

A SYSTEMATIC APPROACH TO CONTROLLING FIREARMS MARKETS

By William J. Vizzard

A national system of gun registration and gun licensing would substantially assist the prosecution of felon-in-possession cases, without imposing unreasonable burdens on legitimate gun owners, argues William J. Vizzard. Professor Vizzard is an Associate Professor of Criminal Justice at California State University-Sacramento. Before that, he served as a Special Agent, Resident Agent in Charge, Group Supervisor, Special Agent in Charge, and Operation Officer (headquarters) for the Bureau of Alcohol, Tobacco and Firearms. He is the author of two books on firearms policy: "In the Crossfire: A Political History of the Bureau of Alcohol, Tobacco and Firearms" (1997) and "Evolution of Gun Control Policy in the United States" (1993).

I. Introduction

For over sixty years, the nation has debated the desirability of gun control.¹ Unfortunately, little of that discussion has focused on specific policy options and even less has engaged the details of administration and implementation of options.² The direct result too often has been ideologically driven policy discussions, in which both advocates and opponents emphasized symbolism and ideology, without providing detailed descriptions of policies.³ Even when the general outlines of policy have been delineated, inadequate attention has been given to crafting the details of policy.⁴ The result has been initiatives shaped primarily by political and symbolic concerns. Recent examples can be observed in the crafting of the Brady Law. Presumably seeking to reduce opposition to the bill from citizens suspicious of federal

authority, the drafters of Brady required record checks of buyers to be processed by local authorities. Opponents quickly responded with constitutional challenges under the Tenth Amendment reservation clause which succeeded before the Supreme Court.⁵ Efforts by several states and the federal government to prohibit assault weapons ignored the difficulties of definition and have been bypassed by manufacturers, who simply produce new models.⁶

Conversely, much of the research on gun control issues has been difficult to translate into concrete public policy proposals.⁷ Although increased funding by the National Institute of Justice has expanded the body of basic research in recent years, this work tends to focus on the current patterns of firearms acquisition and possession, particularly among youth. Only a few authors have attempted to examine the dynamics of firearms markets, and fewer still have considered alternative systems of market regulation. Legislative staffs and the bureaucracy display a conspicuous absence of detailed knowledge of the mechanics of firearms markets.⁸

II. The State of the Literature

The literature relating directly to details of firearms regulation is quite meager. Several authors have conducted critical examinations of the current federal gun control laws, although the majority of this work has been written by opponents of those laws and focuses on alleged abuses of citizens rights by the Bureau of Alcohol, Tobacco and Firearms (ATF).⁹ If we assume that abolition of all federal regulation of firearms commerce is no more likely than firearms prohibition, such critiques serve to provide little guidance as to the costs, benefits or preferable form of firearms regulation, particularly as such regulation would apply to controlling markets. Some scholars have attempted to describe the structure, vulnerability and incentives of illicit markets, without detailed evaluation options for molding those markets.¹⁰

Two articles, published concurrently, have addressed directly the details of market regulation and the links between the primary, or licensed commercial market, and the secondary, or unregulated market. Cook, Molliconi and Cole utilized a summary of available literature on firearms acquisition, possession and use to review the structure and interdependence of these markets and the effectiveness of the existing federal regulation for discouraging the acquisition of handguns by prohibited persons, particularly felons and juveniles; the authors then advanced some proposals for enhancing the effectiveness of those regulations.¹¹ Jacobs and Potter responded to Cook et al with a more detailed analysis of weaknesses in existing regulation and an evaluation of potential corrective measures to address these weaknesses.¹²

Cook et al focused primarily on the secondary firearms market, although they did address the primary market and its regulation in an effort to explain its impact on the secondary market.¹³ Their analysis of the available data suggests that the majority of firearms acquired for use in crime are acquired through the secondary market and that each new cohort of offenders must acquire new firearms.¹⁴ They concluded that most purchasers would prefer to acquire firearms from the primary market, where access and choice is greatest, but that existing restrictions on acquisition by felons, juveniles and other specified classes diverts many of these buyers to secondary markets.¹⁵

