.
24. A.991, S.696, 153rd N.Y. Leg Sess.; see CRIME COMM’N OF N.Y. STATE, SPECIAL REPORT TO THE COMMISSION ON FIREARMS LEGISLATION 12 (1930) [hereinafter 1930 CRIME COMM’N REPORT] (quoting §§ 1899-b and 1899-n(3) of proposed legislation); see also *New Gun Curb Act Proposed in Place of Sullivan Law*, N.Y. TIMES, Feb. 8, 1930.
25. 1930 CRIME COMM’N REPORT, *supra* note 24, at 5.
26. *Id.* at 12 (quoting § 1899-b of proposed legislation).
27. See *Assembly Kills Bill for Stiff Pistol Law*, N.Y. TIMES, Apr. 22, 1926.
28. See *Anti-Crime Bills in Peril at Albany*, N.Y. TIMES, Mar. 18, 1927.
29. See *New Gun Curb Act Proposed in Place of Sullivan Law*, N.Y. TIMES, Feb. 8, 1930.
30. *Esmond Helps to Kill His Own Pistol Bill, Saying That the Public Won’t Give Up Weapons*, N.Y. TIMES, Mar. 25, 1930.
31. A.1940, S.693, 155th N.Y. Leg Sess.
32. See *id.*; see also *Legislation: The Uniform Firearms Act*, 18 VA. L. REV. 904, 904 (1932); *Mulrooney Fights Easing Pistol Law*, N.Y. TIMES, Mar. 25, 1932.
33. A.1940, S.693, 155th N.Y. Leg Sess.; see also *Governor Vetoes Gun Law Changes*, N.Y. TIMES, Mar. 29, 1932; *Topics of the Times: Another Wise Veto*, N.Y. TIMES, Mar. 29, 1932.
34. *Governor Vetoes Gun Law Changes*, N.Y. TIMES, Mar. 29, 1932.
35. See CAITLIN KELLY, *BLOWN AWAY: AMERICAN WOMEN AND GUNS* 232 (2004); David Kopel, *A Chance to Fight Back*, N.Y. TIMES, Jan. 12, 2011.
36. See KELLY, *supra* note 35; see also *Topics of the Times: Another Wise Veto*, N.Y. TIMES, Mar. 29, 1932; *Mulrooney Fights Easing Pistol Law*, N.Y. TIMES, Mar. 25, 1932; *Seeks Pistol Law Veto*, N.Y. TIMES, Mar. 23, 1932; *Mulrooney Scores Pistol-Permit Bills*, N.Y. TIMES, Mar. 11, 1932.
37. A.1852-A, S.1401-A, 202nd N.Y. Leg Sess.
38. See N.Y. LEGISLATIVE SERV., NEW YORK STATE LEGISLATIVE ANNUAL 1979, at 492–93 (Governor’s Veto Message) (“the provision... would require that a license to carry a handgun be issued without limitation, restriction, condition or qualification”).
39. See *id.*
40. See, e.g., A.3268, S.1863, 234th N.Y. Leg Sess.; A.6187, S.3478, 232nd N.Y. Leg Sess.; A.6378, 230th N.Y. Leg Sess.; A.4236, S.2037, 230th N.Y. Leg Sess.; S.1542, 228th N.Y. Leg Sess.; A.2397, S.1111, 226th N.Y. Leg Sess.; A.9560, S.2302, 224th N.Y. Leg Sess.
41. See PL §§ 265.00(10) (“licensing officer” defined); 400.00(3)(a) (where persons must apply).
42. See *id.* § 400.00(4).
43. See 1964 COMM’N REPORT, *supra* note 16, at 40–41; see also *Guida v. Dier*, 54 A.D.2d 86, 87, 387 N.Y.S.2d 720, 721 (3d Dep’t 1976); *Moore v. Gallup*, 267 A.D. 64, 66, 45 N.Y.S.2d 63, 64–65 (3d Dep’t 1943), *aff’d*, 293 N.Y. 846, 59 N.E.2d 439 (1944).
44. See *Guida*, 54 A.D.2d at 87, 387 N.Y.S.2d at 721.
45. For example, web pages for Albany, Dutchess, Erie, Monroe, Onondaga, Rockland, Sullivan, and St. Lawrence counties direct individuals to apply to the sheriff and/or the clerk. See Office of the Albany County Clerk, <[http://www.albanycounty.com/departments/clerk/programs\\_services.asp?id=2658](http://www.albanycounty.com/departments/clerk/programs_services.asp?id=2658)> (last visited Dec. 23, 2011); DUTCHESS COUNTY SHERIFF’S OFFICE, PISTOL LICENSE BUREAU, PISTOL PERMIT APPLICATION, <<http://www.co.dutchess.ny.us/CountyGov/Departments/Sheriff/pistolpermitapp.pdf>> (last visited Dec. 23, 2011); Erie County Clerk’s Office, How to Apply for a Pistol Permit, <<http://www2.erie.gov/clerk/index.php?q=how-apply-pistol-permit>> (last visited Dec. 23, 2011); Monroe County, Pistol Permits, <<http://www.monroecounty.gov/clerk-pistolpermits.php>> (last visited Dec. 23, 2011); Onondaga County Sheriff’s Office, Pistol License Unit, <<http://www.ongov.net/sheriff/pistol.html>> (last visited Dec. 23, 2011); Office of the Rockland County Clerk, Pistol License Information, <[http://www.rocklandcountyclerk.com/pistol\\_license.html](http://www.rocklandcountyclerk.com/pistol_license.html)> (last visited Dec. 23, 2011); Sullivan County, Information Guide: Pistol Permits, <<http://co.sullivan.ny.us/Default.aspx?TabId=3450>> (last visited Dec. 23, 2011); St. Lawrence County Gov’t, St. Lawrence County Clerk, Pistol Permits, <<http://www.co.st-lawrence.ny.us/Departments/CountyClerk/PistolPermits>> (last visited Dec. 23, 2011).
46. See PL § 265.00(10).

47. See *id.* § 400.00(1)(g), (2)(a); see also *Shapiro v. Cawley*, 46 A.D.2d 633, 634, 360 N.Y.S.2d 7, 8 (1st Dep't 1974) ("If an applicant meets the four requirements delineated in subdivision 1 of section 400.00 of the Penal Law, he is entitled to the issuance of an on-premises license.").
48. PL § 400.00(2)(f); see also *Moore*, 267 A.D. at 69, 45 N.Y.S.2d at 67.
49. *Moore*, 267 A.D. at 69, 45 N.Y.S.2d at 67.
50. See *id.*
51. See *O'Connor v. Scarpino*, 83 N.Y.2d 919, 921, 615 N.Y.S.2d 304, 306 (1994).
52. See *id.*
53. *O'Brien v. Keegan*, 87 N.Y.2d 436, 439-40, 639 N.Y.S.2d 1004, 1005 (1996).
54. See *id.* at 440, 639 N.Y.S.2d at 1005.
55. 1945 N.Y. Op. (Inf.) Att'y Gen. 167, 1945 N.Y. AG LEXIS 401, \*5 (June 22, 1945).
56. *Davis v. Clyne*, 58 A.D.2d 947, 947-48, 397 N.Y.S.2d 186, 187 (3d Dep't 1977).
57. See *Klapper v. Codd*, 78 Misc. 2d 377, 378, 356 N.Y.S.2d 431, 432 (Sup. Ct., N.Y. Co. 1974) ("Marksmanship purposes have been recognized as a proper basis upon which to seek a pistol license"); see also *In re O'Connor*, 154 Misc. 2d 694, 696-97, 585 N.Y.S.2d 1000, 1002-03 (County Ct., Westchester Co. 1992); *Kreshesky v. Codd*, 89 Misc. 2d 439, 441, 391 N.Y.S.2d 792, 794 (Sup. Ct., N.Y. Co. 1976); *Katz v. Murphy*, 71 Misc. 2d 220, 221, 335 N.Y.S.2d 844, 845 (Sup. Ct., N.Y. Co. 1972).
58. 1964 COMM'N REPORT, *supra* note 16, at 16-19, 29; see also *id.* at 53.
59. *Id.* at 62.
60. See *Moore v. Gallup*, 267 A.D. 64, 66-67, 45 N.Y.S.2d 63, 65 (3d Dep't 1943) (discussing lower court ruling), *aff'd without op.*, 293 N.Y. 846, 59 N.E.2d 439 (1944).
61. *Id.* at 67, 45 N.Y.S.2d at 65.
62. *Moore v. Gallup*, 293 N.Y. 846, 59 N.E.2d 439 (1945).
63. See, e.g., *O'Connor v. Scarpino*, 83 N.Y.2d 919, 921, 615 N.Y.S.2d 305, 306 (1994); *Bando v. Sullivan*, 290 A.D.2d 691, 693, 735 N.Y.S.2d 660, 662 (3d Dep't 2002); *Williams v. Bratton*, 238 A.D.2d 269, 270, 656 N.Y.S.2d 626, 627 (1st Dep't 1997).
64. For examples of cases where the City appealed from lower court decisions that granted licenses for the purpose of self-protection, see *Kaplan v. Bratton*, 249 A.D.2d 199, 673 N.Y.S.2d 66 (1st Dep't 1998), *Williams*, 238 A.D.2d 269, 656 N.Y.S.2d 626, and *Bernstein v. Police Department of New York*, 85 A.D.2d 574, 445 N.Y.S.2d 716 (1st Dep't 1981).
65. *Williams*, 238 A.D.2d at 270, 656 N.Y.S.2d at 627; see also *Bando*, 290 A.D.2d at 693, 735 N.Y.S.2d at 662 ("respondent's restriction of petitioner's license was neither arbitrary nor capricious"); *Kaplan*, 249 A.D.2d at 201, 673 N.Y.S.2d at 68 ("Judicial review of a discretionary administrative determination is limited to deciding whether the agency's actions were arbitrary and capricious.").
66. See 1964 COMM'N REPORT, *supra* note 16, at 30-31.
67. See *Bitondo v. State*, 182 A.D.2d 948, 948, 582 N.Y.S.2d 819, 820 (3d Dep't 1992) (observing that from 1978 through the present "the duly designated licensing officer for the issuance of pistol permits in Cortland County did not consider personal protection 'proper cause' for the issuance of an unrestricted license"). 68. *In re Bastiani*, 23 Misc. 3d 235, 236, 881 N.Y.S.2d 591, 592 (County Ct., Rockland Co. 2008); see also *Kaplan*, 249 A.D.2d at 201, 673 N.Y.S.2d at 68.
69. 75 A.D.2d 793, 793, 428 N.Y.S.2d 256, 257 (1st Dep't 1980), *aff'd*, 53 N.Y.2d 685, 439 N.Y.S.2d 108 (1981).
70. *Id.* at 793, 428 N.Y.S.2d at 257.
71. *Klenosky v. N.Y. City Police Dep't*, 53 N.Y.2d 685, 439 N.Y.S.2d 108 (1981).
72. See, e.g., *Kaplan*, 249 A.D.2d at 201, 673 N.Y.S.2d at 68; *Bernstein v. Police Dep't of New York*, 85 A.D.2d 574, 445 N.Y.S.2d 716, 717 (1st Dep't 1981).
73. 38 RCNY § 5-03(a)-(b).
74. See *In re Bastiani*, 23 Misc. 3d 235, 236, 881 N.Y.S.2d 591, 592 (County Ct., Rockland Co. 2008) (citing *Klenosky*); *In re O'Connor*, 154 Misc. 2d 694, 697, 585 N.Y.S.2d 1000, 1003 (County Ct., Westchester Co. 1992) (citing 38 RCNY § 5-03), *aff'd sub nom.*, *O'Connor v. Scarpino*, 83 N.Y.2d 919, 615 N.Y.S.2d 305 (1994).
75. See *Bando v. Sullivan*, 290 A.D.2d 691, 693, 735 N.Y.S.2d 660, 662 (3d Dep't 2002) (citing *Klenosky*).
76. 1964 COMM'N REPORT, *supra* note 16, at 31.
77. See generally *O'Connor*, 83 N.Y.2d at 921, 615 N.Y.S.2d at 306.
78. See generally *Sarntagata v. Currier-Woods*, 84 A.D.3d 821, 822, 921 N.Y.S.2d 868, 868-69 (2d Dep't 2011); 1999 N.Y. Op. (Inf.) Att'y Gen. 1060, Informal Op. No. 99-25, 1999 N.Y. AG Lexis 30, \*1-2 (Sept. 7, 1999).
79. See *People v. Thompson*, 92 N.Y.2d 957, 959, 683 N.Y.S.2d 159, 160 (1998); *People v. Parker*, 52 N.Y.2d 935, 437 N.Y.S.2d 669 (1981), adopting the dissenting opinion reported below at 70 A.D.2d 387, 391-94, 421 N.Y.S.2d 59, 62-64 (1st Dep't 1979) (Birns, J., dissenting).
80. See PL §§ 70.02(1)(b), 70.02(3)(b), 265.03(3).
81. See *Mulligan v. Williams*, 169 A.D.2d 280, 283, 572 N.Y.S.2d 471, 473 (3d Dep't 1991); see also 1999 N.Y. Op. (Inf.) Att'y Gen. 1060, Informal Opinion No. 99-25, 1999 N.Y. AG Lexis 30, \*1-2 (Sept. 7, 1999).
82. *Moore v. Gallup*, 267 A.D. 64, 66, 45 N.Y.S.2d 63, 65 (3d Dep't 1943), *aff'd without op.*, 293 N.Y. 846, 59 N.E.2d 439 (1944).
83. 1964 COMM'N REPORT, *supra* note 16, at 32.
84. *Id.*
85. *Katz v. Murphy*, 71 Misc. 2d 220, 221, 335 N.Y.S.2d 844, 845 (Sup. Ct. N.Y. Co. 1972).
86. 1972 N.Y. Op. Att'y Gen. 4, 1972 N.Y. AG Lexis 3, \*3 (Dec. 26, 1972).
87. See *id.* at \*1-2.
88. See *Babernitz v. Police Dep't*, 65 A.D.2d 320, 324, 411 N.Y.S.2d 309, 311-12 (1st Dep't 1978); *Davis v. Clyne*, 58 A.D.2d 947, 947-48, 397 N.Y.S.2d 186, 187 (3d Dep't 1977) ("the issuing officer may restrict the license so as to limit the use of the pistol"); *Klapper v. Codd*, 78 Misc. 2d 377, 378, 356 N.Y.S.2d 431, 431 (Sup. Ct., N.Y. Co. 1974). A 1992 decision reflects that Cortland County officials issued a Restricted license in 1978. See *Bitondo v. State*, 182 A.D.2d 948, 948, 582 N.Y.S.2d 819, 820-21 (3d Dep't 1992).
89. See *Mulligan v. Williams*, 169 A.D.2d 280, 283, 572 N.Y.S.2d 471, 473 (3d Dep't 1991).
90. See, e.g., Rockland County Clerk, Pistol License Information, <[http://www.rocklandcountyclerk.com/pistol\\_license.html#5](http://www.rocklandcountyclerk.com/pistol_license.html#5)> (last visited Dec. 23, 2011) (pistol licenses can be obtained for the purposes of "Target shooting, hunting, fishing, hiking and camping").
91. See PL § 400.00(6).
92. See, e.g., *In re Davies*, 133 Misc. 2d 38, 42, 506 N.Y.S.2d 626, 629 (County Ct., Oswego Co. 1986) (revoking license where applicant resided in a different county at time of her application).
93. See Revised Permit Map, <<http://www.nyfirearms.com/forums/pistol-permits/6709-revised-permit-map.html>> (last visited Dec. 23, 2011). I participated in the preparation of this information.
94. See *id.* The counties are Allegany, Broome, Cattaraugus, Chautauqua, Chemung, Chenango, Columbia, Cortland, Delaware, Dutchess, Essex, Franklin, Hamilton, Livingston, Monroe, Niagara,

- Ontario, Orleans, Ostego, Putnam, Schoharie, Schulyer, Steuben, Sullivan, Wayne, Wyoming, and Yates.
95. See *id.* Aside from New York City, the counties are Genesee, Nassau, Rockland, Saratoga, Suffolk, Tompkins, and Westchester.
  96. See *id.* The counties are Albany, Cayuga, Clinton, Erie, Fulton, Greene, Herkimer, Jefferson, Lewis, Madison, Montgomery, Onondaga, Oneida, Orange, Oswego, Rensselaer, Schenectady, Seneca, St. Lawrence, Tioga, Ulster, Warren, and Washington.
  97. I relied on 2000 Census data to develop these conclusions, <[http://factfinder.census.gov/servlet/GCTTable?\\_bm=y&-geo\\_id=04000US36&-box\\_head\\_nbr=GCT-PH1&-ds\\_name=DEC\\_2000\\_SF1\\_U&-format=ST-2](http://factfinder.census.gov/servlet/GCTTable?_bm=y&-geo_id=04000US36&-box_head_nbr=GCT-PH1&-ds_name=DEC_2000_SF1_U&-format=ST-2)> (last visited Dec. 23, 2011).
  98. For documentation of this practice, see Pro 2A Judges, <<http://www.nyfirearms.com/forums/pistol-permits/21111-pro-2a-judges.html>> (last visited Dec. 23, 2011); *Recreational restriction in Broome?*, <<http://www.nyfirearms.com/forums/pistol-permits/18044-recreational-restriction-broome.html>> (last visited Dec. 23, 2011); Moving out of Dutchess into Putnam County, <<http://www.nyfirearms.com/forums/pistol-permits/17484-moving-out-dutches-into-putnam-county.html>> (last visited Dec. 23, 2011); Revised Permit Map, <<http://www.nyfirearms.com/forums/pistol-permits/6709-revised-permit-map.html>> (last visited Dec. 23, 2011); Permit Restrictions: Pros & Con's, <<http://www.nyfirearms.com/forums/pistol-permits/11755-permit-restrictions-pros-cons.html>> (last visited Dec. 23, 2011).
  99. See Questions about CCW laws in NY, <<http://www.nyfirearms.com/forums/laws-politics/6750-questions-about-ccw-laws-ny.html>> (last visited Dec. 23, 2011).
  100. See John Pitarresi, *Officials focus on safety as the number of pistol permits granted is on the rise*, OBSERVER-DISPATCH, Dec. 22, 2010; Putnam County Sheriff's Department, Pistol License Application Instructions (June 15, 2009), available at <<http://www.putnamsheriff.com/sites/default/files/pistol.pdf>> (last visited Dec. 23, 2011).
  101. See *People v. Li Lap*, 150 Misc. 2d 724, 727, 570 N.Y.S.2d 258, 260 (Sup. Ct., N.Y. Co. 1991).
  102. See *Murad v. City of New York*, 12 A.D.3d 193, 193-94, 783 N.Y.S.2d 585, 586 (1st Dep't 2004); *De Illy v. Kelly*, 6 A.D.3d 217, 218, 775 N.Y.S.2d 256, 256-57 (1st Dep't 2004); *Sanchez v. Kelly*, 5 Misc. 3d 1024A, 799 N.Y.S.2d 164, 164 (Sup. Ct., N.Y. Co. 2004).
  103. See 38 RCNY 5-22(a)(16), 5-23(a)(3)-(4).
  104. See Suzanne Novak, *Why the New York State System for Obtaining a License to Carry a Concealed Weapon is Unconstitutional*, 26 FORDHAM URB. L.J. 121, 126 (1998).
  105. See *Williams v. Bratton*, 238 A.D.2d 269, 269-70, 656 N.Y.S.2d 626, 627 (1st Dep't 1997) (attorney); Novak, *supra* note 104, at 126 (physicians).
  106. See Clayton E. Cramer & David B. Kopel, "Shall Issue": *The New Wave of Concealed Handgun Permit Laws*, 62 TENN. L. REV. 679, 684 (1995); Novak, *supra* note 104, at 127 n.33.
  107. 154 Misc. 2d 694, 585 N.Y.S.2d 1000 (County Ct., Westchester Co. 1992), *aff'd sub nom.*, *O'Connor v. Scarpino*, 83 N.Y.2d 919, 615 N.Y.S.2d 305 (1994).
  108. *Id.* at 698, 585 N.Y.S.2d at 1003-04.
  109. *Id.*
  110. See STEPHEN P. HALBROOK, SECURING CIVIL RIGHTS: FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS 12-13, 40-41, 131 (2010) (Fourteenth Amendment and Civil Rights Act sought to curb laws, particularly in southern states, that prevented freedmen from possessing and carrying arms); Robert J. Cottrol & Raymond T. Diamond, "Never Intended to Be Applied to the White Population": *Firearms Regulation and Racial Disparity—the Redeemed South's Legacy to a National Jurisprudence?*, 70 CHI.-KENT L. REV. 1307, 1324-25, 1328-29 (1995).
  111. See *Watson v. Stone*, 4 So. 2d 700, 703, 148 Fla. 516, 524 (Fla. 1941) (Buford, J., concurring) (emphasis added).
  112. See DAVID B. KOPEL, THE SAMURAI, THE MOUNTIE, AND THE COWBOY: SHOULD AMERICA ADOPT THE GUN CONTROLS OF OTHER DEMOCRACIES?, at 342-43 (1992); Cottrol & Diamond, *supra* note 110, at 1333-34.
  113. See Cramer & Kopel, *supra* note 106, at 681.
  114. See *id.*
  115. See *id.* at 687-708 (detailing legislative changes in Alaska, Arizona, Florida, Georgia, Idaho, Mississippi, Montana, Oregon, Pennsylvania, Tennessee, Virginia, Washington, West Virginia, and Wyoming).
  116. See Ark. Code § 5-73-309 (a); Colo. Rev. Stat. § 18-12-203 (1); Fla. Stat. § 790.06(2); Ga. Code § 16-11-129; Idaho Code § 18-3302(1); Ind. Code § 35-47-2-3(e), Iowa Code § 724.7; Kan. Stat. § 75-7c03; Ky. Rev. Stat. § 237.110(2); La. Rev. Stat. § 40:1379(A)(1); Me. Rev. Stat. tit. 25, § 2003; Mich. Comp. Laws § 28.422(3); Minn. Stat. § 624.714, subdiv. (2)(b); Miss. Code § 45-9-101(2); Mo. Stat. § 571.101; Mont. Code § 45-8-321(1); Neb. Rev. Stat. § 28-1202; Nev. Rev. Stat. § 202.3657(2); N.H. Rev. Stat. § 159.6; N.M. Stat. § 29-19-4; N.C. Gen. Stat. § 14-415.11(b); N.D. Cent. Code § 62.1-04-03; Ohio Rev. Code § 2923.125(D)(1); Okla. Stat. tit. 21, § 1290.12(A); Or. Rev. Stat. § 166.291; 18 Pa. Cons. Stat. § 6109(e); R.I. Gen. Laws § 11-47-11(a); S.C. Code § 23-31-215(A); S.D. Codified Laws § 23-7-7; Tenn. Code § 39-17-1351(b); Tex. Gov't Code § 411.177(a); Utah Code § 53-5-704(1)(a); Va. Code § 18.2-308(D); Wash. Rev. Code § 9A.1.070(1); W. Va. Code § 61-7-4(f); Wis. Stat. § 175.60(2)(a).
  117. See Ala. Code § 13A-11-75; Conn. Gen. Stat. §§ 29-28(b), 29-35(a); Del. Code tit. 11 § 1441; see also Michael P. O'Shea, *Federalism and the Implementation of the Right to Arms*, 59 SYRACUSE L. REV. 201, 209-11 nn.40 & 50 (2008); Nat'l Rifle Ass'n, Inst. for Legis. Action, Right-to-Carry 2010, <<http://www.nraila.org/Issues/FactSheets/Read.aspx?ID=18>> (last visited Dec. 23, 2011). In addition, both Delaware and Alabama recognize permits issued by a number of states with nondiscretionary standards. See Ala. Code § 13A-11-85; Del. Code tit. 11 § 1441(j); see also state of Ala., Office of the Attorney Gen., Gun Reciprocity Law, <<http://www.ago.state.al.us/Page-Gun-Reciprocity-Law>> (last visited Dec. 23, 2011); state of Del., Attorney Gen. of Del., Weapons Reciprocity, <<http://attorneygeneral.delaware.gov/crime/concealedweapons.shtml>> (last visited Dec. 23, 2011).
  118. See Cal. Penal Code § 12050; Mass. Gen. Laws ch. 140, § 131(d); N.Y. Penal Law § 400.00(2)(f). For a discussion of the policy differences between different California counties, see Cramer & Kopel, *supra* note 106, at 712-16.
  119. See Haw. Rev. Stat. § 134-1-9; Md. Code, Pub.Safety § 5-306; Md. Code Regs. 29.03.02.04; N.J. Stat. § 2C:58-4; N.J.A.C. § 13:54-2.4(d); see also Hawaii Rifle Ass'n, Hawaii Gun Laws (rev. Aug. 10, 2010), available at <[http://www.hawaiiifleassociation.org/index.php?option=com\\_content&task=view&id=42&Itemid=47](http://www.hawaiiifleassociation.org/index.php?option=com_content&task=view&id=42&Itemid=47)> (last visited Dec. 23, 2011).
  120. See 720 ILCS 5/24-1; 720 ILCS 5/24-1.6; D.C. Code § 22-4504(a).
  121. 1930 CRIME COMM'N REPORT, *supra* note 24, at 5.
  122. *Id.*
  123. See *id.*
  124. See, e.g., Philip J. Cook & Jens Ludwig, *The Social Costs of Gun Ownership*, 90 J. PUB. ECON. 379, 390 (2006) (study estimates \$600 in social cost arising from decision to own handgun); David Hemenway, et al., *Firearms and Community Feelings of Safety*, 86 J. CRIM. L. & CRIMINOLOGY 121, 124-27 (1995) (considering poll results on whether people feel safer when others purchase guns to address the issue of externalities).
  125. See generally John R. Lott, Jr. & David B. Mustard, *Crime, Deterrence, and Right-to-Carry Concealed Handguns*, 26 J. LEGAL STUD. 1 (1997); see also John R. Lott, Jr., *Guns & Violence: Does Allowing Law-Abiding*



*Citizens to Carry Concealed Handguns Save Lives?*, 31 VAL. U.L. REV. 355 (1997).

126. See Lott & Mustard, *supra* note 125, at 12; see also Cramer & Kopel, *supra* note 106, at 680-86.
127. See Lott & Mustard, *supra* note 125, at 12; see also Cramer & Kopel, *supra* note 106, at 680-86.
128. Lott & Mustard, *supra* note 125, at 12.
129. *Id.*; see also *id.* at 64.
130. See *id.* at 4.
131. See *id.* at 24.
132. See *id.*
133. See generally JOHN R. LOTT, JR., MORE GUNS, LESS CRIME: UNDERSTANDING CRIME AND GUN CONTROL LAWS (3d ed. 2010); see also CHARLES F. WELLFORD, ET AL., EDS., FIREARMS AND VIOLENCE: A CRITICAL REVIEW at 125-27 (2004).
134. See generally, e.g., John J. Donohue, *Guns, Crime, and the Impact of State Right-to-Carry Laws*, 73 FORDHAM L. REV. 623 (2004) (advocating the inclusion of additional factors and the use of different weighting variables); Ian Ayres & John J. Donohue III, *Shooting Down the "More Guns, Less Crime" Hypothesis*, 55 STAN. L. REV. 1193 (2003) (arguing that changes to the analytic model decrease or eliminate the significance of right-to-carry laws); Dan A. Black & Daniel S. Nagin, *Do Right-to-Carry Laws Deter Violent Crime?*, 27 J. LEGAL STUD. 209 (1998) (same). But see Florenz Plassmann & John Whitley, *Confirming "More Guns, Less Crime,"* 55 STAN. L. REV. 1313 (2003) (responding to Ayres and Donohue); John R. Lott, Jr., *The Concealed-Handgun Debate*, 27 J. LEGAL STUD. 221 (1998) (responding to Black and Nagin).
135. Wellford, *supra* note 133, at 150. The dissenting committee member found that "some of [Lott's] results survive virtually every reanalysis done by the committee," and that those results ought to be credited as reliable. *Id.* at 269.

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# New York Gun Laws: An Advocate's View

By Jackie Hilly

## I. Introduction

New York State and City have strong gun laws that are effective in keeping our citizens and public spaces safe from gun violence, and guns out the hands of criminals. Every year the Brady Campaign<sup>1</sup> rates the 50 states according to the strength of their gun laws. Last year, New York was ranked fourth after California, Maryland and Massachusetts. The Legal Community Against Violence<sup>2</sup> also recently rated New York's gun laws and found our state to be the eighth strongest among the 50. Both analyses relied on research and experience in evaluating state laws and count our licensing of individuals and dealers among the most important laws.



New York State's comprehensive licensing structure is effective in keeping guns out of the hands of criminals. In addition, New York State's commitment to strong and effective gun laws includes closing the gun show sales loophole, banning assault weapons and high capacity magazines, and requiring licensees to report lost and stolen weapons. This article will discuss areas where our laws can be improved, but the good news is that New York State and City laws are strong and effective.

The bad news is that New York State and City suffer from a lethal flood of guns that arrives on our streets from states with weak gun laws and because of loopholes in the federal background check system. Guns come to New York from Pennsylvania, North and South Carolina, Georgia, Virginia, Florida,<sup>3</sup> and other states where weak gun laws allow anyone to buy a gun without a background check. Guns are sold to drug dealers, gang members and other criminals who injure and murder New Yorkers with shocking regularity. When anyone can buy a gun, no one is safe.

More than 40% of the guns sold in this country are sold by private sellers without a background check.<sup>4</sup> With no viable information, criminals, the seriously mentally ill, drug dealers and users, and other dangerous people have easy and unfettered access to guns. As New York Attorney General Eric Schneiderman recently noted after an eight-month investigation into sales at gun shows in New York, "[o]ur investigation confirms what too many already know in America, guns are freely available to all,

regardless of criminal history or other prohibitive factors."<sup>5</sup>

Guns sold in states with weak gun laws are often powerful and dangerous military style weapons, not at all like your father's hunting rifle. Our country's weak gun laws provide military style assault weapons and high capacity magazines to dangerous people producing a death toll from gun violence that is both dramatic and unremitting. Thirty thousand<sup>6</sup> people die every year because of gun violence, a number roughly equal to the runners in a New York City Marathon. The suffering of the victim's families continues for years after the dead are buried and the media have moved on to the next tragic shooting.

It is estimated that 60% of gun sales in our country are completed after a federal background check is conducted but there are still problems in this system. The National Instant Criminal Background Check System (NICS), which is the way we review the background of potential buyers, is only as effective as the information it contains. NICS relies on information sent to it from the 50 states and the federal government and compliance is tragically incomplete. NICS successfully captures records like felony convictions and citizenship status and has recently improved its collection of orders of protection and domestic violence cases. Unfortunately, NICS is woefully lacking in other important records including records evidencing serious mental illness, chronic drug use and other dangerous characteristics we know can lead to tragedy. A recent report by Mayors Against Illegal Guns called *Fatal Gaps*<sup>7</sup> documents the holes in NICS including the fact that 19 states have submitted fewer than 100 mental health records to NICS and four states have sent no mental health records to NICS. In another troubling category, 44 states were found to have submitted fewer than 10 records on drug use to NICS.<sup>8</sup> The report also verifies the difficulty states have faced in compiling required records for submission to NICS. *Fatal Gaps* is required reading for anyone interested in understanding the deficiencies in NICS and why guns so easily fall into the wrong hands. Without any review of buyers in more than 40% of firearms sales in this country and an inadequate NICS review of the remaining 60%, our safety is tethered to a broken system.

This article will discuss federal law and the way weak or non-existent federal laws perpetuate the interstate movement of crime guns into New York. It will also discuss the strengths and weaknesses of New York State gun laws and how we can improve them. Although laws in other states will be mentioned, they are discussed only in the way they impact New York. New York City laws, a model for the country and New York State, are discussed

elsewhere in detail in this *Journal*, so they are not discussed herein. The use of the word “gun” in this article will refer to a handgun<sup>9</sup> as that term is defined in New York Penal Law and not to a long gun or rifle. And finally, although suicide gun deaths are horrific, they are not discussed in this article.

## II. New York Is Flooded with Illegal Guns

Illegal guns travel to New York hidden in the trunks of cars, vans and trucks so often that Interstate 95 is referred to as the “Iron Pipeline.” With sickening regularity we read in New York’s papers about innocent bystanders who are killed by illegal guns.<sup>10</sup> When gun laws are weak and arbitrarily enforced, random violence and killing become the norm and can impact anyone. Close to a thousand New Yorkers are killed every year<sup>11</sup> by gun violence and the cost to families and communities is immeasurable.

New York State has strong laws governing the sale and licensing of guns, which help to prevent guns from getting into the hands of criminals. New York State has closed the gun show loophole and requires background checks on private sales at gun shows.<sup>12</sup> Only one third of crime guns in New York come from sales in New York, and New York exports very few guns used in crimes in other states.

In 2009, 85% of guns traced<sup>13</sup> after being used in crimes in New York City were found to have come from other states with weak gun laws. Stated another way, more than 8 out of 10 crime guns in New York City were originally sold in another state, frequently without any regard to the background of the buyer. In New York State as a whole, 68% of traced crime guns<sup>14</sup> were found to have come from sales in other states. The first problem New York faces is that despite its careful regulation of licensees and sales of weapons, far too many guns end up in New York from state sales to people who do not undergo *any* kind of background check. Federal laws to help prevent this flood of illegal guns into New York are necessary to ensure that weak laws in other states do not result in gun trafficking into our state. New laws and the strengthening of existing laws are necessary to solve this problem. Three important areas for improvement are outlined below.

### A. Federal Legislation Should Target Illegal Trafficking of Guns

Senator Kirsten Gillibrand recently introduced the Gun Trafficking Protection Act<sup>15</sup> to address illegal trafficking of guns. The bill would make federal law more effective by making every player in the illegal trafficking business culpable from the corrupt dealer and straw purchaser to the transporter and seller. It would enhance the penalties for everyone involved in trafficking with sentences of up to 20 years in prison, including the possibility of a substantial fine. It also focuses additional penalties on the leaders of the trafficking enterprise adding the po-

tential of five additional years to their sentencing. The bill gives the Attorney General of the United States and the Bureau of Alcohol Tobacco and Firearms (ATF) the ability to suspend or revoke the licenses of corrupt dealers and to impose conditions and special restrictions on dealers who have been identified as high risk. In addition, the bill provides funding and resources to support the work. Ending gun trafficking is a serious problem in our country. This gun trafficking bill, if passed, will give police and prosecutors the tools they need to arrest, convict and punish all parties in this deadly criminal enterprise and will help to stem the flow of guns into New York.

### B. Federal Law Should Close the Loophole for Private Sales

Federal law requires a background check on all sales of firearms by federally licensed firearms dealers (FFL)<sup>16</sup> to prevent prohibited persons from purchasing firearms. It does not, however, require a background check to be conducted by sellers on private sales. And therein lies the problem.

FFL are regulated by the ATF and permitted by federal law to sell firearms and explosives. FFL are required to keep records of every sale, including the serial number of the weapon and the name and other identifying information about the purchaser. The record of sale is an important document that helps the ATF trace guns later used in crimes. If there is no record of the first sale, the gun becomes difficult to trace and easy to sell in the illegal market.

Only 16 states regulate private sales<sup>17</sup> and the ATF estimates that more than 30% of guns sold at gun shows are later used in crimes.<sup>18</sup> But even outside of a gun show setting, private sellers all over the country are permitted to sell their guns from their homes. They can also attend a gun show and sell their guns to anyone, so long as the private sellers do not specifically know the purchaser is a prohibited person. Even for a private seller it is a federal crime to sell a gun knowing the purchaser is a prohibited person.<sup>19</sup> The easiest way *not* to find out if someone is prohibited from buying a weapon is *not* to ask the question. A private seller is not required to ask a purchaser about prohibited status and is also not required to keep a record of the weapon sold or the identity of the purchaser.<sup>20</sup>

If a private seller sells guns to someone in his home, no one will ever know what transpired. In the majority of states, if a private seller attends a gun show and claims to be an “occasional seller” as that term is defined in federal law,<sup>21</sup> rather than in the business of selling firearms, he does not have to conduct a background check even though he may have a table right next to an FFL. This is true even if the occasional seller and the FFL are selling the exact same weapon to the exact same person. Our current system of disparate legal requirements gives a competitive advantage to occasional sellers, and an incentive to purchasers who cannot pass a background check,

to deal with an occasional seller and not an FFL. When the first sale of a weapon is made by a private seller with no obligation to keep a record of the purchase or to conduct a background check, the weapon becomes very easy to subsequently transfer to anyone, including criminals and other prohibited people.

Most Americans may think that dangerous weapons including AK-47s, explosives, semi-automatic pistols and rifles, and high capacity magazines are sold only after a background check<sup>22</sup> is conducted on the purchaser. But nothing could be further from the truth. In more than 33 states, sales of a variety of military style weapons at gun shows are conducted without a background check. In the Columbine High School massacre where 13 people were killed and 21 injured, Eric Harris and Dylan Klebold obtained two weapons from a friend who purchased them at a gun show in Denver and another one from an employee of a pizza shop.<sup>23</sup> None of the sales involved a background check. The friend who purchased at the gun show said she would never have done it if she had been required to fill out paperwork for a background check, which requires an affirmative statement that the gun is for the purchaser's own possession.<sup>24</sup>

Despite the massacres at Columbine, Virginia Tech and Tucson, where weak gun laws permitted criminals with serious mental illnesses to wreck havoc, Congress has failed to pass any legislation to close the private sales or gun show loopholes. Two bills pending in Congress address the problem of closing these loopholes. The Gun Show Loophole bill<sup>25</sup> would require background checks on sales at *gun shows* by private sellers. It does not, however, address the issue of private sales that occur in other locations, including over the Internet. The Fix Gun Checks Act<sup>26</sup> introduced in 2011 in the wake of the Tucson shooting, if passed, would require a background check to be conducted on all private sales no matter who conducts the sale and no matter where the sale occurs. The strongest bill which addresses all private sales is the Fix Gun Checks Act. Either of these bills if passed would require background checks on all sales at gun shows and would go a long way towards stemming the flood of illegal guns coming into New York. Instead, Congress has done nothing and at thousands of gun shows every year, hundreds of thousands of guns continue to be sold without a background check.<sup>27</sup>

In every recent survey, most Americans, including gun owners, want regulations to prevent dangerous guns from getting into the hands of dangerous people like Jared Loughner who shot Congresswoman Giffords and 19 others in Tucson. In Arizona,<sup>28</sup> just weeks after the shooting in Tucson, a large gun show was held where thousands of dangerous weapons were sold without background checks.<sup>29</sup>

Year after year, the leadership of the NRA lobbies against passage of legislation to end gun trafficking or close the private sales loophole. Most gun owners and

members of the NRA, however, support sensible gun regulations. Sixty-nine percent of NRA members and 85% of non-NRA members support requiring a background check on the sales of all weapons no matter where they occur.<sup>30</sup> The leadership of the NRA and the gun industry repeatedly stonewall legislation in the name of their membership.

The tragic and false distinctions incorporated in current federal law which allow private sellers to make sales without a background check threaten the safety of families and communities around the country. We need look no further than Tucson to see how a bright beautiful day can turn into a deadly bloodbath when dangerous weapons are sold to anyone who walks into a gun show.

### C. The National Instant Criminal Background Checks System Needs Improvement

The first federal law identifying who should be denied access to firearms was initiated in 1968 after Robert Kennedy and Martin Luther King, Jr. were shot.<sup>31</sup> This system was essentially an honor system and did not require an FFL to verify information contained on applications. Thereafter, a background check requirement was incorporated into the Brady Handgun Violence Prevention Act (the Brady Law) passed in 1993, many years after the March 1981 shooting of President Ronald Reagan and his press secretary James Brady.<sup>32</sup> Since 1993 and after several amendments, the Brady Law background check now identifies nine categories<sup>33</sup> of prohibited persons who cannot purchase a gun including people:

- Convicted of or under indictment for a felony
- Convicted of domestic violence misdemeanors
- Adjudicated mentally ill
- Using or addicted to controlled substances
- Subject to a court order for intimate partner violence
- Who are not citizens
- Dishonorably discharged from the military
- Who are fugitives from justice
- Who have renounced their citizenship

When enacted, the Brady Law required that background checks would be implemented no later than 1998 through NICS<sup>34</sup> and would be run by the FBI. NICS provides an immediate answer to an FFL as to whether a proposed purchaser should be permitted to purchase a weapon or if additional information is needed, and is available to FFL seven days a week and every day of the year (except Christmas). FFL telephone NICS using a toll free number or the Internet and request a background check on the information provided by the purchaser. Since its implementation, the background check system has re-

viewed through NICS and state and local agencies more than 108 million requests and denied about 1.9 million. But the NICS system has flaws that should be corrected.

### 1. Missing Mental Health Records

After the murder of 32 students and faculty at Virginia Tech on April 16, 2007, a fatal flaw was revealed in the NICS background check system. The shooter, Seung-Hui Cho, had been “adjudicated a mental defective”<sup>35</sup> by a court in Virginia, and under NICS should have been prohibited from buying a gun. But unfortunately Virginia did not send the record of his adjudication to NICS and because of this failure, Cho was able to purchase weapons used to kill 32 people.

Mr. Cho’s ability to buy two guns despite his history has brought new attention to the adequacy of background checks that scrutinize potential gun buyers. And since federal gun laws depend on states for enforcement, the failure of Virginia to flag Mr. Cho highlights the often-incomplete information provided by states to federal authorities.<sup>36</sup>

NICS, like all other systems, is only as good as the information it contains, and Virginia Tech and Tucson revealed how much more needs to be done to make NICS a real barrier to prohibited people getting guns. NICS required states to send records to its system but prior to 2008 there was no financial support to encourage compliance, nor were any penalties imposed for failing to do so. In 2008, then-President George W. Bush signed the NICS Improvements Amendments Act of 2007 (NIAA)<sup>37</sup> into law giving states the opportunity to compete for federal funds to improve their compliance with NICS. New York was one of the grantees in the first and subsequent rounds of funding under NIAA and has improved its system of reporting, including the submission of more mental health records to NICS.<sup>38</sup> In fact, New York is ranked fourth among the states in having the most records of mental health in NICS and fourth in the per capita submission of records of mental health to NICS. In 2007, at the time of Virginia Tech, New York had one mental health record in NICS. New York State’s dramatic reporting improvement can be attributed in large measure to federal funding and leadership by the New York State Division of Criminal Justice in solving many technical and practical problems.

### 2. Missing Domestic Violence Records

Federal law required two types of records of domestic violence events to be sent to NICS. The first are records of misdemeanor convictions of domestic violence and the second are orders of protection, both temporary and final, issued in domestic violence cases. New York State has effectively sent many records of its orders of protection to NICS<sup>39</sup> and recently improved submission of its records of misdemeanor convictions of domestic violence, an area where it had been entirely lacking records.

New York Penal Law does not have a specific crime of domestic violence,<sup>40</sup> and consequently state records of conviction for misdemeanors, where the underlying conduct constituted domestic violence, could not previously be entered into the NICS database. NICS required a certification that the domestic violence crime involved “intimate partners”<sup>41</sup> but that element was not an element proved in New York domestic violence prosecutions. The fact of “intimate partner” is now proved and established in New York by plea allocution of the defendant or by proof at trial. The record of this proof is certified by the court and entered into the certificate of conviction which is then sent to NICS. Under New York State law,<sup>42</sup> now records of convictions for misdemeanor crimes of domestic violence can be accepted by NICS and entered into its database.

### 3. Missing Records from Federal Agencies

Federal agencies are required to send the names of prohibited persons to NICS four times a year. The list of agencies required to perform this important task is long and includes, but is not limited to, the Coast Guard, Departments of Defense, Justice and State, as well as the FBI, Secret Service and Department of Veterans Affairs.<sup>43</sup> The federal government itself, however, has failed to send required records to NICS. Mayors Against Illegal Guns’ report *Fatal Gaps* found that many federal agencies do not send any records to NICS despite legal requirements to do so. The only agency that is complying with its obligations under NICS is the Department of Veterans Affairs.<sup>44</sup>

### 4. Missing Records from Other States

Many states<sup>45</sup> have failed to act responsibly and even today have very few records in NICS in categories like serious mental illness and drug use. Unfortunately, in January of 2011, the need to repair and reform NICS was again apparent when Congresswoman Gabrielle Giffords was shot by Jared Loughner, who had passed a background check. Also a “prohibited person” under NICS, Loughner was able to buy a powerful military style gun and several high capacity magazines. Loughner was an admitted drug user who had twice been arrested and charged with drug offenses. He admitted using drugs in his application to the military. In addition, he had been physically removed from and refused admittance to his community college campus in Tucson because of threatening and strange behavior described by teachers, fellow students and security. Any one of these instances should have prevented Loughner from obtaining a gun, but no record of any of the events was sent to NICS. In Arizona, long after Loughner demonstrated on numerous occasions that he was dangerous, he was permitted to purchase weapons and ammunition. Communities around the country suffer the consequences of a broken and weak background check system every day. When 19 people are shot and six killed, mothers and fathers, husbands and wives suffer for a lifetime.

Senators Gillibrand and Schumer and Congresswoman Carolyn McCarthy are the sponsors of the Fix Gun Checks<sup>46</sup> bill that would require a background check on the sale of all weapons, including sales at gun shows and sales conducted by private sellers. If passed, the bill would give states financial incentives to put as many records as possible into NICS by reducing funding to the state under federal Justice Assistance grants if the state fails to send a specific targeted number of records to NICS. Heads of federal agencies would be required to certify in writing twice a year that they have sent necessary records to NICS. Perhaps most importantly, the issue of mental health and drug use would be addressed in three ways. First, the bill would clarify that court-mandated outpatient treatment for mental illness constitutes “adjudication of mental illness” and, therefore, places the person receiving it in the category of a prohibited person under NICS. Second, the definition of drug abuse would require that individuals using drugs be included in NICS for five years rather than only for one year as currently required. Third, the bill would require federally funded colleges and universities to report a student who is referred for mental health observation to a state mental health agency. These changes will help make NICS a more effective system, and close the private sales and gun show loophole. Sensible laws like Fix Gun Checks may not prevent all future tragedies, but as a nation we can certainly do a better job of protecting the safety of American families than we have so far.

### III. New York Gun Laws

#### A. New York’s Statutory Framework

New York Civil Rights Law Article II, Section Four provides that “[a] well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms cannot be infringed.” New York State does not have a state constitutional right to bear arms but its statutory language is identical to the language of the Second Amendment.<sup>47</sup> The Second Amendment to the U.S. Constitution has been interpreted by the Supreme Court in the two recent historic cases of *District of Columbia v. Heller*,<sup>48</sup> and *McDonald v. City of Chicago*.<sup>49</sup> The Supreme Court defined for the first time in many years the right incorporated in the Second Amendment (*Heller*) and its applicability to the states and localities (*McDonald*). The *Heller* decision resolved a long standing debate, finding that the Second Amendment included an individual right to bear arms for self defense in the home and not just a collective right to possess based upon militia service.<sup>50</sup> But in defining and describing that right the Court explicitly stated “[l]ike most rights, the right secured by the Second Amendment is not unlimited.”<sup>51</sup> In addition, the Court noted, “nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government building or laws

imposing conditions and qualifications on the commercial sale of arms.”<sup>52</sup>

Legal Community Against Violence reviewed post *Heller* court decisions of challenges to local and state laws around the country.<sup>53</sup> In decisions addressing a variety of civil challenges to local and state laws, it noted:

Federal and state courts have also upheld laws requiring the registration of all firearms, requiring an applicant for a license to carry a concealed weapon to show “good cause” or “proper cause” or qualify as a “suitable person,” requiring an applicant for a handgun possession license to be a state resident, prohibiting the sale of firearms and ammunition to individuals younger than twenty-one-years-old, and prohibiting the possession of firearms in places of worship and within college campus facilities and at campus events.<sup>54</sup>

The *Heller* case law from around the country reaffirms its central holding that local and state statutes addressing possession by felons and the mentally ill, possession in sensitive places, and conditions and qualifications on the sales of firearms will be upheld.<sup>55</sup>

In 2000, under then Governor George Pataki, New York passed an omnibus bill including seven critical gun laws<sup>56</sup> that to this day are among the strongest gun laws in our state. Included in this bill are many of the laws discussed in this section including licensing, registration, reporting lost and stolen guns and assault weapons and high capacity magazine bans. New York is consistently ranked among the best states for laws that keep the public safe and keep dangerous weapons out of the hands of dangerous people. New York Penal Law Section 400 is the statutory framework for licensing firearms in the state. A “firearm” in the Penal Law is defined basically as a handgun or more precisely “as a pistol, revolver or short barreled rifle or shotgun.”<sup>57</sup> New York’s Environmental Conservation Law regulates hunting, fishing and trapping and uses the word “firearm” differently to refer to any gun as the word is conversationally understood, including handguns, shotguns, rifles, air guns, spring guns, BB guns, and muzzle loaded guns.<sup>58</sup> This article discusses New York’s regulation of “firearms” or handguns only.

#### B. The Police Power Is Not Pre-empted by Federal Law

The police power of the states found in the Tenth Amendment to the Constitution states, “The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are therefore reserved to the States respectively, or to the people.”<sup>59</sup> One of the powers not delegated to the federal government and reserved to the states is the police power. Federal law has long recognized the importance of the police power of states and

localities and the fundamental purpose it serves to protect the public and public safety.<sup>60</sup> “The promotion of public safety is ‘unquestionably at the core’ of a municipality’s police power.”<sup>61</sup> It is for this reason that federal law defers to state and local laws in issues relating to police powers and matters of public safety. New York law also confers broad powers on local governments<sup>62</sup> to adopt laws that relate to, among other things, the “protection, order, conduct, safety, health and well-being of persons or property.”<sup>63</sup> Local laws may not conflict, however, with the federal or with the state constitution or its general laws.<sup>64</sup> Both federal<sup>65</sup> and New York State<sup>66</sup> courts have found the regulation of weapons to be an area of law not preempted by federal law and a legitimate exercise of local police power.