Although they admittedly could not calculate precisely the magnitude of the secondary market, they estimated that as many as fifty percent or more of all handgun acquisitions are from friends, relatives, unlicensed dealers, casual transfers, theft and unlawful sales by licensed dealers.¹⁶ Their conclusion confirms a position assumed by most of the critics of gun control, who have long argued that prohibited persons will simply bypass existing regulation. Cook et al countered, however, that regulation of the primary market does have influence on the secondary market by reducing supply.¹⁷

To decrease the flow of firearms to the secondary market, Cook et al suggested improvement in the existing procedures for

licensing and supervision of dealers by federal, state and local authorities and efforts to impact trafficking in stolen firearms.¹⁸ They also suggested extending the waiting period and record checks of handgun purchasers to transactions in the secondary market.¹⁹ Although Cook et al suggested more stringent regulation and extension of existing regulations, the details of such suggestions and a detailed analysis of implementation problems were not addressed.

Jacobs and Potter critiqued Cook et al by examining the weaknesses in the current regulation of the primary market and by reviewing potential difficulties with implementation of alternative schemes for expansion of regulation to the secondary market. They began by reviewing the Brady amendment to the Gun Control Act (GCA), which requires licensed dealers to obtain photo identification from a potential handgun purchaser and submit the name and identifying information to a Chief Law Enforcement Officer (CLEO) for a record check. If not notified by the CLEO that the purchaser is a prohibited person, the dealer can deliver the firearm after five business days.²⁰ Jacobs and Potter noted that there appears to be little risk associated with an attempted acquisition by a prohibited person, and that no means exists to determine what portion of ineligible buyers shift to the secondary market once denied.²¹

Jacobs and Potter found the effectiveness of the Brady procedures wanting on several other accounts. They characterized the underlying licensing structure upon which the entire process depends as weakened by inadequate procedures, oversight and regulation, which Jacobs and Potter attribute both to limits on ATF jurisdiction and resources.²² In this, Jacobs and Potter are closely aligned with Cook. Jacobs and Potter also find that the failure to identify handgun purchasers with fingerprints, the ease of using “straw purchasers” to bypass record checks, the lack of control on the secondary market, and limits on availability and accuracy of databases provide numerous

opportunities for bypassing Brady checks and thus limit Brady's potential impact on firearms acquisition.²³

Jacobs and Potter's greatest contribution to the literature is their detailed examination of the mechanisms available for enforcing Brady requirements and of potential alternatives for remedying the weakness inherent in the current structure.²⁴ As attorneys, they recognized the problems in developing evidence of violations of the Brady requirements by either the seller or buyer. This led them to examine alternatives for "thickening" the regulatory web, including Cook's proposal to extend Brady to private transactions.²⁵ They concluded that Cook's proposed amendment to Brady would be bypassed readily, thus leading to a call for the additional requirements of owner licensing and handgun registration.²⁶ They argued that owner licensing would be impractical because of the requirement for a "massive" new bureaucratic apparatus, the probability of widespread non-compliance, and the likelihood that it would not reduce crime.²⁷ They also conclude that national registration would be neither manageable nor enforceable.²⁸ Ultimately, they speculate, "Perhaps it would make sense to give up on the idea that there is some system of regulation that can prevent criminals from obtaining handguns."²⁹

III. Another View

Any effort to prescribe a system of market regulation for firearms based on available social science knowledge faces serious limitations that are unlikely to abate with further study or research. Social problems are not so much solved as altered.³⁰ The desirability of a change depends on a number of factors, cost and political will being primary among them. In addition, the exact outcomes of any social policy are seldom predictable in detail. Scholars can suggest possible models, calculate incentives, test opinions, and speculate on potential reactions, but only experimentation will ever answer fully the question.³¹ Even after

a policy has been adopted, pertinent behavior and reaction to that policy may change in response to social learning, changing values or an altered environment.

The inability to predict the exact outcome of policy is not, however, an argument against the examination of potential outcomes. Some policy is always in effect, even when the policy is *laissez faire*. Examination offers policy makers and the polity alternative perspectives and models. It helps to define options and identify interests, and, at its best, can provide criteria of evaluation policy implementation. The United States currently has in place a gun control policy, or rather a multitude of policies.³² Any effort to affect significant change in those policies in any direction will face significant obstacles.³³

This article is intended to offer specific proposals for rationalizing that policy, by addressing the gaps in the current regulatory scheme, while creating regulatory standards that are more uniform, understandable and easily followed than those currently in existence. It also attempts to expand the rational basis for a regulated market from a simply *ex ante* strategy. These proposals are not based on new research but on the existing literature and the author's many years of experience in implementing existing firearms policy.³⁴

A. The Utility of Market Regulation

Fairly widespread consensus has emerged in the literature that the present population of firearms in the United States exceeds 200 million,³⁵ that the composition of the population and markets has shifted away from sporting arms and toward handguns, assault rifles and combat shotguns, and that this trend is increasing.³⁶

The sheer magnitude of this reservoir of unrecorded and unregulated firearms has provided the most daunting argument against efforts at systematic regulation. Cook and his fellow authors came to an interesting conclusion, however, from their interview research with young offenders and other data. They postulated that most of the firearms used by young offenders are

newly acquired, and, “That each new cohort of violent offenders must obtain guns somewhere.”³⁷ Research reflects that sources consist of friends, relatives, theft, the secondary market and the primary market,³⁸ the latter being far less significant for young offenders than older ones.³⁹ This led the authors to the conclusion that policy should be crafted to disrupt supplies of firearms “leaking” from primary markets into these alternative sources, as well as preventing high risk individuals from obtaining firearms directly through the primary market. Kennedy reached similar conclusions from his examination of firearms use by youthful offenders in Boston.⁴⁰ Thus, the potential for reducing the flow of firearms to potential offenders, particularly youths, may be substantially more promising than the population numbers first imply.

B. An Alternative Paradigm for Utility

The justification for market regulation does not rest entirely upon the ability of such regulations to deny firearms ante facto to high risk persons likely to utilize them in criminal acts. An alternative conceptualization exists for the utility of firearm laws. American crime control policy has progressively shifted toward identification, arrest, prosecution and extended incarceration of serious, repeat offenders as the means of controlling serious crime. Although there is major controversy regarding the deterrent impact of these laws, the impact on the incarcerated offenders is undeniable. The opponents of firearm control, in fact, have been at the forefront of the post facto strategy of “getting tough on criminals.”⁴¹ Both advocates and opponents of gun controls, however, have conceptualized the value of controls almost solely as direct prevention strategies while ignoring their potential for facilitating incarceration strategies.⁴²

Changing sentencing structures, over the past decade, have significantly altered the potential impact of illegal firearm possession on many offenders. A person with three prior violent felony convictions is subject to a mandatory minimum fifteen-

year sentence under federal law if convicted of possessing any firearm.⁴³

Some states have gone even further. Under California's "three strikes" law, any person with two prior convictions for serious or violent felonies is subject to a 25 year to life sentence for a third felony conviction.⁴⁴ Under these statutes, serious offenders do not have to be convicted of murder, rape, robbery or other violent offenses to face extended incarceration. Simple possession of a firearm by persons in this high risk class is adequate. This fact allows for very effective proactive strategies by police and parole authorities that involve far less risk and more likelihood of success than strategies focused on apprehending these offenders in the course of burglaries or robberies.⁴⁵

Available research supports the rationality of using firearm laws in this manner. Wright and Rossi's survey of incarcerated felons revealed that a subset of about 20% of these felons accounted for about 50% of all felonies and most of the violent felonies reported by the sample.⁴⁶ This group also reported habitually acquiring, possessing and carrying firearms.⁴⁷ Subsequent survey research of arrestees and incarcerated juvenile offenders has produced data supportive of Wright and Rossi's findings.⁴⁸ A strategy of targeting this group of firearm predators for arrest and prosecution for firearms possession has the dual advantages that they are both vulnerable and appropriate targets.