### C. Licensing, Registration and Reporting Lost and Stolen

One of the most important statutory requirements in New York law is licensing of gun owners and registration of guns. Many states have no licensing of owners and no limited registration of guns. Research demonstrates that when cities and states have some form of both licensing and registration they also have greater success in keeping guns out of the hands of criminals.<sup>67</sup> Licensing laws and state laws that require the issuance of a purchase permit before a gun can be sold have the effect of lowering the rate at which guns move into the illegal market. In a study conducted by *Mayors Against Illegal Guns*,<sup>68</sup> states with licensing laws were shown to limit the number of guns recovered in crimes in other states to one-third the rate of states that had no licensing laws.<sup>69</sup> In other words, states with licensing laws were less likely to export guns that were later used in crimes in other states. Federal law does not require a license to own a gun. Four states (HI, IL, MA, and NJ) require licenses for all firearms while New York and 6 other states (CA, CT, IO, MI, NC, RI) require a license for handguns only.

New York has one licensing statute in the Penal Law that covers all handgun licenses including, but not limited to individual, business and concealed carry licenses.<sup>70</sup> The license application requires an applicant be 21 years old or honorably discharged from the military, of good moral character, not have had a prior handgun permit revoked, not be mentally ill, or the subject of a family court order, and not exhibit “good cause” why the permit shall not issue.<sup>71</sup>

New York’s licensing structure is thorough and gives a complete picture of an applicant in large part because the state process gives discretion to law enforcement and because of our requirement of good moral character. New York State’s system of licensing is called a “May Issue” system because of law enforcement’s discretion about whether or not to issue a license. Most other states are called “Shall Issue” because they do not give any discretion to law enforcement. These more lenient “Shall Issue” states often have few requirements for applicants and

some grant applicants as young as 18 unlimited permits to carry anywhere. Other “Shall Issue” states do not give law enforcement any ability to reject applicants even if a review of their background would reveal a risk like mental illness or repeated drug or alcohol treatments.

In New York, a license application is made in the county of residence, employment or place of business and each county except the five counties of New York City, Nassau, Suffolk and Westchester, issues licenses for life. New York City issues licenses for three years and Nassau, Suffolk and Westchester for five years. Counties conduct investigations on license applications through a variety of offices including the police and sheriffs’ offices or the county clerk where applicants are likely to be known and their local references easy to interview. Among New York’s 62 counties there are a variety of ways law enforcement reviews applications, but each officer charged with the responsibility of review has the discretion to review an applicant’s good character.

Once approved, license applications are forwarded with recommendations by local authorities to the Superintendent of State Police, where the application is again reviewed. If the application is approved, the permit is issued by the Superintendent of State Police.<sup>72</sup> Only Westchester County requires training in weapons use and safety. Once an applicant has been approved for a license, New York State does not limit the number of guns licensees may purchase.

Revocation of licenses occurs automatically with a licensee’s conviction of a felony or a serious offense. A serious offense is defined as violating an order of protection where physical injury was inflicted or where there was the use or threatened use of a deadly instrument. Revocation may also occur with the court’s issuance of a temporary order of protection<sup>73</sup> and suspension of a license can occur if a court finds “a substantial risk that the defendant may use or threaten to use a firearm, against a person or persons for whose protection a temporary order of protection is issued.”<sup>74</sup>

New York’s requirement of registration of handguns is accomplished through its licensing structure. All handguns are required to be listed or registered on the license, and if sold to another, removed from the license. The registration or sale of a handgun is accomplished by an “amendment” to the license so that each gun purchased, sold or owned is added to, removed and/or listed on the license.<sup>75</sup> A licensee has an affirmative obligation to report each additional purchase of a handgun to the police department who issues a “receipt” or a kind of permit to purchase that then allows the licensee to pick up a purchased gun. Licensees also have an affirmative obligation to amend a license to reflect a gun sold and a change of address which must be done in writing within 10 days of the move, and recorded on the back of the license. Failure to report a change of address is a Class A Misdemeanor.<sup>76</sup> Licensees or other people lawfully in possession of fire-

arms also have an obligation to report lost and/or stolen firearms to the police within 24 hours of the discovery of the loss or theft.

New York's licensing and registration structure ensures that handgun licensees are well known in the community where they live or work and are responsible adults who have been educated about New York laws and responsibilities. New York's requirement of reporting lost and stolen firearms provides a system of accountability on handgun ownership that discourages illegal sales and gun trafficking and can help law enforcement trace crime guns.

#### D. Renewable Licenses

The five New York City counties and the downstate counties of Nassau, Suffolk and Westchester require licenses to be renewed, which gives law enforcement the opportunity to confirm an applicant's good character, conducting a NICS background check and a periodic review of records of mental state, drug use, or domestic violence involvement. But only eight of New York's 62 counties require renewal and consequently most New York licensees are never reviewed for good character and suitability after the original issuance. Renewable licenses serve the important purpose of periodic review of applicants. At the time of renewal law enforcement can check state databases for important information like new arrests and records of warrants, repeated drug arrests that did not result in convictions for felonies, or mental health exams ordered by the court where no plea or conviction results.

Renewable licenses are required in New York State for many professions and employment positions and provide the kind of up-to-date information needed by employees and law enforcement to help determine the character and fitness of applicants. For years in the New York legislature, a Five Year Renewable Licensing bill<sup>77</sup> has floundered. The bill passed the Assembly, but the Senate failed to take any action on it. If passed, the Five Year Renewable Licensing bill would give New York State law enforcement a recent and informed view of whether a licensee continues to meet our state standards.

#### E. Licensing of Firearms Dealers

Applicants for a gun dealer license must undergo the same "May Issue" review and background check required for an individual license to possess. The applications for business licenses are filed in the city or county where the business is located, and if approved a gun dealer license is issued for the premises where the gun store is located. Dealers must prominently display their license in the premises, and are permitted to operate off premises at gun shows and events "sponsored by any organization devoted to the collection, competitive use or other sporting use of firearms." These dealer licenses are issued in New York City for three years and must be renewed in the rest of the state every six years.<sup>78</sup>

One dangerous oddity in New York law is that once a business license is granted and the owner passes a background check, employees who work in the business are not required by law to also pass any kind of a background check. Gun dealer employees should at least be required to pass a NICS background check. Investigations have confirmed that guns used in crimes were later traced to gun dealer employees with criminal backgrounds.<sup>79</sup> It seems logical that when dealer/owners are required to pass a background check, employees, who may be left in charge of the business and the inventory of weapons and ammunition, should also be required pass a NICS background check. But in 2009, a bill to require employees to undergo a background check<sup>80</sup> was proposed in the New York State Assembly and failed to pass or garner the support it deserved in the Senate.

#### F. New York Gun Dealer Regulations

In addition to New York's requirement of licensing of the dealer, our state regulations on the way gun dealers conduct business should be changed. New York gun dealer regulations should be revised to incorporate several safeguards now missing. One element missing and already discussed is that employees of gun dealers should be required to undergo a background check for many sensible reasons like their ready access to the inventory of guns, and their obligation as employees to perform a background check on others. In addition, employees should be required to have training in recognizing straw purchasers since straw purchasers are so often surrogates for criminals and other prohibited persons.

Gun dealers now have no legal requirement to safeguard their inventory from burglary even though easy access to firearms through unlocked windows, skylights, and doors are known sources of stolen guns. And under current New York law, gun dealers must make their records of sales available to state police if an inspection is requested.<sup>81</sup> A dealer does not, however, have a legal obligation to permit the police to compare the record of sales to the inventory when missing inventory is a well-known source of crime guns. Other requirements like liability for injury to customers on the dealer's premises should be considered. A bill called the Gun Dealer Responsibility Act,<sup>82</sup> if passed, would require all of the regulations outlined here. The bill has been passed in the Assembly but the Senate has failed to act on these important changes.

#### G. New York Gun Shows

A recent investigation by Attorney General Schneiderman revealed that operators of gun shows are not following the law in New York State, and that illegal gun sales are occurring with alarming ease at gun shows. Investigators from the Attorney General's staff visited 10 gun shows around the state and were repeatedly able to buy guns illegally. In each case, the undercover investigators told private sellers that they could not pass a back-



ground check because of having an order of protection against them for domestic violence. The sellers ignored longstanding federal prohibitions and clear New York law,<sup>83</sup> blatantly selling guns to the undercover investigators.

Under New York law, gun show operators have minimal duties to post signs and inform show sellers about federal requirements for background checks.<sup>84</sup> In addition, New York law requires an FFL to be present at every gun show and available to conduct background checks. Despite the convenience of the FFL at the gun show, the operators failed to meet even these minimal requirements.<sup>85</sup> The investigation revealed the need for genuine enforcement of background check requirements among private sellers in New York and the need for legal responsibility and compliance by gun show hosts to ensure that background checks are conducted.

#### H. Assault Weapons and High Capacity Magazines Bans

In 1994, Congress enacted a federal ban on assault weapons and high capacity magazines holding more than 10 rounds. The ban required, among other things, that high capacity magazines be marked “for law enforcement/military use only.” In 2004, Congress allowed this federal assault weapons ban and its high capacity magazines ban to sunset. There is no longer a federal ban, and assault weapons and high capacity magazines are readily available in gun stores and over the Internet throughout the country. We need look no further than Tucson to see the devastation caused by high capacity magazines that carry 15 or 30, 90 or even 100 rounds. High capacity magazines facilitate rapid, unrelenting firing of bullets and cause devastation in seconds. Jared Loughner fired more than 30 rounds in 16 seconds and was only prevented from reloading one of his three 30-round high capacity magazines by ordinary people who were standing close by.

New York State has an assault weapons and high capacity magazine ban passed in 2000 under the Pataki Omnibus bill. New York law forbids the selling or possessing of assault weapons but our definition of an assault weapon is not the best available. New York State’s definition of an assault weapon is called a “two characteristic” test since it requires the weapon have the ability to hold high capacity magazines and have any two attributes like a “folding or telescoping stock or a pistol grip that protrudes conspicuously beneath the action of the weapon.” In ordinary language, the characteristics that define an assault weapon also promote the rapid firing of multiple rounds by offering high capacity magazines, convenient easy to hold long grips, telescoping lenses, bayonet mounts, and grenade launchers.

A “one characteristic” test defines a rifle, shotgun or pistol with the capacity to hold high capacity magazines.

The one characteristic test describes the essence of an assault weapon. In New York, if a weapon has the ability to hold high capacity magazines and only has a pistol grip it would not be considered an assault weapon. New York’s two characteristic test allows weapons to evade and slip through the ban by requiring a second superfluous element. In fact, gun manufacturers carefully study definitions like New York’s and redesign weapons to circumvent these tests. New York should have a one characteristic assault weapon definition.

The 2000 Omnibus bill also grandfathered the selling and/or possessing of high capacity magazines possessed or made before 1994, the year of the federal ban’s enactment. Although high capacity magazines produced during the time of the federal ban contain the embossed mark stating “for law enforcement/military use only,” other high capacity magazines produced throughout the country now no longer contain this mark. In practice, it is almost impossible to distinguish a pre- or post- ban high capacity magazines. To distinguish pre-1994 grandfathered high capacity magazines, dealers and other sellers in New York wrap pieces of paper around high capacity magazines to indicate date and/or origin. This easily falsified method of verification is hardly an effective way to enforce a ban on high capacity magazines and fails completely to distinguish among pre- and post- high capacity magazines. The grandfathering of high capacity magazines should be eliminated in New York law.

In the legislative session that ended in June 2011, a bill was introduced<sup>86</sup> which if passed would have eliminated the grandfathering of pre-1994 high capacity magazines in New York. This bill was not acted upon in either house of the legislature.

#### I. Microstamping

Nationally, 36% of homicide cases are never solved.<sup>87</sup> And 67% of all homicides are committed with a gun.<sup>88</sup> In New York City, the gun of choice for most criminals is a semi-automatic.<sup>89</sup> With rapid fire and a clip that ejects shell casings after the bullets have been fired, criminals who use semi-automatics leave shell casings at many crime scenes around the state. Unfortunately, these shell casings do not often provide a link for law enforcement to the guns or the criminals that fired them. Microstamping would create such a link.

Anyone who has investigated crimes knows that the sooner evidence is connected to a gun or to a person, the greater the likelihood that other evidence can be located and developed. Where crime scene evidence is not connected, evidence is lost, and the case can become cold very quickly. More evidence developed in a timely way means a greater likelihood of conviction at trial. On a regular basis, the nightly news depicts police at crime scenes around the state marking the locations of shell casings and placing them into evidence bags. But most criminals do not leave their guns behind at crime scenes and with-

out the gun, shell casings often remain an undeveloped lead. A potential link to a criminal is lost, but microstamping could create that link.

New Yorkers Against Gun Violence issues reports, called *Shell Casings Anonymous*, once a week tracking media reports of shots fired where shell casings are found<sup>90</sup> at crime scenes. In cities around the state like Buffalo, Syracuse, Albany, Utica, Poughkeepsie, and in downstate counties like Nassau and Suffolk, thousands of shell casings are found by law enforcement but are not connected to a gun or a criminal. Most of the reports of shots fired do not result in an arrest of any kind. In fact, in Syracuse from 2006 to 2010 there were 1,360 reports of shots fired and only 160 resulted in arrest. When no arrest is made, the gun remains in the hands of the criminal and the community remains at risk.

Law enforcement throughout the state support microstamping as a tool that would help solve crimes<sup>91</sup> because it would imprint identifying marks created on the shell casing when a shot is fired. Law enforcement could then identify and trace crime guns using the shell casings. New York's legislature should help law enforcement as much as possible by giving them the tools they need. Microstamping has passed the Assembly three times but the Senate refuses to pass the bill.

In other articles in this issue, the mechanics and technology of microstamping are fully discussed. However, it is critical to remember that with 34% of homicides unsolved and thousands of guns flooding the streets of New York communities, law enforcement needs all the help and technology we can offer. Microstamping is one good choice to help solve crimes.

## V. Conclusion

Stronger federal laws to end the private sale loophole, and put better information into NICS from other states and the federal government, would mean fewer illegal guns flooding New York and getting into the hands of criminals. This in turn would mean fewer gun deaths and injuries to New York citizens. In a recent study<sup>92</sup> by Mayors Against Illegal Guns, states with weak gun laws were found to be more likely to export guns later used in crimes than states that had strong gun laws like New York. In the states with weak gun laws, more police officers were killed as a result of criminals' easy access to dangerous guns.

With sensible and strong gun laws, New York is among the safest states in the country and has a lower than national average rate of gun violence death and injury.<sup>93</sup> In fact, our per capita gun death and injury is half the national average. Not coincidentally New York is also a state with among the lowest per capita rates of gun ownership.<sup>94</sup>

Research demonstrates that more guns mean more death and injury in all categories of gun violence. In fact,

in all parts of the country, using similar levels of education, poverty, urban settings and other constants, states with higher per capita gun ownership also have higher rates of gun death.

For most contemporary Americans, scientific studies indicate that the health risk of a gun in the home is greater than the benefit. The evidence is overwhelming for the fact that a gun in the home is a risk factor for completed suicide and that gun accidents are most likely to occur in homes with guns. There is compelling evidence that a gun in the home is a risk factor for intimidation and for killing women in their homes.<sup>95</sup>

Not surprisingly, many people chose not to own a gun or have one in their home. In fact, gun ownership in the United States is decreasing in all categories and hit an all time low this year as recorded by the National Opinion Research Council (NORC).<sup>96</sup> In its General Social Survey, NORC tracks opinions of Americans on social issues and from 1977 to 2010 there was a 40% drop in American households reporting gun ownership. In the same time period, reporting of personal gun ownership dropped 33%, male gun ownership dropped more than 20%, and female gun ownership (which was already a small number) dropped more than 10%. Contrary to the marketing campaigns of gun industry, fewer people choose to own firearms today than in years past.

In communities all across the country, crime is down and especially in New York City and State. New York City is one of the safest big cities in America. According to the United States Department of Justice, violent crime has been declining across the country including decreases of more than 5% for a five-year trend from 2005 to 2009 and more than 7.5% for a ten-year trend from 2000 to 2009. In New York State the numbers are even more impressive.<sup>97</sup>

Despite the reality of lower crime and documented lower rates of gun ownership, or maybe because of it, the gun industry continues to hawk new weapons and higher fire power. And elected officials regurgitate second amendment platitudes without reference to Heller's specific limitations, and legislatures continue to allow carrying of guns in more and more outrageous locations.<sup>98</sup> Ignoring the enumerated limitations in *Heller*, and the fact that the majority of Americans oppose the carrying of concealed weapons in public places, the gun industry and complicit elected officials increase gun possession in bars, churches, cars and other public places where people gather like sports arenas, libraries and shopping malls. This national push to allow guns everywhere, and the weak regulations in many states that allow illegal guns to flow freely across state borders, jeopardize our individual right to be free from gun violence, and threatens the public safety of everyone who walks the streets of our communities. New York and other states with strong, sensible

gun laws can only provide safety for their residents when federal gun laws are strengthened to prevent illegal guns from flowing into our state.

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# Regulating Guns in New York: Existing State Laws and How They Could Be Strengthened

By Laura Cutilletta and Juliet Leftwich

The State of New York has some of the strongest gun laws in the United States.<sup>1</sup> Strong state laws are essential to public safety because our federal gun laws are extremely weak—in fact, they're the weakest of all industrialized nations worldwide.<sup>2</sup> Not surprisingly, the United States also has the highest rate of gun deaths and injuries.



Laura Cutilletta

In 2009, for example, the most recent year for which statistics are available, more than 31,000 Americans died from firearm-related injuries—an average of more than 85 deaths each day—and nearly 70,000 others were treated in emergency rooms for non-fatal gunshot wounds.<sup>3</sup> In that year, guns were used to commit over 385,000 crimes and nearly 70% of all murders.<sup>4</sup>

In addition to its devastating emotional toll, gun violence has enormous medical, legal and societal costs. Medical costs alone have been estimated at \$2.3 billion annually, half of which are borne by American taxpayers.<sup>5</sup> When all direct and indirect medical, legal and societal costs are included, the estimated annual cost of gun violence in our nation amounts to \$100 billion.<sup>6</sup>

Some states, like New York, have moved to address America's gun violence epidemic by adopting laws to fill gaps in our federal regulatory system. As discussed below, however, New York could do much more to help reduce the gun violence that devastates families every day.

This article focuses on the following specific approaches to reducing gun-related deaths and injuries:

- Requiring Gun Owner Permits
- Regulating Firearms Dealers and Ammunition Sellers
- Prohibiting Multiple Firearms Sales
- Requiring Handgun Microstamping
- Retaining Records of Gun Sales
- Mandating Safe Storage of Firearms

The article discusses the benefits of each approach, summarizes relevant existing federal and New York law, and suggests ways that New York could add to, or strengthen, its existing laws to implement each policy.

Examples of how the laws of other states, and in some cases local governments, address these policies are also provided. Finally, the laws of New York City, which fill many of the gaps in state law identified in this article, are described where relevant.



Juliet Leftwich

## Requiring Gun Owner Permits

Firearms permitting (also known as licensing) laws require a person who wishes to purchase or possess a firearm to obtain a permit.<sup>7</sup> Permit applicants must fulfill specific requirements, which vary depending on the goals of the permitting scheme. For example, an applicant might be required to pass a background check before obtaining a permit. This requirement helps close a loophole in federal law that requires licensed firearms dealers, but not private sellers, to conduct background checks on prospective gun purchasers.<sup>8</sup> A permitting law with a background check requirement helps keep felons, domestic abusers, the mentally ill and other legally prohibited purchasers from purchasing firearms from private sellers.<sup>9</sup>

Some permitting laws also require applicants to complete safety training and/or pass a written test demonstrating knowledge of relevant firearms laws. Safety training helps ensure that gun owners know how to safely use and store firearms. Requiring gun owners to demonstrate knowledge of existing firearms laws helps increase their compliance with those laws.<sup>10</sup>

Federal law does not require gun owners or purchasers to obtain a firearms permit.

## Existing New York Law

New York's permitting scheme is complex. First, New York law treats pistols and revolvers (handguns) differently than rifles and shotguns (long guns). New York requires a permit to possess a handgun but does not require a permit for possession of a long gun.<sup>11</sup> Second, state law requires applicants to apply for a permit in the city or county in which they reside, are principally employed, or have their principal place of business.<sup>12</sup> The state imposes only minimal baseline requirements and, as a result, permitting systems differ widely depending on the laws of each local jurisdiction.

An applicant for a permit to possess a handgun in the home must, among other basic criteria, be at least 21 years

of age, have no felony or other serious offense convictions, and have no history of mental illness.<sup>13</sup> In addition, the issuing authority has discretion to deny a permit if good cause exists for denial or if an applicant does not demonstrate that he or she is of good moral character.<sup>14</sup>

Handgun possession permits are generally valid for an indefinite period of time.<sup>15</sup> This means a permit holder is not required to demonstrate periodically that he or she still meets the criteria required to hold the permit. Thus, a permit holder who has been convicted of a felony or otherwise become prohibited from possessing a firearm may nonetheless retain his or her permit and his or her handgun.

When a handgun permit holder purchases a new handgun, state law requires that he or she apply to the issuing authority for an amendment to the permit.<sup>16</sup> However, only minimal requirements are imposed during this process and state law does not require a background check for the amendment. As mentioned above, federal law does not require private sellers to conduct a background check before transferring a firearm to a prospective purchaser. Therefore, unless a local jurisdiction in New York requires a permit holder to pass a background check prior to purchasing a new handgun, a permittee who has become prohibited from possessing a firearm could still purchase a new firearm from a private seller.

New York's permitting law is also lacking in the area of safety training. State law does not require applicants to learn how to safely use and store their firearms or demonstrate knowledge of existing firearms laws, except for those who reside in Westchester County.<sup>17</sup>

### How New York Law Could Be Strengthened

New York could impose a permit requirement for the possession of all firearms, instead of limiting the requirement to handguns as it currently does. Many states require a permit to purchase or possess long guns, as well as handguns. For example, in New Jersey, a handgun purchaser must obtain a permit to purchase a handgun and a person who wishes to possess a rifle or shotgun must obtain a Firearms Purchaser Identification Card.<sup>18</sup>

New York could limit the duration of all firearms permits, regardless of which jurisdiction issues the permit, and require an applicant to satisfy all of the original application requirements, including a background check, before the permit is renewed.<sup>19</sup> This would keep permit holders who have been convicted of a felony or otherwise become prohibited purchasers from retaining a permit. In addition, this requirement would help notify authorities when firearms should be seized from a person who is prohibited from possessing them. As with the initial application stage, the renewal process should grant issuing authorities discretion to determine whose permit should be renewed.

Other states that require a firearms permit limit the duration of the permit. For example, in Hawaii, long gun permits are valid for only one year.<sup>20</sup> In Iowa, a handgun permit expires after one year<sup>21</sup> and in California handgun permits expire after five years.<sup>22</sup>

New York could require that all jurisdictions mandate that an applicant undergo hands-on safety training and pass performance-based tests showing he or she knows how to safely load, unload, clean, store, and fire a gun. In addition, state law could require applicants to pass a written test demonstrating knowledge of relevant firearms laws. Massachusetts requires permit applicants to undergo safety training.<sup>23</sup> California requires handgun permit applicants to pass a written test demonstrating knowledge of firearms laws.<sup>24</sup>

Finally, New York could require a permit to purchase or possess ammunition, as some states do. Illinois, for example, requires its residents to obtain a Firearm Owner's Identification Card<sup>25</sup> before purchasing or possessing ammunition.<sup>26</sup>

### Regulating Firearms Dealers and Ammunition Sellers

Federal law requires firearms dealers (persons engaged in the business of purchasing and selling firearms) to obtain a license.<sup>27</sup> Federal law mandates that federally licensed firearms dealers (FFLs) comply with various requirements, such as initiating background checks on prospective gun purchasers, maintaining transaction records and reporting the loss or theft of firearms.<sup>28</sup> Federal law does not require the licensing of ammunition sellers.<sup>29</sup>

The Bureau of Alcohol, Tobacco, Firearms & Explosives (ATF) administers and enforces federal firearms dealer licensing laws. Unfortunately, the agency lacks the resources and authority to properly oversee the more than 60,000 firearms dealers, manufacturers, collectors and others that it licenses.<sup>30</sup> In fact, ATF inspects each FFL, on average, only once a decade.<sup>31</sup> The Office of the Inspector General has concluded that ATF inspections are not fully effective for ensuring that licensees comply with federal firearms laws.<sup>32</sup>

FFLs are responsible for a large percentage of the firearms that enter the criminal market through illegal sales. In 2000, ATF published a report analyzing firearms trafficking in the United States.<sup>33</sup> The report analyzed 1,530 trafficking investigations during the period July 1996 through December 1998. The investigations involved a total of 84,128 diverted firearms (i.e., firearms that have left the stream of lawful commerce and entered the illegal market). The report revealed that FFLs were associated with the largest number of diverted guns (over 40,000), even though they were involved in less than 10 percent of the investigations. The violations included transfers to prohibited purchasers, failure to keep required records,

making false entries in record books and conducting out-of-state transfers.<sup>34</sup>

The International Association of Chiefs of Police recommends that state and local governments enact their own dealer licensing requirements because they can respond to specific community concerns, and because state and local oversight of licensees helps reduce the number of unscrupulous dealers.<sup>35</sup> A 2009 study found that cities in states that regulate firearms dealers and cities where dealers undergo regular compliance inspections have significantly lower levels of gun trafficking than other cities.<sup>36</sup>

### Existing New York Law

New York law requires individuals engaged in the business of selling handguns, other limited classes of firearms and large capacity ammunition feeding devices to obtain a state license in order to conduct business.<sup>37</sup> New York law does not, however, require individuals who only sell long guns or ammunition to obtain a state license. The state does not otherwise regulate firearms dealers and ammunition sellers.

### How New York Law Could Be Strengthened

New York could strengthen its dealer licensing laws by requiring individuals engaged in the business of selling any type of firearm (including long guns) and any type of ammunition to be licensed. New York laws could also require that those licensees:

- Locate away from residential areas and other sensitive areas. Massachusetts prohibits firearms dealers from operating in a residence or dwelling.<sup>38</sup> Many local governments in California prohibit firearms dealers from locating near residential or other sensitive areas (such as schools, daycare facilities, parks and places of worship).<sup>39</sup> New York could require dealers to locate a specified distance from these areas.
- Conduct background checks on employees. Several states require firearms dealers to conduct background checks on employees to ensure they are not legally prohibited from possessing firearms and ammunition. In Delaware, for example, dealers must maintain a list of current employees and conduct a background check on each employee at least once a year. A record of the background check and the list of employees must be available for inspection by law enforcement.<sup>40</sup>
- Follow specified security precautions when storing firearms and ammunition. States have enacted a wide array of security measures to reduce the risk of theft from dealers' premises. Some, for example, require dealers to:
  - Store firearms in a particular manner after business hours (California and Minnesota);<sup>41</sup>

- Display handguns so that they cannot be seen readily from the outside of the store (Alabama, California, and numerous other states. West Virginia imposes the requirement on the storage of all firearms and ammunition);<sup>42</sup>
- Install burglar alarms (Connecticut and New Jersey).<sup>43</sup>
- Provide law enforcement with a physical inventory of all firearms every six months so that dealers are held accountable for all firearms and ammunition that come into and out of their stores (San Francisco).<sup>44</sup>
- Maintain adequate liability insurance<sup>45</sup> to help pay for the damage caused by a dealer who negligently sells a firearm or ammunition that injures or kills a member of the public.<sup>46</sup>

### Prohibiting Multiple Firearms Sales/Purchases

Studies have shown that firearms that are sold in multiple sales to the same individual are frequently used in crime.<sup>47</sup> Crime gun trace data from 2000, for example, showed that 20% of all retail handguns recovered in crime were purchased as part of a multiple sale.<sup>48</sup> A study of the sale and subsequent criminal use of handguns sold in Maryland in the 1990s revealed that handguns sold in multiple sales accounted for about a quarter of crime guns and were up to 64% more likely to be used in crime than handguns sold in single sales.<sup>49</sup>

Laws prohibiting multiple purchases of firearms help prevent gun traffickers from buying guns in bulk and reselling them to criminals and other prohibited purchasers, thus reducing the number of guns entering the illegal market. Because jurisdictions with weaker firearms laws attract gun traffickers who make multiple purchases and resell those guns in jurisdictions with stronger firearms laws, laws prohibiting multiple purchases also help stem the illegal flow of firearms between states.<sup>50</sup>

A study of Virginia's "one-gun-a-month" law, which prohibited the purchase of more than one handgun per person in any 30-day period, demonstrated that the law was effective in reducing the number of crime guns traced to Virginia dealers. Virginia adopted its law in 1993 after the state became recognized as a primary source of crime guns recovered in states in the northeastern U.S. After the law's adoption, the odds of tracing a gun originally acquired in the Southeast to a Virginia gun dealer (as opposed to a dealer in a different southeastern state) dropped by 71% for guns recovered in New York, 72% for guns recovered in Massachusetts, and 66% for guns recovered in New Jersey, New York, Connecticut, Rhode Island and Massachusetts combined.<sup>51</sup> On February 28, 2012, a National Rifle Association-drafted measure repealing Virginia's one-gun-a-month restriction was signed into law by Republican Governor Robert McDonnell.<sup>52</sup>

Federal law does not limit the number of guns a person may buy in any given time period. Federal law does require federally licensed firearms dealers (FFLs) to report multiple sales of handguns to ATF and other specified law enforcement agencies, and defines “multiple sales” as the sale of two or more handguns by an FFL to a non-FFL within five consecutive business days.<sup>53</sup> The multiple sales reporting requirement was created to enable ATF to “monitor and deter illegal interstate commerce in pistols and revolvers by unlicensed persons.”<sup>54</sup> ATF and the other law enforcement agencies receiving the reports are not charged with any investigative duties regarding those sales, however.<sup>55</sup>

## Existing New York Law

In New York, it is a class C felony for a person to unlawfully sell, exchange, give or dispose of five or more handguns, short-barreled shotguns or rifles, or assault weapons to another person or persons in a period of not more than one year.<sup>56</sup> It is a class B felony for a person to unlawfully transfer ten or more such weapons to a person or persons in a period of not more than one year.<sup>57</sup> These state law provisions only apply to *unlawful* transfers, however. New York has no other laws limiting the number of firearms that may be sold to, or purchased by, the same individual in any given period of time.

## How New York Law Could Be Strengthened

New York could help reduce gun trafficking by adopting a law prohibiting multiple firearm sales. Several state and local governments, including California,<sup>58</sup> Maryland,<sup>59</sup> New Jersey,<sup>60</sup> the District of Columbia,<sup>61</sup> and New York City<sup>62</sup> have enacted such laws. In California, New Jersey and the District of Columbia, a person may buy only one handgun every 30 days. In Maryland, a person may buy only one handgun or assault weapon every 30 days. New York City has the strongest law in this area, limiting purchases to one handgun and one rifle or shotgun to one per person every 90 days.<sup>63</sup>

## Requiring Handgun Microstamping

Handgun microstamping laws utilize existing technology to help law enforcement solve gun crimes in an innovative way. When gun manufacturers “microstamp” a handgun, they use lasers to make precise, microscopic engravings on the internal mechanisms of the gun, such as the breech face and firing pin. Each time the gun is fired, a unique code identifying the gun’s make, model and serial number is stamped on to the expelled cartridge case.

Microstamping provides a crucial tool for law enforcement because it allows investigators to connect a cartridge case recovered at a crime scene directly to the gun that fired it. Without microstamping, ballistic experts can only analyze the microscopic scratches and indentations that are *unintentionally* transferred to a cartridge case when a firearm is discharged. Those unintentional markings cannot, however, identify a specific firearm unless

the firearm has been recovered and a test round has been produced for comparison. Intentional firearms microstamping, in contrast, allows crime guns to be identified without the need to recover the gun itself.

Microstamping is supported by the International Association of Chiefs of Police, which adopted a resolution in 2008 stating, “[T]his technology would be used to help law enforcement identify the first known purchaser of a weapon used in crime, therefore providing leads that would allow for substantial evidentiary information that will help identify, apprehend and arrest criminals.”<sup>64</sup>

In 2010, the American Bar Association House of Delegates adopted a resolution urging federal and state governments to require all newly manufactured pistols to be microstamped.<sup>65</sup>

## Existing New York Law

New York law does not currently require firearm microstamping.

## How New York Law Could Be Strengthened

New York could adopt a microstamping law similar to the laws adopted in California and the District of Columbia, the only jurisdictions that have enacted a microstamping requirement.

California’s Crime Gun Identification Act of 2007 will require all new models of semiautomatic pistols manufactured for sale in the state to be designed and equipped with microstamping technology once the California Department of Justice (DOJ) certifies that the technology is available to more than one manufacturer unencumbered by patent restrictions.<sup>66</sup>

Beginning January 1, 2013, the District of Columbia will prohibit licensed firearms dealers from selling or offering for sale any semiautomatic pistol manufactured on or after January 1, 2013 that is not “microstamp-ready.”<sup>67</sup>

## Retaining Records of Gun Sales

Federal law requires firearms dealers to keep records of firearms transactions, but does not require them to submit those records to a centralized location.<sup>68</sup> Federal law does not require private sellers to record any information regarding firearms sales.

Laws requiring all firearms sales transaction records to be retained *and* submitted to a central repository are crucial for many reasons. First, by providing information about the firearm that was purchased as well as who purchased it, the records help law enforcement trace firearms recovered at crime scenes. Without access to sales records, the process of determining who sold and purchased a firearm is slow and difficult.

Second, knowledge that law enforcement can readily trace a gun to a specific purchaser may deter that purchaser from selling the firearm illegally. Finally, access to



firearms transaction records can help protect police officers. The ability to access such records prior to responding to an incident would provide law enforcement with information about whether firearms are likely to be present at the scene.

### Existing New York Law

New York law requires firearms dealers to keep a record of every transaction involving a handgun, including details about the transaction and specific information about the purchaser's handgun permit. These records must be forwarded to the Division of State Police where they are maintained in a statewide database. Although federal law requires firearms dealers to retain records of transactions involving long guns, neither federal nor New York law requires dealers to submit long gun records to a centralized location. New York does not require private sellers to record information regarding firearm transactions.

### How New York Law Could Be Strengthened

New York could require firearms dealers to retain sales records for all transactions involving long guns, as it currently requires for handguns.<sup>69</sup> As with handgun sales records, dealers could be required to submit records detailing long gun sales to a centralized repository for inclusion in a statewide database. In addition, New York could require private sellers to record information for all firearm transactions and submit the records to a centralized repository, or require that all private sales be conducted through a dealer.<sup>70</sup>

Other states, such as Connecticut, require that all firearms sales records be retained and centralized.<sup>71</sup> A recently enacted California law requires the Attorney General to maintain long gun transaction records in a centralized database.<sup>72</sup> The new requirement supplements California law which has long required retention of handgun transaction records in a statewide database.<sup>73</sup> Illinois and Rhode Island require all sellers (including private sellers) to retain records of all firearms sales.<sup>74</sup> Massachusetts requires all sellers to keep records of all firearms transactions and to submit the records to a centralized location.<sup>75</sup> Pennsylvania and Maryland impose the same requirements on private sellers for select classes of firearms.<sup>76</sup> In California, all firearm transfers must be conducted through licensed dealers, thereby ensuring that sales reporting requirements will include private sales.<sup>77</sup>

### Mandating Safe Storage of Firearms

Unintentional shootings cause thousands of deaths and injuries each year in the U.S. In 2009, 554 people died from unintentional firearm injuries.<sup>78</sup> During the following year, 14,161 people were unintentionally shot, but did not die as a result of their injuries.<sup>79</sup>

All too often, children and young adults are the victims of unintentional shootings. Unintentional shootings

were among the leading causes of unintentional death for children between the ages of ten and fourteen in 2007 and 2008.<sup>80</sup> According to the U.S. Centers for Disease Control and Prevention (CDC), 123 young people under the age of 20 were killed in unintentional shootings in 2008, almost half of these victims were younger than 15. Many more do not die from firearm injuries, but their lives—and the lives of their families—are changed forever. Over 3,000 people under the age of 20 survived unintentional gunshot injuries in 2010 alone.<sup>81</sup>

Tragically, many of these deaths and injuries occur when firearm owners fail to store their weapons safely. A 2005 study of firearm storage patterns in U.S. homes found that adults owned firearms in one third of the homes in which a child younger than six-years-old lived or visited.<sup>82</sup> Of the homes in which a young child resided, 33% of adults admitted to keeping a firearm unlocked, while 56% of adults living in a home in which a young child visited admitted to keeping a firearm unlocked.<sup>83</sup> A 2005 study of adult firearm storage practices in U.S. homes found that over 1.69 million children and youth under age 18 are living in homes with loaded and unlocked firearms.<sup>84</sup>

The presence of unlocked guns in the home also increases the risk of youth suicide. Over half of all young people under the age of 25 who committed suicide in 2008 used a firearm. According to the CDC, 361 of those individuals were under the age of 18, and 50 were younger than 15. One study found that more than 75% of the guns used in youth suicide attempts and unintentional injuries were stored in the residence of the victim, a relative, or a friend.<sup>85</sup> At least two studies have found that the risk of suicide increases in homes where guns are kept loaded and/or unlocked.<sup>86</sup>

Furthermore, a U.S. Secret Service study of 37 school shootings in 26 states found that in nearly two-thirds of the incidents, the attacker obtained the gun from his or her own home or that of a relative.<sup>87</sup>

Federal law does not require that firearms in the home be stored locked or unloaded, or otherwise inaccessible to children. Federal law does, however, prohibit a licensed firearms dealer from transferring a handgun unless the transferee is provided with a secure gun storage or safety device.<sup>88</sup>

### Existing New York Law

New York law does not require that firearms in the home be stored in any specified manner. State law, however, does require that firearms dealers include a locking device with each firearm they transfer.<sup>89</sup> Dealers must also include a specified warning, affixed to the firearm or placed in the container in which the firearm is transferred, and post the same warning on their premises where firearms are displayed or transferred.<sup>90</sup> The warning must

encourage owners to store firearms unloaded, locked, separate from ammunition and inaccessible to children.<sup>91</sup>

In addition, New York law mandates that the Division of State Police develop and promulgate regulations setting forth the specific devices or minimum standards and criteria which constitute an effective gun locking device.<sup>92</sup>

### How New York Law Could Be Strengthened

New York could enact a requirement similar to a Massachusetts law mandating that all firearms in the home be stored locked or in a locked container.<sup>93</sup> The Massachusetts law does not apply while a firearm's owner, or another lawfully authorized user of the firearm, is carrying it or has it under his or her control.<sup>94</sup> Alternatively, New York could require that firearms be stored unloaded, or locked and unloaded, when not being carried or under an individual's control.<sup>95</sup>

New York could also require that locking devices be tested and approved by a certified independent laboratory before they may be sold. In California, locking devices may only be sold if they have passed laboratory testing and have been listed in a roster of approved devices maintained by the state Department of Justice.<sup>96</sup>

New York could also adopt a Child Access Prevention, or CAP, law. CAP laws impose criminal liability on adults who negligently leave firearms accessible to children. These provisions have been found to be effective at reducing unintentional firearm deaths among children.<sup>97</sup> Numerous states have enacted CAP laws. Minnesota, for example, prohibits any person from negligently storing or leaving a loaded firearm in a location where the person knows, or reasonably should know, that a child under age 18 is likely to gain access to the firearm, unless reasonable action is taken to secure the firearm against access by the child.<sup>98</sup>

### Conclusion

In the absence of strong federal laws regulating guns, it is up to each state to take action to protect the public from the dangers of gun violence. New York has long been among the states with the strongest firearms laws in the nation. And yet, in several areas, New York could strengthen its laws, or implement new approaches to regulating firearms. The legislative solutions presented in this article make clear that there are many options available for legislators who continue to strive to reduce the number of New Yorkers whose lives are lost or changed forever by gun violence.

### Endnotes

1. See Legal Community Against Violence, *Gun Laws Matter: A Comparison of State Firearms Laws and Statistics* (July 2010), at <[http://www.lcav.org/gun\\_laws\\_matter.asp](http://www.lcav.org/gun_laws_matter.asp)>; Legal Community Against Violence *New York State Law Summary*, at <<http://www.lcav.org/states/newyork.asp>>.
2. Wendy Cukier & Victor Sidel, *The Global Gun Epidemic: From Saturday Night Specials to AK-47s* 131 (2006). For an in-depth

- discussion of how U.S. gun laws compare to those of the rest of the world, see Gun Policy.org, *United States—Gun Facts, Figures and the Law*, <<http://www.gunpolicy.org/firearms/region/united-states>>.
3. Nat'l Ctr. for Injury Prevention & Control, Ctrs. for Disease Control and Prevention, *WISQARS Fatal Injury Reports, 1999-2009, for National or Regional; WISQARS Nonfatal Injury, 2001-2010*, at <<http://www.cdc.gov/injury/wisqars/index.html>> (last visited Dec. 5, 2011).
4. Bureau of Justice Statistics, U.S. Dep't of Justice, *Key Facts at a Glance: Crimes Committed with Firearms, 1973-2007*, <<http://bjs.ojp.usdoj.gov/content/glance/tables/gunccrimetab.cfm>> (last visited June 29, 2011).
5. Philip J. Cook et al., *The Medical Costs of Gunshot Injuries in the United States*, 282 JAMA 447 (Aug. 4, 1999).
6. Philip J. Cook & Jens Ludwig, *Gun Violence: The Real Costs* 115 (2000).
7. Permitting is also required in most states to carry a concealed weapon outside the home. In New York, the same system is used for both a permit to carry a concealed handgun and to possess a handgun in the home. This article will not address issues particular to the carrying of concealed weapons outside the home. For more information on laws regulating the carrying of concealed firearms, see Legal Community Against Violence, *Guns in Public Places: The Increasing Threat of Hidden Guns in America* (July 2011), at <<http://www.lcav.org/content/gunsinpublicplaces.asp>>; Legal Community Against Violence, *LCAV Model Law Regulating the Carrying and Possession of Firearms in Public Places* (Feb. 2011), at <[http://www.lcav.org/publications-briefs/model\\_laws/LCAV\\_Model\\_CCW\\_Law.pdf](http://www.lcav.org/publications-briefs/model_laws/LCAV_Model_CCW_Law.pdf)>.
8. See 18 U.S.C. § 921(a)(21)(C). For a full explanation of this loophole, see Legal Community Against Violence, *Model Laws for a Safer America: Seven Regulations to Promote Responsible Gun Ownership and Sales, Model Law Requiring Background Checks on All Gun Purchasers* 6 (Nov. 2011), at <[http://www.lcav.org/model\\_laws\\_for\\_a\\_safer\\_america.asp](http://www.lcav.org/model_laws_for_a_safer_america.asp)>.
9. There are other approaches to closing this dangerous loophole in federal law. For example, California requires all firearms sales to be conducted through a federally licensed firearms dealer who must conduct a background check on the prospective purchaser before a sale may take place. Another approach would be to require registration of all firearms and require a background check prior to the issuance of a registration card. For more information on laws that require firearm registration, see Legal Community Against Violence, *Model Laws for a Safer America: Seven Regulations to Promote Responsible Gun Ownership and Sales, Model Law Requiring the Registration of Firearms* 26 (Nov. 2011), at <[http://www.lcav.org/model\\_laws\\_for\\_a\\_safer\\_america.asp](http://www.lcav.org/model_laws_for_a_safer_america.asp)>.
10. See Legal Community Against Violence, *Model Laws for a Safer America: Seven Regulations to Promote Responsible Gun Ownership and Sales, Model Law Requiring the Licensing of Firearm Owners* 14 (Nov. 2011), at <[http://www.lcav.org/model\\_laws\\_for\\_a\\_safer\\_america.asp](http://www.lcav.org/model_laws_for_a_safer_america.asp)>.
11. N.Y. Penal Law § 400.00(1) (PL). See PL § 265.00(3) (defining "firearm").
12. PL § 400.00(3)(a).
13. PL § 400.00(1)(a), (c), (d), (2)(a).
14. PL § 400.00(1)(b), (g).
15. State law provides exceptions for New York City, where a permit is valid for up to three years, and in the counties of Nassau, Suffolk and Westchester, where permits are valid for up to five years. PL § 400.00(10).
16. PL § 400.00(9).
17. PL § 400.00(1)(f), (4-b).
18. N.J. Admin. Code § 13:54-1.9(b) (2012).

19. This and all other suggestions for improving New York's permit laws are intended as a baseline standard that all jurisdictions would be required to meet. State law should continue to allow local jurisdictions to impose requirements that are stricter than the baseline suggested here.
20. Haw. Rev. Stat. Ann. § 134-2(e) (LexisNexis 2011).
21. Iowa Code §§ 724.15, 724.20 (2011).
22. Cal. Penal Code § 31655(c) (Deering 2012).
23. Mass. Ann. Laws ch. 140, § 131P(a) (LexisNexis 2011).
24. Cal. Penal Code §§ 31625(a), 31645(a) (Deering 2012).
25. 430 Ill. Comp. Stat. 65/2(a)(2) (2012).
26. New York City has enacted several provisions that fill gaps in state law in this area. New York City issues five types of handgun permits and requires a permit to purchase or possess a rifle or shotgun. 38 RCNY 5-01; N.Y.C. Admin. Code § 10-303. Handgun permits and rifle or shotgun permits expire every three years. 38 RCNY 3-14(j); N.Y.C. Admin. Code § 10-131(a). Rifle or shotgun ammunition may not be sold to anyone who does not possess a valid rifle or shotgun permit and a valid long gun registration certificate. N.Y.C. Admin. Code § 10-306(c). Handgun ammunition may not be sold to anyone who does not possess a valid permit to possess a handgun that will hold the caliber of ammunition that is being sold. N.Y.C. Admin. Code § 10-131(i)(2).
27. A firearms seller who "makes occasional sales, exchanges, or purchases" is allowed to sell firearms without a license because these types of sellers are not deemed to be engaged in the business of selling firearms. 18 U.S.C. § 921(a)(21)(C). As discussed above, federal law does not require unlicensed sellers to conduct background checks. Background checks are critical to helping keep felons, domestic abusers, the mentally ill and other legally prohibited purchasers from purchasing firearms.
28. See 18 U.S.C. §§ 922(t)(1), 923 (g)(1)(A), 923(g)(6).
29. As originally enacted, the federal Gun Control Act of 1968 required ammunition manufacturers and dealers to be licensed and abide by other requirements. Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213. However, a gun lobby-sponsored law known as the Firearms Owners' Protection Act later repealed the ammunition-related requirements. Firearms Owners' Protection Act, 99 Pub. L. No. 308, 100 Stat. 449 (1986).
30. For licensee figures, see Bureau of Alcohol, Tobacco, Firearms and Explosives, U.S. Dep't of Justice, *Listing of Federal Firearms Licensees (2011)*, at <<http://www.atf.gov/about/foia/ffl-list.html>>.
31. Sari Horwitz & James V. Grimaldi, *ATF's Oversight Limited in Face of Gun Lobby*, Wash. Post, Oct. 26, 2010, at <<http://www.washingtonpost.com/wp-dyn/content/article/2010/10/25/AR2010102505823.html?sub=AR>>.
32. Office of the Inspector General, Evaluation and Inspections Division, U.S. Dep't of Justice, *Inspection of Firearms Dealers by the Bureau of Alcohol, Tobacco, Firearms and Explosives* (July 2004), at <<http://www.usdoj.gov/oig/reports/ATF/e0405/exec.htm>>.
33. Bureau of Alcohol, Tobacco and Firearms, U.S. Dep't of the Treasury, *Following the Gun: Enforcing Federal Laws Against Firearms Traffickers* (June 2000), at <[http://www.mayorsagainstilllegalguns.org/downloads/pdf/Following\\_the\\_Gun%202000.pdf](http://www.mayorsagainstilllegalguns.org/downloads/pdf/Following_the_Gun%202000.pdf)>.
34. *Id.*
35. Int'l Ass'n of Chiefs of Police (IACP), *Taking a Stand: Reducing Gun Violence in Our Communities* 14 (Sept. 2007), at <<http://theiacp.org/LinkClick.aspx?fileticket=%2Fs0LiOkJK5Q%3D&tabid=302>>.
36. Daniel W. Webster et al., *Effects of State-Level Firearm Seller Accountability Policies on Firearms Trafficking*, 86 J. Urb. Health 525 (July 2009).
37. PL §§ 265.00(9), 400.00(2).
38. Mass. Ann. Laws ch. 140, § 123 (Fifteenth) (LexisNexis 2011).
39. See Prevent Handgun Violence Against Kids, Legal Community Against Violence, *Communities on the Move: How California Communities are Addressing the Epidemic of Handgun Violence 6* (2000), at <[http://www.lcav.org/publications-briefs/surveys\\_local\\_ordrs/com2000\\_pdf.pdf](http://www.lcav.org/publications-briefs/surveys_local_ordrs/com2000_pdf.pdf)>.
40. Del. Code Ann. tit. 24, § 904(b) (2011).
41. Cal. Penal Code § 26890(a) (Deering 2012); Minn. Stat. § 624.7161, subd. 2 (2011).
42. Ala. Code § 13A-11-79 (LexisNexis 2011); Cal. Penal Code § 26820 (Deering 2012); W. Va. Code § 61-7-10(a) (2011).
43. Conn. Gen. Stat. § 29-37d (2011); N.J. Admin. Code §§ 13:54-3.11; 13:54-6.1 through 13:54-6.7 (2012).
44. San Francisco, Cal., Police Code art. 9, § 613.10(m).
45. Federal law grants firearms dealers and others immunity from certain civil lawsuits. 15 U.S.C. §§ 7901-7903. However, federal law exempts from this immunity any action in which a seller of a firearm knowingly violated a state or federal statute applicable to the sale or marketing of a firearm where the violation was a proximate cause of the harm for which relief is sought. 15 U.S.C. § 7903(5)(A)(iii). In addition, federal law exempts actions for negligence per se and negligent entrustment. 15 U.S.C. § 7903(5)(A)(ii).
46. New York City has implemented a number of these laws already, requiring the licensing of long gun dealers and handgun ammunition sellers, and prohibiting long gun dealers from employing anyone who does not possess a valid handgun or long gun permit. N.Y.C. Admin. Code §§ 10-131(i)(1), 10-302(a), 10-303(c); 38 RCNY 4-04(a), 5-02, 5-03. Moreover, local law enforcement may require the termination of any employee of a long gun dealer who it deems unfit. 38 RCNY 4-04(a). New York City prohibits handgun dealers from displaying handguns in windows and doors and from displaying ammunition at any time. 38 RCNY 4-04(n), N.Y.C. Admin. Code § 10-312. It also requires handgun dealers to lock firearms in a secure area at certain times. *Id.* The City requires handgun dealers to conduct a physical inventory of the firearms on their premises twice per year and to forward the inventory to the Licensing Division and to local police. N.Y.C. Admin. Code § 10-302(n)(3), (4); 38 RCNY 4-04(o). Long gun dealers are required to take safety precautions to secure their merchandise, including alarms and high-security cylinder locks. 38 RCNY 1-06. Long gun dealers must also allow law enforcement to physically inspect the premises and make recommendations for increased security. *Id.*
47. See, e.g., Bureau of Alcohol, Tobacco and Firearms, U.S. Dep't of the Treasury, *Youth Crime Gun Interdiction Initiative, Crime Gun Trace Reports* (2000) National Report 52 (July 2002), at <<http://www.atf.gov/publications/download/ycgii/2000/ycgii-report-2000-general-findings.pdf>>.
48. *Id.*
49. Christopher S. Koper, *Crime Gun Risk Factors: Buyer, Seller, Firearm, and Transaction Characteristics Associated with Gun Trafficking and Criminal Gun Use*, Report to the Nat'l Inst. of Justice 6, 83 (2007), at <<http://www.ncjrs.gov/pdffiles1/nij/grants/221074.pdf>>.
50. Douglas S. Weil & Rebecca C. Knox, *Effects of Limiting Handgun Purchases on Interstate Transfer of Firearms*, 275 JAMA 1759, 1759-61 (1996).
51. Douglas S. Weil & Rebecca Knox, *Evaluating the Impact of Virginia's One-Gun-A-Month Law*, The Center to Prevent Handgun Violence 1, 4-6 (Aug. 1995).
52. Note that prior to repeal, the Virginia legislature adopted measures backed by the National Rifle Association that significantly weakened the law by allowing concealed handgun permit holders and persons who purchase handguns through private sales to purchase more than one handgun per month. Va. Code Ann. § 18.2-308.2:2(P)(2) (2011).
53. 18 U.S.C. § 923(g)(3)(A).

54. U.S. General Accounting Office, *Federal Firearms Licensee Data—ATF’s Compliance with Statutory Restrictions* 11 (Sept. 1996), at <<http://www.gpo.gov/fdsys/pkg/GAOREPORTS-GGD-96-174/pdf/GAOREPORTS-GGD-96-174.pdf>>.
55. A November 2010 report from the U.S. Department of Justice found that long guns, rather than handguns, have become the weapons of choice for Mexican drug cartels, and gun traffickers frequently purchase long guns in multiple sales from FFLs. The report concluded that the lack of a federal reporting requirement for multiple sales of long guns has hindered ATF’s ability to disrupt the flow of illegal firearms into Mexico, and recommended that multiple sales of long guns be reported. Office of the Inspector General, U.S. Dep’t of Justice, *Review of ATF’s Project Gunrunner* iv, 36-40 (Nov. 2010), at <<http://www.justice.gov/oig/reports/ATF/e1101.pdf>>. In July 2011, such a regulation took effect requiring FFLs along the southwest border to report multiple sales of certain long guns. See, e.g., Office of Public Affairs, U.S. Dep’t of Justice, *Statement of Deputy Attorney General James Cole Regarding Information Requests for Multiple Sales of Semi-Automatic Rifles with Detachable Magazines*, July 11, 2011, at <<http://www.justice.gov/opa/pr/2011/July/11-dag-900.html>>.
56. PL § 265.12.
57. PL § 265.13.
58. Cal. Penal Code §§ 27535, 27540(f) (Deering 2012).
59. Md. Code Ann., Pub. Safety § 5-128 (LexisNexis 2011).
60. N.J. Stat. Ann. §§ 2C:58-2.a(7), 2C:58-3.i (2012).
61. D.C. Code Ann. § 7-2502.03(e) (LexisNexis 2011).
62. N.Y.C. Admin. Code § 10-302.1(a), (b).
63. New York City also requires firearms dealers to contact the police department and licensing authority in order to confirm that a purchaser has not purchased a firearm during the previous 90 days and to maintain a record of the contact and confirmation. N.Y.C. Admin. Code § 10-302.1(c)-(e).
64. Resolution of the International Association of Chiefs of Police adopted at the 115th Annual Conference, San Diego, California, 45 (Nov. 11, 2008), at <<http://www.iacp.org/resolution/2008Resolutions.pdf>>.
65. Resolution of the American Bar Association adopted by the House of Delegates 115 (Aug. 9-10, 2010).
66. Cal. Penal Code § 31910(b)(7) (Deering 2012). DOJ also may approve a method of equal or greater reliability and effectiveness in identifying the specific serial number of a pistol from spent cartridge casings discharged by that firearm if the new method is unencumbered by patent restrictions.
67. D.C. Code Ann. §§ 7-2504.08; 7-2505.03 (LexisNexis 2011). “Microstamp-ready” semi-automatic pistols are those manufactured to produce a unique alpha-numeric or geometric code on at least two locations on each expended cartridge case that identifies the make, model, and serial number of the pistol.
68. There is a limited exception for sales records relating to machine guns, short-barreled shotguns and rifles. Note that federal law prohibits the use of certain federal records for the creation of a comprehensive system of registration of firearms or firearms owners. 28 C.F.R. § 25.9(b)(3). However, federal law does not prohibit states from using their own records to create a system that tracks firearms and their owners.
69. As noted, federal law already imposes this requirement. New York law should mirror the federal provision to enable state and local oversight and enforcement of the requirement.
70. New York City has closed some of these gaps in state law by requiring long gun dealers to maintain all purchase and sales transaction records and by requiring that, whenever a permit holder purchases a new handgun or long gun from a dealer or private seller, information identifying the seller, purchaser, and firearm be provided to law enforcement. N.Y.C. Admin. Code §§ 10-302(n), 10-304(a), (e); 38 RCNY 5-25.
71. Conn. Gen. Stat. §§ 29-33(e), 29-37a(b) (2011).
72. Cal. Penal Code §§ 11105, 11106 (operative Jan. 2014) (Deering 2012).
73. Cal. Penal Code § 11105 (Deering 2012).
74. 430 Ill. Comp. Stat. 65/3 (b) (2012); R.I. Gen. Laws §§ 11-47-35(a)(2), 11-47-35.2(b) (2012).
75. Mass. Gen. Laws ch. 140, § 123 (2011).
76. 18 Pa. Cons. Stat. §§ 6111, 6113 (2012); Md. Code Ann., Pub. Safety § 5-123 (LexisNexis 2011).
77. Cal. Penal Code § 27545 (Deering 2012).
78. Nat’l Ctr. for Injury Prevention & Control, Ctrs. for Disease Control and Prevention, *WISQARS Fatal Injury Reports, 1999-2009, for National or Regional*, at <<http://www.cdc.gov/injury/wisqars/index.html>> (last visited Dec. 5, 2011).
79. Nat’l Ctr. for Injury Prevention & Control, Ctrs. for Disease Control and Prevention, *WISQARS Nonfatal Injury, 2001-2010*, at <<http://www.cdc.gov/injury/wisqars/index.html>> (last visited Dec. 5, 2011).
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82. Tamera Coyne-Beasley, Carol W. Runyan, L. Baccaglioni, Davis Perkins, & R. M. Johnson, *Storage of Poisonous Substances and Firearms in Homes with Young Children Visitors and Older Adults*, *American Journal of Preventative Medicine*, 28(1), 109-115.
83. *Id.*
84. Catherine A. Okoro et al., *Prevalence of Household Firearms and Firearm-Storage Practices in the 50 States and the District of Columbia: Findings from the Behavioral Risk Factor Surveillance System, 2002*, 116 *Pediatrics* e370, e371-e372 (Sept. 2005), at <<http://pediatrics.aappublications.org/cgi/content/full/116/3/e370>>.
85. David C. Grossman, Donald T. Reay & Stephanie A. Baker, *Self-Inflicted and Unintentional Firearm Injuries Among Children and Adolescents: The Source of the Firearm*, 153 *Arch. Pediatr. Adolesc. Med.* 875, 875 (Aug. 1999).
86. Matthew Miller & David Hemenway, *The Relationship Between Firearms and Suicide: A Review of the Literature*, 4 *Aggression & Violent Behavior* 59, 62-65 (1999) (summarizing the findings of multiple studies).
87. United States Secret Service, U.S. Dep’t of the Treasury, *Safe School Initiative: An Interim Report on the Prevention of Targeted Violence in Schools* 6 (Oct. 2000).
88. 18 U.S.C. § 922(z). A secure gun storage or safety device is defined in 18 U.S.C. § 921(a)(34) as: “(A) a device that, when installed on a firearm, is designed to prevent the firearm from being operated without first deactivating the device; (B) a device incorporated into the design of the firearm that is designed to prevent the operation of the firearm by anyone not having access to the device; or (C) a safe, gun safe, gun case, lock box, or other device that is designed to be or can be used to store a firearm and that is designed to be unlocked only by means of a key, a combination or other similar means.”
89. N.Y. Gen. Bus. Law § 396-ee(1). New York law defines gun locking device as: “an integrated design feature or an attachable accessory that is resistant to tampering and is effective in preventing the discharge of such rifle, shotgun or firearm by a person who does not have access to the key, combination or other mechanism used to disengage the device.” *Id.*
90. N.Y. Gen. Bus. Law § 396-ee(1), (2).

91. Specifically, the warning must state: "The use of a locking device or safety lock is only one aspect of responsible firearm storage. For increased safety firearms should be stored unloaded and locked in a location that is both separate from their ammunition and inaccessible to children and any other unauthorized person." N.Y. Gen. Bus. Law § 396-ee(2).
92. The rules that have been promulgated require, for example, that a locking device be of such a quality that it cannot be easily defeated by use of common household tools and must be accompanied by instructions that explain its use. See, N.Y. Comp. Codes R. & Regs. tit. 9, § 471.1 *et seq.* In addition, the rules are listed on the New York State Police website at [http://www.troopers.ny.gov/Firearms/Gun\\_Locks/](http://www.troopers.ny.gov/Firearms/Gun_Locks/).
93. Mass. Gen. Laws ch. 140, §131L(a) (LexisNexis 2011).
94. *Id.* This exception allows an individual to use the firearm for self-defense in the home as recent Supreme Court rulings require (see footnote 95 for more information about these rulings). See *Commonwealth v. Patterson*, 79 Mass. App. Ct. 316, 946 N.E.2d 130 (2011) (upholding the Massachusetts law against a Second Amendment challenge. The court held that the law does not interfere with an individual's right to use a firearm for self-defense).  
New York City has already adopted a law, similar to the Massachusetts law, which requires a lawful owner or custodian of a handgun or long gun to render the weapon inoperable by using a locking device while the weapon is out of the owner's or custodian's possession or control. N.Y.C. Admin. Code §§ 10-311(a), 10-312(a).
95. In 2008, the U.S. Supreme Court held for the first time that the Second Amendment to the U.S. Constitution protects the right of responsible, law-abiding individuals to possess a handgun in the home for purposes of self-defense. *District of Columbia v. Heller*, 554 U.S. 570 (2008). The Court, in a 5-4 ruling, struck down Washington D.C.'s decades-old ban on handgun possession. The Court also struck down the District's requirement that firearms in the home be stored unloaded and disassembled and bound by a locking device because the requirement had no exception for self-defense. The Court also held, however, that the right conferred by the Second Amendment is not unlimited and identified a non-exhaustive list of regulatory measures that it deemed "presumptively lawful" under the Second Amendment. In addition, the Court declared that its analysis should *not* be read to suggest the invalidity of laws regulating the storage of firearms to prevent accidents. *Id.* at 2817 (emphasis added). Note that in 2010, the U.S. Supreme Court announced its decision in *McDonald v. City of Chicago*, holding in a 5-4 ruling that the Second Amendment applies to state and local governments in addition to the federal government and reiterating the holding in *Heller*. *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010). For more information on Second Amendment litigation, see Legal Community Against Violence, *Gun Regulation and the Second Amendment: Moving Forward After District of Columbia v. Heller* (October 2008), at < [http://www.lcav.org/pdf/DC\\_v\\_Heller\\_Gun\\_Regulation\\_Brochure.pdf](http://www.lcav.org/pdf/DC_v_Heller_Gun_Regulation_Brochure.pdf) >, see also Legal Community Against Violence, *The Second Amendment* (March 1, 2011), <[http://www.lcav.org/content/secondamend\\_index.asp](http://www.lcav.org/content/secondamend_index.asp)>.
96. Cal. Penal Code § 23635(a) (Deering 2012).
97. A 2004 study found that state CAP laws were responsible for a decrease of 8.3% in firearm suicides for children between the ages of ten and seventeen. J.A. Manganello, D.W. Webster, J.S. Vernick, & A.M. Zeoli, *Association Between Youth-Focused Firearm Laws and Youth Suicides*, JAMA, 292(5), 594-601. The same study found that CAP laws significantly reduced the rate of firearm suicides for young people between the ages of 18 and 20.
98. Minn. Stat. § 609.666, subd. iv 2 (2011).

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# Microstamping: A Cost-Effective Tool in the Fight Against Crime

By Senator José Peralta

I am currently sponsoring a bill that gives police officers a new and effective tool in the fight to keep New Yorkers safe from handgun violence. The tool is microstamping—a technology that transfers a unique alphanumeric code onto the bullet casing that is ejected when a semiautomatic pistol is fired. Ballistic examiners can use these marks to quickly, consistently, and reliably trace crime guns back to their original purchasers, providing police with a crucial investigative lead.



Law-abiding sportsmen, collectors, and hobbyists have no cause to worry—microstamping is about crime control, not gun control.

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*“Ballistic examiners can use these marks to quickly, consistently, and reliably trace crime guns back to their original purchasers, providing police with a crucial investigative lead.”*

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The bill does not require rifles, shotguns, or revolvers to be microstamped. The bill does not apply to firearms manufactured before the law goes into effect. Microstamping will not impede any gun’s performance, and the law will not be enforced if the process costs more than \$12 per gun.

The only gun owners who will be adversely affected are those who use semi-automatic handguns to commit violent crimes.

Microstamping will not eradicate handgun violence in New York, but it can be a particularly cost-effective tool for police departments that already have been hit hard by budget cuts over the past few years and face additional cuts.

Microstamping legislation has passed the New York State Assembly each of the last three years. It has widespread support across New York State from mayors and law enforcement groups who recognize the need to combat the tragic problems posed by handgun violence. Now it is time for the New York Senate to do what’s right

and provide law enforcement with an effective, low-cost crime-fighting tool.

## Gun Violence May Be Back on the Rise

After years of steady decrease, violent crime in New York City rose in all categories in 2011, including an alarming 14% increase in the murder rate.<sup>1</sup> Nearly two-thirds of the 2011 murders were committed by gun.<sup>2</sup> A one-year increase might be anomalous, but as of mid-October 2011, 30 more people have been victims of shooting crimes than at the same time last year.<sup>3</sup> Gun violence is not simply a New York City problem to be comfortably ignored by the rest of the state. While the crime rate in New York State has generally declined in the last decade, the percentage of violent crimes involving firearms has actually increased outside New York City.<sup>4</sup>

More than 5,000 New Yorkers outside the five boroughs were victims of firearm-related rapes, robberies, aggravated assaults, and murders last year.<sup>5</sup> Despite the exemplary efforts of New York State law enforcement, these startling figures threaten to rise further in the future unless decisive action is taken.

## Handguns: The Criminal’s Weapon of Choice

Any weapon can be used to threaten or kill, but time and again criminals turn to handguns. Handguns are more dangerous to the general population than any other type of weapon. Although they account for only 40% of total U.S. gun ownership,<sup>6</sup> handguns are used in as many as 75%<sup>7</sup> or 80%<sup>8</sup> of firearm homicides. Recent statistics show that New York State is no exception. According to the Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF”), handguns are used in New York crimes more than twice as often as all other guns.<sup>9</sup> While the type of gun used in New York firearm murders in 2010 is known with certainty in only 153 of 517 (29%) cases, of those 153 cases, 135 (88%) involved handguns.<sup>10</sup>

Even when the type of gun is known, handgun murders are hard to solve. The perpetrator of a handgun murder is identified 16% less often than when a shotgun is used and 18% less often than when a rifle is used.<sup>11</sup>

These statistics underscore two important points: handguns are significantly different in purpose and use than rifles and shotguns, firearms primarily used by law-abiding sportsmen and hobbyists; and given that the type of gun used is known in fewer than one-third of firearm murders, current ballistic investigation needs to be improved.

## Shrinking Law Enforcement Budgets Demand Cost-Effective Innovation

Handgun crimes have always been difficult to solve, and this difficulty will only be compounded by the fiscal constraints imposed on law enforcement in this down economy. Whereas the 20 years prior to 2008 saw a steady increase in state and local police budgets and personnel,<sup>12</sup> a recent study found that 85% of state and local law enforcement agencies were forced to reduce their budgets in the past year (a quarter of those by 10% or more).<sup>13</sup> This circumstance is even more dire in New York State than on the national level. The NYPD, for example, is projected by June 30, 2012, to have its lowest number of personnel in the last 20 years.<sup>14</sup> Similarly, the police forces in cities like Buffalo and counties like Suffolk have been reduced by nearly 20% since 2001.<sup>15</sup>

Despite the intuitive and statistically proven correlation between the size of a police force and the attendant crime rate,<sup>16</sup> little hope for relief is on the horizon. The U.S. Department of Justice projects that the recent economic downturn will drastically affect local law enforcement budgets for at least the next five to 10 years, possibly permanently.<sup>17</sup> In the lean years to come, cost-effective innovations in law enforcement policies and procedures will be more critical than ever. Microstamping is one such promising innovation.

Microstamping is the process of using laser technology to etch a unique microscopic alphanumeric identifier on a firearm's hard surfaces (e.g., firing pin or breach face). When the gun is fired, the alphanumeric identifier, or signature, is stamped onto the relatively soft metal of the bullet or bullet casing.<sup>18</sup> This signature can then be extracted and read by trained ballistics investigators using the common microscopes already available in every crime lab. When the same signature is etched on more than one of a gun's hard surfaces, it is often possible to positively identify bullets distorted after firing, or even bullet fragments.<sup>19</sup> If gun manufacturers uniformly implemented this process and documented the unique codes in the accompanying paperwork, police could quickly and accurately trace the gun back to its original purchaser. Microstamping is a relatively new process, but it is also a logical and significant improvement on the current state of firearm identification.

## The Current State of Ballistic Investigation

Currently, firearms are imprinted with conventional serial numbers.<sup>20</sup> When a weapon is recovered, police can sometimes use these serial numbers to trace firearms back to the point of purchase.<sup>21</sup> Unfortunately, most criminals are not sufficiently accommodating to leave a gun behind at the crime scene. However, when shots are fired, police are often able to recover either bullets, bullet casings, or both. For instance, the Albany Police Department in 2008 retrieved shell casings in 54% of shooting incidents,

and in 2006 shell casings were recovered in 44% of gun homicides investigated by the Nassau County District Attorney's Office.<sup>22</sup> Retrieving shell casings enables forensic analysts to match the casings with a later-recovered firearm using the century-old investigative technique of firearm toolmark identification.<sup>23</sup>

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Firearm toolmark identification is a subset of a larger forensic discipline that seeks to connect particular tools with the marks they leave behind on the softer surfaces they act on. For example, bolt-cutters (hard) leave particular marks on padlocks (soft).<sup>24</sup> Forensics posits that if the markings of the tool and the subordinate surface are sufficiently similar, skilled examiners can determine with the requisite level of certainty that a particular tool made the marks in question. In the late 1990s, the ATF created the National Integrated Ballistic Information Network ("NIBIN"), a computer database that enables law enforcement agencies to upload photographs of firearms toolmark evidence and compare them with a computer-generated list of closely matched images.<sup>25</sup>

For NIBIN to work as an investigative tool, however, three conditions must be met: A gun must have been recovered; used in a previous crime or test-fired by police or the manufacturer; and had an image of its toolmarks entered into the system more than once.<sup>26</sup> The improbability of meeting all three requirements has limited NIBIN users to a "hit" rate of 1.8%, based on the most recent available data.<sup>27</sup> Taken alone, the relative paucity of positive identifications does not mean that NIBIN or toolmark analysis are not useful. However, concern is growing that despite the assistance of NIBIN, firearm toolmark analysis is inherently flawed and scientifically suspect.<sup>28</sup>

In her article on the unreliability of toolmark identifications, Professor Adina Schwartz cites three persistent sources of ballistic misidentification: "(1) the individual characteristics of toolmarks are comprised of non-unique marks; (2) subclass characteristics shared by more than one tool may be confused with individual characteristics unique to one and only one tool; and (3) the individual characteristics of the marks made by a particular tool change over time."<sup>29</sup>

Professor Schwartz contends that because human judgment, based on flawed science, is still required to make the ultimate identification, NIBIN hits should not be admissible in court even in those relatively rare cases when they occur.<sup>30</sup> While Professor Schwartz's position may be extreme, the National Research Council warns ballistics examiners to avoid testifying that "matches" of

ballistic evidence [could] identify a particular source gun 'to the exclusion of all other firearms'"<sup>31</sup> because there is "no statistical justification for such a statement and it is inconsistent with the element of subjectivity inherent in any firearms examiner's assessment of a match."<sup>32</sup>

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*"While microstamping could radically improve law enforcement's ability to solve gun crimes, the manufacturing process is not radically different from what is currently in place."*

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Wherever one comes down on the evidentiary value of ballistic matching in courtrooms, it is clear that the ability to trace crime guns is vital to generating investigative leads. Furthermore, optimal use of a microstamping system requires the expertise of highly trained firearm and toolmark examiners,<sup>33</sup> so the skill set would still be critical in a microstamping regime. Still, the inconsistency of current ballistics counsels the need for a supplemented approach. It is crucial to find a way to connect particular guns to particular crimes. The best way to do this is to make ballistic matches more frequent and more reliable by requiring that newly manufactured guns be microstamped.

### **Microstamping Is a Natural Evolution of Existing Manufacturing Protocol**

While microstamping could radically improve law enforcement's ability to solve gun crimes, the manufacturing process is not radically different from what is currently in place. First, microstamping is very much like the "known and accepted practice" of imprinting a serial number on all guns sold in the United States and recording that number at the time of sale.<sup>34</sup> As such, microstamping would not require manufacturers to implement new recording databases, but merely to add a new input field to the ones already in existence.

Second, a microstamping law has already passed in California.<sup>35</sup> Although the California law is yet to be implemented due to a difficulty over patent certification, its passage has given firearm manufacturers more than four years to plan and prepare for this process.

Third, in Massachusetts, regulations since 1998 have made it unlawful to transfer a handgun manufactured after September 30 of that year unless it is equipped with a "tamper-proof serial number."<sup>36</sup> Compliance requires that the serial number must be either (1) "placed on the interior of the handgun," or (2) "placed on the exterior of the handgun in a way that is not visible to the unaided eye."<sup>37</sup> In other words, for more than a decade, guns made for sale in Massachusetts have had either an internal

etching or a microstamped etching. The legislation I am sponsoring is little more than a combination of these two elements.

Additionally, as the National Research Council explained in a comprehensive 2008 report on the current state of ballistic imaging, the machinery used to perform microstamp etching is not highly specialized, so the additional overhead involved is small.<sup>38</sup> Each microstamped imprint can be created in approximately 200 milliseconds, allowing production to proceed with very limited delay.<sup>39</sup> Furthermore, there is no reason that firearm manufacturers could not and should not farm out their microstamping requirements to independent businesses who specialize in laser-etching. If this process cannot be performed for \$12 or less, the law will not go into effect.

### **Microstamping Makes Forensic Analysis Easier and Less Expensive**

A primary benefit of microstamping is that it has the potential to make the jobs of forensic examiners exponentially easier. For instance, the identifying signature on a microstamped shell casing could be read using the sort of common microscope that is already universally present in standard laboratories.<sup>40</sup> It might even be possible that the markings could be extracted at the crime scene using only a magnifying glass, saving additional time and money.<sup>41</sup> Once the alphanumeric code is identified, it is a simple matter of contacting the firearm manufacturer to discover the gun's original purchaser.

Unlike traditional toolmark analysis or NIBIN, microstamping allows a firearm's original purchaser to be identified the first time it is used in a crime.<sup>42</sup> This makes it by far the shortest "time-to-crime" data point available to law enforcement, providing a crucial investigative starting point.<sup>43</sup>

### **Microstamping Is More Reliable Than Traditional Ballistics**

Above and beyond microstamping's time- and cost-saving features, it would also limit the inherent subjectivity that critics of current ballistic interpretation find so troubling.<sup>44</sup> Unlike the incidental striations used in traditional toolmark analysis, microstamping's alphanumeric identifiers are genuinely unique. This means that human error is highly unlikely to lead to misidentification of the gun. If all the microstamped digits successfully transfer to the bullet or shell-casing, a forensic examiner can legitimately testify that the gun could be identified to the exclusion of all others.

While the criticism that microstamped characters, like accidental toolmarks could also "change over time" is technically valid, there is no reason to believe that potential degradation could lead to the false positives that



lead to miscarriages of justice. What's more, even a damaged or partial microstamp imprint would narrow down the field of possible weapons considerably. Additionally, traditional forensic analysis could be combined with the information gleaned from the microstamp to provide a more complete picture.<sup>45</sup>

### **Microstamping Leads to a Significant Increase in Ballistic Matches**

Although microstamping's efficiency and reliability are crucial reasons to support its implementation, no benefit is more significant than the consistency with which a bullet or shell casing can be matched to a microstamped gun. Todd Lizotte, the man who invented firearm microstamping, has performed tests in which an eight-digit microstamped code was able to be deciphered 96.8% of the time.<sup>46</sup> Mr. Lizotte also posits that even if law enforcement limited itself to extracting microstamped identifiers using only optical microscopy, rather than employing superior scanning electron microscopy, it is still reasonable to expect an extraction rate of greater than 90%.<sup>47</sup> Additionally, the National Research Council's microstamping report noted that microstamping identifiers have been shown to transfer in situations where they could reasonably be expected to be illegible, such as when primers are lacquered or when the cartridge misfires.<sup>48</sup>

Even George Kristova's relatively critical microstamping paper, which is regularly cited by the legislation's detractors,<sup>49</sup> found that every single digit of the alphanumeric code was legible in 54% of test fires.<sup>50</sup> This is a massive upgrade over the NIBIN hit rate of 1.8%, and it comes with significantly more reliability. Furthermore, Kristova's study was structured so that if even a single digit were obscured it would be considered unsatisfactory.<sup>51</sup> However, as discussed above, a casing on which one or more etchings was unreadable would still narrow down the potential purchaser pool and provide police with a valuable starting point.

### **Microstamping Is Not Intended to Price Guns Out of the Reach of Ordinary Citizens**

At the outset, it is important to clarify what the microstamping bill is and what it is not. The bill is crime control legislation, not gun control legislation. This cannot be emphasized enough. It has absolutely no impact on sportsmen or law-abiding hobbyists, and any contention that it is some sort of stealth attempt to price guns beyond the reach of ordinary Americans<sup>52</sup> is unsupported by reality. First, the bill does not call for microstamping on rifles, shotguns, target pistols or revolvers. It also does not require that any gun already in circulation be microstamped. The requirement applies only to newly minted semi-automatic handguns.

Second, the law will never go into effect unless the state police receive a written notification that microstamping can be done for \$12 or less per firearm in batches of 1,000.<sup>53</sup> Any opposition that cites a \$200 to \$300 per pistol price increase<sup>54</sup> is simply attacking a straw man. If that were indeed a legitimate figure, the law would never actually be enforceable. In reality, Laser Light Technologies, a company capable of providing microstamping services, projected a cost of between \$0.50 and \$3.00 per gun in 2007.<sup>55</sup> Even assuming that the technology has not become more cost-effective in intervening years, the additional costs would hardly make a ripple compared to baseline prices that usually range between \$250 and \$2,500 per gun,<sup>56</sup> and will in no event stray past the \$12.00 mark. Microstamping deters criminals, not sportsmen or hobbyists.

### **Passing This Legislation Will Not Drive Gun Manufacturers Out of New York**

Another financial argument leveled against this legislation is that it will convince firearms manufacturers to relocate to other states, taking much-needed jobs with them. New York Assembly Minority Leader Brian Kolb and State Rifle and Pistol Association President Tom King have been the most vocal proponents of this concern.<sup>57</sup> Their argument appears to be based in large part on the 2011 *The New York Times* article, "States Pitch a Lifestyle to Lure Gun Makers From Their Longtime Homes."<sup>58</sup> However, both recent history and basic economics show that such an exodus is highly unlikely.

*The New York Times* posits that microstamping laws in New York and Connecticut could drive firearm manufacturers to move operations to states perceived to be more gun-friendly.<sup>59</sup> However, the very same article also notes that California, which has more firearm manufacturing jobs than any other state, had already passed a microstamping law in 2007.<sup>60</sup> It appears that the only gun manufacturer to leave California was a small custom competition pistol operation,<sup>61</sup> hardly the kind of fallout forecast by Kolb and King.

In Massachusetts, the nation's oldest and largest firearm manufacture, Smith & Wesson, remains headquartered in Springfield more than a decade after the state began requiring tamper-resistant serial numbers. Indeed, Smith & Wesson was the first manufacturer to comply with the new regulations, which do not appear to have driven any other manufacturer out of the state either.<sup>62</sup>

While firearms manufacturers are understandably leery of potentially costly regulations, they, like law-abiding gun owners, should be reassured by the guarantee that this law will not go into effect if microstamping is found to cost more than \$12 per gun. Furthermore, a costly relocation process would not actually avail them any savings. This legislation does not limit itself to handguns manufactured in New York, but covers all semi-automatic

pistols sold in New York. Thus moving manufacturing out of state could hardly be justified as a legitimate business decision.

### Microstamping Will Deter Straw Purchasers

There is a pervasive argument that microstamping will be ineffective because it only marks guns which are sold legally.<sup>63</sup> This contention is probably a reflection of a pre-1990s orthodoxy that assumed that the vast majority of crime guns were stolen.<sup>64</sup> However, in the words of the Bureau of Alcohol Tobacco and Firearms:

Virtually every crime gun in the United States starts off as a legal firearm. Unlike narcotics or other contraband, the criminals' supply of guns does not begin in clandestine factories or with illegal smuggling. Crime guns, at least initially, start out in the legal market, identified by a serial number and required documentation.<sup>65</sup>

The ATF study indicates that a significant number of crime guns originally enter the market through "straw purchasers,"<sup>66</sup> a person who buys a firearm on behalf of someone who is not so authorized, such as a convicted felon.<sup>67</sup> The names of straw buyers do not appear when run through lists of ineligible gun purchasers,<sup>68</sup> and they can sell guns at a premium to convicted felons or anyone contemplating using a gun for crime. The problem is so pervasive that the ATF has recently launched a national awareness campaign aimed at potential straw purchasers called "Don't Lie for the Other Guy."<sup>69</sup> The problem is even more acute in New York and surrounding Northeastern states, where straw purchasers are involved in two-thirds of ATF investigations.<sup>70</sup>

While microstamping will have limited effect on the largely ephemeral problem of stolen guns, it could have a profound effect on the straw purchase marketplace. The fact that guns would be readily traced to their original purchasers will serve as an out-and-out deterrent, sharply curtailing the practice. For those it does not deter, the threat of prosecution under the state or federal straw purchaser laws will be a powerful incentive to cooperate with police.

Even if the straw purchaser refuses to cooperate, knowing his or her identity can lead to the trafficker or violent offender for whom the purchase was made. That's because straw purchasers almost always have preexisting, often close, relationships with the next person in the criminal chain. An ATF study shows that 45% of straw purchasers were friends with the gun buyer, 23% were family members, and 18% were spouses or girlfriends.<sup>71</sup> This kind of leverage and investigative information is a boon to police and prosecutors without a commensurate impact on already strained budgets.

### This Is Forward-Looking Legislation That Will Have an Immediate Impact

There is also a school of pessimistic, defeatist criticism that essentially argues that because the microstamping bill applies only to new guns and not the guns already in circulation, it is not worth implementing. This line of argument is a paradigmatic example of the nirvana fallacy—the rejection of an important partial solution because it is not perfect or all-encompassing.<sup>72</sup> No, this bill will not regulate every gun that could possibly be used to commit a crime, nor even every automatic handgun. However, this is a forward-looking law that recognizes that every year, old guns without microstamping will be taken out of circulation to be replaced by microstamped guns that can be easily traced. Moreover, even at the very outset, the law will pay clear dividends.

For instance, in 2009, there were 118,314 registered retail firearms transactions in New York State.<sup>73</sup> An ATF Study found that, even discounting straw purchases, licensed firearms dealers were by far the most common source of crime guns.<sup>74</sup> In fact, crime guns were four times more likely to be purchased from authorized dealers than they were to be stolen.<sup>75</sup> More importantly, a survey of firearms purchases by undercover police officers in New York City showed that most illegally trafficked guns are actually "relatively new....many of them still in original boxes with manuals and gun cleaning paraphernalia."<sup>76</sup> This is supported by a statistical expert who found that 13% of crime guns traced by the ATF were recovered within one year of their sale, and 30% were recovered within three years of their first sale.<sup>77</sup> This does not even account for the far greater number firearms that were used to commit a crime soon after their legal purchase but not recovered.

This means that, within a few years of the microstamping law's implementation, a significant percentage of guns used to commit violent crimes will be traceable back to their purchasers. It is impossible to know for certain the exact collateral effect this will have on gun violence—it might mean that more criminals are apprehended, that fewer crimes are committed, or that criminals will simply use old-model guns. In all likelihood, it will initially lead to some combination of the three. However, as the years go by and more and more non-microstamped guns leave the marketplace, the positive effects of this law will grow exponentially. So no, this law is not a utopian solution that will immediately put a total end to New York gun crime, but it is an important step in the right direction that requires nearly negligible taxpayer investment.

### This Legislation Is Designed to Maximize Efficacy and Prevent Circumvention

While some legitimate criticism has been leveled at the efficacy of microstamping, namely, that it does not work particularly well when applied to rifles<sup>78</sup> and can be

circumvented by filing down or removing the firing pin,<sup>79</sup> the proposed legislation is adapted to steer clear of these potential failings. First, my bill applies only to automatic handguns, not rifles or any other kind of firearm.

Secondly, the bill requires that the guns be micro-stamped in at least two locations, making it impossible to escape detection simply by altering the firing pin. The NRC report also notes that placing recessed characters on the pin or adding a microstamped identifier elsewhere would make it much more difficult to deface or remove the identifiers without making the gun itself inoperable.<sup>80</sup>

In addition, ATF data shows that conventional firearm serial numbers, which are external and visible to the naked eye, are only defaced in 6% to 11% of recovered crime guns.<sup>81</sup> The relatively low percentage of serial numbers that are filed off, coupled with the difficulty of removing a microscopic stamp from a second, internal location, make plain that this criticism is overstated.

### **Microstamping: Supported by Mayors, Prosecutors and Police; Opposed by the NRA**

Perhaps most tellingly, New York microstamping is overwhelmingly supported by both local political leaders and law enforcement organizations. More than 100 New York mayors and more than 80 police departments and law enforcement organizations have spoken out in favor of the proposed legislation.<sup>82</sup> These are the people who, day in and day out, must deal with the devastating impact of gun violence and crime on communities and are most knowledgeable about what the problems are and where the likely solutions will come from. The list of supporters includes the New York City Patrolmen's Benevolent Association, New York State District Attorneys Association and the New York State Association of Chiefs of Police.<sup>83</sup> The positive response to microstamping spans all across New York's geographic, economic, and political spectrum,<sup>84</sup> defying the reflexive divisiveness of modern politics.

New York State politics can be contentious, no doubt, but microstamping lends itself to bipartisan support. Who, after all, doesn't want to see justice done by victims of gun violence or help law enforcement keep us safe? When law enforcement is clamoring for microstamping, who is opposing it? The answer, unsurprisingly, is the NRA and the rest of the gun lobby.<sup>85</sup> Unfortunately, gun lobby money and propaganda have so far successfully stymied this legislation.

This bill has now passed the New York State Assembly in three consecutive sessions. In 2010, with a Democratic Majority, the legislation fell two votes short in the New York State Senate. Last year, when the bill was reintroduced in the Senate, it was held up in committee and never even made it to a floor vote. The most logical explanation is that Senate Republicans wanted to avoid

the public embarrassment of appearing to appease the gun lobby by voting down a law enforcement bill with such broad bipartisan support. I would like to believe that is not the case.

Justice Holmes famously coined the notion of a Marketplace of Ideas and wrote that, "The best test of truth is the power of the thought to get itself accepted in the competition of the market." If the Senators who oppose this legislation do so for good reason, then let us hear them give those reasons out in the open. If, however, they oppose microstamping only because NRA money has turned our marketplace of ideas into a true commercial marketplace, let that come out instead.

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*"My proposed bill has law enforcement support from Hempstead to Malone Village, from Albany to Buffalo, and dozens of New York towns and cities in between. It is our job to educate the public on the true implications of this bill."*

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### **The Time Has Come to Make Microstamping a Reality**

Crime control is supposed to be a bedrock principle of the Republican party, and some Republicans have recognized that microstamping helps achieve this goal. For instance, Republican Daniel M. Donovan, the Nassau County District Attorney who ran against Eric Schneiderman for Attorney General, is a staunch supporter of microstamping.<sup>86</sup> During that heated election, D.A. Donovan observed that while he and Schneiderman "probably disagree on 90 percent of things," microstamping was one thing both could agree on.<sup>87</sup> He jokingly followed up by saying: "I looked at the bill and believed the bill was the right bill before I realized that Eric was the sponsor."<sup>88</sup> While Mr. Donovan's quip was intended to be amusing, it is also illustrative of our biggest problem as elected representatives; too often we let party-politics come before sound policy and ill-serve our constituents in the process.

Given the increased prevalence of gun violence outside of New York City, it is imperative that that the elected representatives from the rest of the state do their part to assist their local police departments and protect their citizens. My proposed bill has law enforcement support from Hempstead to Malone Village, from Albany to Buffalo, and dozens of New York towns and cities in between.<sup>89</sup> It is our job to educate the public on the true implications of this bill.

Hunters and hobbyists will be unaffected. Law-abiding gun users have no reason for concern. The worst-case scenario for your average gun owner is the possibility of having to pay a few more dollars the next time he or she

buys an automatic pistol. To vote for microstamping is to take a stand against violent criminals, not guns.

The bill represents a rare opportunity to do a great deal of good at very little cost. It is incumbent upon us as legislators to set aside partisan politics and rhetoric. We owe it to the memories of the thousands of victims of gun violence whose cases remain unsolved to pass this legislation.

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**José Peralta became the first Dominican-American ever elected to the New York State Senate with his special election victory in March 2010 and was later re-elected with more than 82 percent of the vote in the general election. Senator Peralta is the Ranking Democrat on the Labor Committee and also serves as a member of the Finance, Investigations and Insurance Committees. Prior to his election to the senate, Senator Peralta served in the New York State Assembly from 2002 to 2010, representing the 39th Assembly District.**

# Microstamping Guns: A Tool to Help Solve Gun Crimes in New York

By Assemblywoman Michelle Schimel

## I. Introduction

Across New York State, hundreds of gun-related crimes go unsolved each year because the crime gun is never recovered and police officers are often unable to connect the evidence left at the scene of a shooting to the perpetrator.



According to the New York State Law Enforcement Council, “[i]n 2007, a staggering 21,780 violent crimes were committed with a firearm in New York State. Yet perpetrators who use firearms to harm or take another’s life often evade justice.”<sup>1</sup> Nationwide in 2008, only 64 percent of all homicides were cleared by arrest.<sup>2</sup> In reality, nearly 50 percent of firearms used in violent crimes are not recovered at a crime scene.<sup>3</sup>

On the morning of June 22, 2010, a Long Island Border Patrol Agent was shot 25 times outside his Elmont home.<sup>4</sup> According to *CBS News*, police were searching for an unknown gunman. Police later recovered 25 shell casings across the street. There were no suspects.<sup>5</sup>

This news story underscores how a large amount of potential evidence, 25 shell casings, can still result in a cold case. An officer of the law was killed in front of his own home; no suspect, no gun, no leads. Isn’t it government’s responsibility to provide every tool available to law enforcement to protect its citizens?

Shell casings are often the only evidence left behind at a crime scene and are of limited value unless the firearm has been recovered.<sup>6</sup> Criminals, however, rarely leave their guns at crime scenes.<sup>7</sup> Firearms are important because they are serialized and can be traced to the manufacturer and then to the first purchaser.<sup>8</sup> This creates a gap in evidence, which makes it harder for law enforcement to solve the case. Through recently developed technology, cartridge cases can now give law enforcement the same type of information as a recovered firearm, but manufacturers are slow to adopt this technology. As a result, many gun cases go cold, which leaves criminals free to pull the trigger again.

Since 2008, I have been working to advance microstamping legislation (A.1157-B) in the New York State legislature. Microstamping is a technology that allows law enforcement to “identify the serial number of a firearm directly from an expended cartridge case found at a crime

scene.”<sup>9</sup> With microstamping, police can link shell casings found at a crime scene back to the gun that fired them. In the future, New York could see a higher percentage of closed firearm cases with microstamping.

## II. Microstamping Technology

### A. How the Technology Works

Microstamping is a ballistic identification technology, which utilizes a “laser based micromachining process that forms microscopic ‘intentional structures and marks’ on components within a firearm.”<sup>10</sup> As a gun is fired, “these microstamp structures transfer an identifying tracking code onto the expended cartridge ejected from the firearm.”<sup>11</sup>

“Microstamped structures are laser micromachined alpha numeric and encoded geometric tracking numbers, linked to the serial number of the firearm.”<sup>12</sup> These intentional alpha numeric codes are formed as micro-embossed structures etched on the firing pin and breech face of a semi-automatic handgun which “come into contact with a cartridge that is cycled through the firearm and ejected when it is fired.”<sup>13</sup>

Quite simply, when a shell cartridge is recovered at the scene of a crime, ballistic experts will look at the microstamped imprint that was transferred onto the cartridge casing.<sup>14</sup> The microstamped code will lead law enforcement to the gun’s manufacturer.<sup>15</sup> The manufacturer is required to keep a record of serial numbers and can identify the licensed firearm dealer to whom the gun was sold.<sup>16</sup> Under federal law, dealers are required to retain identifying information about the purchaser.<sup>17</sup> Thus, through this tracing process the first purchaser of a gun can be traced just like a serial number of a recovered firearm. This type of tracing has been identified by law enforcement as a crucial part of crime scene investigation.<sup>18</sup>

### B. Unintentional and Intentional Firearm Markings

The transferring of unique markings in the form of numbers and letters has been around for centuries. The Gutenberg press is one of the first instances where a “formed or molded set of alpha-numeric characters was used repeatedly to transfer unique marks from one medium to another.”<sup>19</sup>

Like the Gutenberg press, microstamping is not new—firearms have always microstamped unintentionally.<sup>20</sup> Since the 1900s, trained firearm examiners have used these unintentional markings to positively identify cartridge cases fired by the same gun.<sup>21</sup> These unintentional markings take the form of striations that are produced by

tool marks left on the firearm during the manufacturing process.<sup>22</sup> “[U]nintentional tool marks have been accepted as reliable for identification of firearms associated with crimes.”<sup>23</sup> “Today’s [m]icrostamping is just an enhanced version of this process, optimized and developed for application to firearms with intentional micro-code structures.”<sup>24</sup>

Metal stamping identification numbers has been on the market for years on many consumer products. The terrorist who left a Nissan Pathfinder in Times Square in 2010 was identified through the use of a metal stamping technology for a car.<sup>25</sup> “The break in the case” took place when a NYPD Detective went under the vehicle and obtained the hidden metal stamped vehicle identification number (VIN).<sup>26</sup> According to New York City Police Commissioner Raymond Kelly, “[t]his identified the owner of record, who in turn...sold it to the suspect.”<sup>27</sup> Like the VIN on a car, the sole purpose of microstamping is to provide law enforcement with a more accurate method to track down the owner of a gun that is used in a crime.

### C. Enhancing Ballistic Identification in Criminal Investigations

The Bureau of Alcohol, Tobacco, Firearms and Explosives’ (ATF) National Integrated Ballistic Information Network (NIBIN) program currently provides Integrated Ballistics Imaging System (IBIS) equipment and technology to state and local law enforcement agencies, which is used to compare ballistic evidence found at crime scenes.<sup>28</sup> Through the use of imaging software, IBIS captures images of unintentional markings on bullets and cartridge cases that have been recovered at crime scenes.<sup>29</sup> These images are then compared to similar ballistic evidence found at other crime scenes that was “previously entered into the NIBIN database.”<sup>30</sup> “By automating the process and narrowing the data only to likely matches, NIBIN allows law enforcement agencies to discover links between crime scenes that might not otherwise be apparent.”<sup>31</sup>

While NIBIN is a valuable tool, it cannot lead investigators to the firearm that produced the “ballistic fingerprint” unless the weapon is recovered.<sup>32</sup> Most firearms used in violent crimes are not recovered, but blank shell casings are.<sup>33</sup> Because microstamping transfers a unique identifiable code onto each cartridge case ejected from a firearm, investigators would not need to recover the crime gun to secure its serial number and can start the trace immediately.<sup>34</sup>

Microstamping improves the usefulness of an existing tracing system by adding more information to that system. The technology “does not collect any new personal information from gun owners in any way and has no Second Amendment implications whatsoever.”<sup>35</sup>

## III. Research Studies

### A. The Effectiveness of the Technology

A series of peer-reviewed studies has shown that firearms equipped with microstamping technology consistently produce identifiable codes even after thousands of rounds of test firings.<sup>36</sup> Studies conducted by the inventors of the technology, Todd Lizotte, a gun owner and member of the National Rifle Association (NRA), and Orest Ohar, represent the most extensive testing of the technology to date. In 2008, Todd Lizotte conducted a “3,500 round durability and microstamp transfer reliability test of a .45 Cal Colt 1991 A1 Commander (1911 Model) semiautomatic handgun.”<sup>37</sup> According to Lizotte, results indicate that:

when a firearm is properly optimized, outfitted and tested with intentional Microstamping features, even if law enforcement willingly limits their analysis to optical microscopy, the process of microstamping has the ability to yield >90% code extraction rates. It is evident that even higher levels of extraction are possible with scanning electron microscopy.<sup>38</sup>

As with any new product, microstamping has not been immune to criticism about the technology’s effectiveness. George Krivosta, a forensics examiner, conducted a test of the technology, and the results were published in the Winter 2006 edition of the *Association Firearm and Tool Mark Examiners Journal*. In the article, Krivosta questions the decipherability of the microstamped cartridges as well as the “durability of the engraved firing pins he tested.”<sup>39</sup>

Krivosta’s methodology and understanding of the technology should at the very least be questioned. Krivosta used non-optimized NanoTag First Generation firing pins from an early research project.<sup>40</sup> The technology tested by Krivosta “does not represent the mature microstamping technology that is currently available” for use.<sup>41</sup> According to Lizotte, the technology requires that a series of optimization tests be conducted for each model of firearm.

The firearm is outfitted with a matrix of Microstamping features of different geometries and resolutions. As each of these test character sets are cycled through the firearm, a quality level is attached to the resulting features produced into the cartridge casing surfaces. The data is tabulated and an optimized character set developed. Once the optimized character and feature geometries are chosen they are outfitted into the firearm and the firearm is tested for repeatability of character transfer.<sup>42</sup>

In his test rounds, Krivosta determined a satisfactory grade only if all eight characters of the microstamped code impression were decipherable under a microscope.<sup>43</sup> “If one or more of the characters was un-decipherable that impression was graded [u]nsatisfactory. The overall ratio of Satisfactory to Unsatisfactory impressions was 54 to 46.”<sup>44</sup> Even without optimized character sets, and his high self-imposed criteria, a fifty-four percent success rate of decipherability of shell cartridges would be beneficial to gun crime investigators because it would give them firearm trace information in more than half of the cases where they currently get zero information. Heck, as an Assembly Member facing the voters every two years, I would take a guaranteed fifty-four percent margin of victory in an election any day!

When I questioned police officers about evidence at crime scenes involving semi-automatic weapons, they pointed out that it is extremely rare to have just one shell cartridge at a crime scene to examine. In a real world investigation, the ability to decipher characters on multiple shell cartridges from the same gun by a trained ballistics investigator raises the prospect for identifying all eight characters.<sup>45</sup> But “even if only six characters could be read by a ballistics investigator, that would narrow the field to just five possible firearms!”<sup>46</sup>

Another critic of microstamping, Michael Beddow, a UC Davis graduate student, asserted in his research paper that microstamping “does not work well for all guns and ammunition tested.”<sup>47</sup> In his study, Beddow used vintage firearms that had not previously been considered for testing because of their advanced age and mechanical condition.<sup>48</sup> Under the California law and the New York State bill, only new semi-automatic handguns would be equipped with microstamping technology. Like Krivosta, Beddow used non-optimized firing pins.<sup>49</sup> In a subsequent test, Lizotte was able to use a Scanning Electron Microscope, which provides greater resolution and magnification, to easily decipher marked cartridge cases similar to the ones Beddow disqualified as unacceptable.<sup>50</sup>

I have sponsored two “Live Fire Demonstrations” where several cartridges were fired from a semiautomatic pistol equipped with microstamping capability. The first demonstration was held at the New York State Police Academy Firing Range in Albany, and the other was held at the Nassau County Police Academy Firing Range in Hempstead. At both demonstrations, all of the attendees had the opportunity to view the test-fired shell cartridges under a microscope. In both cases, every character on the numerous cartridges fired was decipherable to everyone present viewing them under the microscope.

As stated in a May 18, 2008, press release about the Albany demonstration, Assemblyman Steven Englebright, who attended the live fire, remarked that “[t]he results were clear as a bell. The microstamp registered clearly, repeatedly, and legibly on the cartridge even though the gun had been fired 5,800 times prior to that day.”<sup>51</sup>

## B. The Need for Forensic Examiners

George Krivosta’s study operates under the incorrect assumption that microstamping would make trained ballistic examiners obsolete. According to Krivosta “[t]his vendor suggests that NanoTag markings will be readily identifiable at the crime scene, with 100% reliability, with little to no training of the analyst needed, and yet remain easily affordable.”<sup>52</sup>

“It is important to note that the final determination of a match is always done through direct physical comparison of the evidence by a firearms examiner, not the computer analysis of images.”<sup>53</sup> In my meetings with Todd Lizotte, the co-inventor of microstamping, he emphasized that the markings on the shell casings could not be read at the crime scene, and would need to be sent to a crime lab to be reviewed under strict standards by firearm examiners.