With such severe sanctions, however, offenders seldom plead guilty and routinely seek any available strategy to avoid conviction.⁴⁹ Because witnesses in firearms possession cases are often police officers and because the elements of the crime are rather simple, the most effective defense strategies are to challenge the legitimacy of the search or to create doubt about proof of the element of possession.

Suppression of evidence obtained under the authority of a search warrant has, however, become extremely difficult under the good faith rule.⁵⁰ Guns seized without warrants are also

difficult to suppress under a variety of specific situations, including parole searches, searches contemporaneous with arrest, open view, consent, and so-called *Terry* pat-downs. By allowing officers to pat down or frisk specifically for weapons on a standard of reasonable suspicion, *Terry* significantly expands police authority in street encounters.⁵¹ Given the difficulty of suppressing searches in recent years, the most common defense has become an effort to raise reasonable doubt about the defendant's possession of the firearm.⁵²

Systems of licensing and controls on transfers provide investigators with several advantages in proving possession. In an uncontrolled environment, any third party who is not prohibited from possessing firearms, can, with little risk, come forward and claim possession of a firearm.⁵³ Thus, in most jurisdictions, a friend or relative of the accused can claim possession of a seized firearm, knowing that there is no record of transactions between individuals to disprove the claim nor potential of prosecution for failure to register the firearm or obtain a license. Although this defense is of little value when the firearm is recovered from the defendant's person, it is an effective strategy for raising doubt when the gun is recovered from a car or residence.

Licensing systems and transfer records deter this sort of perjury by creating risk of prosecution for both the perjury and the failure to comply with registration and licensing laws.⁵⁴ These laws also have potential for providing investigators other advantages. They furnish leads that allow investigators to locate witnesses and evidence relative to the history and ownership of the firearm.⁵⁵

Two specific examples from my own experience are helpful as illustrations of the utility of firearms records in establishing proof of possession. In the first case, a subject with multiple felony convictions fled police serving a search warrant at his residence. While being pursued across an open field at in the dark, the subject turned and pointed what appeared to be a handgun in the direction of pursuing police. One officer fired, and the subject continued running to a small lake, where he swam to

an island. A subsequent search by divers revealed a revolver in the mud at the bottom of the lake. The firearm was later traced through several owners to a residence where the suspect had been present a week before the incident.

In a similar case, an individual with multiple violent convictions was discovered in a small shed by officers responding to a report of gunshots. The officers also discovered a recently fired revolver hidden in the shed. Although the suspect denied any knowledge of the firearm, it was subsequently traced to a former girlfriend, who testified that the subject had taken it from her house.

Both of these individuals, who between them were responsible for at least five homicides,⁵⁶ were convicted in jury trials and received extended sentences. Both were potentially violent, criminally active and routinely carried firearms illegally. Unfortunately, these successful examples are less common under current law than cases in which the trail is cold.

In addition to providing means for incarcerating career offenders, firearm possession and transfer regulations can provide a wedge that allows police to solve other crimes. A highly visible example was provided by the arrest of Timothy McVeigh for carrying a concealed handgun, which led to the solution of the Oklahoma City federal building bombing.⁵⁷

A final advantage for the prosecution has little or no importance in law but much in practical litigation. Although lack of knowledge of a prohibition is no defense in law, it has significant potential to sway juror sympathy in status offenses. Bypassing a license requirement that is general knowledge provides strong evidence of knowledge and intent in cases involving possession of firearms by prohibited persons and may serve as evidence of prior intent in violent offenses.