## C. Microstamping Cannot Be Easily Defeated

According to the National Rifle Association (NRA), microstamping technology can easily be defeated using “common household tools.”<sup>54</sup> This claim is based on Krivosta’s intentional defacement of the technology in which he used a fifty-year-old stone, portable drill, and ballpoint pen to deface a firing pin.<sup>55</sup> Semiautomatic weapons equipped with microstamping technology have several counter measures to prevent tampering. Lizotte and Ohar, the co-inventors of the technology, “pioneered new methods to make microstamped markings tamper-resistant, in part by utilizing advanced metallurgical coatings and by adding redundant markings.”<sup>56</sup> There are redundant markings on the firing pin, breech face and gear of the firearm.<sup>57</sup> These redundant markings take the shape of geometric codes, similar to bar codes that are easy to interpret and difficult to destroy without affecting the operation of the firearm.<sup>58</sup> Under my microstamping legislation, defacement would be a felony.<sup>59</sup>

As mentioned earlier, a microstamped code on a cartridge case is as valuable a tool as the vehicle identification number or license plate on a car because all of these tools identify a registered owner or first purchaser, which provides a valuable lead for law enforcement.<sup>60</sup> Serial numbers can link manufactured objects to the owners providing a valuable tool to law enforcement in developing leads in criminal cases. License plates, for instance, can easily be removed from a car, but still manage to provide law enforcement leads every single day.

According to the National Research Council’s 2008 report *Ballistic Imaging*, “[b]ecause serial numbers can link manufactured objects to their owners, they provide a valuable tool to law enforcement in developing leads in criminal cases.”<sup>61</sup> The report uses the 1993 bombings of the World Trade Center (WTC) in New York City as an example of how serial numbers are used in criminal investigations.



Investigators sifting through the rubble in the parking garage of the [WTC] following the...bomb explosion found fragments bearing a VIN corresponding to the number of a missing van. Tracing the van to a Ryder Truck rental agency led to the arrest of a suspect in the bombing; leading...to the capture of additional suspects.<sup>62</sup>

We must keep in mind that within the context of firearms evidence, this case illustrates “the remarkable retention of engraved serial numbers on metallic components [even when] subjected to explosive impact.”<sup>63</sup>

#### D. Microstamping Is Inexpensive

Despite claims by the gun lobby that the cost of microstamping technology would be prohibitive to manufacturers and gun owners alike, the technology is inexpensive. The inventors have put the technology into the public domain and manufacturers will incur minimal costs to adopt this technology.<sup>64</sup> The lasers used to create the microstamp can be accessed at numerous job shops. There have been unfounded claims that it would cost upwards of \$200, but the co-inventors of the technology have testified it would cost between \$.50 and \$1 per handgun.<sup>65</sup>

In a letter I received dated March 31, 2009, from Phyllis Hannan, the President of Laser Light Technologies, Inc., Hannan states that:

Even in the worst case scenario LLTI has determined that the service price would range between \$.50 and \$3.00 per surface processed, based on volume. It should be noted that LLTI has provided such micro-marking serialization on ultra-hard materials with marking volumes reaching millions per year...LLTI can easily schedule its processing activities according to the customers “Firearm Industry” MRP (Manufacturing Resource Planning) platforms to synchronize to their delivery requirements...the task of processing the firearms components will be both uncomplicated and cost effective.<sup>66</sup>

### IV. Microstamping Legislation in New York State

#### A. The Crime Gun Identification Act

Recognizing the enormous crime-fighting potential of microstamping, both California and the District of Columbia have passed laws mandating the technology’s use.<sup>67</sup> Several states are considering similar legislation. Since 2008, I have sponsored microstamping legislation in the New York State legislature.

The measure, which is known as the Crime Gun Identification Act (A.1157-B), would require all semiautomatic pistols manufactured or delivered to any licensed

firearms dealer in the state of New York to be capable of microstamping ammunition by January 1, 2014.<sup>68</sup> Under the legislation, microstamp-ready is defined as a semi-automatic pistol “manufactured to produce a unique alpha-numeric or geometric code on at least two locations on each expended cartridge case that identifies the make, model, and serial number of the pistol.”<sup>69</sup>

Microstamping does not require the creation of any new databases nor does it mandate that licensed dealers or law enforcement enter microstamping information into an existing database.<sup>70</sup> This legislation does not place any restrictions on gun ownership or access, and will not have any fiscal impact on the state.<sup>71</sup>

#### B. Support from Law Enforcement and Mayors from Across the State

When the former Governor of California, Arnold Schwarzenegger, signed microstamping legislation into law on October 13, 2007, the legislation garnered the support of 65 police chiefs across the state.<sup>72</sup> My microstamping bill, which in 2011 passed the New York State Assembly for the fourth consecutive year, has received the support of more than 80 law enforcement organizations and police departments and 100 mayors from across the state.<sup>73</sup>

According to Derek Champagne, the President of the District Attorneys Association of the State of New York, “[t]his significant new technology would thereby aid in the investigation of a crime scene as well as deter criminals from the negligent use of a firearm.”<sup>74</sup>

The New York City Bar’s Committee on Criminal Justice Operations 2011 legislative report states that:

Another significant benefit of the microstamping legislation is that it is likely to serve as a deterrent to those who purchase guns for others, commonly known as straw buyers. Because criminals in New York may not purchase guns, often other individuals with clean records purchase weapons for them. However, if the weapons are used in future crimes and will be traced back to the purchasers, the purchasers may choose not to take such a risk and fewer guns may be available to criminals.<sup>75</sup>

Following the passage of the bill in the Assembly in 2009 and 2010, over 80 law enforcement agencies and elected officials wrote support letters to members of the State Senate urging them to pass this vital legislation. In a letter dated November 24, 2009, to Senator Dale Volker, the former ranking member of the Senate Codes Committee, and carbon copied to the entire New York State Senate, twelve upstate mayors urged Senator Volker to support microstamping:<sup>76</sup>

We understand that you recently asked the New York Association of Chiefs of Police to reverse its support of microstamping legislation. We are writing to you today to correct the record about the benefits of microstamping technology to law enforcement's ability to investigate gun crimes.

Your September 10, 2009 letter to the Association's President, states that support for microstamping is "misguided," "a result of inaccurate information and politics," "anti-second amendment," "anti-law enforcement" and a "pro-criminal dream." Your letter also claims that microstamping "does not work, and increases the cost of ammunition, even for law enforcement officers."

As mayors of upstate NY cities, we are disturbed about your mischaracterization of microstamping—and those who support it. We support the Second Amendment rights of law abiding gun owners and we support common sense policies, such as microstamping, to crack down on illegal guns.<sup>77</sup>

The letter reminds Senator Volker that twenty-one New York police officers were shot and killed between 1998 and 2007, including officers in Albany, Oneida, Essex, Chemung, Suffolk, and Chautauqua counties.<sup>78</sup> Unfortunately, police officer deaths, including those fatally shot in the line of duty, are on pace to rise for the second straight year.<sup>79</sup> According to a midyear report issued by the National Law Enforcement Officers Memorial Fund, overall officer deaths were up 14 percent so far in 2011, while deadly shootings had increased by 33 percent.<sup>80</sup>

### C. The Fight for Microstamping Legislation in NYS

Microstamping technology is an effective, proven tool that will help law enforcement put criminals behind bars. Even the media has recognized the value of microstamping. The editorial boards of the *New York Times*, *Albany Times Union*, *New York Daily News*, *New York Post*, *Newsday*, *the Buffalo News*, and several other papers have endorsed the legislation. Despite widespread support from law enforcement, elected officials, and the media, microstamping legislation has yet to become New York State Law. While the New York State Assembly passed the Crime Gun Identification Act in 2008, 2009, 2010, and 2011, the measure has not been passed by the State Senate.

The only time the bill reached the Senate floor was in 2010 when the Democrats held the majority. Senator Eric Schneiderman, currently the New York State Attorney General, was the Chairman of the Senate Codes Committee and the co-sponsor of my microstamping bill in the

Senate. In June 2010, Senator Schneiderman brought the bill to a vote in the Codes Committee, which passed the legislation. On June 15, 2010, Senator Schneiderman and I stood on the steps of the State Capitol Building with a bipartisan coalition of mayors and law enforcement officers, including New York City Mayor Michael Bloomberg, NYPD Commissioner Ray Kelly, Detective Steven McDonald, and his wife, Malverne Mayor Patricia-Ann McDonald, for one of the largest press events I have ever attended on gun crime prevention. Following the press event, Senator Schneiderman surprised us all that afternoon by bringing the microstamping bill to the floor of the Senate for a vote. Unfortunately, the bill's passage fell short by two votes and the bill was pulled from the floor.<sup>81</sup> While there is no denying that the outcome was disappointing, we achieved an incredible amount of progress with regards to the bill's advancement in 2010.

In August 2010, I received word that the House of Delegates of the American Bar Association adopted a resolution urging all U.S. governments to enact laws requiring new handguns to be fitted with microstamping technology. Upon hearing this news, I immediately phoned Mayor Michael Bloomberg's Division of Criminal Justice. They too had heard the news. We all felt that we were one step closer to New York State passing microstamping legislation.

### American Bar Association Recommendation August 9-10, 2010

RESOLVED, That the American Bar Association urges federal, state, and territorial governments to enact laws requiring that all newly-manufactured semi-automatic pistols be fitted with microstamping technology which would ensure that when a firearm is fired, an alphanumeric and/or geometric code would be stamped on the cartridge casing by way of the firing pin, breech face or other internal surfaces of the firearm, that would enable law enforcement to identify the serial number of the pistol and hence the first known purchaser of a weapon used in a crime.<sup>82</sup>

In November 2010, the Republicans regained control of the State Senate. I continued to push for the advancement of the bill. On May 24, 2011, for the fourth year in a row, the Crime Gun Identification Act was brought to the Assembly floor. As expected, when introduced by the Clerk of the Assembly, the bill was laid aside, which means it would be subject to debate. My opening remarks were as follows:

This legislation amends the penal law, in relation to requiring semi-automatic pistols manufactured or delivered to any licensed dealer in this state to be capable of microstamping ammunition...this trace-

able evidentiary linkage will enable law enforcement to resolve presently unsolvable crimes committed with handguns.<sup>83</sup>

The debate on the floor lasted an hour and a half. The bill passed in the Assembly with 84 ayes and 55 nays.<sup>84</sup> In 2011, my microstamping bill never made it to the floor for a vote in the State Senate. I was repeatedly informed by inside sources that the senate could not get enough votes to move the bill out of the Codes Committee in order to get it onto the legislative calendar for a floor vote. Despite intense lobbying by law enforcement organizations, elected officials, gun violence prevention advocates, and the Bloomberg Administration, the State Senate remained immovable on the issue.

Why is there such resistance in the legislature, particularly in the State Senate, to a technology that could put more information into the hands of police early in a criminal investigation?

According to the *New York Times*, “[t]he gun lobby is pushing back hard. It predictably minimizes the public safety value of microstamping, claiming that criminals would file down all the markings. It exaggerates the cost of the process and claims that it would curtail the availability of handguns in New York. The State Assembly rightly ignored these arguments and passed the bill.”<sup>85</sup>

## V. Conclusion

It has been a decade since meaningful crime gun legislation has been enacted in New York State. In 2000, Governor George Pataki was able to form a bipartisan coalition of state legislators to pass legislation that closed the state’s gun show loophole and placed a ban on assault weapons with magazine clips greater than ten rounds. That was 11 years ago.

Microstamping is an inexpensive, highly effective tool that allows law enforcement officials analyzing a crime scene to link readily available evidence to the person who pulled the trigger. It also stands to reason that there should be a significant drop in the number of straw purchases when microstamping legislation is adopted. Straw purchasers would be less likely to buy a gun for someone else if they know that the trace of the spent cartridge casing will lead police to their door because they purchased the firearm. As the New York City Bar stated in its memo of support, “The New York Legislature’s passage of the microstamping bill will bring law enforcement one step closer to solving violent gun crimes and deterring future crimes, with no identifiable downside.”<sup>86</sup>

Once and for all, microstamping technology is important because it will stop criminals and terrorists from firing anonymous ammunition. Law enforcement officers should have access to the best technology available for tracking down violent criminals. This is not an issue about the Second Amendment; this is an issue about the safety and security of our citizens. When a person is murdered

with a firearm, police should have the full range of tools to investigate who fired that gun. Any law enforcement officer will tell you that the trail of a criminal goes cold quickly. Microstamped cartridges will allow law enforcement to begin its investigation in the first few critical hours after a crime has been committed. It has been 11 years. For the safety and security of our citizens, it’s time.

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# “A Crime to Possess a Firearm”: Does the Second Amendment Apply in New York?

By Stephen P. Halbrook

“Under New York law, it is a crime to possess a firearm.”<sup>1</sup> Those words from a 2004 decision of the U.S. Court of Appeals for the Second Circuit contrast sharply with the Second Amendment’s language that “the right of the people to keep and bear arms, shall not be infringed.”<sup>2</sup> The U.S. Supreme Court held in *District of Columbia v. Heller* (2008) that “the people” actually does mean the people and that they have a right to possess handguns, particularly in the home.<sup>3</sup> It seems odd that exercise of a constitutional right would be a crime.



The basis of the Second Circuit’s decision was that the Penal Code prohibits possession of a firearm (defined as a pistol or revolver) and that having a license is an affirmative defense which the gun owner must prove at trial.<sup>4</sup> Thus, police officers who merely “see [a] gun” are “justified in seizing it because of its ‘immediately apparent’ incriminating character.”<sup>5</sup> The prohibition did not offend the Second Amendment because “the right to possess a gun is clearly not a fundamental right.”<sup>6</sup>

After the Supreme Court decided *Heller*, the Second Circuit acknowledged that the Second Amendment “confers an individual right on citizens to keep and bear arms.”<sup>7</sup> However, “the Second Amendment applies only to limitations the federal government seeks to impose on this right.”<sup>8</sup> Moreover, the law did “not interfere with fundamental rights” and could be upheld under the rational relation test.<sup>9</sup>

The above two Second Circuit opinions were *per curiam* panel decisions in which now Supreme Court Justice Sonia Sotomayor joined. These decisions reflected New York federal and state precedents according the Second Amendment little or no meaning or deference. However, as a circuit judge Sotomayor had questioned the more stringent sentencing of persons under federal law based on New York’s more draconian firearm laws.<sup>10</sup>

Following the above decisions, the Supreme Court held in *McDonald v. City of Chicago* (2010) that the right to keep and bear arms is indeed a fundamental right applicable to the States through the Fourteenth Amendment.<sup>11</sup> To date, however, under New York law it remains a crime to possess a firearm.

The criminalization of mere possession of a firearm in New York was a legislative innovation of the twentieth century, and the judicial denial of any constitutional protection for a right to arms was an invention of the second half of that century. By contrast, when the New York constitutional convention ratified the federal Constitution in 1788 before it was amended to include the Bill of Rights, the convention declared that certain rights “cannot be abridged or violated,” including that “the people” have a “right freely and peaceably to exercise their religion” and that “the people have a right to keep and bear arms; that a well regulated militia, including the body of the people *capable of bearing arms*, is the proper, natural, and safe defence of a free state.”<sup>12</sup>

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*“To date, however, under New York law it remains a crime to possess a firearm.”*

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The demand to recognize the right to arms stemmed from bitter experiences preceding the American Revolution. A century before, the Crown had “caus[ed] several good Subjects, being Protestants, to be disarmed,” complained the English Declaration of Rights of 1689, which thus declared: “That the Subjects which are Protestants, may have Arms for their Defence suitable to their Condition, and as are allowed by Law.”<sup>13</sup> William Blackstone explained that, to vindicate the rights to personal security, personal liberty, and private property, subjects were entitled to justice in the courts, the right to petition, and “the right of having and using arms for self-preservation and defense.”<sup>14</sup>

After Boston was occupied by Redcoat troops in 1768, the *New York Journal* publicized throughout the colonies their transgressions on the rights of Englishmen,<sup>15</sup> including their denigration of the right to arms. Samuel Adams anonymously wrote that “it is certainly beyond human art and sophistry, to prove the British subjects, to whom the *privilege* of possessing arms is expressly recognized by the Bill of Rights,...are guilty of an *illegal act*, in calling upon one another to be provided with them....”<sup>16</sup> It was reported that in Boston “the inhabitants had been ordered to bring in their arms, which in general they had complied with; and that those in possession of any after the expiration of a notice given them, were to take the consequences.”<sup>17</sup> The *Journal* retorted:

It is a natural right which the people have reserved to themselves, confirmed by the Bill of Rights, to keep arms for their own

defence; and as Mr. Blackstone observes, it is to be made use of when the sanctions of society and law are found insufficient to restrain the violence of oppression.<sup>18</sup>

After Lexington and Concord, the New York General Committee resolved “that it be Recommended to every Inhabitant, to perfect himself in Military Discipline, and be provided with Arms, Accoutrements, and Ammunition, as by Law directed.”<sup>19</sup> In 1776, after independence was declared, the pro-British New York Governor William Tryon decreed: “That all offensive arms, indiscriminately, be forthwith collected,... to deliver them up at head-quarters, to the Commander-in-chief of the King’s troops.”<sup>20</sup>

Given these experiences, it was understandable that after the Constitution was proposed in 1787 without a bill of rights, Antifederalists objected that “a citizen may be deprived of the privilege of keeping arms for his own defence, he may have his property taken without a trial by jury.... These things are entirely contrary to our constitution....”<sup>21</sup> New Yorker John De Witt warned that Congress “at their pleasure may arm or disarm all or any part of the freeman of the United States.”<sup>22</sup>

But James Madison had addressed this issue in the New York-published *Federalist Papers*, referring to “the advantage of being armed, which the Americans possess over the people of almost every other nation,” in contrast to the kingdoms of Europe, where “the governments are afraid to trust the people with arms.”<sup>23</sup> Pursuant to the great compromise that a declaration of rights would be considered after the Constitution was adopted, Madison introduced what would become the Bill of Rights in the first Federal Congress in 1789, including: “The right of the people to keep and bear arms shall not be infringed....”<sup>24</sup> Federalist Tench Coxe explained:

As civil rulers, not having their duty to the people duly before them, may attempt to tyrannize, and as the military forces which must be occasionally raised to defend our country, might pervert their power to the injury of their fellow-citizens, the people are confirmed...in their right to keep and bear their private arms.<sup>25</sup>

When the New York convention ratifying the Constitution in 1788 demanded recognition of what would become the Second Amendment and other guarantees, the New York Constitution itself had no bill of rights. Nor did that of 1822. Delegates at the constitutional convention who drafted the latter argued that “a bill of rights is the mere repetition of the fundamental rights of this people, which have never been violated,” that rights omitted “might be considered to be yielded,” and that—stated future U.S. President Martin Van Buren—such a bill was historically “a concession extorted from the king, in favor of popular liberty,” unbecoming a republic.<sup>26</sup>

Nevertheless, in 1828 New York enacted a statutory declaration “Of the Rights of the Citizens and Inhabitants of this State” which still states: “A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms cannot be infringed.”<sup>27</sup> As late as 1907, statutory revisors traced this to the English Declaration of Rights and the Second Amendment.<sup>28</sup>

After the Civil War, the Southern States reenacted the Slave Codes as the Black Codes, which prohibited African Americans from possessing firearms without a license. The archetypical Mississippi law, for instance, provided that “no freedman, free negro or mulatto, not in the military service of the United States government, and not licensed so to do by the board of police of his or her county, shall keep or carry fire-arms of any kind....”<sup>29</sup> The Supreme Court in *McDonald* cited this prohibition as illustrative of what the Fourteenth Amendment was designed to preclude,<sup>30</sup> and the Court was speaking to the deprivation, not just to its race-based, equal protection violation.<sup>31</sup>

In the debates of the Reconstruction Congress leading to its proposal of the Fourteenth Amendment, Rep. Henry Raymond of New York, the editor of the *New York Times*, explained that making the African American a citizen meant that “he has every right which you or I have as citizens,” including a right to defend himself and his wife and children; a right to bear arms....<sup>32</sup> Rep. Roswell Hart of New York asserted that the United States had a duty to secure to the people of the Southern States a republican form of government, meaning “[a] government...where ‘the right of the people to keep and bear arms shall not be infringed’....”<sup>33</sup> In introducing the Fourteenth Amendment, Senator Jacob Howard’s explanation that it would protect “the personal rights guaranteed by the first eight amendments of the United States Constitution such as... the right to keep and bear arms” appeared on the front page of the *New York Times* and *New York Herald*.<sup>34</sup>

The *New York Evening Post* opined that the civil rights of African Americans should preclude laws preventing “their holding public assemblies” and “keeping fire-arms.”<sup>35</sup> The page facing that editorial supporting enforcement of First and Second Amendment rights had an advertisement for rifles, muskets, and “pocket and belt revolvers,” with the admonition: “In these days of housebreaking and robbery every house, store, bank and office should have one of Remington’s revolvers.”<sup>36</sup> Later issues of the *Post* depicted the New York police as being “employed in the service of the wealthy and prosperous corporations” while crime was rampant.<sup>37</sup>

The right to keep and bear arms seems to have been alive in New York for the next half century. General George W. Wingate, President of the New York Public Schools Athletic League and a founder of the National Rifle Association, wrote *Why Should Boys Be Taught to Shoot?* (1907).<sup>38</sup> President Teddy Roosevelt contributed an afterword congratulating the New York schoolboy who was

the best shot of the year, adding that, in time of war, “it is a prime necessity that the volunteer should already know how to shoot if he is to be of value as a soldier.”<sup>39</sup>

That tradition was still alive when now-Justice Antonin Scalia was a schoolboy on the rifle team: “I grew up at a time when people were not afraid of people with firearms.... I used to travel on the subway from Queens to Manhattan with a rifle. Could you imagine doing that today in New York City?”<sup>40</sup> Indeed, such a schoolboy now might be shot on sight by a SWAT team.

No caselaw on the Second Amendment developed in New York until the turn of the century because regulations were so minimal. New York did not forbid carrying pistols concealed without a permit until 1881.<sup>41</sup> The courts began by distinguishing “criminal” type weapons such as the slung-shot from “those ordinary legitimate weapons of defense of protection which are contemplated by the [federal] Constitution and the [New York] Bill of Rights.”<sup>42</sup> But in 1911 the Sullivan Law was passed, the first law in any State (other than Southern laws on African Americans) to require a permit for keeping a pistol or other concealable firearm in the home. Newly arrived Italians and other unruly immigrants were not to be trusted.<sup>43</sup>

Upholding the law, *People v. Warden of City Prison* (1913) held that the federal Bill of Rights did not apply to the States,<sup>44</sup> but “fully recogniz[ed] the proposition that the rights enumerated in the [New York] Bill of Rights were not created by such declaration. They are of such character as necessarily pertain to free men in a free state.”<sup>45</sup> The court ruled the law to be valid because it regulated the right to keep arms by requiring a permit rather than prohibited the right. “If the Legislature had prohibited the keeping of arms, it would have been clearly beyond its power.”<sup>46</sup>

Since the law referred only to firearms that could be concealed on the person, the dissent noted that it did not apply to “a blunderbuss or a horse pistol,” which were too large to be concealed.<sup>47</sup> He suggested that “the professional criminal will generally violate the act and take his chances of discovery and punishment, while the law-abiding citizen will be obliged to disarm himself of his only effective protection against the predatory classes.”<sup>48</sup>

Since “a rifle may be possessed in the home or carried openly upon the person on the street without violating any law,”<sup>49</sup> a 1958 decision held the law not to apply to a rifle carried wrapped in a newspaper, noting: “In enacting the ‘concealed’ weapon provision...[the Legislature] carefully avoided including rifles because of the Federal constitutional provision and the Civil Rights law provision.”<sup>50</sup> Another decision denied forfeiture of a hunting rifle a person used to defend himself against a prejudiced mob based on “the constitutional guarantee of the right of the individual to bear arms. Amendments Art. II.”<sup>51</sup>

Beginning at least as early as a decision rendered while World War II raged, New York courts deferred to issuing authorities on whether an applicant for a license to carry a concealed pistol stated a “proper cause.” *Moore v. Gallup* (1943) began by finding that the New York statutory right to bear arms meant the same as the federal Second Amendment and then said that the Second Amendment does not apply to the States,<sup>52</sup> leaving one to wonder what the New York provision applied to if not to the State. While the legislature could modify that statutory right with the ban on carrying a pistol without a license, the court said that “the Second Amendment created no right to bear arms, a right which long ante-dated the adoption of the Federal Constitution....”<sup>53</sup> If that suggested a natural or common-law right of the individual, the court next added that the Second Amendment’s purpose is “to enable the Federal Government to maintain the public security.”<sup>54</sup> If that was not enough to discount any personal liberty, the court added that “the arms to which the Second Amendment refers include weapons of warfare to be used by the militia, such as swords, guns, rifles and muskets...but not pistols,” which “are habitually carried by...gangsters.”<sup>55</sup>

The dissent would have held that such construction of the law violated the right to keep and bear arms.<sup>56</sup> It noted the current perceived threat of a foreign invasion, which demonstrated the “need of the citizens to become proficient in the use of firearms....”<sup>57</sup>

The *Moore* case set the stage for how New York courts would, for decades to come, view the incredible shrinking “right” only of “the people” endorsed by the authorities to bear arms. It may well have been a test case, in that amici curiae briefs were filed by rifle clubs, a range association, and the National Rifle Association<sup>58</sup>—the first such NRA amicus brief nationwide of which this author is aware.

As noted above, rifles have been more leniently restricted under New York law. In the 1960s, however, New York City required the registration of all firearms, including rifles and shotguns. Opponents who argued that such registration could lead to confiscation were derided as “right-wing kooks.”<sup>59</sup> But in 1991, the City enacted a prohibition on certain rifles it derogatorily called “assault weapons,” which it said were “generally recognized as particularly suitable for military and not sporting purposes”<sup>60</sup>—the very kind of arm *Moore* held to be protected. Persons with registered rifles who failed to inform the police by a deadline that they no longer possessed the rifles in the City could expect a knock on their door by police officers.

The ordinance was challenged by the Richmond Boro Gun Club, the NRA, the New York State Rifle and Pistol Association, and several John Does.<sup>61</sup> The federal Civilian Marksmanship Program sold or issued M-1 Garand rifles, which were militarily obsolete but training in which Con-

gress thought promoted national defense, to individuals and clubs. The U.S. Court of Appeals for the Second Circuit held that the local ban was not preempted by federal law because the rifles could be stored and used outside City limits.<sup>62</sup>

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*“At least in recent decades, the Second Amendment has been given short shrift by both federal and state courts in New York.”*

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The state of New York would later enact a prohibition on possession of what it called “assault weapons,” mostly rifles, not lawfully possessed by 1994.<sup>63</sup> But New York law continues to focus mostly on criminalization of possession of a “firearm,” which is defined as a pistol or revolver.<sup>64</sup> “A person is guilty of criminal possession of a weapon in the fourth degree,” a class A misdemeanor, when “[h]e or she possesses any firearm....”<sup>65</sup> Possession of a loaded firearm outside of one’s home or place of business constitutes criminal possession of a weapon in the second degree, a class C felony.<sup>66</sup> Licensees are exempt:

A license for a pistol or revolver...shall be issued to (a) have and possess in his dwelling by a householder; (b) have and possess in his place of business by a merchant or storekeeper;... (f) have and carry concealed, without regard to employment or place of possession, by any person when proper cause exists for the issuance thereof....<sup>67</sup>

Under these provisions, a handgun may never be carried outside one’s premises, except that it may be carried concealed (but not openly) under a license issued for “proper cause,” which is limited to “a special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession....”<sup>68</sup> Thus, no right to bear arms for self-defense exists unless the issuing authority grants it:

[I]ssuance of a pistol license is not a right, but a privilege subject to reasonable regulation. The Police Commissioner has broad discretion to decide whether to issue a license.... Judicial review of a discretionary administrative determination is limited to deciding whether the agency’s actions were arbitrary and capricious.... The agency’s determination must be upheld if the record shows a rational basis for it....<sup>69</sup>

Moreover, New York restricts issuance of a license merely to possess a handgun only to New York residents, which the Second Circuit held does not violate the Second

Amendment because it did not apply to the states.<sup>70</sup> While the Supreme Court in *McDonald* later held that it does so apply through the Fourteenth Amendment,<sup>71</sup> no court has applied that to issuance of a license to a non-resident. Indeed, despite a federal law providing that a person is “entitled” to transport a firearm through a State where otherwise unlawful if the person may possess firearms under federal law and is going from and to states where legal,<sup>72</sup> the Second Circuit held that the police may arrest such person anyway without probable cause to believe any element of the federal law is not met, and such person has no resultant civil rights action.<sup>73</sup> This often happens, as it did in that case, to travelers who seek to transport firearms pursuant to federal regulations at New York airports.

At least in recent decades, the Second Amendment has been given short shrift by both federal and state courts in New York. A U.S. district court held that the seizure and destruction of a person’s firearm by New York police could not give rise to a Second Amendment claim, because “the ‘right to bear arms’ is not a right to hold some particular gun,” and it did not “prevent him from acquiring another weapon.”<sup>74</sup> It seems strange to suggest that the right to keep and bear arms does not refer to the arms owned by specific persons.

When the Supreme Court in *Heller* held that the Second Amendment guarantees the right to possess a handgun for self defense,<sup>75</sup> the handwriting of incorporation through the Fourteenth Amendment on the wall could clearly be anticipated. A court decided that even if the Second Amendment is “extended to the individual states as a fundamental right,” New York’s prohibition on bearing arms without a license in which the police decide whether the person has “proper cause” remained intact.<sup>76</sup>

Another court upheld a conviction for criminal possession of a weapon in the second degree, stating that “Penal Law article 265 does not effect a complete ban on handguns” and that “New York’s licensing requirement remains an acceptable means of regulating the possession of firearms....”<sup>77</sup> In noting that the “defendant was not in his home at the time of the crime and did not have a valid pistol permit,”<sup>78</sup> the court failed to mention that carry permits are unavailable to the average citizen or to discuss how this virtually complete ban on bearing arms is consistent with the right to bear arms.

Little seems to have changed so far after the Supreme Court in *McDonald* held in 2010 that the Second Amendment applies to the states through the Fourteenth Amendment. The requirement of a premises license from the police merely to possess a firearm was upheld in part because “a significant percentage of premises license applications resulted in premises residence licenses in New York City.”<sup>79</sup> That could not be said for the license to have and carry concealed—the right to bear arms is banned for the people at large.



When the severe, discretionary restrictions on obtaining a license to carry concealed were challenged, a U.S. district court held those restrictions or prohibitions do not even implicate the Second Amendment, because they are outside its scope.<sup>80</sup> This lengthy opinion seems to ignore the simple words of the Second Amendment that “the right of the people to...bear arms, shall not be infringed.”

At this Nation’s founding, New York was at the forefront demanding what became the Second Amendment. While the U.S. Supreme Court was AWOL on the meaning of the Amendment until its recent *Heller* and *McDonald* decisions, perhaps the New York legislature and courts will rethink the proposition: “Under New York law, it is a crime to possess a firearm.”<sup>81</sup>

## Endnotes

1. *United States v. Sanchez-Villar*, 99 F. App’x 256, 258 (2d Cir. 2004) (per curiam), *vacated*, 544 U.S. 1029 (2005) (for further consideration in light of *United States v. Booker*, 543 U.S. 220 (2005)).
2. U.S. CONST. amend. II.
3. *District of Columbia v. Heller*, 554 U.S. 570 (2008).
4. *Sanchez-Villar*, 99 F. App’x at 258 (citing N.Y. Penal Law §§ 265.01(1) (PL) (crime), 265.20(3) (exception for license)); *People v. Washington*, 209 A.D.2d 162, 163, 618 N.Y.S.2d 32 (1st Dep’t 1994) (affirmative defense).
5. *Sanchez-Villar*, 99 F. App’x at 258 (citation omitted).
6. *Id.* at 258 n.1 (quoting *United States v. Toner*, 728 F.2d 115, 128 (2d Cir. 1984)).
7. *Maloney v. Cuomo*, 554 F.3d 56, 58 (2d Cir. 2009) (per curiam) (upholding New York’s ban on nunchaku, i.e., two sticks connected by cord), *cert. granted*, 130 S. Ct. 3541 (2010), *vacated*, 390 F. App’x 29 (2d Cir. 2010).
8. *Id.* at 58-59 (citing, *inter alia*, *Bach v. Pataki*, 408 F.3d 75, 84, 86 (2d Cir. 2005)) (upholding law excluding non-resident of New York to be eligible to obtain a license to possess a firearm), *cert. denied*, 546 U.S. 1174 (2006).
9. *Id.* at 59.
10. *United States v. Cavera*, 550 F.3d 180 (2d Cir. 2008) (*en banc*). The Second Circuit upheld more prison time under the federal Gun Control Act of an army veteran over 70 years old for selling guns across state lines into New York City based on the theory that its strict gun laws created a large black market that required more severe penalties for deterrence. Judge Sotomayor dissented on the basis that sentencing should not be based on “arbitrary and subjective considerations, such as a judge’s feelings about a particular type of crime,” using “questionable empirical data or by invoking a ‘common sense’ at odds with reality.” *Id.* at 220 (Sotomayor, J., dissenting).
11. *McDonald v. City of Chicago*, 130 S.Ct. 3020 (2010).
12. 18 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 298 (Merrill Jensen ed., 1995).
13. An Act Declaring the Rights and Liberties of the Subject, and Settling Succession of the Crown, 1689, 1 W. & M., c.2 (Eng.).
14. 1 WILLIAM BLACKSTONE, COMMENTARIES \*143-44.
15. Boston Under Military Rule 1768-1769: As Revealed in a Journal of the Times xiii-ix (Oliver Morton Dickerson, ed. 1971).
16. 1 THE WRITINGS OF SAMUEL ADAMS 299 (Harry Alonzo Cushing ed., 1904); see N.Y. JOURNAL, Supplement, Apr. 6, 1769, No. 1363, at 2, col. 1.
17. N.Y. JOURNAL, Feb. 2, 1769, at 2, col. 2.
18. N.Y. JOURNAL, Supplement, Apr. 13, 1769, at 1, col. 3.
19. N.Y. JOURNAL or GEN. ADVERTISER, May 4, 1775, at 2, col. 3.
20. HENRY ONDERDONK, JR., REVOLUTIONARY INCIDENTS OF SUFFOLK AND KINGS COUNTIES 59 (1849).
21. N.Y. JOURNAL & DAILY PATRIOTIC REG., Apr. 21, 1788, at 2, col. 2.
22. THE ANTI-FEDERALIST PAPERS 75 (Morton Borden ed., 1965).
23. THE FEDERALIST NO. 46 (James Madison), in 15 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 492-93 (1984).
24. 4 The Documentary History of the First Federal Congress of the United States of America, March 4, 1789–March 3, 1791 10 (Charlene Bands Bickford & Helen E. Veit eds., 1986).
25. A Pennsylvanian, *Remarks on the First Part of the Amendments to the Federal Constitution*, N.Y. Packet, June 23, 1789 at 2, cols. 1-2.
26. Nathaniel H Carter et al. Reports of the Proceedings and Debates of the Convention of 1821, Assembled for the Purpose of Amending the Constitution of the State of New York 163, 171-72 (1821).
27. N.Y. Civil Rights Law § 4 (2011) (original version at R.S., pt. 1, c. 4, § 3 (1828)).
28. “This provision appears in the Declaration of Rights of William and Mary (1689, ¶ 7), in the United States Constitution (2d amendment) and in the Revised Statutes of 1828 (Pt. 1, Ch. 4, § 3).” Report of Board of Statutory Consolidation 440 (1907).
29. *McDonald v. City of Chicago*, 130 S.Ct. 3020, 3038 (2010) (quoting *Certain Offenses of Freedmen*, 1865 Miss. Laws p. 165, § 1).
30. *Id.*
31. *Id.* at 3040-41.
32. CONG. GLOBE, 39th Cong., 1st Sess. 1266 (1866).
33. *Id.* at 1629.
34. N.Y. HERALD, May 24, 1866, at 1, col 3; N.Y. TIMES, May 24, 1866, at 1, col. 6.
35. *The Civil Rights Bill in the Senate*, N.Y. EVENING POST, Apr. 7, 1866, at 2, col. 1.
36. *Id.* at 3, col. 10.
37. N.Y. EVENING POST, Apr. 16, 1866, at 2, col. 2; N.Y. EVENING POST, May 10, 1866, at 2, col. 4.
38. Gen. George W. Wingate, *Why Should Boys Be Taught to Shoot?* (1907).
39. *Id.* at 13.
40. Justice Antonin Scalia, *Speech at National Wild Turkey Federation Annual Convention* (Feb. 25, 2006), available at <http://www.freerepublic.com/focus/f-news/1586586/posts>.
41. 1881 N.Y. Laws 103.
42. *People v. Persce*, 204 N.Y. 397, 97 N.E. 877, 879 (1912).
43. Lee Kennett & James LaVerne Anderson, *The Gun in America 177-78* (1975).
44. *People v. Warden of City Prison*, 154 A.D. 413, 419, 139 N.Y.S. 277 (1st Dep’t 1913).
45. *Id.* at 421.
46. *Id.*
47. *Id.* at 426 (Scott, J., dissenting).
48. *Id.* at 427.

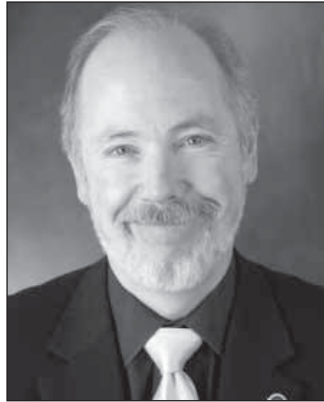
49. *People v. Raso*, 9 Misc.2d 739, 741, 170 N.Y.S.2d 245 (County Ct. 1958).
50. *Id.* at 742.
51. *Hutchinson v. Rosetti*, 24 Misc. 949, 951, 205 N.Y.S.2d 526 (1960). The prohibition was later held not to apply to a short-barreled shotgun at home because “this weapon a more nearly approximates the ancient blunderbuss or horse pistol than the modern revolver or pistol. The sawed-off shotgun before the Court is not any more readily concealable upon the person than is a rifle, carbine or unaltered shotgun.” *People v. Roberts*, 73 Misc. 2d 500, 502, 342 N.Y.S.2d 757, 758 (1973).
52. *Moore v. Gallup*, 267 A.D. 64, 67, 45 N.Y.S.2d 63 (3d Dep’t 1943), *aff’d*, 293 N.Y. 846, 59 N.E.2d 439, *motion granted*, 294 N.Y. 699, 60 N.E.2d 847.
53. *Id.* at 67-68.
54. *Id.* at 68.
55. *Id.*
56. *Id.* at 71.
57. *Id.*
58. *Id.* at 65. NRA counsel was Karl T. Frederick, a former NRA president.
59. Related to author by David I. Caplan, a New York attorney who litigated pistol license cases. *E.g.*, *Savitch v. Lange*, 114 A.D.2d 372, 493 N.Y.S.2d 889 (2nd Dep’t 1985).
60. N.Y. City Local Law No. 78, § 1 (1991).
61. *Richmond Boro Gun Club, Inc. v. City of New York*, 896 F. Supp. 276 (E.D.N.Y. 1995), *aff’d*, 97 F.3d 681 (2d Cir. 1996). This author argued the case.
62. 97 F.3d at 687.
63. N.Y. Penal Law § 265.22 (PL).
64. § 265.00(3).
65. § 265.01(1).
66. § 265.03(3).
67. § 400.00(2). The issuing authority has up to six months, which period may be delayed by giving “reasons,” to act on an application for a license. § 400.00(4-a).
68. *Kaplan v. Bratton*, 249 A.D.2d 199, 201, 673 N.Y.S.2d 66 (1st Dep’t 1998). New York City regulations further require a showing of “extraordinary personal danger, documented by proof of recurrent threats to life or safety,” adding that “the mere fact that an applicant...resides or is employed in a ‘high crime area,’ does not establish ‘proper cause’....” *Id.*, quoting 38 RCNY 5-03(b). “Proper cause” does not include the wish to exercise rights under the Second Amendment.
69. *Id.*
70. *Bach v. Pataki*, 408 F.3d 75 (2d Cir. 2005).
71. *McDonald v. City of Chicago*, 130 S.Ct. 3020 (2010).
72. 18 U.S.C. § 926A. “This is intended to prevent local laws, which may ban or restrict firearm ownership, possession or transportation, from being used to harass interstate commerce and travelers.” Report 98-583, Senate Judiciary Committee, 98th Cong., 2d Sess., 27-28 (1984).
73. *Torraco v. Port Authority of N.Y. & N.J.*, 615 F.3d 129 (2d Cir. 2010). This author argued the case.
74. *Garcha v. City of Beacon*, 351 F. Supp. 2d 213, 217 (S.D.N.Y. 2005).
75. *District of Columbia v. Heller*, 554 U.S. 570 (2008).
76. *In re Bastiani*, 23 Misc.3d 235, 237-38, 881 N.Y.S.2d 591 (2008) (affirming denial of license).
77. *People v. Perkins*, 62 A.D.3d 1160, 1161, 880 N.Y.S.2d 209 (3d Dept. 2009).
78. *Id.*
79. *People v. Foster*, 30 Misc.3d 596, 600, 915 N.Y.S.2d 449 (2010).
80. *Kachalsky v. Cacace*, No. 10-cv-5413, 2011 WL 3962550, \*20-23 (S.D.N.Y. 2011).
81. *United States v. Sanchez-Villar*, 99 Fed. Appx. 256, 258, 2004 WL 962938 (2d Cir. 2004) (*per curiam*).

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# Gun Law, Policy, and Politics

By Robert J. Spitzer

Late in 2011, the U.S. House of Representatives passed a bill that would dramatically alter gun practices throughout the country if enacted into law. Approved in the House by a vote of 272-154, the bill's passage had long been assured, as over 240 House members co-sponsored the bill, backed by the National Rifle Association (passage of the bill in the Senate in 2012 was considered unlikely, as a similar version of the bill had failed to win approval in that chamber). Titled the National Right-to-Carry Reciprocity Act, this bill would require any state or jurisdiction that issues concealed-carry gun permits to recognize and honor the permits granted by any other state. The practical effect of this bill would be to set as a *de facto* national standard the gun-carry standards of the state with the least restrictive regulations. This would result in dramatic changes in most states, because state gun-carry laws vary widely, and states make their gun-carry licenses available to residents of other states.



For example, 35 states have “shall issue” carry laws that allow applicants to obtain a concealed-carry gun license unless they are barred from doing so if, for example, they have a felony record. That is, a gun license can be obtained in a manner similar to obtaining a driver’s license, where the presumption is that the applicant can obtain the license unless the applicant fails to meet some knowledge-based standard (e.g., a driver’s test) or is otherwise disqualified. Ten states have “may issue” laws, where the applicant must justify the desire to carry a gun, and the state has discretion as to whether to grant the license. Four states allow their residents to carry concealed weapons without a permit. Only one state, Illinois (plus the District of Columbia), does not issue concealed-carry permits. Under the new law, the least restrictive state provision would have to be accepted by the 49 other states that have some kind of concealed-carry law. So, for example, one state, Utah, allows civilian concealed-gun carrying on its college campuses, regardless of the preferences of the campus. Under the new federal law, all carry states would have to recognize the Utah standard (half of the states have laws specifically barring campus gun carrying). Most states require concealed-carry applicants to complete a training course to obtain a permit (New Mexico, for example, requires 16 hours), but ten states require no training. Under the new law, those who obtained gun permits in states

where no training is required would be able to carry their guns in the other 40 states.<sup>1</sup>

These examples illustrate why a variety of organizations, in addition to pro-gun control organizations, oppose this measure, including the American Bar Association and the International Association of Chiefs of Police. Philadelphia Police Commissioner Charles Ramsey testified before Congress that among his objections to the bill was the fact that it did not include the establishment of a national database that police could consult to determine if an out-of-state gun-carry permit in the possession of an individual carrying a loaded gun was valid. In fact, an amendment to the bill to require states to maintain databases of permit holders was defeated.<sup>2</sup> While the policy significance of this bill is apparent, what is arguably even more significant is that it exemplifies how far the national gun policy debate has shifted in favor of gun rights organizations.

At a time when crime in virtually every category is at historic lows, when police are better trained, more professionalized, and more respected than ever, and when overall rates of civilian gun possession continue to decline, it might seem puzzling, even bizarre, that gun rights organizations would not only press so frantically for, but meet apparent success in, a protracted effort to extend gun carrying ever more into the general population.

This article will first examine key political forces that have turned gun policy in an ever-more gun friendly direction within the last decade. It will then examine the Supreme Court’s landmark and controversial decision in which it created a new, Second Amendment right of civilian gun possession, arguing that its verdict was based on historical analysis largely detached from historical reality. It then offers a brief conclusion.

## I. Gun Policy and Politics

### A. The Second Bush Presidency

During the 2000 presidential campaign, the National Rifle Association’s first vice president and Iowa State Republican Party Chair, Kayne Robinson, was caught on videotape in February of 2000 as saying that the election of George W. Bush would mean that the NRA would have “a president where we work out of their office.”<sup>3</sup> Many interest groups offer similar assertions in the heat of a campaign in order to persuade their members that the election of their preferred candidate represents a boon to the organization’s goals and interests. Yet in this instance, this private NRA brag would prove to be an entirely accurate assessment.

In fact, the second Bush presidency proved itself to be, in policy terms, the most gun-friendly presidency in history, even more than the Ronald Reagan and George H.W. Bush administrations, both of which won enthusiastic endorsement from the NRA. That, in itself, is unexceptional, insofar as every administration pursues policies in line with some interests, and opposed to others; further, no candidate can capture the White House without an extensive web of interest group support. What is remarkable about Bush and gun control, however, is the extent to which the administration put itself out, not only in its political stands on the issue, but in the administration's policy toward law-related matters pertaining to the gun issue, where the administration adhered to the NRA line with near-total devotion. Aside from the implementation of gun-friendly policies in statutes and in courts, the second Bush presidency's gun adherence is significant for two other reasons: first, Bush's 2000 election victory helped to cow national Democrats on the issue; second, the administration's pro-gun positions helped legitimize pro-gun ideology in American political discourse and public opinion.<sup>4</sup>

Many Democrats in 2000, headed by presidential nominee Al Gore, campaigned on a strongly pro-gun control platform. Control foes, spearheaded by the NRA, campaigned vigorously to defeat Gore. Despite these efforts, the key battleground states of Pennsylvania, Michigan, Wisconsin, Iowa, Washington State, and New Mexico were all won by Gore. Three states that went to Bush for which the NRA claimed credit—Arkansas, Tennessee, and West Virginia—were all critical to Bush's win. Yet of the three, only West Virginia had voted Democratic with any regularity up until the 2000 elections (since then, West Virginia has supported Republican presidential candidates). While the gun issue may have helped Bush in these three states (and may have been decisive in West Virginia), it is difficult to conclude that the issue worked more to Bush's benefit than to Gore's.<sup>5</sup> Still, a win is a win, and the NRA claimed its share of credit, as would any interest group so deeply vested in the race. This loss prompted considerable soul-searching in the Democratic Party. The result was that the national Democratic party largely backed away from its generally pro-control positions on guns,<sup>6</sup> believing the issue to be too contentious. In addition, the Democrats' conscious decision to embrace more centrist and "Blue-dog" Democrats to recapture control of Congress also impelled them to back away from a pro-control agenda. While there is good reason to believe that the NRA's ability to inflict damage on pro-control Democrats was little, Democrats by and large chose to focus their political energies on other issues and policies.<sup>7</sup>

## B. Bush's Pro-Gun Policies

Shortly after taking office, Bush Attorney General John Ashcroft moved to codify and legitimize the NRA's view of the Second Amendment. In one of his first legal pronouncements, Ashcroft outlined his views on

the meaning of the right to bear arms in a letter sent on May 17, 2001 to NRA Executive Director James Jay Baker shortly before the NRA's annual convention in which Ashcroft said: "let me state unequivocally my view that the text and the original intent of the Second Amendment clearly protect the right of individuals to keep and bear firearms."<sup>8</sup> The letter embraced the argument that the amendment endorsed an individual right to own guns, aside and apart from citizen service in a militia—a position Ashcroft had embraced as a United States senator. As a formal issuance from the nation's chief law enforcement officer, the letter was notable not only because it argued that the individualist view "is not a novel position,"<sup>9</sup> but because it contradicted the existing position that the Justice Department had taken in a then-pending Fifth Circuit Court of Appeals case, *U.S. v. Emerson*,<sup>10</sup> and was sent to a group, the NRA, which had filed an opposing friend of the court brief in the very same case.

The letter was remarkable, first, because it represented an offhanded, informal, and political means to articulate and inaugurate what proved to be an abrupt and total about-face in decades of Justice Department policy on the meaning of the Second Amendment. Second, the letter's arguments contradicted over a century of federal court rulings that had uniformly rejected the view embraced by Ashcroft. Third, the evidence and sources cited in the letter to support Ashcroft's claim did no such thing. And fourth, the letter failed to cite the most important sources explaining what the right to bear arms does mean.<sup>11</sup> Yet it represented the initial political and legal charge to reinterpret the Second Amendment—an effort that met with success in 2008.

Other elements of the NRA's political agenda were successfully advanced by the Bush administration. Limits were placed on gun data record-keeping, as well as law enforcement access to such records, even in the face of the 9/11 attacks, when captured documents revealed that terrorist leaders advised operatives to exploit America's weak gun laws and easy gun availability. Federal funding for gun buyback programs was eliminated. The assault weapons ban, enacted after a bitter struggle in 1994, was allowed to lapse in 2004. And in 2005, Congress enacted the centerpiece of the NRA's political agenda: federal liability protection for the gun industry. The Protection of Lawful Commerce in Arms Act extended to gun manufacturers, distributors, dealers, and importers unique legal protection against civil suits.<sup>12</sup>

## II. The Supreme Court Weighs In

Responding in part to a rising tide of writing in support of an "individualist" view of the Second Amendment buttressed substantially by gun rights groups,<sup>13</sup> and because of a more conservative court sympathetic to this viewpoint as embraced by the Bush Administration, the Supreme Court reversed course on the Second Amendment in 2008 in the landmark case of *D.C. v. Heller*.<sup>14</sup> In

this case, the court majority set two firsts: for the first time in history, a federal court overturned a gun regulation as a violation of the Second Amendment; in addition, it adopted the individualist interpretation of the amendment,<sup>15</sup> reversing course on its prior rulings, all of which supported some version of the militia-based interpretation of the amendment.<sup>16</sup>

The *Heller* case arose as a challenge to the District of Columbia's strict gun law, first enacted in 1976 (and drafted, ironically, with the assistance of the NRA), which banned the new registration of handguns, banned handgun carrying, and required that firearms in the home be kept unloaded and locked. Police officers and security guards were exempted. The law was challenged as a violation of the Second Amendment. The fact that the nation's capital is governed directly by the federal government meant that the court's past refusal to incorporate the Second Amendment (that is, apply it to the states through the Fourteenth Amendment) did not keep the case from proceeding, as the entire Bill of Rights has always applied to actions of the federal government.

On appeal from the District of Columbia Circuit,<sup>17</sup> the Supreme Court ruled 5-4 against the D.C. law, striking it down as inconsistent with the court majority's individualist reading of the Second Amendment. Writing for the majority, Justice Antonin Scalia concluded that the amendment now protected a personal right of civilians to own handguns to protect themselves in their homes. This right is by no means unlimited, however. Scalia noted that:

nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons or the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.<sup>18</sup>

In addition to lending support for longstanding gun regulations, the court also suggested that certain types of especially powerful weapons might also be subject to regulation, and that laws regarding the safe storage of firearms would also be allowable. As for the court's past reading of the Second Amendment as militia-based, the majority decision rejected the idea that the first half of the Second Amendment referencing a "well regulated militia" explained the second half of the sentence (referencing the right to bear arms), arguing instead that the first half of the sentence in effect merely offered an example of the right mentioned in the second half of the sentence. Indeed, most of the text of this lengthy opinion dealt with the history of the right to bear arms. The decision did not overturn the 1939 *U.S. v. Miller*<sup>19</sup> case, which analyzed the Second Amendment as a militia-based right, but dealt with it instead by saying that *Miller* was only about "the

type of weapon" at issue in the case. "Beyond that," Scalia concluded, "the opinion [i.e., *Miller*] provided no explanation of the content"<sup>20</sup> of the Second Amendment.

The four dissenting justices filed two opinions, authored by Justices John Paul Stevens and Stephen Breyer. Stevens's opinion disputed Scalia's historical analysis, arguing in a similarly lengthy historical analysis that the amendment was indeed a militia-based right, and that the Supreme Court had said so in *Miller* and the 1886 case of *Presser v. Illinois*<sup>21</sup> (Scalia argued that the prior court rulings either supported, or were not inconsistent with, the individualist view). Stevens wrote that "The text of the [Second] amendment, its history, and our decision in *United States v. Miller*...provide a clear answer"<sup>22</sup> to the meaning of the amendment. In Stevens's view, that answer was that the amendment "was adopted to protect the right of the people of each of the several States to maintain a well-regulated militia."<sup>23</sup> Stevens's interpretation of *Miller* was that "it protects the right to keep and bear arms for certain military purposes."<sup>24</sup> Stevens also noted that this was how *Miller* had been interpreted by literally hundreds of federal judges in dozens of cases. Breyer's dissent argued that, even if the individualist interpretation were correct, D.C.'s strict gun law was still allowable as a legitimate effort to control crime. In all, the *Heller* decision is notable first, for carving out a new, individual right to own guns, even if the right is subject to limitations and regulation; second, for its heavy reliance on history; and third, for the fierce controversy it engendered. In the aftermath of *Heller*, scores of legal challenges were mounted against gun laws around the country.

The Supreme Court completed its establishment of this new right two years later in the case of *McDonald v. Chicago*,<sup>25</sup> where the high court, by the same 5-4 vote, applied or "incorporated" the Second Amendment to the states. The *McDonald* case arose from a Second Amendment-based challenge to Chicago's strict law that essentially banned handguns, and any other gun not already registered with the city (Chicago's law was very similar to the D.C. law struck down by *Heller*). The majority opinion, written by Justice Samuel Alito, did two primary things. First, it affirmed the qualified *Heller* individual right, saying that "the right to keep and bear arms is not 'a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.'"<sup>26</sup> Further, this ruling was not to cast doubt on "longstanding [gun] regulatory measures"<sup>27</sup> such as those cited in *Heller*. Second, the majority opinion incorporated or applied the Second Amendment to the states, while cautioning that "incorporation does not imperil every law regulating firearms."<sup>28</sup> The means by which the Court chose to effect incorporation was through the Fourteenth Amendment's "due process" clause, which had been the basis for past incorporation decisions regarding parts of the Bill of Rights. It rejected the argument that it should use the Fourteenth Amendment's "privileges or immunities"

clause (a much-discussed but controversial method that was discarded by the Court in the nineteenth century),<sup>29</sup> and it rejected the idea of “total incorporation,” a theory arguing that the entire Bill of Rights should be applied to the states as a whole. *McDonald* produced five opinions: three in the majority and two in the minority. While the majority argued that this individual right to guns was a “fundamental” right “necessary to our system of ordered liberty”<sup>30</sup> (the standard for incorporation), Justice John Paul Stevens, in his dissent, argued that guns “destabilize ordered liberty.”<sup>31</sup> He and the dissenters continued to argue that *Heller* was wrongly decided, and that incorporation itself was not warranted in this case. As for the Chicago law, the Court did not strike it down, but sent it back to the lower court for review in the light of its new ruling. In the first two years following *Heller*, over 260 challenges to gun laws around the country have been brought; to date, virtually all have failed.<sup>32</sup>

The *Heller* and *McDonald* rulings established, as a matter of law, an individual rights interpretation of the Second Amendment. But while judges can change the law, they cannot change history, and the historical record largely contradicts the bases for these two recent rulings.

The militia-based understanding of the Second Amendment is that found in most standard historical texts on the Bill of Rights. From classic nineteenth-century analyses such as those of St. George Tucker, Joseph Story, and Thomas M. Cooley, to modern treatments, the verdict is the same.<sup>33</sup> In his classic book on the Bill of Rights, Irving Brant writes: “[t]he Second Amendment, popularly misread, comes to life chiefly on the parade floats of rifle associations and in the propaganda of mail-order houses selling pistols to teenage gangsters.”<sup>34</sup> Similar, if less sarcastic, sentiments are found in other standard works.<sup>35</sup> Moreover, “[s]tandard legal reference works used by lawyers and judges paralleled this perspective.”<sup>36</sup> The fact that standard historical treatments of the amendment have long accepted the militia-based view lends credence to the criticism that the *Heller* ruling played fast and loose with history. As one legal historian noted about *Heller*, Scalia’s opinion “is at best confused” and presents “an historical argument that is limited and wrongheaded.”<sup>37</sup> To cite but one example, Scalia supports his non-military reading of the Second Amendment by saying in his majority opinion that “there is no evidence whatsoever to support a military reading of ‘keep arms.’”<sup>38</sup> He adds that “we find no evidence that it [i.e. the phrase “keep and bear arms”] bore a military meaning.”<sup>39</sup> The historical consensus, however, is the reverse. Contrary to Scalia’s categorical assertion, not only is there evidence that the Second Amendment phrase had a military meaning, but most colonial and military historians say as much. For example, as the Pulitzer Prize-winning historian Garry Wills has written, “‘Bear arms’ refers to military service... ‘arms’ means military service in general....” The historical evidence of the military usage of bearing arms, Wills

says, is “overwhelming.” Wills’s overall conclusion about the Second Amendment is clear: “[h]istory, philology, and logic furnish no solid basis for thinking the Second Amendment has anything to do with the private ownership of guns.”<sup>40</sup>

As the conservative federal judge Richard A. Posner noted, “professional historians were on Stevens’ side” in *Heller* (Stevens defended the militia-based view). Scalia’s distortion of history, according to Posner, is an example of “law office history,” meaning that it is the product of lawyers “tendentiously dabbling in history, rather than by disinterested historians.” Posner archly concludes that Scalia’s decision “is evidence of the ability of well-staffed courts to produce snow jobs.”<sup>41</sup> Other commentators, notably prominent conservatives, accused Scalia of unwarranted judicial activism (a criticism usually reserved for liberals) and distortion of history, arguing that an accurate “originalist” reading of the Second Amendment leads to the militia-based understanding of the amendment, not the individualist view.<sup>42</sup>

#### A. The “Individualist” View

As mentioned, the *Heller* court decision embraced the individualist view—that is, that the Second Amendment was meant to bestow on every American citizen a right to have guns for personal self-defense, aside from the militia principle. Yet this view suffers from several problems.

The first problem with the individualist view in *Heller* is that it often relies on quotations pulled out of context.<sup>43</sup> The historical issue of the bearing of arms *as it pertained to the Constitution and the Bill of Rights* always came back to military service and the balance of power between the states and the federal government, as seen in the two most important historical sources: the records of the Constitutional Convention and those of the First Congress when the Bill of Rights was formulated. In *Heller*, Scalia dismisses the First Congress’s deliberations and debate over the Second Amendment by saying that it is of “dubious interpretive worth.”<sup>44</sup> Second, the definition of the citizen militias at the center of this debate has always been men roughly between the ages of seventeen and forty-five.<sup>45</sup> That is, it has always excluded a majority of the country’s adult citizens—men over forty-five, the infirm, and women. Therefore, it was not a right enjoyed by all citizens, unlike such Bill of Rights protections as free speech, religious freedom, or right to counsel.

Scalia argued in *Heller* that the reference to “the people” in the Second Amendment has the same meaning as it does in other parts of the Bill of Rights, as in “the right of the people [to] peaceably assemble” in the First Amendment, or the “right of the people to be secure in their persons, houses, papers and effects” in the Fourth Amendment. Because all citizens are considered to have such First and Fourth Amendment protections, why shouldn’t the Second Amendment be read as meaning

that all citizens have a right to bear arms? In support of this claim, Scalia referenced a 1990 Supreme Court case, *U.S. v. Verdugo-Urquidez*,<sup>46</sup> for support.<sup>47</sup> This claim is false on four grounds. First, militia service, from colonial times on, always pertained only to those capable and eligible to serve in a militia—that is, healthy young-to-middle-age men (excluding the infirm, old men, and nearly all women). Second, the courts (especially in the *Presser* case) and federal law up until *Heller* clearly defined and interpreted the Second Amendment as having this specific meaning. Third, no evidence suggests that the authors of the Bill of Rights attempted, or succeeded, in imposing a single, uniform definition of “the people” in the document; the Bill of Rights was the product of many hands and many ideas, a fact reflected in the variety of ideas, interests, and concerns addressed in the first ten amendments. Fourth, and most important, the *Verdugo-Urquidez* case has nothing to do with interpreting the Second Amendment. In fact, the case deals with the Fourth Amendment issue of whether an illegal alien from Mexico was entitled to constitutional protection regarding searches (the court ruled that non-U.S. citizens were not “people” as the term is used in the Fourth Amendment). In the majority decision, Chief Justice William H. Rehnquist discussed what was meant by the phrase “the people,” given that the phrase appears not only in several parts of the Bill of Rights, but also in the Constitution’s preamble, in order to determine its applicability to a noncitizen. Rehnquist speculated that the phrase “seems to have been a term of art” that probably pertains to people who have developed a connection with the national community.<sup>48</sup> Rehnquist’s speculations about whether the meaning of “the people” could be extended to a noncitizen, and his two passing mentions of the Second Amendment in that discussion, shed no light, much less legal meaning, on this amendment.

Third, Scalia’s central claim that the individualist view reflects an originalist reading of the Second Amendment is contradicted by the fact that the individualist view is of modern origin. It first appeared in print in a law review article published by a law student in 1960.<sup>49</sup> Prior to 1960, the militia or collective view of the Second Amendment was the basis for understanding and analyzing the Second Amendment in thirteen law journal articles published from 1874 to 1959.<sup>50</sup>

## B. Self-Defense

The overriding goal and purpose of *Heller* is to establish a Second Amendment-based personal right of civilians to own guns for self-protection. As Scalia wrote, “individual self-defense.... was the *central component*” of the Second Amendment.<sup>51</sup> As others have noted, Scalia reached this conclusion by “dismembering”<sup>52</sup> the Second Amendment—that is, by essentially ignoring or removing the first half of the amendment referring to a well regulated militia. Scalia does this in part by intermixing the defense needs of early Americans (against Native Americans

or predators, for example) with modern personal self-defense against robberies, assaults, rapes, intrusions into people’s homes, or other life-threatening circumstances. Yet, the Second Amendment by design and interpretation has to do not with these very real modern-day threats but with the threats posed by armies and militias.

This does not mean that the law affords no legal protection to individuals who engage in personal self-defense—far from it. American and British common law has recognized and legally sanctioned personal self-defense for hundreds of years, prior to and independent of the Second Amendment. But it arises from the area of criminal law, not constitutional law,<sup>53</sup> a fact that Scalia largely ignores. A standard, long-accepted definition of self-defense from common law reads:

A man may repel force by force in the defense of his person, habitation, or property, against one or many who manifestly intend and endeavor, by violence or surprise, to commit a known felony on either. In such a case he is not obliged to retreat, but may pursue his adversary until he find himself out of danger; and if, in a conflict between them, he happen to kill, such killing is justifiable. The right of self-defense in cases of this kind is founded on the law of nature; and is not, nor can be, superseded by any law of society.<sup>54</sup>

Even in the light of *Heller* and *McDonald*, the Second Amendment is as superfluous to legal protection for personal defense or defense of the home today as it was more than two centuries ago. Indeed, as defined in the common law tradition, the self-defense principle supersedes even constitutional guidelines.

## C. A “Right of Revolution”?

At least twice, Scalia’s opinion in *Heller* links the right to bear arms with citizen resistance to tyranny.<sup>55</sup> Given the decision’s individualist view of the Second Amendment, it infers that citizens, armed and acting independent of the government (not as part of a government-organized and regulated militia), somehow may use force against tyranny—government tyranny. This assertion harkens to a so-called “right of revolution,” which, though not expressly endorsed by *Heller*, has been an important component of how many supporters of the individualist view have interpreted the Second Amendment. That is, proponents of a right of revolution (also called “insurrectionism”) have argued that the amendment is meant to provide a right of citizens to threaten or use force against their own government to somehow keep the country’s rulers responsive to the citizens.<sup>56</sup> Although these theories pose interesting intellectual questions about the relationship between citizens and the state, they do not translate into meaningful policies for modern America.

Most citizens recognize the importance of using democratic institutions and values to voice their opinions by participating in elections, juries, expressions of public opinion, and participation in interest groups rather than by pointing guns (whether by threat or deed) at congressional leaders or the White House. Few Americans approve of those few groups in America that actively pursue something resembling a right of revolution—the Ku Klux Klan, the skinheads, the Branch Davidians, Los Angeles rioters, those responsible for bombing the federal office building in Oklahoma City in April 1995, or elements of the modern so-called “Patriot movement.” As the legal scholar Roscoe Pound noted, a “legal right of the citizen to wage war on the government is something that cannot be admitted.... In the urban industrial society of today a general right to bear efficient arms so as to be enabled to resist oppression by the government would mean that gangs could exercise an extra-legal rule which would defeat the whole Bill of Rights.”<sup>57</sup>

In any event, any so-called right of revolution is carried out against the government, which means against that government’s constitution as well—including the Bill of Rights and the Second Amendment. In short, one cannot carry out a right of revolution against the government and at the same time claim protections within it. This fact was well understood by the country’s founders, for in 1794 the government, through its militias, moved to suppress the Whiskey Rebellion, an uprising that was denounced by Federalists and Anti-Federalists alike. As the historian Saul Cornell noted, in the 1790s there was “widespread agreement that the example of the American Revolution did not support the rebels’ actions” because Americans at the start of the Revolution “did not enjoy the benefits of representative government,” whereas those who fomented the Whiskey Rebellion “were represented under the Constitution.”<sup>58</sup> The Constitution itself makes this point forcefully, as Congress is given the powers “[t]o provide for calling forth the Militia to execute the Laws of the Union, *suppress Insurrections* and repel Invasions (emphasis added)” in Article I, Section 8; to suspend habeas corpus “in Cases of Rebellion or Invasion” in Section 9; and to protect individual states “against domestic Violence” if requested to do so by a state legislature or governor in Article IV, Section 4. Further, the Constitution defines treason in Article III, Section 3, this way: “Treason against the United States, shall consist only in levying War against them” (the United States was originally referred to in the plural). In other words, the Constitution specifically and explicitly gives the national government the power to suppress by force anything even vaguely resembling revolution. Such revolt or revolution is by constitutional definition an act of treason against the United States. The militias are thus to be used to suppress, not cause, revolution or insurrection. These powers were further detailed and expanded in the Calling Forth Act of 1792 (1 *U.S. Stat.* 264), which gives the president broad powers to use state

militias to enforce both state and federal laws in instances where the law is ignored or in cases of open insurrection. This act was passed by the Second Congress shortly after the passage of the Bill of Rights.<sup>59</sup> In current law, these powers are further elaborated in the *U.S. Code* sections on insurrection (10 *U.S. Code* 331–334). Still, the link between guns and freedom has become an ever-more entrenched component of the individualist view of the Second Amendment. For example, the 2010 Republican nominee for the U.S. Senate from Nevada, Sharron Angle, said during the campaign, “our Founding Fathers, they put that Second Amendment in there for a good reason and that was for the people to protect themselves against a tyrannical government...if this Congress keeps going the way it is, people are really looking toward those Second Amendment remedies....”<sup>60</sup> Angle lost her Senate race, but her assertion that the Second Amendment gives people the right to use violence against Congress if they disagree with its decisions embodies a fanciful and dangerous idea that bears no sane relationship to the intention or purposes of the Second Amendment. Gun rights groups like the NRA have been leading exponents of this “insurrectionist” view of the Second Amendment.<sup>61</sup>

Along these lines, others have argued that traditionally oppressed groups, such as women and African Americans, should aggressively claim for themselves a right to bear arms.<sup>62</sup> Blacks in particular have been subject to race-based violence for hundreds of years and were unquestionably denied arms as a manifestation of racial oppression. Yet the key handicap for blacks and other oppressed groups has not been the denial of Second Amendment rights but the denial of *all* basic Bill of Rights freedoms, not to mention denial of the basic common law principle of self-defense. Further, an article by the legal scholar Carl Bogus presents substantial evidence that southern state leaders supported inclusion of the Second Amendment to ensure that they could use their state militias to suppress slave revolts.<sup>63</sup>

### III. Conclusion

By the end of the Bill Clinton presidency in the 1990s, it seemed as though the forces supporting stronger gun laws had all but won the upper hand—or at least had logged significant victories on the battlefield of gun politics. While its most significant achievements, including enactment of the Brady law in 1993 (requiring background checks for handgun purchases) and the assault weapons ban in 1994, came early in his administration, the public continued to support stronger gun laws by wide margins. In addition, continued gun massacres, capped by the horrific Columbine High School shooting in 1999 and the pro-gun control Million Mom March on Washington, D.C. in 2000, seemed to intensify public outrage at easily accessed and poorly regulated gun ownership patterns. Yet by the end of the second Bush presidency, that tide had reversed course. In the super-charged environment of gun politics,



the nation's conservative turn had included sweeping political victories for those seeking to not only halt, but reverse, decades of gun laws. That effort was capped by the Supreme Court's embrace of a newly created constitutional right to own guns for personal self-protection.

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At the least, these changes reflect two important political lessons. The first is that the maelstrom of interest group politics does not necessarily produce democratic outcomes. Policy victors in the interest arena prevail by greater political force, not the broad winds of popular preference. Second, policies that are the product of these forces may bear no resemblance to any rational weighing of policy alternatives. As the gun issue demonstrates, the courts are no less immune to the temptations of counter-factual analysis when heated in the super-charged environment of interest politics than are the political branches of government.

## Endnotes

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2. Editorial, *Packing Heat Everywhere*, N.Y. TIMES, Sept. 19, 2011, at A26; *House Approves Bill Making Travel Easier for Gun Owners*, N.Y. TIMES, Nov. 17, 2011, at A16.
3. James Dao, *National Rifle Association Unleashes Attack on Gore*, N.Y. TIMES, May 21, 2000.
4. For more on the gun issue and public opinion, see ROBERT J. SPITZER, *THE POLITICS OF GUN CONTROL* 116-18 (5th ed. 2012).
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6. Noam Scheiber, *Gun Shy*, NEW REPUBLIC, Jan. 29, 2001, at 15-16.
7. SPITZER, *supra* note 4, at 116-18.
8. Letter from John Ashcroft, U.S. Attorney General, to James Jay Baker, Executive Dir., Nat'l Rifle Ass'n, May 17, 2001.
9. *Id.*
10. *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001).
11. See Robert J. Spitzer, *Gun Rights for Terrorists? Gun Control and the Bush Presidency*, in *TRANSFORMED BY CRISIS: THE PRESIDENCY OF GEORGE W. BUSH AND AMERICAN POLITICS* 150-55 (Jon Kraus, Kevin J. McMahon, & David M. Rankin, eds., 2004).
12. SPITZER, *supra* note 4, at 156-59.
13. NRA lawyer Stephen P. Halbrook alone has written four books and dozens of law journal articles on gun control and the Second Amendment. See Carl Bogus, *The Hidden History of the Second Amendment*, 31 U.C. DAVIS L. REV. 309, 318 (1998). The National Rifle Association and other gun rights groups have provided extensive support for this writing; e.g., see Scott Heller, *The Right to Bear Arms*, Chronicle of Higher Education, July 21, 1995, at A12.
14. 554 U.S. 570 (2008).
15. In the case of *U.S. v. Emerson*, a lower federal court accepted the individualist interpretation of the Second Amendment, but did not use it to strike down the gun restriction that gave rise to the challenge. 270 F.3d 203 (5th Cir. 2001).
16. ROBERT J. SPITZER, *THE RIGHT TO BEAR ARMS* ch. 2 (2001).
17. *Parker v. District of Columbia*, 478 F.3d 370 (D.C. Cir. 2007). The appeals court accepted the individualist view in a 2-1 ruling against the D.C. law.
18. *Heller*, 554 U.S. 678.
19. 307 U.S. 174 (1939). The *Miller* case was the last Supreme Court case to address the meaning of the Second Amendment.
20. *Heller*, 554 U.S. 675.
21. 116 U.S. 252 (1886).
22. *Heller*, 554 U.S. 684.
23. *Id.* at 684.
24. *Id.* at 685.
25. 130 S.Ct. 3020 (2010).
26. *Id.* at 3047.
27. *Id.*
28. *Id.*
29. *Slaughter-House Cases*, 83 U.S. 36 (1873). Only Justice Clarence Thomas supported using the "privileges or immunities" clause as the basis for incorporation. For more on incorporation and the Second Amendment, see Robert J. Spitzer, *Why Gun Ruling is a Teachable Moment*, CNN Opinion, June 30, 2010, <<http://www.cnn.com/2010/OPINION/06/29/spitzer.guns.supreme.court/index.html?iref=storysearch>>.
30. *McDonald v. Chicago*, 130 S.Ct. 3042.
31. *Id.* at 3108.
32. Paul Helmke, *Future of Gun Laws After McDonald*, The Huffington Post, July 12, 2010, <[http://www.huffingtonpost.com/paul-helmke/future-of-guns-laws-after\\_b\\_643453.html](http://www.huffingtonpost.com/paul-helmke/future-of-guns-laws-after_b_643453.html)>.
33. Saul Cornell, *St. George Tucker and the Second Amendment*, 47 WM. & MARY L. REV. 1123 (2006). Tucker viewed the Second Amendment as a civic right and a right belonging to the states. He also addressed personal self-defense, but not as coming from the Second Amendment. JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION* 708 (Durham, N.C.: Carolina Academic Press 1987; first published 1833); THOMAS M. COOLEY, *GENERAL PRINCIPLES OF CONSTITUTIONAL LAW* 298-299 (1898). Cooley's book did not include discussion of the important *Presser* case until the subsequent (fourth) edition of this book, published in 1931, which buttressed the standard interpretation found in the writings of other constitutional scholars. Both Story and Cooley describe the broader, more general nature of keeping and bearing arms arising from the old-style unorganized militias and musters of the pre-Civil War era.
34. IRVING BRANT, *THE BILL OF RIGHTS* 486 (1965).
35. ROBERT A. RUTLAND, *THE BIRTH OF THE BILL OF RIGHTS* 229 (1955).
36. Robert J. Spitzer, *Lost and Found: Researching the Second Amendment*, 76 CHI.-KENT L. REV. 349, 368 n.105 (2000). ("In 1975, the American Bar Association endorsed the understanding that the Second Amendment is connected with militia service.")
37. Paul Finkelman, *District of Columbia v. Heller: It Really Was About a Well Regulated Militia*, 59 SYRACUSE L. REV. 267, 267 (2008).
38. *D.C. v. Heller*, 554 U.S. 602 (2008).
39. *Id.* at 657.
40. GARRY WILLS, *A NECESSARY EVIL* 257, 258, 259 (1999).

41. Richard A. Posner, *In Defense of Looseness*, NEW REPUBLIC, Aug. 27, 2008. For more on “law office history” and the Second Amendment, see ROBERT J. SPITZER, SAVING THE CONSTITUTION FROM LAWYERS ch. 5(2008).
42. Posner, *supra* note 41; J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253 (2009); Douglas Kmiec, *Guns and the Supreme Court: Dead Wrong*, Tidings Online, July 11, 2008, at <[http://www.the-tidings.com/2008/071108/kmiec\\_text.htm](http://www.the-tidings.com/2008/071108/kmiec_text.htm)>. Doug Kmiec, *What the Heller? Is Only the Supreme Court’s Liberty Enhanced?*, SLATE MAGAZINE, July 8, 2008.
43. To pick an example, Stephen Halbrook in *The Founders’ Second Amendment* (Chicago: Ivan R. Dee, 2008) quotes Patrick Henry as saying during the Virginia ratifying convention “that every man be armed” (4) as evidence that the country’s founders favored “the ideal of an armed populace.” (3). This quote would seem to support the view that at least some early leaders advocated general popular armament aside from militia purposes. Yet here is the full quote from the original debates:
- May we not discipline and arm them [the states], as well as Congress, if the power be concurrent? so that our militia shall have two sets of arms, double sets of regimentals, &c.; and thus, at a very great cost, we shall be doubly armed. The great object is, *that every man be armed*. But can the people afford to pay for double sets of arms, &c.? Every one who is able may have a gun. But we have learned, by experience, that, necessary as it is to have arms, and though our Assembly has, by a succession of laws for many years, endeavored to have the militia completely armed, it is still far from being the case (emphasis added).
- JONATHAN ELLIOT, 3 ELLIOT’S DEBATES, ON THE ADOPTION OF THE FEDERAL CONSTITUTION 386 (New York: J.B. Lippincott, 1937). It is perfectly obvious that Henry’s comments are in the context of a discussion of the militia and of the power balance between the states and Congress.
44. *D.C. v. Heller*, 554 U.S. 646.
45. See 10 U.S.C. § 311. Current code lists the lower age as seventeen, but in colonial times, the age range was of necessity wider.
46. 494 U.S. 259 (1990).
47. *Heller*, 554 U.S.650.
48. *Verdugo-Urquidez*, 494 U.S. at 265.
49. Stuart R. Hays, *The Right to Bear Arms, a Study in Judicial Misinterpretation*, 2 WM. & MARY L. REV. 381 (1960).
50. See Robert J. Spitzer, *Lost and Found: Researching the Second Amendment*, 76 CHI-KENT L. REV. 349-401 (2000); Spitzer, *supra* note 36; Spitzer, *supra* note 16, at 72.
51. *D.C. v. Heller*, at 662. Emphasis in original.
52. David Thomas Konig, *The Second Amendment and the Right to Bear Arms After D.C. v. Heller: Why the Second Amendment Has a Preamble: Original Public Meaning and the Political Culture of Written Constitutions in Revolutionary America*, 56 UCLA L. REV. 1295, 1297 (2009).
53. See JOEL SAMAHA, CRIMINAL LAW ch. 6 (St. Paul, Minn.: West 1993).
54. Am. Law Inst., 1 Model Penal Code and Commentaries 380-81 (Philadelphia: American Law Institute, 1985). See also definition of self-defense in HENRY C. BLACK, BLACK’S LAW DICTIONARY 947 (St. Paul, Minn.: West, 1991).
55. *D.C. v. Heller*, at 661, 662.
56. Robert E. Shalhope says the Second Amendment protects weapons possession for Americans in part “for the purpose of keeping their rulers sensitive to the rights of the people.” Would this make, say, Lee Harvey Oswald, John Wilkes Booth, and David Koresh true democrats? See Robert E. Shalhope, 69 *The Ideological Origins of the Second Amendment*, JOURNAL OF AM. HISTORY 614 (1982); Wayne LaPierre, *Guns, Crime, and Freedom* 19-20 (Washington, D.C.: Regnery, 1994); Glenn H. Reynolds, *The Right to Keep and Bear Arms under the Tennessee Constitution*, 61 TENN. L. REV. 668-69 (1994).
57. Roscoe Pound, *The Development of Constitutional Guarantees of Liberty* 90-91 (New Haven: Yale University Press 1957).
58. Saul Cornell, *Whose Right to Bear Arms Did the Second Amendment Protect?* 19-20 (Boston: Bedford/St. Martin’s, 2000). See also Saul Cornell, *A Well Regulated Militia* (New York: Oxford University Press 2006). Stuart R. Hays goes so far as to cite with approval the Civil War as an instance of “the right to revolt when the laws of the government began to oppress.” Whatever one thinks of that conflict, the effort of southern states to break away from the Union was not within the bounds of the Constitution but an attack on the document and was a threat to the Union’s continued existence. “Right to Bear Arms,” 382.
59. The Calling Forth Act states as its purpose “to provide for calling forth the Militia to execute the laws of the Union, suppress insurrections and repel invasions.” Section 1 of the act says “in case of an insurrection in any state, against the government thereof, it shall be lawful for the President of the United States, on application of the legislature of such state, or of the executive (when the legislature cannot be convened) to call forth such number of the militia of any other state or states, as may be applied for, or as he may judge sufficient to suppress such insurrection.” Section 2 says “That whenever the laws of the United States shall be opposed, or the execution thereof obstructed, in any state, by any combinations too powerful to be suppressed by the ordinary course of judicial proceedings...it shall be lawful for the President of the United States to call forth the militia of such state to suppress such combinations, and to cause the laws to be duly executed. And if the militia of a state...shall refuse, or be insufficient to suppress the same, it shall be lawful for the President, if the legislature of the United States be not in session, to call forth and employ such numbers of the militia of any other state or states most convenient thereto.”
60. Greg Sargent, *Sharron Angle Floated Possibility of Armed Insurrection*, WASH. POST, June 15, 2010.
61. See JOSHUA HORWITZ & CASEY ANDERSON, GUNS, DEMOCRACY, AND THE INSURRECTIONIST IDEA (University of Michigan Press 2009).
62. In his *McDonald* concurring opinion, Justice Clarence Thomas raises this very argument. See also Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEORGETOWN L.J. 309-361 (1991); Stefan B. Tahmassebi, *Gun Control and Racism*, 1 GEO MASON U. CIV. RTS. L.J. 67-99 (1990).
63. Bogus, *supra* note 13. See also Carl Bogus, *Race, Riots, and Guns*, 66 SOUTHERN CAL. L. REV. 365-88 (1993).

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# Not Quite Bulletproof—Gun Litigation Continues Against Corrupt Gun Sellers Despite an Unprecedented Federal Shield Law

By Daniel R. Vice, Jonathan E. Lowy, and Robyn Long



Daniel R. Vice

In the past decade, about one million people have been shot in America, about 300,000 fatally. Many of these deaths and injuries are the result of gun industry misconduct—and the gun lobby’s legis-



Jonathan E. Lowy

lative clout enables it to get away with causing such havoc. Gun sales and distribution are grossly under-regulated. In virtually all states, dealers are allowed to sell limitless numbers of guns to the same customer, even though high-volume sales are commonly used by traffickers and criminals, but not by law-abiding gun owners. Dealers can sell military-style assault weapons and high-capacity ammunition magazines that belong on the battlefield, and are otherwise useful only to mass killers. Gun dealers can get away with claiming guns are “lost” when they are in fact illegally sold, as there is no federal law requiring that dealers conduct inventory checks or utilize basic security measures that would prevent thefts and expose such false alibis. Legal loopholes and restrictions on law enforcement enable gun dealers, distributors and manufacturers to profit off of the criminal gun market, often without detection or fear of punishment. And since guns are—inexplicably—the only consumer product exempt from federal consumer safety oversight, they can be sold without inexpensive, feasible life-saving features.

Like victims of other industries whose political influence has enabled them to cause injuries and deaths, many gun violence victims and survivors have turned to the more level playing field of the courts to seek civil justice, and provide an incentive for gun companies to behave more responsibly. However, there too they have faced the gun lobby’s influence. Following years of court rulings allowing lawsuits against the gun industry to proceed to trial—and over \$4.3 million in settlements in 2004 alone against negligent gun dealers and manufacturers—in 2005 the gun lobby successfully pushed through Congress unprecedented special interest legislation to shield gun companies from some liability: the Protection of Lawful Com-

merce in Arms Act (“PLCAA”). The gun industry’s lobby group, the National Shooting Sports Foundation, defiantly proclaimed that this new law would “provide the full protection sought by the firearms industry and nullify pend-



Robyn Long

ing lawsuits” as well as blocking new suits. However, like news of Mark Twain’s passing, reports trumpeting the end of gun litigation were premature.

While the PLCAA has proven to be a misguided, unnecessary, and unconstitutional piece of special interest legislation, many victims of gun violence are still able to seek civil justice in the courts against corrupt gun dealers. But the law creates difficulties that lawyers bringing such actions must be aware of, and be prepared to counteract. Further, some courts misconstrue the PLCAA and improperly dismiss actions that should be viable, so appeals may be needed to try to correct these injustices.

This article explains how attorneys for gun violence victims and survivors can navigate through the PLCAA, and successfully litigate cases to hold gun dealers and manufacturers accountable for reckless conduct that arm dangerous criminals with deadly weapons. The article first summarizes the basic negligent sales and distribution theories of liability that can be brought against gun companies. Then, the PLCAA is summarized, as well as key cases that have construed the Act. Finally, the article discusses how lawsuits can be pled and litigated to avoid dismissal under the PLCAA.

## Overview of Liability Theories Against Gun Manufacturers and Dealers

Before the PLCAA was enacted in 2005, courts throughout the country embraced liability for gun manufacturers and dealers whose negligent sales or design caused shootings. Many courts, including the Supreme Courts of Indiana and Ohio, upheld claims by several of the over 34 cities and counties that had brought suit

against the gun industry for negligently supplying criminals, and New York City's lawsuit was poised to begin trial. Cases on behalf of individuals resulted in landmark settlements, such as a \$2.5 million settlement in a lawsuit brought by the Brady Center to Prevent Gun Violence ("the Brady Center") on behalf of victims of the Washington, D.C.-area snipers.<sup>1</sup>

Lawsuits against gun manufacturers and dealers generally focused on two theories of liability—irresponsible (although frequently not illegal) distribution of firearms that arm criminals, and unsafe design of firearms. This article focuses on gun manufacturer and dealer liability relating to gun distribution.<sup>2</sup> Firearm distribution cases are generally based on two causes of action—negligence and public nuisance. About two-dozen courts in recent years have allowed these types of cases to go forward against gun manufacturers and dealers.<sup>3</sup> In each case, Brady Center attorneys served as *pro bono* co-counsel with local trial lawyers assisting the plaintiffs' attorneys in litigating their cases against gun industry defendants.<sup>4</sup> In many other cases as well, courts have held that gun dealers may be liable for shootings resulting from their negligent or illegal sales.<sup>5</sup>

The successful lawsuit filed on behalf of Washington, D.C. sniper victims illustrates a typical gun distribution case, albeit one before the PLCAA was enacted. Following the fall 2002 sniper attacks that killed 10, wounded 3, and terrorized the Washington D.C. area, victims of the shootings filed a lawsuit against the gun's manufacturer and dealer, alleging negligent gun distribution and creation of a public nuisance.<sup>6</sup> The federal Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") had traced the snipers' Bushmaster XM-15 semi-automatic assault rifle to the dealer Bull's Eye Shooter Supply in Tacoma, Washington. Although it was never definitely established how the snipers obtained their gun, it was clear that they got it from the gun shop even though federal law barred them from possessing a gun.<sup>7</sup>

When law enforcement contacted Bull's Eye to find out how the assault rifle got into the snipers' hands, the store claimed not to know that the gun was missing—even though it was prominently displayed and three feet long. Lee Malvo, the 17-year-old sniper, later told police that he simply walked into the store and walked out with the gun. However, ATF audits showed that Bull's Eye had repeatedly failed to secure or track its inventory, with 230 firearms "missing" from its shop in three years without any record of sale.<sup>8</sup> "Missing" guns often indicate that a gun dealer is actually selling guns illegally, off the books, and then claiming that the guns were stolen when they are recovered by law enforcement and traced back to it. Bull's Eye ranked in the top 1% nationwide in numbers of crime guns traced to the shop,<sup>9</sup> with more than fifty gun traces linked to crimes including murders, kidnappings, and assaults.<sup>10</sup>

Federal ATF audits and Bull's Eye's gun records demonstrating its reckless practices were accessible to gun manufacturer Bushmaster, providing it with notice that a dealer it picked to sell its assault weapons was one of the most irresponsible in the country.<sup>11</sup> Bushmaster nonetheless supplied Bull's Eye without requiring even a minimum code of conduct to ensure that its products were being sold responsibly.

Armed with these facts, the sniper victims alleged that, regardless of whether the snipers were illegally sold the gun, or were able to steal it because of the gun store's shoddy security and inventory controls, they obtained it as a result of Bull's Eye's negligent business practices, and those practices circumvented the federal firearms laws. As to Bushmaster, the suit alleged that it negligently entrusted and distributed firearms to one of the worst dealers in the country, and knew or should have known that entrusting guns to Bull's Eye would foreseeably lead to injuries and death.<sup>12</sup>

The sniper victims' public nuisance claim was based on Bull's Eye's and Bushmaster's business practices that led to guns frequently "disappearing" from Bull's Eye and ending up in the hands of criminals, including the Bushmaster firearm that injured the plaintiffs. This claim required different proof from the negligence claim, was prospective rather than limited to a specific past injury, and allowed for a grant of injunctive relief in addition to damages.

To prove a public nuisance, a plaintiff must show that the defendant created a condition that is an "unreasonable interference with a right common to the general public," and that the plaintiff suffered specific harm because of the nuisance.<sup>13</sup> This may be shown with proof that a defendant's conduct "generates injury or inconvenience to others that is both sufficiently grave and sufficiently foreseeable that it renders it unreasonable to proceed at least without compensation to those that are harmed."<sup>14</sup> Because a focus of public nuisance claims is on harm to the public, evidence of other similar acts may be admitted to prove the extent of the nuisance. Thus, it was relevant that Bull's Eye "lost" scores of other weapons, had dozens of guns traced to crime, and sold hundreds of guns in suspect "multiple sale" transactions.

In June 2003, the trial court denied motions to dismiss filed by Bull's Eye and Bushmaster, and held that the sniper victims, if they proved their case, could recover damages against the dealer and manufacturer. The court held that based on the facts alleged, "Bushmaster Firearms, Inc., knew or should have known that Bull's Eye Shooter Supply was operating its store in a reckless or incompetent manner, creating an unreasonable risk of harm."<sup>15</sup> As to Bull's Eye, the court ruled that gun dealers "owe a common law duty to third parties injured by weapons made available to an unfit person by a firearms dealer."<sup>16</sup> Additionally, the court held:

The facts in the present case indicate that a high degree of risk of harm to plaintiffs was created by Bull's Eye Shooter Supply's allegedly reckless or incompetent conduct in distributing firearms.... Furthermore, intervening criminal acts, such as the sniper shootings in the case at bar, may be found to be foreseeable, and if so found, actionable negligence may be predicated thereon.<sup>17</sup>

Bushmaster filed an interlocutory appeal to the Washington State Court of Appeals, which was likewise denied.<sup>18</sup> Shortly thereafter, Bull's Eye and Bushmaster agreed to settle the case for a total of \$2.5 million, and Bushmaster agreed to reforms of its distribution practices. While the facts of the sniper case (like any case) are unique, the theories of liability can be replicated in other cases.

In another Brady Center case, two New Jersey police officers successfully claimed that a West Virginia gun dealer should be liable in negligence and negligent entrustment for selling 12 handguns in a cash sale to a straw purchaser, after one of the guns was used to shoot them. The officers defeated motions to dismiss, and then recovered \$1 million from the dealer.<sup>19</sup>

In another Brady Center case, post-PLCAA, the Court of Appeals of Kansas held that a gun dealer could be liable in negligent entrustment for selling a single gun to straw purchaser where that gun was later used to kill an 8-year old boy.<sup>20</sup>

## New York Gun Cases

Plaintiffs litigating liability cases against gun dealers and manufacturers in New York should be cognizant of certain relevant state case law, including some cases rejecting certain claims against gun companies that are likely to be cited by defendant gun companies, but should be distinguishable from the causes of actions discussed in this article.

New York common law has long imposed a duty on those who handle or deal in particularly dangerous products that create a foreseeable risk of injury to others to use reasonable care to minimize the risk that those injuries will occur.<sup>21</sup> Even before privity of contract was abolished as to other products, New York law imposed broader liability on purveyors of "poisons, explosives, deadly weapons—things whose normal function it is to injure or destroy," extending a duty to those who may be foreseeably injured as a result.<sup>22</sup> As early as 1901, New York courts held that "the vendor [of firearms] owes to the public a duty not to expose human life to danger by negligently and carelessly putting upon the market an article as harmless which is in fact dangerous."<sup>23</sup> Because of the "common experience" that guns in the hands of

dangerous persons are likely to result in injury to others, New York law imposes on those who deal in or possess firearms a duty to use care to prevent guns from falling into the wrong hands.<sup>24</sup>

While in some cases a duty is only imposed if the defendant has a "special relationship" with the plaintiff, New York courts have distinguished between cases involving misfeasance (affirmative conduct) and nonfeasance (passive conduct),<sup>25</sup> holding that where the defendant engages in misfeasance—affirmative conduct that increases risks to others and causes harm—liability is imposed without a "special relationship."<sup>26</sup> Other jurisdictions also require a "special relationship" only for nonfeasance.<sup>27</sup> By choosing to sell lethal weapons in a manner likely to arm criminals, gun companies are guilty of misfeasance, and no "special relationship" should be required.

While these principles of New York law support imposing liability on gun companies whose negligent conduct causes foreseeable harm, liability has been rejected in some cases, albeit on weaker (and distinguishable) facts than the causes of action recommended in this article. In *Hamilton v. Beretta USA Corp.*,<sup>28</sup> the Court of Appeals of New York, answering questions certified from the Second Circuit, held that negligence and negligent entrustment claims brought by several victims of gun violence against several gun manufacturers should be dismissed.<sup>29</sup> The guns used to shoot the plaintiffs, for the most part, were not recovered by law enforcement,<sup>30</sup> so it was not known who made the guns, how they were sold, or who sold them. Plaintiffs were therefore left to sue the gun industry as a whole, claiming that gun manufacturers should be liable on a market share liability theory to victims of gun violence since they supplied the criminal gun market by negligently distributing guns.<sup>31</sup> On these facts, the Court of Appeals rejected liability, noting:

Plaintiffs, however, presented no evidence, either through the testimony of experts or the submission of authoritative reports, showing any statistically significant relationship between *particular classes* of dealers and crime guns. To impose a general duty of care upon the makers of firearms under these circumstances because of their purported ability to control marketing and distribution of their products would conflict with the principle that any judicial recognition of a duty of care must be based upon an assessment of its efficacy in promoting a social benefit as against its costs and burdens [citation omitted]. Here, imposing such a general duty of care would create not only an indeterminate class of plaintiffs but also an indeterminate class of defendants whose

liability might have little relationship to the benefits of controlling illegal guns [citation omitted].<sup>32</sup>

While the *Hamilton* Court rejected a generalized duty of care, which could impose liability on gun companies without evidence that they engaged in wrongful conduct that caused a specific plaintiff's harm, the decision did not shut the door to claims against gun companies in New York. Rather, the Court of Appeals merely declined to impose "[s]uch broad liability, potentially encompassing all gunshot crime victims...without a more tangible showing that defendants were a direct link in the causal chain that resulted in plaintiffs' injuries, and that defendants were realistically in a position to prevent the wrongs."<sup>33</sup> While the Court refused "[t]o impose a *general* duty of care upon the makers of firearms *under these circumstances*,"<sup>34</sup> it approved of imposing liability on gun manufacturers in cases with more specific evidence:

The negligent entrustment doctrine might well support the extension of a duty to manufacturers to avoid selling to certain distributors in circumstances where the manufacturer knows or has reason to know those distributors are engaging in substantial sales of guns into the gun trafficking market on a consistent basis.<sup>35</sup>

The case of *People of the State of New York v. Sturm, Ruger & Co., Inc.*<sup>36</sup> also refused to impose liability on the gun industry, but that case is also wholly different from the causes of action discussed here. *People* was brought by the State of New York, not individual victims of gun violence, and like *Hamilton* it did not seek recovery for specific injuries caused by specific acts of negligent or illegal conduct. Rather, the State of New York sought injunctive relief against the gun industry at large by which courts (if the State prevailed) would monitor, supervise, and/or restrict its operations.<sup>37</sup> The First Department upheld dismissal of the case, stating: "[n]otably, nowhere in its complaint does plaintiff particularize any practical methods by which defendants should or could effectuate an abatement of the alleged nuisance, or, even more important, any specific, realistic, and practical way judges could monitor and enforce any such court-ordered abatement."<sup>38</sup> However, as the dissent pointed out, "the Court of Appeals [in *Hamilton*] did not lock the door against damages actions against gun manufacturers and distributors."<sup>39</sup>

*NAACP v. Accusport, Inc.*,<sup>40</sup> like *People*, involved a generalized public nuisance claim seeking injunctive relief against the gun industry at large, this time brought by public interest groups led by the NAACP. After a trial before an advisory jury, the court ultimately denied plaintiffs relief, but only because the court found that they did not suffer special harm distinct from the general public.<sup>41</sup> More significant to the ambit of this article, the court held that gun companies could be liable for contributing to the

criminal gun market under a public nuisance theory.<sup>42</sup> In a lengthy opinion that provides a wealth of factual findings and legal discussion helpful to would-be litigants in gun cases, the court found that the sales and distribution practices of gun companies had contributed to criminal gun violence, and had caused a public nuisance cognizable under New York law. Among other findings, the court noted:

The flow of guns into criminal hands in New York would substantially decrease if manufacturers and distributors insisted that retail dealers who sell their guns be responsible—e.g., that they not sell at gun shows, but sell from the equivalent of a store front with a supply of stocked guns; that they not sell under a variety of names; that they protect against theft; that they train and supervise employees to prevent straw sales (which are often notoriously obvious to the seller); and that they take other appropriate and available protective action.<sup>43</sup>

The court's ultimate decision denying relief actually supports imposing liability in cases brought by individual victims:

The fact that the NAACP and the rest of the community can and would be better protected against handgun violence by relatively cheap and simple responsible policies of manufacturers and distributors of handguns is not decisive. Ironically, the demonstration that all New Yorkers would gain from this method of reducing a dangerous public nuisance prevents the NAACP from obtaining relief under New York law on the ground that it suffers a special kind of harm from irresponsible handgun marketing.

New York cases subsequent to *Hamilton*, *People*, and *NAACP* make clear that gun litigation remains viable. In *Johnson v. Bryco Arms*,<sup>44</sup> the court denied a motion to dismiss a public nuisance claim brought by a victim of gun violence against the gun dealer, distributor and manufacturer who sold the gun.<sup>45</sup> The court held that the physical injury suffered by a victim of gun violence is sufficient to constitute the "special" harm required to bring a public nuisance claim.<sup>46</sup> The court recognized that "private plaintiffs claiming a public nuisance have been permitted to seek damages when it has been possible to identify the source or sources of the particular firearm that caused special harm to the plaintiff."<sup>47</sup> The post-PLCAA *City of New York v. A-1 Jewelry & Pawn, Inc.*,<sup>48</sup> also upheld nuisance claims, holding: "[u]nder New York law, a claim for public nuisance may lie against members of the gun retailing industry whose marketing and sales practice lead to

the diversion of large numbers of firearms into the illegal secondary gun market.”<sup>49</sup>

## The Protection of Lawful Commerce in Arms Act

Victories in the courts against negligent gun companies struck fear into the firearms industry that they might have to internalize some of the damage caused by their business practices, and not simply profit off the criminal gun market. As a result, the gun industry pushed for years to pass legislation to limit liability of gun companies, and following Republican victories in the 2004 elections, the gun lobby was finally able to pass a law it had long fought for: the Protection of Lawful Commerce in Arms Act.<sup>50</sup>

The PLCAA bars the filing of certain new cases against gun dealers or manufacturers and requires the immediate dismissal of certain other pending cases, while stating that some causes of action are not restricted. The PLCAA purports to bar cases against gun manufacturers and sellers for harm “resulting from the criminal or unlawful misuse of a [firearm],”<sup>51</sup> but not for cases including:

- 1) An action against a gun dealer for negligent entrustment or negligence per se,<sup>52</sup> and
- 2) An action against a gun manufacturer or dealer who “knowingly violated a State or Federal statute applicable to the sale or marketing of the product, and the violation was a proximate cause of the harm for which relief is sought....”<sup>53</sup>

Essentially, these provisions make clear that the PLCAA does not bar lawsuits: 1) if a gun dealer negligently entrusts a gun to a dangerous person who causes harm with the gun, 2) if a gun dealer is liable for negligence per se and causes harm, or 3) if a gun dealer or manufacturer knowingly violates a state or federal law and the violation is a proximate cause of harm to the victim. Properly understood, however, the PLCAA allows far more actions where gun company negligence causes criminal shootings, as will be explained below.

## Bringing a Case That Will Not Be Blocked by the PLCAA

In order to avoid having a case dismissed by the PLCAA, counsel must take care to highlight the facts and claims necessary to survive motions to dismiss based on the PLCAA.

Where supported by the facts and reasonable inferences, plaintiffs should allege that the gun dealer, distributor, or manufacturer defendant knowingly violated a law applicable to the sale or marketing of firearms, which makes the PLCAA inapplicable. Where applicable and supported, Plaintiffs should also allege that gun dealer defendants are liable in negligent entrustment or negli-

gence per se, which also takes the case out of the PLCAA’s prohibitions.

Although the PLCAA limits negligent entrustment and negligence per se actions to “sellers,” negligence actions may still be brought against gun manufacturers and distributors. For one, a manufacturer or distributor may also have a firearms dealer’s license, in which case it would constitute a “seller” under the PLCAA. As the court recognized in the sniper victims’ case, a manufacturer or distributor may be liable for negligently entrusting guns to an irresponsible gun dealer for resale, so negligent distribution actions should be allowed under negligent entrustment.

Plaintiffs also may contend that “pure” negligence actions remain viable under the PLCAA, against dealers as well as distributors and manufacturers, regardless of whether the PLCAA’s negligent entrustment “exception” is applicable to a given case. This argument is admittedly more difficult than those noted above, as defendants will likely argue that by including “exceptions” specifying permissible subsets of negligence actions, Congress impliedly barred other negligence claims. However, Congress could have expressly barred negligence cases in the PLCAA, and chose not to. Further, there are compelling arguments that the PLCAA should not be held to impliedly bar longstanding negligence theories.

For one, the PLCAA’s stated Findings and Purposes indicate that the PLCAA only bars liability where the criminal misuse of the gun was the “sole cause” of the harm, but does not shield gun companies whose wrongful conduct was an additional cause of harm. The Act’s first “Purpose” states its intent “[t]o prohibit causes of action [against the gun companies covered by the Act] for the harm solely caused by the criminal or unlawful misuse of firearm products...by others....”<sup>54</sup> The Findings reiterate that the PLCAA prevents “[t]he possibility of imposing liability on an entire industry for harm that is solely caused by others.”<sup>55</sup> Another Finding indicates opposition to cases “based on theories without foundation in hundreds of years of the common law and jurisprudence of the United States and [that] do not represent a bona fide expansion of the common law.”<sup>56</sup> In the context of the Act’s Purposes and Findings, the PLCAA’s general bar of cases involving harm “resulting from” criminal misuse should be read to bar only cases where harm was “solely caused” by criminals.

The legislative history removes any doubt that Congress did not intend to broadly prohibit actions based on long-established common law, but intended to preserve true negligence actions against gun companies. As the Act’s chief Senate sponsor, floor leader, and legislative champion Senator Larry Craig (R-ID) explained, the Act “stops only one extremely narrow category of lawsuits.”<sup>57</sup> “The only lawsuits this legislation seeks to prevent are novel causes of action that have no history or grounding

in legal principle.”<sup>58</sup> Senator Craig was clear that victims of negligent gun sellers would not lose their right to civil redress, stating, “[t]his bill will not prevent a single victim from obtaining relief for wrongs done to them by anyone in the gun industry.”<sup>59</sup> Senator Craig elaborated:

As we have stressed repeatedly, this legislation will not bar the courthouse doors to victims who have been harmed by the negligence or misdeeds of anyone in the gun industry... *If manufacturers or dealers break the law or commit negligence, they are still liable.*<sup>60</sup>

Other Senate sponsors agreed:

- “This bill...will not shield the industry from its own wrongdoing or from its negligence.”<sup>61</sup>
- “This legislation does carefully preserve the right of individuals to have their day in court with civil liability actions for injury or danger caused by negligence on [*sic*] the firearms dealer or manufacturer.”<sup>62</sup>
- The PLCAA “doesn’t relieve you of duties that the law imposes upon you...to carefully sell,” but Congress was “not going to extend it to a concept where you are responsible, after you have done everything right, for what somebody else may do who bought your product....”<sup>63</sup>

Fundamental principles of statutory construction require reading the PLCAA to permit claims based on wrongful conduct such as this. “In construing a statute we are obliged to give effect, if possible, to every word Congress used.”<sup>64</sup> This rule has special applicability, for “solely” was a particularly significant word for Congress, as it was one of the last changes made to the legislation to ensure its passage.<sup>65</sup> The clearly stated intent of Congress should not be ignored, for “nothing is better settled, than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion.”<sup>66</sup> “[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available.”<sup>67</sup> Further, a law should not be read to impliedly pre-empt state common law “unless that was the clear and manifest purpose of Congress.”<sup>68</sup> As the Supreme Court stated in another context, it is “difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct.”<sup>69</sup>

Under “the cardinal rule that a statute is to be read as a whole since the meaning of statutory language, plain or not, depends on context,”<sup>70</sup> the Act—and the term “resulting from the criminal or unlawful misuse” in §7903(5)(A)—is properly limited to cases where the harm was “solely caused by” a gun’s criminal misuse and liability

is not supported by the common law. That is the only reading of the Act that “would effectuate the legislative intention”—and if there is any doubt as to the meaning of legislation, courts should look to legislative history to resolve ambiguity.<sup>71</sup>

Courts should conclude that negligence claims against gun sellers who engaged in wrongful conduct can proceed. In the alternative, Congress’s clear intent not to shield bad actors should lead to a broad reading of the PLCAA’s “exceptions,” to allow more negligent entrustment, negligence per se, and knowing violation of laws cases.

## Post-PLCAA Gun Liability Cases

While this article does not purport to review all post-PLCAA firearms cases, a few examples highlight the differing interpretations courts have reached regarding the PLCAA.

In several cases, courts have held that the PLCAA’s “exceptions” apply and thus have denied motions to dismiss cases pursuant to the PLCAA. The PLCAA’s retroactive dismissal of pending cases has also raised constitutional questions, leading one trial court to rule that the law is unconstitutional.<sup>72</sup>

One case examining the impact of the PLCAA on pending litigation was filed by the City of Gary, Indiana against handgun manufacturers and sellers for public nuisance and negligent distribution. Before enactment of the PLCAA, the Indiana Supreme Court had unanimously held:

the City alleges that all defendants intentionally and willingly supply the demand for illegal purchase of handguns.... Taken as true, these allegations are sufficient to allege an unreasonable chain of distribution of handguns sufficient to give rise to a public nuisance generated by all defendants.<sup>73</sup>

On a subsequent motion to dismiss filed by the gun industry defendants based on the PLCAA, an Indiana trial court ruled that the PLCAA is unconstitutional in part because it purports to “direct[] the outcome of this pending case.”<sup>74</sup> On appeal, the Indiana Court of Appeals held that the case could proceed because the PLCAA did not apply, so it did not reach the constitutional question.<sup>75</sup> The Court of Appeals held that because creating a public nuisance in Indiana violates a state statute that is “applicable to the sale or marketing of firearms,” the PLCAA’s exception for conduct that knowingly violates a statute applied and the case was not barred.

Likewise, in two cases filed in Philadelphia on behalf of individual victims of gun violence, a trial court rejected motions by gun manufacturer and dealer defendants to



have the cases dismissed pursuant to the PLCAA. One case, *Oliver v. Lou's Loans*,<sup>76</sup> involved the shooting death of Anthony Oliver, Jr., a 14-year-old boy who was unintentionally shot and killed by a friend who mistakenly thought the safety was on and pulled the trigger. The suit alleged that Lou's Loans of Upper Darby, Pennsylvania, the top supplier of crime guns in Pennsylvania, negligently sold guns to a gun trafficker, one of which was used in the shooting. Plaintiffs alleged that Phoenix Arms, the maker of the "Saturday Night Special" handgun used to kill Anthony, negligently enabled a gun trafficker to obtain the gun, and that the defendants helped to create a public nuisance in Philadelphia through their reckless sales practices.

The other case, *Arnold v. American Security*,<sup>77</sup> was brought by the parents of 10-year-old Faheem Thomas-Childs, who was shot and killed as he walked through the gates of his elementary school in Philadelphia. The suit alleged that American Gun and Lock negligently sold the murder weapon in a "straw sale" to a gun trafficker who accompanied the straw purchaser to the store, picked out the gun, and supplied the money to the straw purchaser, who completed the paperwork for the transaction—including a "handling fee" the clerk charged for the straw purchase. American Gun had sold guns to several other gun traffickers over the years.

After a consolidated hearing on motions to dismiss by the gun industry defendants in *Oliver* and *Arnold*, the trial court ruled that both cases could proceed.<sup>78</sup> The court held that the plaintiffs were entitled to factual discovery to determine the applicability of any exceptions to the PLCAA. Following the denial of the motions to dismiss, defendants reached confidential settlements with the plaintiffs in each case.

Some other courts have given the PLCAA an over-broad reading and dismissed cases against gun industry defendants, but those cases, like those pre-PLCAA claims rejected in *Hamilton* and *People*, did not involve specific injuries or acts of wrongdoing. In *District of Columbia v. Beretta*,<sup>79</sup> the court ruled that claims filed under the District's unique strict liability act for assault weapon manufacturers had to be dismissed pursuant to the PLCAA. The court held that a strict liability statute could not be "violated" for purposes of the PLCAA's statutory violation exception because the District's statute imposed no "duty on firearms manufacturers or sellers to operate in any particular manner or according to any standards of care or reasonableness."<sup>80</sup> The court, however, specifically distinguished cases like *City of Gary*, which "claim that gun manufacturers engaged in unreasonable distribution practices."<sup>81</sup> Because most cases against gun manufacturers or dealers concern negligent distribution or the creation of a public nuisance, rather than strict liability claims, the *District of Columbia* ruling is not likely to be relevant in other gun litigation.

The City of New York's lawsuit against twenty-four gun manufacturers and distributors was similarly dismissed. In response to a motion to dismiss, New York City argued that the PLCAA did not apply to the City's case, and asked the court to find the PLCAA unconstitutional, violative of separation of powers principles, the First Amendment right to petition, due process of law, fundamental principles of federalism, and equal protection. The U.S. Department of Justice filed a motion defending the constitutionality of the legislation. After the trial court ruled that New York City's case fits within an exception of the PLCAA for cases involving knowing violations of state or federal law, the U.S. Court of Appeals for the Second Circuit reversed, holding 2-1 that New York's lawsuit was barred by the PLCAA.<sup>82</sup> The Court held, contrary to *Gary*, that defendants' alleged violation of New York's public nuisance statute did not exempt the case from the PLCAA under the "knowing violation" of law provision. The Court also rejected claims that the PLCAA was unconstitutional. Significantly, however, *New York City* did not involve specific claims by individuals who had been injured as a result of specific acts of negligence or violations of firearms laws. The decision should not prevent individual victims from bringing lawsuits when they can prove, for example, that a gun dealer negligently entrusted a gun, or sold a gun in violation of a firearm law.

*Ileto v. Glock, Inc.*<sup>83</sup> also dismissed claims against gun companies pursuant to the PLCAA, but while that case involved an individual's injuries, it did not involve allegations that a gun dealer engaged in specific negligent (or illegal) conduct that enabled a prohibited person to obtain a gun. Indeed, the 2-1 *Ileto* majority noted that plaintiffs "did not...allege that Defendants violated any statute prohibiting manufacturers or sellers from aiding, abetting, or conspiring with another person to sell or otherwise dispose of firearms to illegal buyers."<sup>84</sup> *Ileto* attacked the marketing strategies of gun manufacturers and distributors—not dealers—and even there, "Glock [was] not alleged to have done anything illegal. Rather, its liability [was] based on a theory that it failed to reduce profits because it allegedly knew (or a factfinder might find that it should have known) that its heightened output (all of which is legally sold) created a surplus in a secondary market, which Glock allegedly knew was utilized by 'criminals and underage end users.'"<sup>85</sup> Further, the court noted that the PLCAA's sponsors specifically referred to *Ileto* as a case they intended to bar.<sup>86</sup>

Another case from New York, which is currently on appeal after being dismissed under the PLCAA, is *Williams v. Beemiller*.<sup>87</sup> Daniel Williams was 16 when he was shot in the stomach and severely wounded as he played basketball on August 16, 2003, outside his home in Buffalo. Williams was shot by a gang member using one of the hundreds of guns trafficked from Ohio by a notorious gunrunner, James Nigel Bostic. It was reported that between May and October 2000, Bostic purchased at least

250 guns in Ohio, many from gun dealer Charlie Brown, which were then sold for two to three times the price on the streets of Buffalo. The suit alleged that Brown sold Bostic and his straw purchasers 190 Saturday Night Special handguns in five sales, including one purchase of 87 handguns, one of which was the handgun used to shoot and injure Williams. The suit alleged that Brown, MKS Supply (the gun's distributor, operated by Brown), and Beemiller (the gun's manufacturer), were liable for aiding and abetting Bostic's illegal purchases. Defendants moved to dismiss, claiming that the PLCAA immunized them from liability for their wrongdoing. Williams responded that the PLCAA should not shield these gun makers and sellers from liability for their unlawful and negligent conduct in supplying obvious gun traffickers with deadly weapons, and that the PLCAA was unconstitutional. The trial court dismissed the lawsuit, ruling that New York courts lacked personal jurisdiction over the dealer, and that the PLCAA barred all claims. The trial court's ruling appears in error, as the court did not accept all allegations and reasonable inferences when considering a motion to dismiss, including that defendants knowingly violated federal firearms laws—which would make the PLCAA inapplicable—and that Brown sold substantial numbers of guns used in New York—giving New York courts jurisdiction. The ruling is on appeal.

*Tuft v. Rocky Mountain Enterprises, Inc.*<sup>88</sup> was brought by Carolyn Tuft, who was shot and whose 15-year-old daughter Kirsten Hinckley was killed in a mass shooting on February 12, 2007 by 18-year-old Sulejman Talovic at the popular Trolley Square shopping mall in Salt Lake City, Utah. Talovic was armed with a Mossberg 12-gauge pump action pistol grip firearm, and a Smith & Wesson .38 caliber five-shot revolver. After shooting his victims, he fought a gun battle with police in the mall's hallways and was killed by police outside a Pottery Barn Kids store. Because Talovic was 18, the gun dealer violated federal law which prohibits the sale of pistol grip firearms that fire shotgun shells to anyone under 21. The trial court ruled that the dealer's negligent entrustment and illegal sale of a firearm to Talovic exempted the case from the PLCAA.

Two cases are being successfully litigated against one of the top crime gun sellers in the nation, *Arce & Lopez v. Badger Guns*,<sup>89</sup> and *Kunisch & Norberg v. Badger Guns*.<sup>90</sup> Each case was brought by a pair of Milwaukee police officers who were shot with guns sold by Badger in alleged straw purchases; each claim that Badger is liable for negligence, negligent entrustment, negligence per se, public nuisance, and knowingly violating state and federal firearms laws. The complaints allege that Badger's illegal sales were in keeping with its long practice, and that, operating under the names Badger Guns, Badger Outdoors, and Badger Guns & Ammo, it has ranked as the No. 1 crime gun dealer in America; has sold firearms in violation of state and federal laws and engaged in unlawful

straw sales; has accounted for two-thirds of all the crime guns recovered in Milwaukee; and that in recent years, 90 percent of straw buyers prosecuted in Milwaukee purchased their guns at Badger.

Officers Alejandro Arce and Jose Lopez III were shot while on duty on November 6, 2007, by a 15-year-old gang member who fired a Taurus 9mm pistol that the complaint alleges was purchased by a fellow gang member from Badger Guns a mere eight days before the shooting. Thirteen days before buying the Taurus, the purchaser also bought another gun from Badger, along with two high-capacity 30 round magazines, and a flash suppressor, raising additional red flags about the Taurus sale. The gun store filed a motion to dismiss under the PLCAA and the Brady Center's response argued that the PLCAA does not apply to the case since Badger violated gun laws, and that the Act is unconstitutional. A Milwaukee County Judge denied the motion, holding that the PLCAA allows claims since Badger knowingly violated gun laws and negligently entrusted the gun. The judge did not rule on the issue of constitutionality of the PLCAA. The case is now in discovery.

One month later, a different Wisconsin trial judge ruled that Officers Kunisch and Norberg's case against Badger also was not barred by the PLCAA. The officers allege they were shot and seriously wounded with a Taurus PT140 Pro .40 caliber handgun sold by Badger Guns in an illegal straw purchase in which Julius Burton, an 18 year old who could not legally buy a gun, picked out the handgun he wanted to buy while in the store with Jacob Collins, an unlawful drug user, who then illegally purchased the gun for Burton. It is unlawful to sell a firearm in a "straw sale" to someone who is not the actual buyer of the gun, but is purchasing it on behalf of another person. The complaint alleges that rather than terminate the sale and contact police about the attempted straw purchase, Badger Guns conspired with Collins to change his answer on the federal background check paperwork to claim falsely that he was the buyer of the gun, then sold Collins the gun. Days later, Burton shot both officers in the head after they stopped him for riding his bicycle on a sidewalk. Badger filed a motion to dismiss under the PLCAA and a Milwaukee County Judge denied Badgers' motion, holding that the PLCAA allows claims since Badger knowingly violated gun laws and negligently entrusted the gun used to injure the officers. The case is now in discovery.

In *Johnson v. Carter's Country*,<sup>91</sup> the Brady Center represented Houston police officer Joslyn Johnson, whose husband, Houston police officer Rodney Johnson, was killed by Juan Quintero with a gun allegedly sold in an illegal straw sale by Texas gun dealer Carter's Country. The complaint alleged that Juan Quintero, a prohibited purchaser due to his status as a felon and illegal immigrant, picked out the gun, but store employees allowed his wife, a U.S. citizen, to fill out the required paperwork for its

purchase. Juan Quintero then used the gun to kill Officer Johnson on September 21, 2006, following a traffic stop in which Quintero shot Officer Johnson seven times in the back and head as he filled out a booking sheet. The lawsuit included claims of negligence and negligence per se and was filed in state court. The case settled in April 2011 before the court ruled on defendant's motion to dismiss under the PLCAA.

In some cases, specific facts make the PLCAA inapplicable for other reasons. For example, in *Hernandez v. Kahr Arms*,<sup>92</sup> the Brady Center represented the family of Danny Guzman, an innocent bystander who was shot and killed on Christmas Eve 1999 in Worcester, Massachusetts. The murder weapon was one of several guns stolen from Kahr Arms by employees with criminal records. One of the employees, Mark Cronin, was hired despite a history of drug addiction, theft to support the addiction, alcohol abuse, and violence, including several assault and battery charges. Police determined that Cronin had stolen guns from Kahr even before the weapons had serial numbers stamped on them, and resold them to criminals in exchange for money and drugs. The complaint alleged that Kahr was negligent and created a public nuisance because of its failure to screen employees or secure its facility to prevent repeated thefts of unmarked guns. After passage of the PLCAA, Kahr Arms moved to dismiss, arguing that the new legislation required the case to be thrown out. The Brady Center opposed, responding that the PLCAA did not apply because of the stolen gun had not been shipped or transported in interstate commerce, a precondition explicitly stated in the Act. In order to avoid a court ruling, in August 2011, Kahr Arms settled the case, agreeing to pay nearly \$600,000. By agreeing to the settlement, Kahr Arms averted a ruling on pending motions challenging the applicability and constitutionality of PLCAA. The settlement was the largest damages payment ever by a gun manufacturer charged with negligence leading to the criminal use of a gun.

Another type of case that arises against gun dealers is also worthy of note. It is not uncommon that after a gun is recovered in a crime and traced back to a dealer, police discover that there is no record of sale for the gun, and the gun dealer then claims that the gun was stolen. These claims should be greeted with great skepticism, as gun dealers have been known to illegally sell guns "off the books," without a federally required Brady criminal background check, and then claim that the gun was stolen. After all, virtually all gun dealers have no guns "lost"; any responsible, law-abiding firearms dealer would take the inexpensive precautions needed to prevent guns from being taken by criminals (simply locking up display cases would prevent most thefts); and a business person concerned with making a profit would invest a few dollars in locks to prevent losing merchandise worth hundreds of dollars. Hence, lawyers should consider whether the facts and circumstances support alleging that a "missing" gun used in crime was illegally sold, notwithstanding

the dealer's claim that it was stolen. Such an allegation, if supported, should prevent dismissal under the PLCAA.

## Conclusion

Although the gun industry hoped that enactment of the PLCAA would enable it to continue to profit off of supplying the criminal market without being subjected to liability from those victimized as a result, civil litigation against irresponsible gun sellers remains viable. However, lawyers representing those injured by gun violence should carefully plead detailed facts in their complaints that take a case outside of the PLCAA's prohibitions—and be prepared for litigating the PLCAA in motions to dismiss, and perhaps on appeal, as some courts may misconstrue this new law. Helping victims and survivors of gun industry misconduct is an important and fulfilling way to "do well, by doing good." If gun liability cases are litigated effectively, gun companies should be held accountable for their conduct in arming criminals with dangerous firearms, sending a powerful message to encourage the gun industry to become part of the solution to America's gun violence epidemic, instead of a large part of the problem.

## Endnotes

1. *Johnson v. Bull's Eye Shooter Supply*, 2003 WL 21639244, at \*6 (Wash. Super. Ct. June 27, 2003).
2. For information about lawsuits relating to unsafe firearms design, see, e.g., Allen Rostron, *Gunning for Justice*, Trial (Nov. 2001); Brian J. Siebel, *The Case Against the Gun Industry*, Public Health Reports (2000); Jonathan E. Lowy, *Litigating Against Gun Manufacturers*, Trial (Nov. 2000); available at <<http://www.bradycenter.org/legalaction/articles>>. See also *Adames v. Sheahan*, 909 N.E.2d 742, 330 (Ill. 2009) (dismissing product liability claim against manufacturer based on PLCAA).
3. Appellate rulings: *City of Gary v. Smith & Wesson Corp.*, 801 N.E.2d 1222 (Ind. 2003) (appellate reversal of lower court dismissal); *Ileto v. Glock*, 349 F.3d 1191 (9th Cir. 2003) (appellate reinstatement of case); *James v. Arms Tech*, 820 A.2d 27 (N.J. Super. Ct. App. Div. 2003) (trial and appellate denials of motion to dismiss; case later voluntarily dismissed without prejudice to refile); *Hicks v. T&M Jewelry, Inc.*, No. 97-Ci 2617 (Fayette County Cir. Ct., Lexington, Kentucky), *dismissal reversed on appeal*, 2003 WL 21771968 (Ky. Ct. App. 2003); *City of Cincinnati v. Beretta*, 768 N.E.2d 1136 (Ohio 2002) (appellate reversal of lower court dismissal; case later voluntarily dismissed without prejudice to re-file); *Smith v. Bryco Arms*, 33 P.3d 638 (N.M. Ct. App. 2001), *cert. denied*, 34 P.3d 610 (N.M. 2001); *Morial v. Smith & Wesson*, 785 So.2d 1 (La. 2001), *cert. denied*, 534 U.S. 951 (2001) (dismissal based solely on state immunity law); *Kitchen v. K-Mart Corp.*, 697 So.2d 1200 (Fla. S. Ct. 1997) (appellate reinstatement of jury award). Trial court rulings: *NAACP v. AccuSport, Inc.*, 271 F.Supp.2d 435 (E.D.N.Y. 2003) (gun industry held to have created public nuisance after trial; case was dismissed due to lack of organizational standing); *People of the State of California v. Arcadia Machine & Tool*, No. 4095, 2003 WL 21184117 (Cal. Super. Ct. Apr. 10, 2003) (denying summary judgment to gun dealers and distributors, each of whom settled before trial) (case brought by 12 cities and counties); *Lemongello v. Will Co., Inc.*, 2003 WL 21488208 (Cir. Ct. W.Va. 2003) (denying motions to dismiss gun dealer and manufacturer; settlement for \$1 million); *Johnson*, 2003 WL 21639244, *reconsideration denied*, *interlocutory appeal denied* (commissioner ruling) (denying motions to dismiss gun dealer and gun manufacturer; settlement for \$2.5 million); *White v. Smith & Wesson*, 97 F. Supp. 2d 816 (N.D. Ohio

- 2000) (Cleveland, OH) (motion to dismiss denied); *Maxfield v. Bryco Arms, et al.*, No. 841636-4 (Super. Ct. Cal. Alameda Co. 2003) (jury verdict—trial victory); *Hernandez v. Kahr Arms, Inc.*, Civil No. WOCV2002-01747 (Mass. Super. Ct. Apr. 4, 2003) (denying motion to dismiss gun manufacturer); *Anderson v. Bryco Arms Corp.*, No. 00-L-007476 (Cir. Ct. Cook Co., Ill. Apr., 10, 2002) (denial of motion to dismiss); *Jefferson v. Rossi*, No. 02218 (Pa. Ct. Com. Pleas. Aug. 2, 2002) (denying motions to dismiss gun dealer and distributor; settlement for \$850,000); *Isaac v. Southern Ohio Guns International, Inc.*, C.A. No. 98-4618 (Mass. Super. Ct.) (denial of motion for summary judgment; confidential settlement); *Boston v. Smith & Wesson*, 2000 WL 1473568 (Mass. Super. July 13, 2000) (motion to dismiss denied; settled in 2001 defendant agreeing to assist in addressing Boston's continuing gun violence problem); *Mathieu v. Fabrica D'Armi Pietro Beretta SPA and Beretta U.S.A.*, No. 97-CV-12818-NG (D. Mass.) (motion to dismiss denied, case settled in 2000); *McNamara v. Arms Tech, Inc.*, 71 F. Supp. 2d 720 (E.D. Mich. 1999) (dismissal based solely on state immunity law).
4. For descriptions of other cases brought by Brady Center attorneys see <<http://www.bradycenter.org/legalaction/cases>>; see also Brian J. Siebel, *Gun Industry Immunity: Why the Gun Industry's "Dirty Little Secret" Does Not Deserve Congressional Protection*, 73 U.M.K.C. L. Rev. 911 (2005).
  5. See *Hoosier v. Lander*, 17 Cal. Rptr. 2d 518 (Cal. Ct. App. 1993), review denied (Cal. 1993) (finding that a gun dealer could be liable for a murder with a gun obtained via a straw purchase from the dealer); *Hetherington v. Sears, Roebuck & Co.*, 593 F.2d 526 (3d Cir. 1979) (holding that a retail store could be liable for an attempted murder committed with a gun that the store sold to a convicted felon); *Brown v. Wal-Mart Stores, Inc.*, 976 F. Supp. 729, 736 (W.D. Tenn. 1997) (denying summary judgment in negligence action where a gun dealer sold ammunition to an underage purchaser who later murdered another man); *Crown v. Raymond*, 764 P.2d 1146 (Ariz. Ct. App. 1988) (holding that a dealer could be held per se negligent for selling a gun to a minor who used the gun to commit suicide); *Franco v. Bunyard*, 547 S.W.2d 91, 92-93 (Ark. 1977) (holding that a gun dealer may be liable for a double murder committed with a gun sold to an escaped convict); *Jacoves v. United Merch. Corp.*, 11 Cal. Rptr. 2d 468 (Cal. Ct. App. 1992) (stating that a gun dealer has a duty to refuse the sale of a firearm if the seller knows or has reason to know that the purchaser is reasonably likely to use the firearm to harm himself); *Kalina v. Kmart Corp.*, No. CV-90-269920 S, 1993 WL 307630 at \*8 (Conn. Super. Ct. Aug. 5, 1993) (denying summary judgment for a gun dealer who sold a firearm to a purchaser with a criminal record and mental illness); *Tamiami Gun Shop v. Klein*, 109 So.2d 189, 192 (Fla. Dist. Ct. App. 1959) (affirming judgment against gun dealer who sold crime gun to a minor); *Heist v. Lock & Gunsmith, Inc.*, 417 So.2d 1041 (Fla. Dist. Ct. App. 1982) (noting that a gun dealer may have an obligation to identify a person whom the dealer believes will end up using the purchased firearm); *K-Mart Enters. of Fla., Inc. v. Keller*, 439 So. 2d 283, 286 (Fla. Dist. Ct. App. 1983), review denied, 450 So. 2d 487 (Fla. 1984) (holding that a gun retailer can be liable for a negligent sale where purchaser lent gun to the shooter); *Kitchen v. K-Mart Corp.*, 697 So. 2d 1200, 1206 (Fla. 1997) (holding that a gun store can be liable under negligent entrustment for selling a gun to a visibly intoxicated purchaser who then injured a third party with the gun); *Sogo v. Garcia's Nat'l Gun, Inc.*, 615 So. 2d 184 (Fla. Dist. Ct. App. 1993) (ruling that a gun dealer who violated a 3-day waiting period for delivering firearms can be liable for the purchaser's suicide); *Coker v. Wal-Mart Stores, Inc.*, 642 So. 2d 774 (Fla. Dist. Ct. App. 1994) (finding that a gun dealer can be liable for murder after selling ammunition to underage purchasers); *Angell v. F. Avanzini Lumber Co.*, 363 So. 2d 571, 572 (Fla. Dist. Ct. App. 1978) (holding that an intervening third party act does not cut off liability of a gun dealer when the act and resulting injury were foreseeable); *Jones v. Williams Pawn & Gun, Inc.*, 800 So. 2d 267 (Fla. Dist. Ct. App. 2001) (imposing strict liability on a gun dealer for selling a firearm to a person of "unsound mind" in violation of a Florida statute); *Montgomery Ward & Co. v. Cooper*, 339 S.E.2d 755, 757 (Ga. Ct. App. 1986) (denying a gun dealer's motion for summary judgment where the gun dealer sold a firearm to a convicted felon who used the gun to shoot his ex-wife); *West v. Mache of Cochran, Inc.*, 370 S.E.2d 169 (Ga. Ct. App. 1988) (holding that a gun dealer could be subject to liability for selling a gun to a former mental patient and for failing to require the purchaser to show identification); *Spires v. Goldberg*, 106 S.E. 585 (Ga. Ct. App. 1921) (holding that a gun dealer could be liable for the accidental shooting of a third party when the gun dealer sold a firearm to a minor); *Lundy v. Hazen*, 411 P.2d 768 (Idaho 1966) (holding that a sporting goods store may be liable for selling a pistol to a 13-year-old boy without parental consent who then accidentally shot himself); *Semenuik v. Chentis*, 117 N.E.2d 883 (Ill. App. Ct. 1954) (holding that a gun dealer could be liable for selling an air rifle to parents of the shooter); *Rubin v. Johnson*, 550 N.E.2d 324 (Ind. Ct. App. 1990) (holding that a seller of a gun to a mentally unsound customer could be held liable for the purchaser's murder of another man); *Phillips v. Roy*, 431 So. 2d 849 (La. Ct. App. 1983) (holding that a seller of a gun could be liable for the death of a third person after selling the gun to a mentally incompetent purchaser); *Naegle v. Dollen*, 63 N.W.2d 165 (Neb. 1954) (reversing a dismissal of a cause of action against a store owner for negligently allowing a customer to operate a loaded shotgun within the store); *Gallara v. Koskovich*, 836 A.2d 840, 843 (N.J. Super. Ct. App. Div. 2003) (holding that a gun dealer "is legally obligated to take such measures as are reasonably necessary to protect and safeguard its firearms from theft and subsequent criminal misuse"); *Splawnik v. DiCaprio*, 146 A.D.2d 333, 335, 540 N.Y.S.2d 615, 617 (3d Dep't 1989) (ruling that a gun dealer who sold a firearm to a purchaser whom he knew to be depressed could be liable for her suicide); *Pavrides v. Niles Gun Show, Inc.*, 637 N.E.2d 404 (Ohio Ct. App. 1994) (holding that a gun show operator may be liable for a shooting with a gun stolen by minors from the show); *Jefferson v. Amadeo Rossi, S.A., et al.*, No. 002218 (Pa. Commw. Ct. Apr. 19, 2002) (denying gun dealer's demurrers for claims of negligence and public nuisance brought by mother of a child slain with gun sold by dealer to a gun trafficker); *Diggles v. Horwitz*, 765 S.W.2d 839 (Tex. Ct. App. 1989) (reversing summary judgment for a gun dealer who sold a pistol to a man with a history of mental illness); *Bernethy v. Walt Failor's, Inc.*, 97 Wash. 2d 929, 934 (Wa. 1982) (ruling that a gun shop owner may be liable for a shooting committed with a gun that was sold to a visibly intoxicated purchaser); *Johnson, et. al v. Bull's Eye Shooter Supply, et. al.*, No. 03-2-03932-8 (Wa. Sup. Ct. June 27, 2003) (finding that a gun dealer can be liable for a shooting caused by negligent sale of firearms).
  6. *Johnson*, 2003 WL 21639244 at 1.
  7. 18 U.S.C. § 922(g).
  8. *Johnson*, 2003 WL 21639244 at 3.
  9. *Id.*
  10. See Mike Carter, Steve Miletich & Justin Mayo, *Errant Tacoma, Wash., Gun Dealer; Wary Agents Paved Way for Sniper Tragedy*, SEATTLE TIMES, Apr. 29, 2003.
  11. For example, Bushmaster could have required that Bull's Eye provide this information to Bushmaster as a condition of Bushmaster's sale of firearms to Bull's Eye.
  12. Note that Plaintiffs did not claim that Bushmaster was liable simply for manufacturing the gun—the claim was based on Bushmaster's negligent conduct in the distribution of its firearms.
  13. Restatement (Second) of Torts §§ 821B, 821C (1965).
  14. *City of Gary v. Smith & Wesson Corp.*, 801 N.E.2d 1222, 1231 (Ind. 2003) (allowing lawsuit against gun manufacturers and dealers for distribution practices that funnel guns to criminals and create a public nuisance).
  15. *Johnson v. Bull's Eye Shooter Supply*, 2003 WL 21639244, at \*6 (Wash. Super. Ct. June 27, 2003).
  16. *Id.* at \*2.
  17. *Id.* at \*3.

18. See *Johnson v. Bull's Eye Shooter Supply*, No. 30641-7-II (Wash. Ct. App. Oct. 2, 2003) (commissioner ruling).
19. *Lemongello v. Will Co.*, 2004 WL 1453520 (W. Va. Cir. Ct. 2010).
20. *Shirley v. Glass*, 241 P.3d 134 (Kan. App. 2010).
21. See *Hall v. E.I. DuPont De Nemours & Co., Inc.*, 345 F. Supp. 353, 360 (E.D.N.Y. 1972) (“those who deal with firearms...are required to exercise the closest attention and the most careful precautions”) (quoting Restatement (Second) Torts § 298 cmt. b at 69 (1965)); *Havas v. Victory Paper Stock Co., Inc.*, 49 N.Y.2d 381, 386, 426 N.Y.S.2d 233, 236 (1980) (quoting *Heaven v. Prender*, 11 QBD 503, 509, Britt, MR (1883)); see also *McGlone v. William Angus, Inc.*, 248 N.Y. 197, 199 (1928); see also *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339, 344, 162 N.E. 99, 100 (1928) (“The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension.”).
22. *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 387 (1916); see also *Loop v. Litchfield*, 42 N.Y. 351, 359 (1870) (privity of contract barrier did not apply to injuries caused by guns and other “instruments and articles in their nature calculated to do injury to mankind, and generally intended to accomplish that purpose”).
23. *Favo v. Remington Arms Co.*, 67 A.D. 414, 416, 73 N.Y.S. 788, 789 (3d Dep’t 1901) (while Favo involved a manufacturer’s negligent design of a gun, the same principle imposes a duty of reasonable care on gun sellers when their negligent sales and distribution places the public at risk).
24. See *Earsing v. Nelson*, 212 A.D.2d 66, 629 N.Y.S.2d 563 (4th Dep’t 1995); *Sickles v. Montgomery Ward & Co.*, 6 Misc. 2d 1000, 167 N.Y.S.2d 977 (N.Y. Sup. Ct. Ulster Co. 1957); *Henningsen v. Markowitz*, 132 Misc. 547, 230 N.Y.S. 313 (N.Y. Sup. Ct., N.Y. Co. 1928); see also *Wall v. Wanser*, 24 Misc. 2d 132, 203 N.Y.S.2d 938 (N.Y. Sup. Ct., Nassau Co. 1960) (vendor who illegally sold ammunition to minor may be liable for shooting).
25. See *Carrini v. Supermarkets Gen. Corp.*, 158 A.D.2d 303, 305, 550 N.Y.S.2d 710, 712 (1st Dep’t 1990) (security firm hired by a supermarket chain could not be liable to a third party where its negligence was “in the nature of nonfeasance . . . rather than misfeasance” and there was no relationship between the security firm and the plaintiff to give rise to a duty (citation omitted)).
26. See *Kush v. City of Buffalo*, 59 N.Y.2d 26, 462 N.Y.S.2d 831 (1983) (imposing liability where leaving dangerous chemicals on school grounds increased the likelihood that teenagers would steal them); *Splawnik v. DiCaprio*, 146 A.D.2d 333, 540 N.Y.S.2d 615 (3d Dep’t 1989) (denying motion to dismiss where man loaded and handed mentally distressed woman a handgun, which she then used to kill herself); *National Ben Franklin Ins. Co. v. Careccta*, 21 Misc. 2d 279, 280, 193 N.Y.S.2d 904, 905 (N.Y. App. Term. 1959) (defendant who caused an accident could be liable for a subsequent theft of the accident victim’s watch because the defendant’s act of negligence created that risk); *Winnoski v. Polito*, 294 N.Y. 159 (1945) (liability imposed on father who negligently left his son in an illegally parked, running car because he created the risk that pedestrians would be hit by the inexperienced driver—not because of any “special relationship”); see also Restatement of Torts § 302 (“Risk of Direct or Indirect Harm”).
27. See, e.g., *Weirum v. RKO Gen., Inc.*, 123 Cal. Rptr. 468, 472 (1975) (radio station liable for accident resulting from radio listener’s negligent driving when station encouraged listeners to speed to locate one of the station’s disc jockeys to win money).
28. 96 N.Y. 2d 222, 727 N.Y.S.2d 7 (2001), *opinion after certified question answered*, 264 F.3d 21 (2d Cir. 2001).
29. *Id.* at 238-240.
30. *Id.* at 230.
31. *Id.*
32. *Hamilton*, 96 N.Y.2d at 234.
33. *Id.* at 234.
34. *Id.* at 236 (emphasis added).
35. *Id.* at 237.
36. 309 A.D.2d 91, 761 N.Y.S.2d 192 (1st Dep’t. 2003).
37. *Id.* at 93.
38. *Id.* at 106.
39. *Id.* at 13 n.8 (Rosengerger, J., dissenting).
40. 271 F. Supp. 2d 435 (E.D.N.Y. 2003).
41. *Id.* at 497-499.
42. *Id.* at 499.
43. *Id.* at 452.
44. 304 F. Supp. 2d 383 (E.D.N.Y. 2004).
45. *Id.* at 398-399.
46. *Id.* at 399.
47. *Id.* at 392 (citations omitted).
48. 247 F.R.D. 296, 343 (E.D.N.Y. 2007).
49. *Id.* at 343.
50. 15 U.S.C. §§ 7901-03.
51. 15 U.S.C. § 7903(5)(A).
52. 15 U.S.C. § 7903(5)(A)(ii).
53. 15 U.S.C. § 7903(5)(A)(iii). The other exceptions generally relate to civil causes of action based on transfers by gun dealers to criminals where the dealer knows that the criminal will use the gun in a crime, breach of contract or warrant claims, and certain product liability claims. *Id.* § 7903(5)(A).
54. 15 U.S.C. § 7901(b)(1).
55. 15 U.S.C. § 7901(a)(6).
56. 15 U.S.C. § 7901(a)(7).
57. 151 Cong. Rec. S9088 (July 27, 2005).
58. 151 Cong. Rec. S9099 (July 27, 2005).
59. 151 Cong. Rec. S9395 (July 29, 2005).
60. 151 Cong. Rec. S9099 (July 27, 2005) (emphasis added). See also 151 Cong. Rec. S9077 (July 27, 2005) (sponsor Sen. Hatch) (“this bill carefully preserves the right of individuals to have their day in court with civil liability actions where negligence is truly an issue”); 151 Cong. Rec. S9065 (July 27, 2005) (Sen. Craig) (“It is not the gun industry immunity bill. It is important that we say that and say it again because it does not protect firearms or ammunitions manufacturers, sellers or trade associations from any lawsuits based on their own negligence or criminal conduct”); 151 Cong. Rec. S9061 (July 27, 2005) (Sen. Craig) (“It is not a gun industry immunity bill because it does not protect firearms or ammunition manufacturers, sellers, or trade associations from any other lawsuits based on their own negligence or criminal conduct”); 151 Cong. Rec. S9099 (July 27, 2005) (Sen. Craig) (“If manufacturers or dealers break the law or commit negligence, they are still liable”).
61. 151 Cong. Rec. S9107 (July 27, 2005) (sponsor Sen. Baucus).
62. 151 Cong. Rec. S9389 (July 29, 2005) (sponsor Sen. Allen).
63. 151 Cong. Rec. S9226 (July 28, 2005) (Sponsor Sen. Graham).
64. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979).
65. After the PLCAA failed to pass in earlier sessions of Congress, “solely” was added to the Act’s Purpose in the 109th Congress that enacted the legislation—one of the only changes made to the bill. Compare S. 1805, 108th Cong. § 2(b)(1) and H.R. 1036, 108th Cong. § 2(b)(1) (“To prohibit causes of action...for harm caused by the criminal or unlawful misuse...”) with 15 U.S.C. § 7901(b)(1) (“To prohibit causes of action...for the harm **solely** caused by the criminal or unlawful misuse...”) (emphasis added).

66. *Johnson v. United States*, 529 U.S. 694, 707 n.9 (2000) (quoting *In re Chapman*, 166 U.S. 661, 667 (1897)).
67. *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982).
68. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).
69. *Id.* at 487 (quoting *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984)).
70. *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) (citations omitted).
71. *See, e.g., U.S. v. Gayle*, 342 F.3d 89, 93 (2d Cir. 2003) ("To resolve... textual ambiguity, we may consult legislative history and other tools of statutory construction to discern Congress's meaning").
72. *City of Gary v Smith & Wesson Corp.*, No. 45D05-0005-CT-00243 (Lake Super. Ct. Oct. 23, 2006) (ruling on file with authors).
73. *City of Gary v. Smith & Wesson Corp.*, 801 N.E.2d 1222, 1241 (Ind. 2003).
74. *City of Gary v Smith & Wesson Corp.*, No. 45D05-0005-CT-00243 (Lake Super. Ct. Oct. 23, 2006).
75. *Smith & Wesson Corp. v. City of Gary*, 875 N.E.2d 422 (Ind. Ct. App. 2007), *petition for transfer denied*, 915 N.E.2d 978 (Ind. 2009).
76. No. 1836 (Ct. Common Pleas Phila. Cty., July 20, 2005).
77. No. 3118 (Ct. Common Pleas Phila. Cty., July 28, 2005).
78. *Oliver* (Ct. Common Pleas June 22, 2006); *Arnold* (Ct. Common Pleas June 22, 2006) (rulings on file with authors).
79. 940 A.2d 163 (D.C. 2008).
80. *Id.* at 170.
81. *Id.*
82. *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384 (2d Cir. 2008) (New York state criminal nuisance statute not "applicable to the sale or marketing" of firearms, so gun sellers creating such a nuisance are immunized by the PLCAA).
83. 565 F.3d 1126 (9th Cir. 2009), *cert. denied* (2009).
84. *Id.* at 1130.
85. *Iieto*, 370 F.3d 860, 862 (9th Cir. 2004) (Callahan, J., dissenting from denial of en banc hearing).
86. 565 F.3d at 1137.
87. Williams is represented by the Brady Center, along with the Buffalo law firm of Connors and Vilaro.
88. No. 080902325 (Utah Judicial Dist. Ct., Feb. 8, 2008).
89. No. 10CV018530 (Circuit Ct., Milwaukee Co.).
90. No. 10CV020655 (Circuit Ct., Milwaukee Co.).
91. No. 2008-56372 (Dist. Ct. of Harris Co., Texas).
92. No. 021747C (Worcester, MA Super. Ct).

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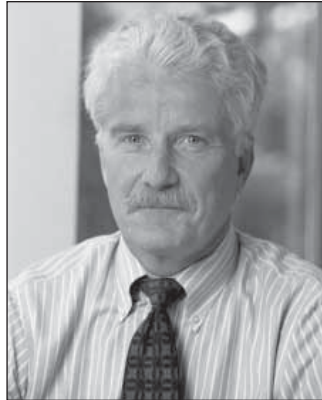
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# Q&A on Firearms Availability, Carrying, and Misuse

By Philip J. Cook

In the *Heller* and *McDonald* decisions, a majority of the Supreme Court for the first time interpreted the Second Amendment to provide a personal right to “keep and bear arms”—a right that limits permissible state and local regulation, as well as federal. While the majority opinion in *Heller* suggested that some regulations would pass Constitutional muster, the scope of this new right is undetermined at this point. The boundaries are being tested by scores of lawsuits brought against existing regulations that restrict commerce, possession, or use of firearms by private citizens. As the courts rule on these cases, they may take into account the appropriate balance between public safety and personal freedom.<sup>1</sup> It is of some interest, then, to consider what has been learned about the role of firearms in American life, and some of the empirical evidence relevant to evaluating common regulations. Here I introduce this topic by posing and answering seven related questions. A concluding section offers some more general observations on research in this area.



## I. What is known about the incidence and costs of gun violence?

A great many Americans die by gunfire. The gun deaths from homicide, accident and suicide have totaled close to one million during the last three decades. Firearms play a dominant role in the most serious violent crimes. In 2007, the most recent year for which the National Center for Health Statistics provides data on injury deaths, there were 18,361 criminal homicides, of which 69% were committed with guns. Emergency rooms treated nearly 50,000 nonfatal gunshot injuries from assaults. And there were a total of over 300,000 assaults and robberies in that year in which the perpetrator used a gun.<sup>2</sup>

Criminal homicide is not evenly distributed across the population, but highly concentrated among youthful minority males. In 2007, homicide victimization rates were 15 times as high for black men aged 15-34, as for white non-Hispanic men in this age group. Homicide is the leading cause of death for black males age 15-34, and the second-leading cause of death for Hispanic males in this age group.

Firearms also pose a particular threat to public officials and law enforcement officers. Fourteen of the 15 di-

rect assaults against Presidents, Presidents-elect, and presidential candidates in United States history were perpetrated with firearms, including the five resulting in death. (The one exception, a failed attack with a hand grenade against President George W. Bush, occurred overseas).<sup>3</sup> Of the 536 law enforcement officers who were feloniously killed between 2000 and 2009, 490 (91%) were assaulted with a firearm and 73% of those were with a handgun.<sup>4</sup>

Efforts to prevent, avoid, and respond to gun violence impose economic and social costs on society. I and my colleagues estimated the costs of treating gunshot wounds to be \$2 billion per year, half of which is borne by the public.<sup>5</sup> The threat of being shot causes private citizens and public institutions to undertake a variety of costly measures to reduce this risk. Furthermore, the threat of gun violence is in some neighborhoods an important disamenity, causing residents to be fearful and to take special precautions to protect themselves and their children. That threat depresses property values and puts a drag on economic development.

Together with economist Jens Ludwig, I quantified the overall magnitude of these social costs by conducting a contingent-valuation survey that asked individuals what they would be willing to pay to reduce gun violence somewhat in their community. Based on their responses we estimated an overall cost of assault and homicide to be \$80 billion in 1995.<sup>6</sup> While actual victimization is highly concentrated, the concern about gun violence (as indicated by willingness to pay for its reduction) is widespread. It tends to increase with income, and be higher for adults with children than those without.

This assessment of the damage done by firearms in private hands is not intended to deny that firearms also provide benefits to their owners, including the pleasures of gun sports and the occasional legitimate self-defense use. Fortunately it is possible to curb misuse without cutting too deeply into the beneficial and legitimate uses. I would appeal here to the analogy with efforts to reduce highway accidents.

## II. Does the type of weapon matter in serious assault cases?

While intuition may suggest that whether the victim lives or dies in an assault or robbery depends mostly on the perpetrator’s intent, the evidence suggests that intent is only part of the story—that if the assailant happens to use a gun, the victim is much more likely to die than if the assailant uses a knife or club. Guns are intrinsically more deadly than other weapons that are commonly used in criminal assault, in that they provide a means of inflicting

a fatal wound quickly, from a distance, with little personal risk, determination, involvement, or strength required.

Gun use in an assault increases the likelihood of death by making it easier to kill. As a result, while only a small fraction (5 percent) of criminal assaults are perpetrated with guns, over two-thirds of fatal assaults (murders and non-negligent homicides) are perpetrated with guns. In two seminal articles, Franklin Zimring provided systematic evidence that the weapon type used in an assault affects the likelihood the victim will be killed.<sup>7</sup> Zimring drew on crime data from Chicago to show that case-fatality rates in gun attacks are a multiple of those in knife attacks, despite the fact that the circumstances are generally quite similar. In serious attacks, he concluded, the difference between whether the victim lived or died was often a matter of chance rather than a difference in intent, and the chances of a fatality were higher with a gun than a knife.<sup>8</sup> Zimring found further confirmation in comparing the case-fatality rates among shootings involving guns of different caliber. He demonstrated that victims were more likely to die in larger-caliber shootings, again suggesting that the intrinsic lethality of the weapon, and not just the assailant's intent, affected the outcome—a result that I have dubbed the “instrumentality effect.”<sup>9</sup>

Research on the specific violent crime of robbery provides further confirmation for the instrumentality effect. About half of victims of non-commercial robbery included in the National Crime Victimization Survey (“NCVS”) report being physically attacked by the robber (rather than just threatened), and one-fifth require medical treatment. Some victims are seriously wounded or killed. In 2005 the FBI classified 921 murders as robbery-related (6 percent of all murders), implying that on the order of one in 1,000 robberies resulted in death that year.

Since the most serious potential outcome of a robbery is the victim's death, it is of considerable interest to know what distinguishes fatal robberies from the great majority in which the victim survives. One of my studies compared robbery murders (as documented by the FBI's Supplementary Homicide Reports) to non-fatal robberies, finding similar statistical patterns with respect to the characteristics of the offenders.<sup>10</sup> The most prominent *difference* between robbery and robbery murder was with respect to the types of weapons used. About two-thirds of robbery murders are committed with guns, while less than *one*-third of robberies involve guns. Gun robberies are three times more likely to result in the death of the victim than knife robberies, and knife robberies three times more likely than robberies with other weapons.<sup>11</sup> A regression analysis of changes in robbery-murder rates in 43 cities found a close relationship between the robbery rate and the robbery murder rate, as if the latter were simply a probabilistic byproduct of the former. Every additional 1,000 gun robberies added four robbery murders to the city's total, while an additional 1,000 non-gun robberies added just one murder.<sup>12</sup>

The conclusion is that whether the victim of an assault or robbery dies is not just a reflection of the offender's intentions. The type of weapon used by the offender in an assault or robbery has a causal effect on whether the victim lives or dies. If the weapon used is a loaded firearm, the victim is much more likely to die than if the weapon is a knife or club. If the fraction of assaults or robberies involving guns increases, then the death rate will also increase.

### III. Are violent offenders always able to get a gun if they want one?

As it turns out, the likelihood that a violent offender will use a gun (rather than a knife or other weapon) is closely linked to the general availability of guns, and especially handguns. Currently, about one in three households nationwide are in possession of at least one firearm, and one in five households are in possession of a handgun. The prevalence of gun ownership differs widely across the counties and states, and is lower in New York State than is true for the United States as a whole.

On average it is easier for youths and criminals to obtain guns in jurisdictions in which gun ownership is common than when gun ownership is relatively rare. The types of transactions by which youths and felons obtain guns include thefts from homes and vehicles, loans from family members and friends, and off-the-books sales. In a high-prevalence area, the informal off-the-books transactions of this sort are easier to arrange and may well be cheaper than in markets where gun ownership is relatively rare.<sup>13</sup> That is true even though in jurisdictions with low prevalence and relatively tight controls, traffickers supply the underground market with guns acquired in other jurisdictions that have looser controls.<sup>14</sup>

My research has provided strong evidence that the prevalence of gun ownership is closely linked to the likelihood that robbers or assailants will use a gun as opposed to a knife or other weapon. In articles published in scientific journals, I and my coauthors have analyzed the effect of changes in the prevalence of gun ownership in the states or 200 largest counties on several crime-related outcomes.

- In a cross-section analysis of data from a survey of adolescent males, I found that the prevalence of gun ownership has a strong positive relationship to the probability of gun carrying by adolescent males.<sup>15</sup> Thus an increase in gun prevalence is associated with an increase in gun carrying by adolescent males. (Gun prevalence has no effect on the likelihood of carrying a knife or other type of weapon.)
- In an analysis of Uniform Crime Reports data for the 200 largest counties over 20 years, we found that an increase in the prevalence of gun ownership also increases the percentage of robberies committed with a gun.<sup>16</sup>



#### IV. Does the prevalence of guns in a community affect crime rates?

The same type of evidence as cited above indicates, perhaps surprisingly, that the prevalence of firearms does not affect rates of assault, robbery, or rape.<sup>17</sup> I conclude that an increase in gun ownership has on balance no deterrent effect on violent crime. Thus the prevalence of firearms does not affect the *volume* of violence, but has a positive effect on the death rate in assault and robbery (e.g., the criminal homicide rate).

These results help explain international differences in violence. The rates of assault and robbery in the United States are similar to those in Canada, Western Europe, and Australia. But our criminal homicide rate is far higher. The difference is that firearms are more prevalent and readily available in the United States, and as a result violent offenders in the United States are far more likely to use a firearm. As a result, the death rates in the United States are higher.<sup>18</sup>

#### V. What types of firearms are most commonly used in crime?

While only about one-third of the firearms in private possession are handguns (pistols or revolvers, as opposed to rifles or shotguns), the vast majority of gun assaults and robberies are perpetrated with handguns. For example, in 2009, 88% of all criminal homicides involving guns were committed with handguns.<sup>19</sup> Over 90% of gun robberies involve handguns. Assaultants choose handguns over long guns in part because handguns are smaller and more conveniently carried on the person or in a vehicle and can be readily concealed from law enforcement officers, potential victims, and the public at large. Because handguns pose a particular hazard to public safety, they have traditionally been subjected to more stringent regulation than rifles and shotguns (which are commonly used for hunting and other sporting purposes). For example, the federal Gun Control Act limits sales of handguns by dealers to those age 21 or older, whereas the minimum age for long gun sales is 18. A number of states require that anyone intending to acquire a handgun first obtain a special license or permit from state or local authorities; for seven states, including New York State, that requirement only applies to handguns. Similarly, six states limit the purchase of handguns (but not rifles or shotguns) to one per month.

#### VI. How is concealed carrying regulated and policed?

For an offender to use a gun logically requires that the offender is carrying a gun or has ready access to one at the time of the commission of a crime.<sup>20</sup> For that reason the state has a legitimate interest in the regulation of whether and how guns are carried in public, and by whom.

Concern about the criminal use of guns in public has engendered state and local regulations that limit carrying.

In many cities, police departments have adopted targeted patrol against illegal gun carrying in an effort to reduce gun misuse.<sup>21</sup> Targeted patrol against illicit gun carrying has been shown to be effective. In 1998, the Pittsburgh Police Department instituted a Firearm Suppression Patrol against illegal carrying. This program involved expansion of patrol activities during high crime periods of the week, in two high crime areas of the city. A careful analysis found that the program, which increased the number of stops of suspicious vehicles and pedestrians, had the effect of reducing gun misuse, including “shots fired” calls and gunshot injuries.<sup>22</sup>

All but three states currently restrict carrying a concealed firearm to those who have obtained a license or permit for that purpose. In 33 states the statute requires the relevant authority to issue a license to any applicant who meets certain minimum requirements and pays the required fee; both the requirements and the fee differ among these “shall issue” states. In other states the issuing authority has some discretion in responding to an application. These “may issue” states, including New York State, generally require that the applicant, in addition to meeting minimum requirements and paying a fee, demonstrate a special need to carry a concealed weapon.

During the last three decades many states have eased their restrictions on concealed carry, replacing a “may issue” statute (or outright prohibition) with a “shall issue” statute. These changes have had the effect of increasing the number of private citizens who are legally entitled to carry a concealed firearm. The numerous changes in law and practice provide a sort of policy “experiment” that has been analyzed by scholars to determine whether it has affected crime rates or patterns.

This research has been conducted by economists, statisticians, and other social scientists.<sup>23</sup> The first prominent study of the effect of the adoption of “shall issue” laws was by John Lott and David Mustard, published in 1997.<sup>24</sup> They reported that these laws had a net deterrent effect on homicide rates, but actually had the effect of increasing property crime rates. For the crime of robbery, a crime that typically occurs in public places, their results were mixed. Since the publication of that article, John Lott has published revised estimates that purport to demonstrate that shall-issue laws have a deterrent effect on both violent and property crime (including robbery).<sup>25</sup> Other economists and social scientists have reached different conclusions.

Based on my reviews of this literature, my conclusion is the same as the conclusion of the expert panel assembled by the National Research Council of the National Academies, the Committee to Improve Research Information and Data on Firearms. “The evidence to date does not adequately indicate either the sign or the magnitude of a causal link between the passage of right-to-carry [shall-issue] laws and crime rates.”<sup>26</sup> In other words, if a state liberalizes its concealed carry law by adopting a “shall

issue” provision, there is no empirical basis for predicting whether the result would be to increase or reduce the rates of homicide and other crime. That does not mean that there would be no effect in fact—only that the current state of the science does not support a prediction of what that effect would be.

It is worth emphasizing that this expert committee considered all of the empirical literature that had been published prior to 2005, and also performed its own analysis of the data. There have been numerous studies published, some reporting positive results, and some negative. The conclusion of this panel should be viewed as authoritative in my judgment. The National Research Council of the National Academies was chartered by President Wilson during World War I to provide expert advice to the nation. Since then its committees, including the Committee to Improve Research Information and Data on Firearms, have been appointed from among the leading scholars in the relevant field who are vetted for conflicts of interest with respect to the topic at hand. (The experts are not compensated for their service.) The assessment of this neutral group of experts provides the most trustworthy conclusion possible.

## VII. Why should a state deny a concealed-carry permit to any law-abiding adult who applies?

In shall-issue states where authorities are required to issue concealed-carry permits to all applicants who meet certain minimum conditions, the list of conditions typically includes a minimum age provision (usually 21) and the list of provisions of the federal Gun Control Act that limit lawful possession. Those provisions include a prior felony conviction, a misdemeanor conviction for domestic violence, an involuntary commitment for mental illness, and a current felony indictment. Of those provisions, the one that is most consistently documented in computerized databases that are available to law enforcement authorities in New York State is felony conviction.

It is sometimes alleged that most gun crimes are committed by active criminals who can be readily identified as such. For that reason, it is claimed that issuing concealed-carry permits to applicants who are not identified criminals poses no risk to the public safety. But this claim is false. The evidence demonstrates that a majority of criminal homicides and other serious crimes are committed by individuals who have not been convicted of a felony.

One of the first systematic studies of this subject was conducted using data from Illinois. That study found that just 43% of adults arrested for criminal homicide during the 1990s had a felony conviction on their record.<sup>27</sup> Likewise, recent statistics for Westchester County demonstrate that most adults arrested for felony homicide in those counties do not have a felony conviction. Over the decade 2000–2009, 273 adults were arrested in Westchester County for completed or attempted felony homicide (PL

125), of whom just 111 (41%) had a prior felony conviction. Thus, the clear majority of those arrested for felony homicide would have qualified for a concealed-carry permit prior to that arrest *if* the only meaningful condition was the lack of prior felony conviction.

I expanded this statistical inquiry to include all adults (age 21 and over) arrested for a felony in Westchester County, and in New York State overall. In 2009, 3,644 individuals were arrested for a felony in Westchester County. Of those, just 1,084 (30%) had a prior felony conviction. One implication is that if Westchester County were required to issue concealed-carry permits to all adult applicants who lacked a felony conviction, then most (70%) of those arrested for a felony in 2009 would have qualified prior to their arrest. For all of New York State, just 33% of the 109,705 adults arrested for a felony had a prior felony conviction.

These statistics demonstrate that most adults who are arrested for felony homicide would not have been barred from obtaining a permit to carry a concealed firearm prior to that arrest, *if* the only requirements for obtaining a permit were a lack of prior felony conviction (and minimum age). The same conclusion holds for those who are arrested for other felonies. In other words, if the goal is to protect the public against dangerous criminals, then it is not enough to just screen out those with felony convictions. That group constitutes only a minority of future arrestees for serious crimes, including felony homicide.

Concealed-carry permit systems in shall-issue states are intended to screen out some other groups besides those with a felony conviction record. Following the federal Gun Control Act requirements for legal gun possession, they typically deny a permit to applicants who are known to have been convicted of misdemeanor domestic violence (or subject to a domestic restraining order), are under indictment for a felony or a fugitive, have been involuntarily committed to a mental institution, are an illegal alien, or are a user of illicit drugs. Unfortunately, there are no systematic studies of the prevalence of these disqualifying characteristics among those arrested for serious crime. Furthermore, local officials have only limited access to public records that would identify which applicants have been convicted of domestic violence, or have been involuntarily committed.

In any event, there is good reason to believe that of all the disqualifying conditions, felony conviction is the most common. Statistics from the U.S. Bureau of Justice Statistics indicate that a felony record is by far the most common characteristic that blocks firearms transfers by firearms dealers when they conduct background checks of buyers.<sup>28</sup>

I conclude that there is a legitimate public purpose in restricting the issuance of permits to carry concealed firearms, and providing local law enforcement officials with some discretion in this regard. This public purpose

is to reduce the incidence of firearms use in violent crime, and thereby reduce the rate of criminal homicide. A more lenient permit system that entitles all adults who lack a felony record to obtain a permit would qualify the majority of those who are later arrested for a felony.

### VIII. Additional reading

If this introduction motivates further reading, there is no lack of possibilities, including a number of the books and articles cited here. It is an unfortunate fact that scholarly writings in this area are often assessed through a political lens, with the presumption that scholarly inquiry in this contentious arena must be motivated and shaped by a “pro gun” or “pro control” agenda. I believe that empirical research on gun violence can and should be judged by the same methodological standards as research on other topics. Rather than “pro” or “con,” consider whether a particular line of research and set of findings is based on “good science” or not. That is the judgment that the expert panel of the National Academy of Sciences strived to render on a number of topics.

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# A Stalled Farewell to Arms—Reinvigorating the Gun Control Movement

By Richard Aborn and Marlene Koury

## Introduction

Gun violence continues to plague America, despite historic reductions in crime. From being a burning national issue gun violence has receded from the public's consciousness and disappeared from the nation's political agenda. The gun control movement has felt the brunt of this retreat, while gun control opponents have continued to garner strength. Why is this?



Richard Aborn

41 homicides by firearm in 2009.<sup>5</sup> Other industrialized nations have similarly low numbers. In 2009, the number of homicides by firearm were: 5 in Northern Ireland; 24 in Finland, 30 in Australia; 55 in The Netherlands; 90 in Spain; 173 in Canada and 188 in Germany.<sup>6</sup>



Marlene Koury

One study comparing the rate of homicide by firearm across 23 countries shows that the rate of firearm death in the United States was 19.5 times higher than that of the other countries studied.<sup>7</sup> The number more than doubles when limiting the data to children and young adults. Firearm homicide rates for those aged 15-24 were 42.7 times higher in the United States than in the other countries studied.<sup>8</sup>

Something is wrong in America...is it the "gun culture?"

## America's "Gun Culture" and Its Impact on the Politics of Gun Control

The number of firearms possessed by civilians in the United States is estimated at 270 million—the highest figure in the world by a large margin.<sup>9</sup> With less than 5 percent of the world's population, the United States possesses 35-50% of the world's civilian-owned guns.<sup>10</sup>

The United States has a global reputation for being obsessed with guns. The Small Arms Survey has noted, disturbingly, that "any [global] discussion of civilian gun ownership must devote disproportionate attention to the United States, if only because of the scale of its gun culture."<sup>11</sup>

The NRA claims it's all about the Constitution, but does the United States Supreme Court agree?

The NRA derives much of its clout and brand "glamour" through its connection to a strong, deeply rooted "gun culture." The NRA embodies this gun culture and uses it as support for its assertion that Americans have an unencumbered "right to bear arms" allegedly guaranteed by the Second Amendment.<sup>12</sup> The meaning of the operative Second Amendment language, however, has been hotly debated: did the framers intend to confer an individual the right to bear arms, or was this right to be applied to those serving in the context of a militia?

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*"Firearm violence in the United States far eclipses that of other industrialized nations, despite very sharp declines in the homicide rate in recent years."*

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In this article, we look at the history of gun violence in America and its impact on legislative efforts to control it, the evolving Second Amendment jurisprudence, and the shifting political landscape, asking what can be done to return the gun political agenda to one grounded in reducing gun violence.

## Firearm Violence Is an Epidemic in the United States

Firearm violence in the United States far eclipses that of other industrialized nations, despite very sharp declines in the homicide rate in recent years. On average, nearly 100,000 people are shot—both intentionally and accidentally—each year in the United States,<sup>1</sup> resulting in an average of over 30,000 deaths each year.<sup>2</sup> Of those deaths, over 12,000 are homicides.<sup>3</sup> No level of violence is acceptable, but the amount of firearm violence in the United States is simply unconscionable; especially so when we know that much of it can be prevented.

Firearm injury and death are only one part of the problem. Firearms are also overwhelmingly used in the commission of violent crimes. In 2007, the most recent available data, there were 385,178 crimes committed with a firearm, including 11,512 murders, 190,514 robberies and 183,153 aggravated assaults.<sup>4</sup>

The level of firearm violence in the United States compared to other industrialized countries is embarrassing. For example, in the United Kingdom, there were only

The Supreme Court took the opportunity to interpret this language for the first time in 70 years in the landmark case *District of Columbia v. Heller*, 554 U.S. 570 (2008). In *Heller*, a five-to-four decision, the Supreme Court struck down a decades-old Washington D.C. law that banned handguns and required safe storage of firearms kept in the home. The court determined that the law was unconstitutional, finding that the Second Amendment guaranteed Americans the right to bear arms “for traditionally lawful purposes, such as self-defense within the home.”<sup>13</sup> *Heller*, however, was not the broad sweeping victory that the NRA claimed. Contrary to the NRA position that the Second Amendment is a barrier to all gun control laws, the so-called “individual right” identified in *Heller* is restricted to the right of an individual to possess a handgun in the home for self-defense.<sup>14</sup> Moreover, *Heller* explicitly held that the possession of firearms was subject to reasonable regulations.<sup>15</sup>

Two years after *Heller*, the Supreme Court ruled that the Second Amendment applied to the states. In *McDonald v. Chicago*, 561 U.S. 3025 (2010), the Supreme Court held that “The Fourteenth Amendment makes the Second Amendment right to keep and bear arms fully applicable to the States.”<sup>16</sup> *McDonald* did not, though, expand the right determined in *Heller*, even though it had the opportunity to do so.<sup>17</sup>

Were the *Heller* and *McDonald* decisions a blow to the gun control movement? For years, the NRA had argued with great passion that the Second Amendment was a barrier to gun control laws. The decisions in *Heller* and *McDonald* limit this argument to a handgun in the home kept for self-defense.

In the three years since *Heller*, a number of constitutional challenges to gun control laws have been overwhelmingly rejected by courts.<sup>18</sup> Courts have rejected *Heller*-based challenges to an Illinois law prohibiting carrying a loaded firearm in public,<sup>19</sup> a Pennsylvania law prohibiting guns in the workplace,<sup>20</sup> a Georgia law prohibiting firearms in places of worship,<sup>21</sup> and a New York law regarding a conceal-carry licensing scheme.<sup>22</sup>

## The NRA and the Damage Done

The NRA is not just an interest group of America’s gun owners—the NRA is extremely well-organized and well-funded, with estimates that it has received nearly \$40 million in support from the gun industry since 2005.<sup>23</sup> Many of its policies, particularly those that benefit manufacturers, are likely in place to appease not its members, but to secure its future funding from the gun industry.<sup>24</sup>

The NRA has never met a gun control law it likes. Toward this goal, the NRA has “a team of full-time lobbyists defending Second Amendment issues on Capitol Hill, in state legislatures and in local government bodies.”<sup>25</sup> The NRA is so politically powerful that many politicians—including President Obama—fear advocating for reasonable gun control or opposing dangerous pro-gun legislation.<sup>26</sup>

The power of the NRA, however, does not flow solely from its coffers. It would be a significant mistake to underestimate its ability to organize politically and get its members to vote, and a bigger mistake to underestimate the power that flows from this organizing ability.

For example, the NRA lobbied for the passage of the Firearm Owners’ Protection Act (FOPA).<sup>27</sup> This law prohibits establishing a federal registry of firearms, firearms owners, and firearms transactions and dispositions and also repeals significant parts of the Gun Control Act, allowing convicted, violent felons to have their gun rights reinstated.<sup>28</sup> As a result, in many states, a violent felon who completes prison time may have his gun rights restored, including the right to carry.<sup>29</sup>

The NRA’s success in stopping reasonable gun control measures from passing has created a number of dangerous gaps in the nation’s gun control laws.

## Gaps in the Nation’s Gun Control Laws; The Impact on New York and Other States

Vital important measures impacting the conditions under which guns are sold and to whom are left to the states to determine, including: the regulation of assault weapons; requirement of licensing and registration, regulations regarding private purchases; limitations on the number of guns that can be purchased at any one time; ballistic fingerprinting; mandatory reporting of lost or stolen firearms; limits on large capacity magazines and child access prevention laws.

The relative ease with which a felon may have gun rights restored raises grave concern with the currently pending National Right-to-Carry Reciprocity Act of 2011.<sup>30</sup> As there is no federal legislation regulating the conditions under which an individual may carry a concealed weapon, states are left to regulate whether their residents are permitted to carry a concealed firearm, and under what conditions.

The conceal-carry reciprocity bill would force each state to recognize permits to carry concealed handguns issued by every other state.<sup>31</sup> This bill has passed the House. If passed by the Senate, it would all but paralyze each state’s authority to restrict who may carry guns within its borders.

The practical effect of this law is that a convicted, violent felon may have gun rights reinstated, and then obtain a conceal-carry permit from a state with weak conceal-carry permitting requirements. This violent felon may then travel to New York City legally carrying a concealed, loaded handgun, and there is nothing that can be done to stop this.

This “patchwork” nature of state laws results in wildly inconsistent gun laws, with some states having strong gun control laws while neighboring states have virtually none.<sup>32</sup> This inconsistency between states and a lack of

uniformity in gun control laws exposes Americans to the dangers of gun violence and, given the relative ease of carrying guns across state lines, undermines the ability of states to enact measures aimed at protecting their citizens from gun violence. In particular, the inconsistency of state laws enables gun trafficking—allowing criminals to get their hands on the most lethal weapons with relative ease.

### Trafficking in the United States

The gaps in federal gun control legislation and the lack of uniformity among state laws leave plenty of room for thousands of guns to flow freely between the legal and illegal market<sup>33</sup> as well as between the United States and other countries, especially Mexico.<sup>34</sup> There is a strong association between the strength of a state's gun laws and whether that state exports illegal guns to other states that are later used in crime.<sup>35</sup>

Unlike illegal drugs, which are principally imported from other countries, crime guns invariably originate inside the U.S. Nearly all guns recovered in crimes were originally sold by licensed U.S. gun dealers.<sup>36</sup> Guns used in crime tend to enter the illegal market through various channels, including corrupt dealers, private purchases made at gun shows, straw purchasers, unlicensed sellers and theft.<sup>37</sup>

States that have weak laws facilitate trafficking, such as failing to require background checks at gun shows, export a far greater number of guns that are later used in crime.<sup>38</sup> States that do not require background checks for all handgun sales at gun shows have an export rate two-and-a-half times greater than those states that require background checks.<sup>39</sup> In addition, states that do not require permits to purchase handguns have an export rate three times greater than those states that require permits.<sup>40</sup>

The resulting impact from the lack of national uniform standards combined with the inconsistency in state law can be seen most poignantly in New York. New York's strict gun regulations make it one of the states with the lowest gun export rates.<sup>41</sup> Conversely, weak gun control laws in states along the I-95 Corridor—or the “iron pipeline”—are responsible for a large number of trafficked guns found in New York.

For example, in New York, for 2010, there were over 8,000 guns recovered and traced that originated in another state.<sup>42</sup> Over 6,500 of the over 8,000 guns recovered were handguns.<sup>43</sup> Many of the guns recovered in New York originated in states with weak gun control laws, including Virginia, Georgia, North Carolina, Pennsylvania, South Carolina, and Florida.<sup>44</sup>

Arguably, New York has one of the most stringent, and most effective, gun control laws in the United States; its effectiveness, however, is undermined by other states.

New York's Sullivan Act is one of the oldest gun control laws in the country. The Sullivan Act was passed in

1911 in response to the callous murder of author David Graham Phillips as he was walking toward the Princeton Club near Gramercy Park.<sup>45</sup> On the way, Phillips encountered Fitzhugh Coyle Goldsborough, a mentally disturbed person who wrongly believed that Phillips' work was based on negative representations of his family.<sup>46</sup> Goldsborough shot Phillips six times before turning the gun on himself.<sup>47</sup> The Sullivan Act was passed that same year in response to this murder.

The Sullivan Act requires a person in New York to obtain a police-issued license in order to possess a concealable firearm.<sup>48</sup> In addition, the Sullivan Act makes it a felony to carry an unlicensed, concealed weapon.<sup>49</sup>

### The Gun Control Movement Responds to Gun Violence in America

As a result of the efforts of victims of gun violence, law enforcement, dedicated groups at the national and state level, elected officials, members of the clergy and other engaged citizens, the gun control movement has brought about effective, strong legislation, and hope to Americans that we are moving towards a time when we will all exist in a safer and more peaceful society. Unfortunately, the past few years have proved to be very difficult for the gun control movement.

The intensity of many of the movement's former core supporters has softened. The movement now exists in a more concentrated form: dedicated national and state groups and supporters, law enforcement and certain officials have held strong through this period of decline.

Yet in the face of this decline, firearm violence in the United States remains unconscionably high, as gun control laws are steadily weakened and pro-gun laws are pushed by the gun lobby, and as guns are freely trafficked directly into the hands of criminals at an exponential rate in the United States and in Mexico.

So why, despite the clear need for continued vigor, is the gun control movement struggling? The answer, undoubtedly, is multifaceted and complicated.

In our view, a large factor is that the gun control movement, unlike the so-called gun rights movement, and many other social movements, is not bound together by a single, collective goal that directly impacts individual supporters of the movement. Rather, the goals are broader and center on a collective desire to live in a safer, less violent society.

While the gun control movement has certain built-in organizing weaknesses relative to the gun rights and other social movements, critically, it is clear that the overwhelming majority of Americans—gun owners included—support reasonable gun control measures.<sup>50</sup> In many ways, this single fact is both the biggest hope for the movement, but also its biggest challenge.

## The Gun Control Movement, Interrupted

### Elements of Successful Social Movements

Social movements often follow a pattern of emergence at a grassroots level, followed by the development of a greater level of organization and clearly defined goals aimed at social policy reform. Commonly, a galvanizing or instigating event immediately precedes the switch from a grassroots or local movement to a fully realized, politically powerful movement. These events, such as a street vendor setting himself on fire in Sidi Bouzid, Tunisia,<sup>51</sup> or a seamstress refusing to give up her seat on a bus in Montgomery, Alabama,<sup>52</sup> often arrest the collective consciousness and magnetize people toward the swelling movement.

Although the Arab Spring and the Civil Rights movements had been germinating at a grassroots level, and had behind them years of social discontent, their respective galvanizing events shocked and inspired a broader group of people to join these emerging movements, transforming them into powerful social movements that brought a sea change to the political and social landscape.

The gun control movement shares some of these aspects.

### A History of the Gun Control Movement

The gun control movement cannot look to one galvanizing event, but, instead, has been shaped by a long line of bloody acts. As early as the 1930s, public outrage following firearm violence has spurred legislators into enacting gun control laws. The seeds of the gun control movement first emerged in response to the St. Valentine's Day Massacre of 1929, in which members of Al Capone's gang murdered members of a rival gang led by Bugs Moran. Widespread public outrage following the massacre led to the enactment of the first Federal gun control law—the National Firearms Act of 1934 (“NFA”).<sup>53</sup> The NFA regulated the sale of fully automatic firearms, which Capone's gang used in the massacre, as well as short-barreled rifles and shotguns.<sup>54</sup>

Over thirty years later, the next surge toward a gun control movement followed the assassinations of President John F. Kennedy, Robert Kennedy and Martin Luther King, Jr. The public grief following these tragedies sparked a national debate on gun violence resulting in the passage of the Gun Control Act of 1968 (“GCA”).<sup>55</sup> The GCA mandates the licensing of individuals engaged in the business of selling firearms, prohibits certain people from purchasing or owning firearms, such as felons, and regulates the interstate commerce of firearms.<sup>56</sup>

In the 1970s the gun control movement began to emerge as a well-organized, politically savvy, national movement.<sup>57</sup> With firearm violence swiftly escalating, gun control organizations such as the National Coalition to Ban Handguns (which subsequently changed its name to the Coalition to Stop Gun Violence) and the National Council to Control Handguns (which was subsequently

named Handgun Control, Inc., which in turn became the Brady Campaign to Prevent Gun Violence) were formed to encourage the enactment of sound gun control legislation. In later years, many more interest groups followed, such as the Legal Community Against Violence, PAX and the Million Mom March chapters. Many states developed strong state-level gun control organizations that played, and continue to play, a critical role in the effort to control gun violence.

As the movement grew, and with the strong support of these and other established gun control groups, significant pieces of federal gun control legislation were enacted. In particular, in 1993, twelve years after the assassination attempt on President Reagan, in which White House Press Secretary James Brady was permanently disabled, Congress passed the Brady Handgun Violence Prevention Act,<sup>58</sup> which mandated background checks on all licensed gun sales. In 1994, the Federal Assault Weapons Ban (which Congress declined to renew when its ten-year sunset provision expired)<sup>59</sup> was enacted. In 1996, the Domestic Violence Offender Gun Ban was enacted, which prohibits ownership of guns by those who have been convicted of a misdemeanor crime of domestic violence.<sup>60</sup> Gun violence and gun control had become hot topics in national political debates.

More recently, however, the gun control movement has been in a state of unfortunate decline. The question is why?

### Members of Successful Social Movements Have Something to Gain or Protect

Broadly speaking, successful social movements are sustained and reach the aims of the movement where their members have something to *gain* or a specific right to *protect*.

For example, the Civil Rights movement aimed to outlaw racial discrimination and to achieve equality for African-Americans. African-Americans, who had the most to gain, were the predominant members of the social movement. Similarly, the Women's Suffrage movement sought to obtain the right to vote for women. As such, women were the predominant members of that social movement and likewise with the Choice movement. Even more recent social movements, such as the Arab Spring or the marriage issue, while having broad support, are sustained by those with the greatest interest in gaining a right.

The National Rifle Association (“NRA”) fits snugly within this theory. The NRA is comprised primarily of approximately three million people.<sup>61</sup> It receives a staggering amount of financial support from the gun industry.<sup>62</sup> Like other successful social movements, the NRA mobilizes around the single goal of protecting a defined, however misconstrued, “right” for its members—the constitutionally couched “right to bear arms.” Using rhetoric filtered through this “right,” and by arguing, without any proof

whatsoever, that the gun control movement is actually a gun ban movement, the NRA has been successful in galvanizing its members to stall or repeal legislation aimed at removing guns from the hands of criminals. The NRA has convinced its membership that without its intervention no one would be able to have a gun.

The gun control movement, on the other hand, has a broader, less individualistic goal: seeking a safer, less-violent society. These goals are not particularly tied to any tangible “right” or the desire to possess a weapon or to any particular group of people, but rather to a broader “right” that applies to everyone: the right to live in a society free from gun violence.

While living in a society free from gun violence may be a collective desire, those who hold it, commonly, hold it as one among a large constellation of beliefs; gun control supporters tend to be broad-based progressives who also support education, environment and a host of other issues. In contrast, gun rights advocates tend to hold the right to bear arms more as a North Star that serves as a guide by which to take direct action in the form of voting. In a country that suffers low voter turnout, the ability to form single-issue voting blocs is a very powerful political tool. The NRA has succeeded in doing this; the gun control movement has not.

To be sure, other factors have impacted the gun control movement, and in particular the decline in crime.<sup>63</sup>

As crime has declined, the issue of gun violence has receded in the political agenda.

In the '80s and '90s, crime was such a major issue for Americans that in the presidential elections of both '88 and '92 crime was a major plank in the platform of both successful nominees. In the '88 cycle, a very tough-on-crime approach was espoused by George H.W. Bush encapsulated in the famous, or infamous depending on one's point of view, Willie Horton ads. In '92 then Governor Bill Clinton campaigned on a more expansive approach to crime, promising to add 100,000 police officers to the streets of America, combined with crime prevention programs and some regulation of illegal guns.

In August 1994, 52 percent of Americans told Gallup that crime was the most important issue facing the country; in November 2011, only 1 percent gave that answer.<sup>64</sup>

Undoubtedly, this politically charged atmosphere made the fight for gun control laws easier in the 1990s than now. The challenge now is for the gun control movement to persuade Americans that the fight is far from over, that while much progress has been made, much more has to be done; that illegal guns continue to destroy the lives of more American youths than we dare imagine, that our lack national policy has a deadly impact on other countries and perhaps, strategically most important of all, persuade gun owners that the movement does not seek to limit a law-abiding individual's ability to get a gun.

## Illegal Guns Continue to Destroy America's Youth

While gun crime has declined dramatically, there are still many areas of our country where illegal guns continue to cause mayhem.

In particular, youth violence in America continues at a very high level. Youth violence is the second leading cause of death for people between the ages of 10 and 24.<sup>65</sup> Injuries from youth violence that require emergency medical care—from cuts, bruises and broken bones to gunshot wounds—are astronomical. In 2008, 656,000 youths aged 10 to 24 required emergency medical treatments of injuries resulting from youth violence.<sup>66</sup> Children and young adults (those aged 24 and under) represent a staggering number of firearm homicide victims—over 4,600 each year.<sup>67</sup>

Youth violence is a significant problem in cities and states across America. For example, California, Illinois, Louisiana and New York are seriously affected by severe youth violence resulting in death.<sup>68</sup> Youths with fewer opportunities and those from disadvantaged backgrounds tend to be prone to engaging in violent behavior. For example, cities with some of the lowest high school graduation rates are also those with a disproportionate problem dealing with youth violence, including: Chicago, Detroit, Atlanta, Baltimore and Cleveland.<sup>69</sup>

The ease in which youth can access a firearm—either by finding one in the home, the home of a friend or relative, or on the street—translates to a high number of youth homicides committed by firearm. In 2010, 84% of children and young adults aged 10 to 24 who were victims of homicide were killed with a firearm.<sup>70</sup>

## Lack of Strong, National Gun Control Laws as a Foreign Policy Issue

In the same way that the United States' lack of national gun control laws impacts states with strong laws, particularly those that would stem trafficking, it also has a significant impact on other countries. This can be seen most clearly in the escalating levels of violent crime in Mexico.

Mexico has strong firearms laws, yet it suffers from an astronomical amount of gang- and drug-related firearm violence. The gangs are heavily armed, even though there are no retail gun shops in Mexico.<sup>71</sup> “Shopping” for firearms in the United States via trafficking has become commonplace for criminals in Mexico.

The United States, with our permissive gun laws, is a ready source of firearms for criminals in Mexico, arming the most violent and dangerous gangs with the most lethal weapons.<sup>72</sup> The primary clients of trafficked guns are the major drug cartels.<sup>73</sup> Most of the guns trafficked into Mexico are purchased legally in the United States, and then trafficked across the border to Mexico.<sup>74</sup>



About 87 percent of firearms seized and traced by Mexican authorities between 2004-2009 originated in the United States.<sup>75</sup> In 2008, about 25% of these firearms were high-caliber and high-powered such as AK and AR-15 semiautomatic rifles.<sup>76</sup> As drug trafficking organizations have acquired these more dangerous weapons, it becomes increasingly hard for the Mexican authorities to combat it.

The firearms trafficked to Mexico are typically purchased by straw-purchasers at firearms shops and at gun shows along the southwest border of the United States.<sup>77</sup> Most of the U.S. guns seized in Mexico originate from U.S. gun shows and pawn shops—where no background check is required.<sup>78</sup> Annually, approximately 20,000 firearms are trafficked from the United States to Mexico<sup>79</sup> with a worth of approximately \$20 million per year.<sup>80</sup>

Recently, the violence in Mexico began spilling over into the United States.<sup>81</sup> It is only a matter of time before the escalating violence in Mexico becomes more than a foreign policy issue, but one in which American citizens are placed in grave danger, particularly those who live in states that border Mexico.

But Mexico is not the only country feeling the impact of America's weak gun control laws. For example, in Brazil, a country struggling with epidemic levels of violence, roughly 59.2% of trafficked guns originate in the United States.<sup>82</sup> In Canada, the United States is the primary source of illegal guns.<sup>83</sup> In 2006, 96% of all firearms seized and traced at the border of Canada originated in or transited through the United States.<sup>84</sup>

### **Persuade Gun Owners That the Gun Control Movement Does Not Seek to Take Away Their Guns**

Finally, the single biggest challenge is to convince legitimate gun owners that the movement does not seek to take away their guns or eliminate the ability of law abiding Americans to purchase firearms.

The focus of the gun control movement is to reduce the gun violence in America by instituting reasonable, national gun control legislation aimed directly at keeping guns out of the hands of criminals, children and other prohibited persons.

The solutions are not complicated. There are easily identifiable gaps in the national legislation that, if closed, would go a long way to reducing the level of gun violence in America. Legitimate gun owners should support these measures to secure their own safety and the safety of friends, family and fellow Americans. But, until the gun control movement convinces gun owners that the movement does not seek to prevent law abiding citizens from owning guns, the movement will continue to struggle, losing a potential valuable base of support and also losing the opportunity to significantly undermine the voting strength of the NRA.

### **A National Gun Control Policy; Stem Trafficking at Home and Abroad**

There are four main areas in which we need strong, federal legislation to stem the tide of gun trafficking both in the United States and across its borders: (1) require background checks for *all* gun sales, not just those from federally licensed dealers; (2) impose a limitation on the number of guns that can be purchased at any one time to remove the economic incentive in trafficking; (3) reinstate the Assault Weapons Ban and ban on large capacity magazines; and (4) invoke national licensing and registration of all handguns.

First, the lack of required background checks for private firearms sales means those private sales of firearms from one individual to another, including private sales at gun shows, are not subject to the background checks requirement nor must they be documented in any way. An otherwise prohibited person, a felon, minor, or those who have committed misdemeanor domestic abuse and the mentally ill can easily purchase guns from private sellers.<sup>85</sup> As a result, criminals or other prohibited persons can easily get their hands on lethal weapons simply by purchasing them in a "private" sale.

Second, there needs to be a limit on the number of guns sold to a single person in a defined period of time. Although a federally licensed dealer that sells two or more handguns within five business days to the same person must report the information to the ATF,<sup>86</sup> there is no limit on the number of guns a person can purchase.

In addition, there is no limit or reporting requirement connected to multiple purchases of long guns, including semi-automatic assault weapons, which can be purchased at a time. With the street price of guns exceeding the retail price, there is a strong economic motive for traffickers to buy guns in bulk and sell them on the streets.<sup>87</sup> Limiting the number of guns a person can purchase at a time would eliminate this economic incentive and help to stem trafficking.<sup>88</sup>

We must reinstate the Assault Weapons Ban. This would cut the supply of the most lethal and increasingly popular guns.<sup>89</sup> There is simply no reason to allow the sale of these lethal weapons. The Assault Weapons Ban, when it was in place, was shown to increase public safety.<sup>90</sup> Its immediate reinstatement is necessary to stem trafficking, particularly to Mexico.

We must have national licensing and registration to eliminate the myriad of far too weak local laws that fuel the illegal markets.

### **Conclusion**

Fighting for gun control has never been easy. The Brady Bill and the original ban on assault weapons took over five years to get passed. If anything, it is more difficult now than it was in the 90s; the country's focus has turned elsewhere. But that doesn't mean it can't be done.

At the end of the day, the fight for a sane national gun control policy is a raw political fight. We understand the needed policy, can argue based on evidence that it will work, but we need to change the political dynamics.

In many ways, the gun control movement has a single task. The movement must convert voting for a gun control measure from an act of political courage into an act of political necessity. That and only that needs to be the gun control movement's North Star. Every effort dedicated to changing the political equation, every effort set firmly in the goal of making voting for an act of gun control, must become an act of political necessity. Once that is done, all else will follow.

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# Fort Hood and Its Aftermath: An Archetype of Guns and Gun Violence in America

By Tom Diaz

## Introduction

At about 10 o'clock on the morning of November 21, 2011, Airman 1st Class Nico Cruz Santos barricaded himself in a building on Schriever Air Force Base in Colorado. Airman Santos was a member of the base's 50th Security Forces Squadron. He was armed with his personal handgun.<sup>1</sup>



Schriever Air Force Base is located near Colorado Springs. It is home to the 50th Space Wing, responsible for operating U.S. Department of Defense space satellites.<sup>2</sup> Santos's squadron "provides physical security, force protection measures and law enforcement services" to the wing.<sup>3</sup> Santos, however, was not on a security or law enforcement mission. It appears that he was a troubled person, likely reacting to his imminent discharge from the Air Force and possible imprisonment as a result of having pleaded guilty in a civilian court to a charge of attempted sexual exploitation of a child.<sup>4</sup>

The building in which Santos barricaded himself did not have access to the satellite operations.<sup>5</sup> It was a personnel processing center, a facility in which airmen are prepared for their deployment overseas.<sup>6</sup> The building's function brought immediately to mind the horrific events of almost exactly two years earlier, November 5, 2009, when—in a similar processing center at Fort Hood, Texas—U.S. Army Major Nidal M. Hasan is alleged to have gone on a cold-blooded rampage with his personal handgun, leaving a total of 13 dead and 32 wounded.<sup>7</sup> Unlike Major Hasan, who was subdued only after he was shot several times by police, Airman Santos surrendered without violence at about 8 p.m.<sup>8</sup> According to one report, Santos threatened suicide, but did not threaten to harm others during the siege.<sup>9</sup>

In the interval between the two events, and as a direct consequence of the Pentagon's reaction to Major Hasan's deadly attack at Fort Hood, however, Congress had imposed a significant restriction on the Department of Defense. Sandwiched between two sections of the defense authorization bill for fiscal year (FY) 2011 mandating public access to Pentagon reports, and establishing criteria for determining the safety of nuclear weapons, was to be found a new provision, Section 1062, "Prohibition on infringing on the individual right to lawfully acquire,

possess, own, carry, and otherwise use privately owned firearms, ammunition, and other weapons."<sup>10</sup> As a result of that change in law, General Peter Chiarelli, the Army's second-in-command, told *The Christian Science Monitor* in November 2011, "I am not allowed to ask a soldier who lives off post whether that soldier has a privately owned weapon."<sup>11</sup> The prohibition covers both members of the military and civilian employees of the defense department.<sup>12</sup>

The story of the genesis and fruits of Section 1062 is an archetype of the vexatious condition of gun control in the United States today. The example might superficially be thought a special case of Congressional interference in Pentagon management. Deeper analysis reveals that the story of Section 1062 illustrates some of the most important factors at play today in the increasingly dangerous civilian gun market and the progressively more feeble attempts to regulate it. These factors include:

- Levels of gun death and injury that mark the United States as a frightening aberration among industrialized nations.
- Aggressive "hyper-marketing" of increasingly lethal weapons by a faltering industry.
- Militarization of the civilian gun market as the driving force in that marketing.
- Deliberate suppression of data regarding criminal use of firearms, gun trafficking, and the public health consequences of firearms in the United States.
- Indifference by policymakers who might be expected to lead on gun control, and widespread acquiescence by elected officials to the gun lobby's unrelenting legislative campaigns.

## The Incident at Fort Hood

The massacre at Fort Hood of which Major Nidal Hasan stands accused in an ongoing court martial generated a great deal of attention from the news media, policymakers, and other observers. Most of this attention focused on two points: whether the mass shooting should be classified as a terrorist attack by "violent Islamist extremism,"<sup>13</sup> and where blame should be assigned within the nation's military and intelligence apparatuses for failure to anticipate and head off the rampage.<sup>14</sup>

Curiously, very little media reporting and virtually no official scrutiny has been devoted to the singular imple-

ment with which Major Hasan is accused of mowing down within ten minutes 45 of his comrades-in-arms. This was an FN “Five-seveN,” a 5.7mm high-capacity semiautomatic pistol manufactured by the Belgian armaments maker, FN Herstal (FN). (Although Major Hasan also carried a revolver that day, investigators found that he did not fire it.<sup>15</sup>)

For significant example, the U.S. Senate Committee on Homeland Security and Governmental Affairs issued a report purporting to address the “counterterrorism lessons” to be drawn from the Fort Hood matter, but emphasized that it had not “examined...the facts of what happened during the attack.”<sup>16</sup> The words “gun” or “firearm” appear nowhere in the committee’s report, much less the make, model, and caliber of the efficient killing machine Major Hasan is accused of using. The incident itself is described in two sentences as a “lone attacker” striding into the center, and “moments later,” 13 “employees” of the defense department “were dead and other 32 were wounded,” all by some unnamed cause.<sup>17</sup> The reader of the report might as well imagine that Major Hasan used a flamethrower, chainsaw, or crossbow as the gun that he in fact used. This is the remarkable equivalent of issuing a “lessons learned” report on the notorious 1995 bombing of the federal building in Oklahoma City without mentioning the truck bomb by which its principal perpetrator, Timothy McVeigh, carried out his attack, or presenting a lecture on the implications of the terrorist attacks of September 11, 2001 without addressing the use of commandeered jetliners as flying bombs. The omission is all the more remarkable since the committee chairman and co-author of the report, Senator Joseph I. Lieberman, stated in a May 2010 hearing on terrorists and guns that “the only two terrorist attacks on America since 9/11 that have been carried out and taken American lives were with firearms.”<sup>18</sup> He cited the Fort Hood shooting and the 2009 murder of an army recruiter in Little Rock, Arkansas as the two attacks.<sup>19</sup>

But according to extensive testimony reported to have been given during a pretrial hearing in Major Hasan’s case, the alleged perpetrator himself paid keen attention to the selection of the weapon he used. He chose the FN Five-seveN pistol and the accessories of laser aiming devices and high-capacity ammunition magazines precisely because they suited his purpose of efficiently attacking a large number of people.<sup>20</sup> Thus, before buying the handgun on August 1, 2009, Hasan asked a salesman at the Guns Galore gun dealer in Killeen, Texas, for “the most high-tech gun” available.<sup>21</sup> Another witness, Specialist William Gilbert, a soldier and self-described “gun aficionado” who was in the store when Major Hasan made his inquiry, testified that the accused also sought maximum ammunition magazine capacity.<sup>22</sup> Specialist Gilbert further testified that he owned an FN Five-seveN himself, and recommended that model gun to Major Hasan because it met the officer’s stated specifications.<sup>23</sup> “It’s extremely lightweight and very, very, very accurate,”

said Specialist Gilbert. “It’s easy to fire and has minimal recoil.”<sup>24</sup> The soldier testified that he gave Major Hasan “a 45-minute ‘full tactical demonstration’” of the handgun’s capabilities.<sup>25</sup> According to the manufacturer, those capabilities are considerable. “Five-seveN® Tactical handguns and SS190 ball ammunition team up to defeat the enemy in all close combat situations in urban areas, jungle conditions, night missions, etc. and for any self-defense action.”<sup>26</sup>

Specialist Gilbert and the salesman both noted that Major Hasan seemed to know nothing about handguns. The accused officer videotaped on his cell phone the salesman’s demonstration of how to load and clean the weapon so that he could review these procedures later.<sup>27</sup>

In the several months between his purchase of the handgun and the shootings at Fort Hood, Major Hasan also bought several extra ammunition magazines and magazine extenders that increased to 30 the number of rounds available to be fired in each loading of the gun, from the usual 20.<sup>28</sup> He bought two expensive laser aiming devices, a green one for use in daylight and a red one for use at night. The major also bought hundreds of rounds of the 5.7x28mm ammunition the gun fires, including boxes of a variant specifically designed to penetrate body armor.<sup>29</sup> According to testimony at the hearing, the line of ammunition in question had been ordered off the U.S. civilian market, but dealers were allowed to sell their existing stocks.<sup>30</sup>

In addition to his purchases, Major Hasan was a frequent visitor to Stan’s Outdoor Shooting Range, near Fort Hood, where he took a course to qualify for a concealed carry permit.<sup>31</sup> Witnesses said Major Hasan practiced at the range repeatedly, and specifically sought training in shooting at human targets from as far away as 100 yards. Instructor John Coats testified that after one afternoon’s tutelage, Major Hasan progressed from being an erratic shot to routinely hitting each target’s head and chest.<sup>32</sup> This is consistent with FN’s boast that “the flat trajectory of the 5.7x28mm ammunition guarantees a high hit probability up to 200 m. Extremely low recoil results in quick and accurate firing.”<sup>33</sup>

On the morning of November 5, 2009, Major Hasan allegedly put his “high-tech” weapon and training to use when he opened fire with his FN Five-seveN in a crowded waiting area near the entrance to Building 42003, a facility for processing soldiers being deployed overseas. Ten minutes later, he lay paralyzed from the chest down, shot by police. When the bloodbath ended, 12 soldiers and one civilian had been shot dead. An additional 31 soldiers and one police officer were wounded. A number of other people were injured in the scramble to escape the methodical shooting. Army investigators found more than 200 spent 5.7mm rounds in and around Building 42003.<sup>34</sup> So many rounds were fired that shell casings lodged in the tread of the shooter’s boots, survivors testified, so that they could hear a clicking noise at every step he took. “You could

hear the clack, clack, clack at the same time you could hear the bang, bang, bang of the guns,” one testified.<sup>35</sup> Major Hasan had another 117 unfired rounds in high-capacity magazines when he was stopped.<sup>36</sup>

Witnesses testified that the defendant reloaded often and effortlessly as he calmly walked through the building. One survivor, Specialist Logan Burnett, tried to rush the shooter when he saw an expended magazine fall from the pistol, but was shot in the head before he could reach the gunman. Another soldier contemplated also charging, but testified that the shooter reloaded magazines too quickly for him to act.<sup>37</sup>

## The Pentagon Review

After the Fort Hood shooting, Secretary of Defense Robert M. Gates appointed Togo D. West Jr., a former Secretary of the Army, and Admiral Vernon E. Clark, a former Chief of Naval Operations, to conduct a review of the incident. The review focused primarily on how well the defense department was prepared to meet similar incidents in the future and how the department’s policies might better deal with personnel like the alleged shooter. Aside from a single reference to an unnamed “gunman” having “opened fire,” the report of the review neither described nor inquired into the means—the FN Five-seven pistol, the high-capacity ammunition magazines, and the laser aiming devices—by which Major Hasan allegedly wreaked such great havoc in so short a time.<sup>38</sup> An appendix to the report, however, stated the finding that “[t]he Department of Defense does not have a policy governing privately owned weapons,” and recommended that the department “[r]eview the need for DoD privately owned weapons policy.”<sup>39</sup>

Three months later, the Department of Defense announced its follow-up action on 26 of the 79 recommendations of the independent review.<sup>40</sup> A detailed list accompanying Secretary Gates’s action memorandum noted with respect to privately owned weapons that each of the individual armed services had developed their own policies, and had delegated authority to base commanders to generate specific rules.<sup>41</sup> According to media reports, the commanders of some bases—including Fort Campbell, Kentucky, Fort Bliss, Texas, and Fort Riley, Kansas—required personnel living off post to register their personal firearms. In the case of Fort Riley, civilian dependents were also required to register their firearms.<sup>42</sup> The list attached to Secretary Gates’s memorandum stated that the Under Secretary of Defense for Intelligence was tasked to prepare department-wide guidance on personal guns, which would then be incorporated into the department’s physical security regulations.<sup>43</sup>

These actions were sufficient to galvanize the National Rifle Association (NRA), the principal voice of the gun industry lobby.<sup>44</sup> One month after Secretary Gates’s announcement, U.S. Senator Jim Inhofe introduced the

Service Member Second Amendment Protection Act of 2010, which was designed to forbid any action by the defense department that might affect personal weapons.<sup>45</sup> “Adding more gun ownership regulations on top of existing state and federal law does not address the problems associated with Hasan’s case,” Senator Inhofe stated in a press release. Referring to the proposed defense department regulations, he continued, “Political correctness and violating Constitutional rights dishonors those who lost their lives and is an extreme disservice to those who continue to serve their country.”<sup>46</sup>

Senator Inhofe offered his bill as an amendment to the defense department’s authorization bill for FY 2011. It was adopted by the Senate, and, although no similar provision had been passed in the House version of the authorization bill, it was included in the legislation as enacted, and thus passed into law.<sup>47</sup> Chris W. Cox, executive director of the NRA’s lobbying arm, the Institute for Legislative Action, took credit for the legislation, announcing in a “Political Report” on the matter that “your NRA has sought, and achieved, remedies to some of the worst abuses our service members have suffered, through legislation recently passed by the Congress and signed into law.”<sup>48</sup>

## Gun Death and Injury in the United States

There are many different ways to look at guns and gun control in the United States. But no matter what view one may hold, one stubborn fact is impossible to avoid: the United States stands alone in its high level of gun violence, a shocking contrast to those of other developed nations. Two detailed cross-national comparisons of firearms deaths among comparable nations of the world—published in 1998 and 2011—arrived at similar conclusions. The 1998 study found that “the US is unique in several aspects. It has the highest overall mortality rate, a high proportion of homicides that are the result of a firearm injury, and the highest proportion of suicides that are the result of a firearm injury.”<sup>49</sup> The 2011 study reported that “the United States has a large relative firearm problem; firearm death rates in the US are more than seven times higher than they are in the other high-income countries. Firearm homicide rates are 19 times higher in the US compared with the other 22 countries in this analysis, firearm suicide rates, and unintentional firearm death rates are over five times higher. Of all the firearm deaths in these 23 high-income countries in 2003, 80% occurred in the United States.”<sup>50</sup> This gun carnage is so even though “our rates of crime and nonlethal violence are not exceptional.”<sup>51</sup> In sum, a mugging or argument that goes wrong in Hamburg ends up with a few bruises. In Baltimore or a Denver suburb it may likely end up with someone being shot.

Gross numbers may help draw a more vivid picture of this public health disaster than the more abstract rates.

Take the example of terrorism. The U.S. Senate Committee on Homeland Security described the Fort Hood

attack—in which 13 were killed and 32 wounded—as “the worst terrorist attack on U.S. soil since September 11, 2001.”<sup>52</sup> Although the executive branch has resisted calling the shooting a terror attack, the specter of terrorism since September 2001 has mesmerized policymakers. The threat has inspired infringements on civil liberties that would have been thought preposterous before the attacks.<sup>53</sup> It has consumed unfathomable billions in federal, state and local tax dollars—the Department of Homeland Security’s budget request for fiscal year 2012 was \$57 billion, an increase from its FY 2011 request for \$56.3 billion.<sup>54</sup> In contrast, the combined FY 2012 budget request for the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry was \$11.3 billion.<sup>55</sup>

Yet the relentless count of gun deaths in the United States every year takes 10 times the number of lives as the terrorist attacks of September 11, 2001. Although counts have varied slightly as forensic evidence became available and was more thoroughly examined, the total number of people killed in all of the terrorist attacks on September 11, 2001, is approximately 2,975.<sup>56</sup> By comparison, there were a total of 29,573 firearms deaths in 2001 and 31,593 firearm deaths in the United States in 2008, the latest year for which data are available.<sup>57</sup> Including the Army recruit shot to death in Little Rock (which is officially classified as a terror attack) and, despite arguments to the contrary, the 13 deaths at Fort Hood, a total of 2,989 people have died in terrorist attacks in the United States since 2001. In the years 2001 through 2008, a grand total of 243,927 people died from gunshot injuries in the United States.<sup>58</sup> Of those, 137,094—slightly more than half—were suicides.<sup>59</sup> Another 541,803 were injured by guns but did not die.<sup>60</sup>

These civilian deaths and injuries may be put into further perspective by comparing them to the experience of the U.S. Armed Services during the same period. The total of U.S. active duty military deaths, from all causes, in the years 2001 through 2008 was 12,390.<sup>61</sup> The total deaths caused by “hostile action” during the same eight years was 3,811, while the number of deaths from self-inflicted wounds among active duty military personnel was 1,531.<sup>62</sup>

Given the lack of widespread public outcry for a re-ordering of our national priorities, Americans and their leadership appear either to be ignorant of or have become inured to our endless torrent of civilian gun violence. “Routine” gun homicides, shooting injuries, and gun suicides get cursory, if any, news media attention. Mass shootings, cop-killings, and family annihilations have become virtually weekly events in the United States. In this respect, for all of the attention the Fort Hood affair generated in the media and particularly in the Congress, its toll of dead and injured was no greater than a number of civilian mass shootings involving handguns. These include the April 2009 shooting at the American Civic Association in Binghamton, New York (14 dead, 4 wounded),

the April 2007 shooting at Virginia Tech in Blacksburg, Virginia (33 dead, 17 wounded), and the October 1991 shooting at Luby’s Cafeteria in Killeen, Texas (24 dead, 20 wounded). Many other civilian mass shootings have taken somewhat lesser tolls, such as the January 2011 shooting in Tucson, Arizona in which U.S. Rep. Gabrielle Giffords was gravely injured (6 dead, 13 wounded).<sup>63</sup>

## A Failing Industry

This shameful record is not the inevitable corollary of a free society. Harvard professor David Hemenway, for example, compared the U.S. record with those of the three other developed “frontier” nations where English is spoken, Canada, Australia, and New Zealand. Hemenway points out that, although the four countries are similar in per capita incomes, cultures, histories, and rates of violent and property crimes, “[w]hat distinguishes the United States is its high rate of lethal violence.”<sup>64</sup> The difference, he concluded, is that these other countries “do a much better job of regulating their guns.”<sup>65</sup> Like the tobacco industry before it, the American gun industry and its lobby has successfully employed political intimidation, the crassest form of flag-waving propaganda, and mass marketing techniques appealing to fear and loathing to prevent being called to account for the public health disaster it has inflicted on America, and to avoid meaningful regulation.

What drives the gun industry is, perhaps surprisingly, not success but failure. The civilian firearms industry in the United States has been in decline for several decades. Although it has from time to time enjoyed brief peaks in sales, it has been essentially stagnant. For example, demand for firearms apparently increased beginning in 2008 because of fears that “high unemployment would lead to an increase in crime” and that the administration of President Barack Obama would “clamp down” on gun ownership by regulating assault weapons. But demand fell back as neither of these happened.<sup>66</sup> Unlike many other consumer product industries, the gun industry has failed to keep up with population growth. Between 1980 and 2000 the U.S. population grew from 226,545,805 to 281,421,906—a 24 percent increase.<sup>67</sup> Over the same period, total domestic small arms production fell from 5,645,117 to 3,763,345—a 33 percent decrease.<sup>68</sup>

In short, as America has gotten bigger, the gun industry has gotten smaller. But, like a snake in its death throes, the gun industry has also become more dangerous.

## Militarization of the Civilian Gun Market

The FN Five-seveN and the accessories chosen by Major Hasan are neither aberrant nor unusual products on the U.S. civilian gun market. They are rather typical examples of the military-style weapons that define that market today. There is no mystery in this militarization. It is simply a business strategy aimed at survival: boosting

sales and improving the bottom line in a desperate and fading line of commerce.<sup>69</sup>

The hard commercial fact is that military-style weapons sell in an increasingly narrowly focused civilian gun market. True sporting guns do not. As a recent article in an industry publication observed, “if you’re a company with a strong line of high-capacity pistols and AR-style rifles, you’re doing land office business. If you’re heavily dependent on hunting, you are hurting.”<sup>70</sup>

The gun industry today feverishly designs, manufactures, imports, and sells firearms in the civilian market that are to all intents and purposes the same as military arms. It then bombards its target market with the message that civilian consumers—just like real soldiers—can easily and legally own the firepower of militarized weapons. The industry has done this through three major types of firearms: high-capacity handguns like the FN Five-seveN used by Major Hasan, assault rifles and pistols like the AK-47 clones that are flooding in from the factories of Eastern Europe, and sniper rifles such as the Barrett 50 caliber anti-armor sniper rifle, capable of punching through an inch of steel from 1,000 yards. It should be no surprise that these are the guns of choice in the illegal traffic from the United States to Mexico, Canada, the Caribbean, and other areas of the world.<sup>71</sup>

The FN Five-seveN—known as the *mata policías* (“cop-killer”) in Mexico—is a virtual poster child of the militarization trend. The 5.7x28mm round it fires was specifically designed to defeat body armor on the modern battlefield. Ironically enough, given its use at Fort Hood, the handgun itself was designed for use by counterterrorism teams. FN clearly recognized the danger of the genie it was releasing when it introduced the Five-seveN. The company originally claimed that it would restrict the sale of its new armor-piercing ammunition and pistol. A company spokesman told the *Sunday Times* in 1996 that the pistol was “too potent” for normal police duties and was designed for anti-terrorist and hostage rescue operations.<sup>72</sup>

The gun industry press, which invariably fawns over the debut of any new gun, played along with FN’s righteous fiction. The NRA’s *American Rifleman* claimed in 1999 that: “Law enforcement and military markets are the target groups of FN’s new FiveseveN [sic] pistol,” and told its readers, “Don’t expect to see this cartridge sold over the counter in the United States. In this incarnation, it is strictly a law enforcement or military round.”<sup>73</sup> Similarly, *American Handgunner* magazine assured the public in 2000, “For reasons that will become obvious, neither the gun nor the ammunition will ever be sold to civilians or even to individual officers.”<sup>74</sup>

In fact, however, greed overcame caution and both the gun and its ammunition are easily, legally, and widely available in the United States.

## The Dark Side of the Moon

Like the tobacco industry—on the lessons of which its conduct is modeled—the gun lobby has gone to extreme lengths to draw a veil of secrecy over the facts regarding gun violence in America. The tobacco industry successfully fought regulation for decades after its products were known to be pestilential. But a crack in the industry’s wall of deceit and influence was opened through the process of discovery in private tort lawsuits. Putting aside compensation for the ravaging illnesses tobacco caused its victims, “litigation forced the industry to reveal its most intimate corporate strategies in the tobacco wars.”<sup>75</sup> Discovery revealed that the tobacco industry “had not been dealing straightforwardly with the public but had been acting in deceptive ways to ease its customers’ growing anxieties over the health charges.”<sup>76</sup> This revealing light on the industry’s darkest schemes helped accelerate tighter regulation—“perhaps the most significant change was the public recognition of the industry’s extensive knowledge of the harms of its product, and its concerted efforts to obscure these facts through scientific disinformation and aggressive marketing.”<sup>77</sup>

Knowing that the gun industry could only lose in any public forum in which information about the consequences of its products was freely available, the gun lobby’s strategists marked well the tobacco industry’s defeats in court. After tort litigation was brought against the industry by innocent victims of its lethal products and reckless marketing, the NRA succeeded in pushing through Congress the Protection of Lawful Commerce in Arms Act, which President George W. Bush signed into law in 2004.<sup>78</sup> This extraordinary federal law shields the gun industry against all but the most carefully and artfully crafted private lawsuits.

Another and more direct prong of the NRA’s assault on freedom of information for the public about the gun industry has been a series of so-called “riders”—prohibitory amendments attached to appropriations bills—that began in 2003 and have collectively come to be known as the Tiahrt Amendments, after their perennial sponsor, former Kansas Rep. Todd Tiahrt. These amendments have forbidden the federal Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) from releasing to the public useful information, even in summary form, about gun trafficking and gun crimes. Although some information may be released to law enforcement agencies, and ATF occasionally publishes its own antiseptic and anemic reports, the agency’s top officials have chosen to broadly interpret these prohibitions, virtually shutting down their responses to information requests from the general public and researchers.<sup>79</sup>

With this general background in mind, the industry’s exploitation of the Fort Hood disaster as part of its broader strategy becomes clear. Thus, Section 1062 of Public Law 11-383 forbids the defense department to “collect or record” any information about the private firearms of



members of the military or its civilian employees, unless they relate to such arms on a defense facility proper, and further directs the department to destroy within 90 days of the date of its enactment any such records it may have previously assembled. There is inescapable irony in Section 1062's being inserted between Section 1061, a "sunshine" mandate directing the Pentagon to make available to the public its reports to Congress, and Section 1063, which orders the Pentagon to take certain steps to ensure the safety and security of nuclear weapons.

Section 1062's prohibition has had tragic and entirely foreseeable effects. As noted above, 1,531 active duty members of the military died from self-inflicted wounds between 2001 and 2008.<sup>80</sup> (This number does not include suicides among former members of the military, which are also known to be substantial.) The military has not escaped the infection of suicide that accompanies the widespread availability of guns, and the new law has cut off an important avenue of suicide prevention among both active duty and former military personnel.<sup>81</sup>

In the civilian context, "the empirical evidence linking suicide risk in the United States to the presence of firearms in the home is compelling."<sup>82</sup> The link is no less compelling among the military, serving and former alike. According to Dr. Elspeth Cameron Ritchie, who recently retired as a high-ranking Army psychiatrist directly involved in the issue, "approximately 70 percent of Army and Pentagon suicides are by guns."<sup>83</sup> According to a study released in October 2011—ominously titled *Losing the Battle: The Challenge of Military Suicide*—48% of military suicides in 2010 were accomplished with privately owned weapons.<sup>84</sup> In spite of this, Dr. Ritchie noted, although the Army is "committed to lowering the rate of suicide.... there's a curious third rail that is seldom publicly discussed: the risks of suicide by firearm."<sup>85</sup> She also notes that Army Post Exchanges—"basically government-owned Walmarts [sic] on major posts"—are increasingly selling guns and asks whether this is "sending the troops the right message?"<sup>86</sup>

### Conclusion—the New Third Rail

It was noted above that the word "gun" appears nowhere in the report of the U.S. Senate Committee on Homeland Security and Governmental Affairs regarding the shootings at Fort Hood. Like much of what goes on in the Congress, the report's drafting was done behind closed doors. But some clue as to why the authors of the report chose not to mention Major Hasan's wondrously deadly weapon may be found in the words of one co-author, the committee's ranking Republican member, Senator Susan Collins, in her opening statement at the committee's hearing on "Terrorists and Guns":

For many Americans, including many Maine families, the right to own guns is part of their heritage and way of life. This

right is protected by the Second Amendment.

And so this Committee confronts a difficult issue today: how do we protect the constitutional right of Americans to bear arms, while preventing terrorists from using guns to carry out their murderous plans?<sup>87</sup>

One way to "protect the constitutional right" is simply to ignore the consequences of that right. This has increasingly been the choice of the nation's political leadership. In the words of Jim Kessler, vice president for policy at Third Way, a group distinguished both by its poll-driven policy proposals and its influence among moderate Democrats, "guns seem like the third rail."<sup>88</sup>

Although Congress and the White House are perfectly prepared to "balance" other constitutional rights in pursuit of the so-called "war on terror," neither has even the slightest inclination to do so in the case of "gun rights," notwithstanding the massively disproportionate harm guns inflict on Americans. In 2009, for example, when U.S. Attorney General Eric Holder had the temerity to suggest that Congress should reenact the expired federal assault weapons ban, then-Speaker of the House Nancy Pelosi swiftly squelched the idea. "Echoing the position often taken by advocates of gun rights," according to *The New York Times*, Mrs. Pelosi observed, "On that score, I think we need to enforce the laws we have right now."<sup>89</sup> The issue is considered "toxic" to Democrats, according to many political observers.<sup>90</sup>

Staying clear of the third rail of gun control thus has become a political by-word in Washington. If there was any debate at all on Senator Inhofe's amendment to the defense authorization bill, none of it appears in the public record. The proceedings both of the Senate Armed Services Committee, and of the committee that reconciled the different version of the House and Senate, were closed to the public. No public statement in opposition was issued by any member of Congress, nor by the Obama Administration.

Thus, as the Fort Hood affair demonstrates, the gun lobby has successfully shut down information, intimidated any political opposition, and endangered all Americans by its reckless militarization of our public space. The consequences for public health and the safety of ordinary Americans are grim. We all are placed in danger—in our homes, our schools, our places of work and worship, and even our military bases—by the gun lobby's actions, and by the deafening silence in response from America's political leaders.

### Endnotes

1. The narrative of Airman Santos's actions on November 21 is based on these sources, unless otherwise noted. Press Release, Schriever Air Force Base, Officials ID Barricaded Member, 50th

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2. Schriever Air Force Base, 50th Space Wing Fact Sheet, <<http://www.schriever.af.mil/library/factsheets/factsheet.asp?id=3926>> (last visited Nov. 24, 2011).
  3. Schriever Air Force Base, 50th Security Forces Squadron Fact Sheet, <<http://www.schriever.af.mil/library/factsheets/factsheet.asp?id=3926>> (last visited Nov. 24, 2011).
  4. For the particulars of Santos's offense, see Warrantless Arrest Affidavit, for defendant Nico Cruz Santos (2010) (No. 10CR668); Sanchez, *supra* note 1.
  5. *Gunman Surrenders*, *supra* note 1.
  6. *Id.*
  7. Editorial, Rampage Was the 'Worst Horror Movie,' THE DALLAS MORNING NEWS, Nov. 14, 2010 (Eleven additional personnel were "injured" in the resulting turmoil, as opposed to having been "wounded" by gunshot) [hereinafter *Rampage*]; see, U.S. DEP'T OF DEFENSE, REPORT OF THE DoD INDEPENDENT REVIEW, PROTECTING THE FORCE: LESSONS FROM FORT HOOD 1 (2010) [hereinafter *LESSONS*].
  8. Editorial, AF Investigating Armed Standoff at Colo. Base, AIR FORCE TIMES, Nov. 22, 2011.
  9. *Id.*
  10. Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, 124 Stat. 4363 § 1062.
  11. Anna Mulrine, Pentagon vs. NRA: Will Gun-Rights Law Raise Risk of Soldier Suicides? THE CHRISTIAN SCIENCE MONITOR, Nov. 4, 2011.
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  13. U.S. Senate Comm. on Homeland Security and Governmental Affairs, A Ticking Time Bomb: Counterterrorism Lessons From the U.S. Government's Failure to Prevent the Fort Hood Attack 7 (2011) [hereinafter *Ticking Time Bomb*].
  14. For media examples of these concerns, see Associated Press, Senate Committee Subpoenas Fort Hood Documents, The Associated Press, Apr. 19, 2010; Elisabeth Bumiller & Scott Shane, *Pentagon Report on Fort Hood Details Failures*, N.Y. Times, Jan. 15, 2010.
  15. Jeremy Schwartz, *Police Recall a Torrent of Bullets at Fort Hood*, Austin American-Statesman, Oct. 21, 2010.
  16. *Ticking Time Bomb*, *supra* note 13, at 15.
  17. *Id.* at 7.
  18. Terrorists and Guns: The Nature of the Threat and Proposed Reforms, *Hearing Before the S. Homeland Security and Governmental Affairs Comm.*, May 5, 2010 (Opening Statement of Joseph I. Lieberman, Chairman Senate Homeland Security & Governmental Affairs Comm.).
  19. *Id.*
  20. Unless otherwise noted, the details of Major Hasan's purchase and use of his personal handgun are based on the following sources: Rampage, *supra* note 7; Editorial, *Witness: Man Asked About Gun Capacities*, Austin American-Statesman, Oct. 22, 2010 [hereinafter *Capacities*]; David Zucchini, *Suspect in Ft. Hood Rampage Sought High-Tech Gun, Salesman Says*, Los Angeles Times, Oct. 21, 2010; Editorial, *Witness: Killer Sought 'High-tech' Handgun*, The Dallas Morning News, Oct. 22, 2010; Schwartz, *supra* note 15; Scott Huddleston, *Nurses Recall Carnage at Fort Hood*, San Antonio Express-News, Oct. 19, 2010; Editorial, *Soldiers Describe Deadly Day*, The Dallas Morning News, Oct. 16, 2010 [hereinafter *Soldiers*]; Philip Rucker, *Lawyer: Fort Hood Suspect is Paralyzed*, The Virginian-Pilot, Nov. 23, 2009.
  21. Zucchini, *supra* note 20.
  22. *Capacities*, *supra* note 20.
  23. *Id.*
  24. *Id.*
  25. Zucchini, *supra* note 20.
  26. FNHerstal.com, Five-seveN® Tactical, <[http://www.fnherstal.com/index.php?id=269&backPID=263&productID=66&pid\\_product=295&pidList=263&categorySelector=5&detail](http://www.fnherstal.com/index.php?id=269&backPID=263&productID=66&pid_product=295&pidList=263&categorySelector=5&detail)> (last visited Jan. 30, 2012) [hereinafter *FNHerstal*].
  27. Zucchini, *supra* note 20.
  28. *Id.*; FNHerstal, *supra* note 26.
  29. *Capacities*, *supra* note 20.
  30. *Id.*
  31. Zucchini, *supra* note 20.
  32. *Capacities*, *supra* note 20.
  33. FNHerstal, *supra* note 26.
  34. See *supra* note 20 and accompanying text.
  35. Huddleston, *supra* note 20.
  36. Zucchini, *supra* note 20.
  37. *Soldiers*, *supra* note 20.
  38. *Lessons*, *supra* note 7.
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# Building a Social Movement Around Gun Violence Prevention

By Dan Gross and Allison Dickin

## Introduction

Legal and political advocacy are vitally important parts of the solution to gun violence in the United States. However, to fully realize its goals, the gun violence prevention movement needs something more. In addition to lobbying and legal expertise, the movement needs strong, insightful messaging that will reach Americans on a personal level, and passionately and sustainably engage the public in the fight for solutions.



Dan Gross

Numerous hard-fought legislative battles over specific policy measures have resulted in the national conversation about guns being dominated by partisan political debate, rather than a productive discussion of gun violence as the urgent issue of public health and safety that it is. Further, while far too many people have experienced gun violence firsthand, many have not and do not believe it is an issue that they need to worry about. As a result, for a large portion of America, it is all too easy for the issue of gun violence to be comfortably relegated to “others,” like those who live in our violence-plagued inner cities.

As a result of the political debate and the lack of deep personal identification with the issue, the voice of the American public in demand of any change is dispassionate. Despite the fact that the overwhelming majority of Americans, including most gun owners, are in favor of virtually every proposed policy measure, not nearly enough people see gun violence as “their issue” to have a reasonable chance of changing the status quo, especially considering the power wielded by the well-funded gun lobby. Even the most significant national tragedies eventually fade from the headlines, and any related public outcries for policy change eventually dissipate.

Strategies for engaging the American public behind these policy measures have typically focused on appealing to “common sense,” leveraging shocking statistics or capitalizing on heightened public attention after atypical, high profile shootings. Clearly, this is not enough.

To change the status quo, and to have a meaningful and lasting impact on gun violence, we believe the movement must find a way to resonate more deeply and sus-

tainably with the American public. The dangers of guns, and of youth access to them, must be reframed in the American consciousness as issues of public health and safety—around insights like responsible parenting, social justice and faith—issues that matter to people more personally than even the most shocking statistic or headline alone ever could.



Allison Dickin

Further, in addition to rallying the American public around policy change, to achieve the goal of reducing the greatest possible number of gun deaths, that policy change must, at the very least, occur alongside changes to social norms around how we behave with regard to the millions of guns that are already out there, for example, in a third of American homes. As we have seen with other health and safety issues from smoking to safety belts, changes in social norms often occur hand-in-hand with changes in policy, with each impacting and inspiring the other in generating the momentum for fundamental change.

## The Impact of Gun Violence

Firearm injuries are responsible for approximately 30,000 deaths in the United States every year,<sup>1</sup> and an additional 65,000-75,000 injuries.<sup>2</sup> That’s an average of 270 Americans being shot every day, and 87 dying from gun violence.<sup>3</sup> In one year, guns were used in the murder of 17 people in Finland, 35 in Australia, 39 in England and Wales, 60 in Spain, 194 in Germany, 200 in Canada, and 9,484 in the United States.<sup>4</sup> Even controlling for population, the firearm homicide rate in the U.S. is 19.5 times higher than the combined rate of 22 other high-income countries.<sup>5</sup>

Firearms are particularly dangerous when they are accessible to children and young adults. In 2008, approximately 13% of all deaths of 1-19-year-olds were the result of firearm injury. Eight children and teens die from firearm suicides, accidents and homicides every day, and an additional 56 are injured. New research finds that the incidence of non-fatal pediatric firearm injury in the United States is 30% higher than previous estimates with approximately 20,600 firearm injuries occurring each year in children aged 0-19 years, 40% of which are unintentional.<sup>6</sup>

New York State actually fares better than the country as a whole in terms of firearm deaths, with a rate less than half the national average.<sup>7</sup> However, there are still approximately 1,000 firearm deaths in New York each year, of which, about 100 are youth.<sup>8</sup> These numbers may not be shocking on their own, but each of these deaths represents a tragedy that most likely could have been prevented.

In addition, while New York State's gun death rate overall is below the national average, in urban areas like Rochester and New York City, the rates are much higher among particular subsets of the population. For example, among African Americans between 15 and 19 years old in Rochester, the rate of gun violence is 65 times the national average.<sup>9</sup> This is a dire problem that cannot be ignored.

Injury and death are the obvious costs of access to guns and gun violence. However, gun violence has hard economic costs as well, in the form of medical care to treat those who are injured, as well as in tax dollars that go toward increasing police presence in neighborhoods affected by gun violence, and prosecuting and jailing gun offenders. It is estimated that these costs total \$4 billion to \$5 billion each year.<sup>10</sup>

In addition to the price of lives lost and increased security, there are psychological costs associated with guns, for youth especially.<sup>11</sup> According to the 2009 CDC Youth Risk Behavior Surveillance System, 5% of high schools students did not go to school at least once during the month before the survey because of fear for their safety at or on their way to school.<sup>12</sup> In New York State, the rate is 6.3%, statistically significantly higher than the national average. This represents over 60,000 days missed from school in New York State, probably many more. The fear imposed by gun violence leads to lost educational opportunity for youth, as well as increased likelihood of joining a gang or turning to violence in search of personal protection.

## Addressing The Problem of Gun Violence

The problem is clear: access to guns in our state and across our nation has serious impacts on society, including the shocking loss of human life, and steps must be taken to reduce the negative consequences that result from the presence of guns in the United States. There are two major ways that these issues are traditionally addressed: through advocacy efforts to shift public policies toward those that prevent gun violence (including legal and regulatory efforts), and through education and awareness efforts to reframe the issue as an urgent matter of public health and safety in a way that sustainably engages the American public in the pursuit of solutions. We believe that these efforts must go hand-in-hand.

## The Policy Approach

In January 2011, the mass shooting in Arizona that killed six and critically wounded U.S. Representative Ga-

brielle Giffords incited heated policy debate around guns, with advocates on both sides of the conversation coming out in force. Gun control activists called for stricter gun laws, including proposals of a ban on high-capacity ammunition magazines, a prohibition on carrying guns within 1,000 feet of elected officials, improvements in the background-check system, and closing the "gun show loophole." Meanwhile, gun rights advocates were quick to state that there was no proof stricter gun controls would have prevented the incident from happening, and Arizona's legislature made no changes to its plans to introduce a new bill that would allow college students to carry concealed weapons on campus, days after the incident.

Nearly a year after the Arizona shooting and the public outcry that followed, no firearm-related laws of any kind have been passed into law at the national level, and many remain in committee, not having been voted on by either house. Further, in the months that followed the tragic event, gun rights advocates continued to press for a variety of new rights, both nationally and at the state level. Proposed legislation includes concealed carry reciprocity, which would require states to recognize concealed carry permits issued in other states; granting people the right to carry concealed handguns on college campuses; and barring physicians from asking patients about the presence of guns in the home.

The shooting of Representative Giffords, tragic though it was, was widely seen as the biggest opportunity in years to pass legislation restricting dangerous access to firearms in the United States. Yet, as we have seen after many tragedies that came before, the results have been disheartening. A year after the tragedy, the shooting and the ensuing focus on gun violence have largely dropped out of the public discourse, and the public outcry has once again dissolved to near apathy.

We can take some heart from New York State, where lawmakers pushing for stricter gun safety regulations are continuing to persevere. Attorney General Eric Schneiderman recently released a report exposing the failure of gun vendors at gun shows to carry out mandatory criminal background checks, and Senator Kirsten Gillibrand introduced the Gun Trafficking Prevention Act, which would crack down on illegal gun traffickers. In addition, the New York City Council is considering passing resolutions in favor of closing the "gun show loophole" and opposing national concealed carry reciprocity legislation.

Gun legislation is historically difficult to pass, however. This can seem like a mystery to gun control advocates, as research has shown that the overwhelming majority of Americans are in favor of nearly all gun control policy proposals.<sup>13</sup> The truth is that the existing public support for this issue is simply not enough. It is not passionate enough or dedicated enough, and when matched against the overflowing coffers of powerful gun rights groups, the cries of those in favor of tighter restrictions are easily drowned out.

## Generating Public Support: The Case Study of “Secondhand Smoke”

To have a meaningful and lasting impact on gun violence in the United States, we must find a way to resonate more deeply and sustainably with the American public. The dangers of guns must be reframed in the American consciousness as an issue that impacts people on a level more personal than even the most shocking statistic or headline could ever reach, on the level of people’s personal health and safety and that of their families.

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*“To generate a high level of public support around gun violence prevention, we must demonstrate to Americans that they have a personal connection to the issue, and a stake in solving it, whether or not they have experienced gun violence firsthand, and whether or not there are guns in their homes.”*

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We believe we can learn from other analogous issues, such as tobacco, where campaigns like “Secondhand Smoke” marginalized, even created indignation toward unsafe behavior, providing the public engagement and support necessary for almost unthinkable policy change.

Looking closely at the issue of smoking, there are many analogies between the challenges that issue faced twenty years ago and those that gun violence faces today. First, it is a deeply entrenched, often culturally glamorized behavior. In fact, smoking may have been even more deeply entrenched than guns because of its addictive nature. Second, those against smoking, while also supported by common sense and growing evidence of the serious health impacts, were up against the marketing efforts of a powerful industry and lobby. At one point, the tobacco industry was considered one of the three most powerful national lobbies, just as the gun lobby is today.

The Secondhand Smoke Campaign was essential to overcoming those challenges and creating deep and lasting social and policy change. The campaign did this by creating a sense of social intolerance and individual guilt around behaviors that put others at unnecessary risk. In some cases this led directly to the personal choice of smokers to change their behavior (i.e., “If I’m risking my child’s health, I’m not going to smoke around them”); in other cases it resulted in social pressure based on intolerance from non-smokers (i.e., “How dare you subject me or my loved ones to the impact of your dangerous habit”). Together, these outcomes amounted to a tangible sense of cultural indignation and unacceptability, which led to previously unthinkable social and political change:

- A 2003 study conducted by the University of Cincinnati, which examined the effectiveness of a Sec-

ondhand Smoke media campaign, demonstrated that the overwhelming majority of smoking parents (93%) became committed to protecting children from secondhand smoke as a result of exposure to the campaign, and 53% intended to smoke outside of their home and away from their children.<sup>14</sup>

- According to the Centers for Disease Control and Prevention, between 1997 and 2007, U.S. smoking rates have declined by 5%. Many experts believe that the increased awareness of Secondhand Smoke and other anti-smoking messages played a vital role in this change, beginning with the CDC’s own ad campaign launched in 1998.<sup>15</sup>

Today, lawmakers have gone so far as to ban smoking in restaurants and bars in many cities across the nation; and in New York City it is now illegal to smoke in most public spaces, like parks and beaches. It is true that effective strategic lobbying and legal strategies played an important role in creating changes in smoking laws nationally; but so did the public outcry on the basis of secondhand smoke.

## Generating Public Support for Gun Violence Prevention

The American gun debate, to date, has been largely focused on issues such as what types of guns and ammunition should be legal for individuals to own, and in what places and circumstances, public and private, people should be legally permitted to, or prohibited from, carrying weapons. It is easy for Americans to grow confused or tired of these policy arguments, and to lose a sense of personal connection to the issue. In its current state, it is difficult to generate the level of passionate public support needed to create real social or policy change.

To generate a high level of public support around gun violence prevention, we must demonstrate to Americans that they have a personal connection to the issue, and a stake in solving it, whether or not they have experienced gun violence firsthand, and whether or not there are guns in their homes.

One way The Center to Prevent Youth Violence seeks to accomplish this is by appealing to parents of children and adolescents on the basis of the health and safety of their families. To fully explain CPYV’s approach to this challenge, we must first provide some additional analysis of youth gun deaths, on which our approach is based.

## Dimensionalizing the Problem: The Surprising Danger of Guns in Homes

One significant challenge in dimensionalizing the nature and extent of gun violence as a public health issue is the lack of statistical data. Even though tens of thousands of Americans become victims of shootings every year, there is a surprising lack of information that could

be used to identify and support the best solutions. For example, much of the available data comes from the National Violent Death Reporting System, which currently collects data in fewer than half of the states. Further, local protocols for recording information about violent deaths vary significantly, sometimes even within the same city. However, by closely examining the data available, some striking insights are revealed.

Bringing together experts from the public health and business communities, CPYV recently analyzed exactly how the more than 200 million guns currently in circulation result in youth gun deaths. The conclusions, based on analysis from the Harvard School of Public Health, point to specific opportunities to prevent most youth gun deaths, and some may be surprising:

- Approximately 50% of all youth gun deaths, or approximately 1,500 per year, are the direct result of children having access to guns from homes where the guns are “under direct parental control.” This is counter to the common misperception that the overwhelming majority of youth gun violence is related to “random crime,” gangs or drugs. The reality is that half of youth gun deaths are from suicides, accidents or homicides that simply would not have occurred had parents taken relatively simple steps to prevent a child from having access to a gun in their home.
- The remaining 50% of youth gun deaths, or approximately 1,500 per year, are caused by guns that are “not under direct parental control” such as youth-on-youth homicides from gang, drug and school violence. Encouragingly, there is substantial evidence that these types of gun violence can be prevented through simple measures that young people can take. For example, studies show that in most instances, young people other than the perpetrators are aware that a gun attack is going to occur before it does. However, due to social and safety concerns, young people are often not inclined to come forward with the information that could readily prevent a tragedy. As a result, many youth deaths from gun violence could likely be prevented simply by making it safe for young people to speak up, and inspiring them to do so.

We believe this first category of youth gun deaths, the half that occurs due to guns “under direct parental control,” represents a powerful opportunity to make the issue and its solutions matter to parents, including those with guns in their homes, on a level capable of changing key individual attitudes and behaviors, saving lives immediately and, ultimately, creating new, healthier, social norms.

The following is a breakdown of the three primary ways in which youth access to guns in homes leads to about 50% of youth gun deaths annually:

## *Unintentional Deaths*

Unintentional deaths related to firearms typically refers to deaths occurring either while hunting, when a gun is mistaken for a toy, when showing a gun to others, when the trigger is otherwise pulled unintentionally, or when a gun is dropped or mishandled.

Unintentional deaths are often considered a nearly negligible portion of overall gun deaths. Aside from the fact that on its own, 600 Americans, nearly a third of which are children, dying under preventable circumstances is an unspeakable tragedy, there is strong evidence that the actual number of youth gun deaths is significantly under-reported.

For example, unintentional firearm death rates are often based on the reports from medical examiners and coroners, and local policy often requires that these professionals classify any death resulting from one person shooting another as a homicide. Additionally, even if the police or legal system later declares the death unintentional, there is often no recourse available to change the initial classification. As a result, a significant number of youth deaths per year are mislabeled and miscounted as homicides rather than accidents. In one study focusing on Miami-Dade county, it was observed that over the course of four years, the actual number of pediatric unintentional deaths was more than four times the rate reported through the coroner’s classification.<sup>16</sup>

Regardless of the actual number of unintentional youth gun deaths, there is little question as to the causes and risk factors, as confirmed by a number of studies. The presence of unlocked guns in the home increases the risk to children of both accidental gun injuries and unintentional shootings. Research has demonstrated that residents in states with high levels of gun ownership are several times more likely to die as a result of firearm injury than in states with low rates of gun ownership.<sup>17</sup> Further, a gun in the home is four times more likely to be used in an unintentional shooting than in self-defense.<sup>18</sup>

In addition, storing guns safely, ideally by locking up guns unloaded with ammunition locked up separately, is a critical factor in preventing unintentional firearm deaths and injuries to children and young people.<sup>19</sup> However, in U.S. homes with children and firearms, 55% were reported to have one or more firearms in an unlocked place, and 43% reported keeping guns without a trigger lock in an unlocked place.<sup>20</sup> In 2002, over 1.69 million children under 18 were living in homes with loaded and unlocked firearms.<sup>21</sup>

## *Suicide*

Suicide is the most common cause of firearm death nationally, and the second most common form of youth gun death, after homicides.<sup>22</sup> Firearms are used in half of all suicides. Unlike suicide attempts using other methods, suicide attempts with guns are nearly always fatal.<sup>23</sup> Sev-

eral researchers have drawn a link between suicide and the presence of a gun in the home. For example, it has been demonstrated that keeping a firearm in the home increases the risk of suicide (by any method) by a factor of three to five and increases the risk of suicide with a firearm by a factor of 17.<sup>24</sup> Further, in over 80% of youth suicides involving a firearm, the firearm used in the suicide belonged to a family member, usually a parent. When information about storage status was available, about two-thirds of the firearms had been stored unlocked.<sup>25</sup>

Youth suicide is often an impulsive act. A study examining suicide deaths of youth under 18 found that at least one-third had experienced a crisis in the past 24 hours. However, the crises that lead to suicide are often short-lived; nine out of ten survivors of suicide attempts do not go on to die by suicide. Given that these crises are often temporary, the method of attempt plays a critical role in the outcome. Research suggests that by removing access to firearms in homes with adolescents, the risk of a youth suicide taking place in that home is greatly diminished.

### **Homicide**

About 40% of all gun deaths, and over two-thirds of all youth gun deaths, are classified as homicides. As explained earlier, studies have shown that this number is likely to be inflated, but regardless of the actual proportions, homicide is a significant cause of gun death in the United States.

However, evidence suggests that approximately 41% of all gun-related homicides would not have occurred under the same circumstances if guns were not present—this percentage is made up primarily of homicides committed by intimate partners and family members.<sup>26</sup> In addition, there is some evidence that youth gun offenders tend to rely on guns that are available in homes.<sup>27</sup> This evidence suggests that, like accidents and suicides, many youth homicides could be prevented through safer storage of guns in the home.

### **The Dangers of Guns in Homes: Making the Solutions Matter**

Approximately 50% of all youth gun deaths are the direct result of children and teens having access to guns either in the homes where they live or the homes of friends and family members. This means that if parents were to take some simple steps to store firearms more safely, most, if not all, of these deaths could be prevented.

There is extensive academic support for the fact that simply by storing firearms locked and unloaded, as recommended by the American Academy of Pediatrics, parents can dramatically decrease the likelihood of a child in their home dying from gun violence. Similarly, removing firearms from homes altogether brings the risk of a child dying from gun violence in that home to about zero. Although this point is somewhat obvious, given the political

and ideological debate and the fact that guns are used extensively for recreational purposes, it is not practical to seek to convince the majority of parents to remove their guns altogether.

Fortunately, it also is not necessary. The primary risk factor in the category of “guns under direct parental control” is unsafely stored firearms. By providing the American public with clear, unbiased information, through credible messengers, about the hazards associated with youth access to firearms in the home, including suicide, unintentional shootings, and homicide, and explaining how lives can be saved, by either removing firearms from the home or by storing them safely, we can inspire safer gun ownership and storage choices.

And, more important to policy activists, this also creates a *cultural intolerance of unsafe behavior*, similar to that created by the “Secondhand Smoke” campaign. It transforms gun violence from an abstract political debate into a simple and emotionally charged matter of responsible parenting. In the end, gun violence is not just a law enforcement, political or economic issue; it is a serious threat to public health and safety, one with existing solutions and one that cannot continue to be misunderstood or ignored. If the public is made aware of the facts behind the huge numbers of gun deaths, and shown how simple it would be to prevent them, and eliminate the risk to their own families, those who continue to leave guns accessible to children in their homes will not be abided.

As stated by David Hemenway at the Harvard School of Public Health, “If any other consumer product had this sort of disastrous effect, the public outcry would be deafening; yet when it comes to guns such facts are basically accepted as an unfortunate reality of American society.”<sup>28</sup> We must inform parents, and encourage them to view guns as they view cigarettes, motor vehicles, or any other product that has obvious risks associated with it. And we must create the “deafening public outcry” needed to create real change.

To this end, our organization has developed two distinct, but related, public education campaigns that work to educate and inspire parents, the ASK and Suicide-Proof Your Home Campaigns.

#### **ASK (Asking Saves Kids)**

The ASK (Asking Saves Kids) Campaign was launched in 2000 in partnership with the American Academy of Pediatrics. ASK is based on the facts that about one-third of homes with children have a gun, more than half of those guns are stored unsafely, either loaded or unlocked, resulting in roughly 12 million children under the age of 18 in homes with unsafely stored guns.

ASK inspires parents simply to begin asking if there are guns where their children play. By employing mass media and education to make parents aware of the dangers to their children associated with unsafely stored



guns in other homes, the ASK Campaign sparks a chain reaction of key attitude and behavior changes, leading to a social consciousness and awareness of the dangers of guns in homes with kids and peer-to-peer intolerance of unsafe behavior, ultimately leading to parents storing guns safely or removing them altogether, greatly diminishing or eliminating the possibility that those guns will cause an accident, murder or suicide.

In 2006, CPYV worked with the Harvard School of Public Health to assess the impact of a community-focused ASK Campaign in a controlled study. Using Rockford, Illinois, as the test market and Joliet, Illinois, as the control market, CPYV implemented a year-long campaign that involved mass media, grassroots organization and education, and participation from several local leaders and celebrities. The results of this study demonstrated a significant initial impact and substantial long-term promise, indicating that those who had been exposed to the campaign were more likely to be concerned about the presence of firearms when their children visit friends' or neighbors' houses, and were more likely to ask about the presence of guns in the homes where their children visit.

### **Suicide-Proof Your Home**

The Suicide-Proof Your Home Initiative is a comprehensive public information campaign that focuses on suicide prevention by lethal-means restriction. This approach is based on research by the Harvard School of Public Health showing that the method a person uses to attempt suicide plays a key role in whether he or she lives or dies. While about 85% of attempts with a firearm are fatal, many of the most widely used suicide attempt methods, including overdose and cutting, have fatality rates below 5%. Since 9 out of 10 of those who attempt suicide and survive do not go on to die by suicide, restricting access to lethal means such as firearms, particularly in the home, is crucial to lowering suicide rates and saving lives.

Focusing on individual behavior change around lethal means access, the Suicide-Proof Your Home Initiative educates parents directly about the simple steps they can take to keep guns and medicine away from their children. We partner with local public health and community organizations, using print resources and a media campaign to spread the word. As with all our programs, our organization works closely with our partners to tailor the campaign to the audiences and needs of each community.

The Suicide-Proof Your Home Initiative has been proven effective in influencing attitudes and behaviors, achieving dramatic positive results in our statewide campaign in Rhode Island in partnership with the Rhode Island Department of Health. In a phone survey conducted after the Rhode Island campaign, 72% of parents said it was "very important" to suicide-proof their homes, 33% had already made changes around the home to make their homes safer, and 17% were considering making such changes.

### **Next Steps**

We believe insights and programs like these have the potential to create the type of personal engagement and sustained public outcry necessary to achieving real social change around attitudes and behaviors around gun violence in the U.S. These campaigns speak to parents on an extremely personal level, creating awareness of the risks of unsafely stored guns, and leading to intolerance of dangerous gun storage practices. If taken to the national level and absorbed into the American consciousness, the four youth deaths every day that occur as a result of unsafely stored firearms will no longer go unnoticed. They will no longer fail to illicit public outrage.

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*"It must search for insights to make people care more deeply and more personally about the issue and to demand change of themselves and others—insights like protecting our children or faith and social justice."*

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### **Conclusion**

The gun violence prevention movement is in need of reinvigorating and re-energizing. After decades of battling the better funded, better organized gun lobby, trying to change a deeply entrenched status quo, with an almost irrational lack of concern from the American public, those who have dedicated their careers and, in many cases the better part of their lives, to creating positive change might be justified to feel frustrated. We are often amazed and inspired, however, to see how undeterred the core of the movement has remained.

Just as importantly, however, we are inspired by the opportunity that we are certain exists to turn all this noble work and dedication into real and lasting change. The missing element is the sustained and passionate engagement of the American public, on the basis of our individual and collective health, safety, and well being. We have seen how such insights can turn around analogous issues like tobacco, where the demands of the people can overcome the interest of big business and big lobbying to create almost unthinkable changes in social norms and policy.

The goals of the gun violence prevention movement are already attached to the best interests of the American people—to save lives—what is more fundamental than that? However, the gun violence prevention movement must also not fool itself into thinking that being right or being sensible is ever enough. It must search for insights to make people care more deeply and more personally about the issue and to demand change of themselves and others—insights like protecting our children or faith and social justice.

We at CPYV have seen how programs like The ASK Campaign and Suicide Proof Your Home show the potential that exists to change individual attitudes, behaviors and social norms around guns in homes. We are certain that they are not the only answers, but we are also certain that efforts such as these to engage the American public in solutions and create cultural change are an essential, and to this point underemphasized, part of the movement to create real and lasting change.

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**Dan Gross is the Co-Founder and Executive Director of The Center to Prevent Youth Violence (CPYV), one of the largest and most successful non-profit gun violence prevention organizations in the nation. He resigned as the youngest partner in the history of the J. Walter Thompson advertising agency to co-found CPYV after his brother was critically wounded in a shooting on the observation deck of the Empire State Building in 1997. Today, Dan is widely recognized as one of the most prominent national spokespersons on the gun violence issue, and CPYV's innovative and proven public health and safety campaigns have positively impacted tens of millions of children and families nationwide.**

**Note: Since this article was submitted, but prior to publication, Dan Gross has left CPYV to become President of the Brady gun violence prevention organizations.**

**Allison Dickin is Program Director of The Center to Prevent Youth Violence where she oversees the implementation and evaluation of CPYV's youth gun violence prevention programs. Prior to joining CPYV, Allison was a Senior Project Researcher for Public Affairs & Policy at Harris Interactive, where she managed quantitative and qualitative research projects for nonprofit and academic clients. Allison's background includes work experience in the private, public, and nonprofit sectors, and she has volunteered extensively both domestically and abroad. She holds a Master of Arts degree in Sociology from the University of Chicago, and a Bachelor of Arts degree in Sociology and Economics from Bucknell University.**

## Letter to the Editor

To the Editor,

“*Pataki v. Assembly: The Unanswered Question*,” by my friend Jim McGuire, in 13 *Government, Law and Policy* 11 (2011) significantly understates the problem the plurality created by deciding, in effect, that the Governor can insert the equivalent of substantive legislation into his or her budget bills which the Legislature cannot reject without rejecting the associated appropriation. McGuire argues that the Legislative threat to reject the appropriation can force the Governor to negotiate the legislative language. This argument fails to acknowledge the severe disadvantage the Legislature is likely to face when the appropriation supports popular spending programs.

When I first chaired the Assembly’s Committee on Correction, I and my Senate counterpart, Chris Mega, were able to impose on the Governor’s prison spending proposal what in those days we called “green book” language requiring each correctional facility in our State to offer a drug abuse treatment program. Legislative “green book” language no longer exists, thanks to the Court of Appeals. Perhaps that is as it should be. But if the Legislature cannot add “legislative” items to the budget, the Governor should not have effectively untrammelled power to do so either.

McGuire correctly points out that a sensible curb on that power would be difficult to devise. He is not correct, however, in arguing that the Court should not make the effort.

Sincerely,  
Dan Feldman

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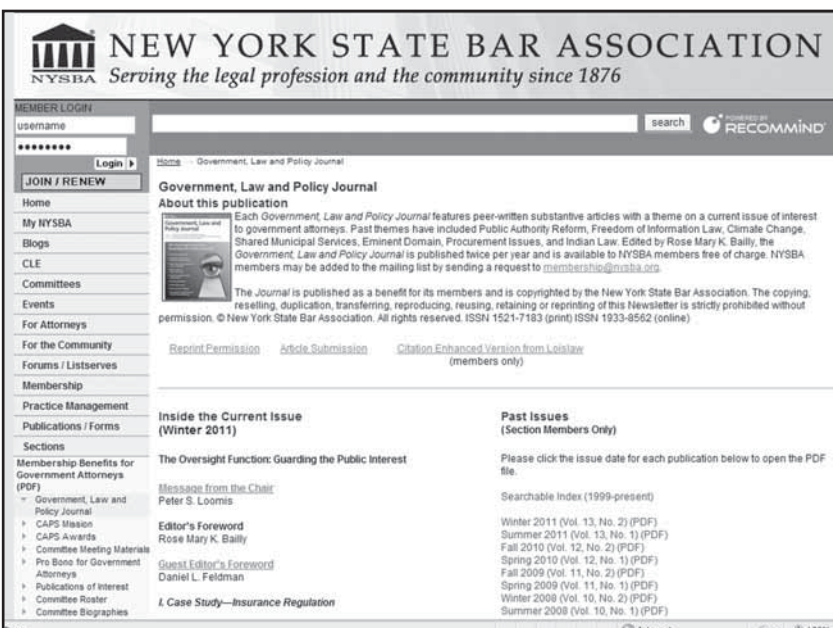
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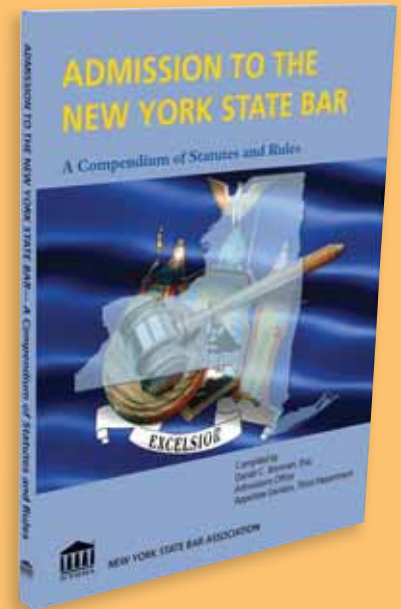
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