C. The Deficiencies of Current Regulation

The existing literature concedes that the present mechanisms for controlling firearms dealers in the primary market are inadequate and that the law does not provide effective sanctions

to prevent licensed dealers from transferring firearms to the secondary market.⁵⁸ There is also consensus that transactions in the secondary market essentially are uncontrolled and uncontrollable under the present law.⁵⁹ The conclusion that the existing federal law is inadequate to regulate either the primary or secondary market is also widely accepted among those with experience administering the law.⁶⁰ This conclusion was not significantly altered by the passage of the Brady Act requirement for point of sale checks on handguns, primarily because it did not mandate a central index of sales records.⁶¹

The current regulatory scheme for firearms is primarily dependent upon a network of over 100,000 licensed federal firearms dealers.⁶² The Bureau of Alcohol, Tobacco and Firearms (ATF) lacks both the resources and the jurisdiction to assure compliance among such a large population⁶³ Besides having the burden of supervising a large number of dealers, ATF is constrained by an almost total lack of discretion regarding the issuance of licenses as well as by limits on inspection authority and sanctions. Under existing law, ATF must issue a license to any applicant over 21 years of age who states that he intends to engage in the business from a premises and that the business to be conducted will not in violation of state or local law. ATF may only deny the license if the applicant is a felon or falls into one of the other specifically prohibited categories, has willfully violated the federal firearms laws, or has made a false statement on the application.⁶⁴ Licenses are issued for three years, and the initial cost is two hundred dollars. A three-year renewal may be obtained for ninety dollars.⁶⁵

Once licensed, a dealer is obligated to maintain records of all firearm acquisitions and dispositions, obtain identification from all purchasers and provide identifying information on all handgun purchasers to the chief local law enforcement officer (CLEO) for a background check.⁶⁶ CLEOs are required to destroy all records of purchaser identity within 20 days.⁶⁷ Although the dealer is required to maintain a record of all acquisitions and dispositions, no central record or index of such transactions is

required or allowed.⁶⁸ ATF may inspect a dealer only once every twelve months to assure compliance with the law.⁶⁹

Assuring compliance is difficult under such circumstances. ATF has only about 1,000 inspectors to oversee manufacturers, wholesalers and retailers of firearms and explosives, as well as manufacturers and wholesalers of alcoholic beverages.⁷⁰ An in-depth audit of a large dealer can take a team of inspectors several days.⁷¹ In addition, many dealers operate from their homes and do not maintain regular business hours, making inspection both difficult and time consuming.⁷² More important, inspectors lack any effective means of determining what firearms a dealer has purchased, thus the most expedient means of foiling an audit is to fail to record the receipt of the firearm.⁷³

The lack of central indexes and cross-referencing precludes any effective means for randomly auditing dealers to determine compliance with records keeping and Brady reporting requirements. Although systematic tracing of firearms seized from prohibited persons and criminals will often point at a specific dealer, substantial time can elapse between the inception of such transactions and the detection of a pattern, during which illegal transactions continue to occur. In addition, such traces do not constitute proof and only provide the beginning point for what is often a protracted investigation.

For many years, ATF required only a name, social security number and date of birth from applicants for a license; however, fingerprints and photographs of the applicant are now required with an application.⁷⁴ This requirement, combined with more extensive licensing review, has made obtaining licenses under false identities more difficult, but applicants still are not subjected to the sort of in-depth background inquiry that would detect a well planned and executed effort at establishing a false identity.⁷⁵

Once firearms are sold by licensed dealers, all federal regulatory control ceases. Although federal law prohibits sales by individuals to minors, out-of-state residents and persons prohibited from receiving and possessing firearms, no regulatory mechanism

exists to record transfers or require reporting by transferors or transferees.⁷⁶

D. Gaps in the Criminal Law

Although the gaps in the regulatory structure have been documented by previous writers, equally important gaps in the criminal law have received less attention.⁷⁷ The problem of detecting and prosecuting “straw” purchasers, who execute purchase documents as surrogates for prohibited persons, with or without the knowledge of the dealer, requires little explanation. Although an illegal transfer takes place between the purchaser of record and the ultimate recipient, the transaction record reveals no violation. Dealers, who knowingly participate in the conspiracy, are also criminally culpable. Such transactions, however, are difficult both to detect and to prove. They take place in private, with all knowledgeable parties motivated to conceal the details.

Although the majority of dealers apparently comply with the law, the potential impact on the availability of firearms in the secondary market of even a small percentage of dealers under the current structure is significant. Because dealers can order unlimited numbers of firearms without attracting any attention and can operate illegally for a substantial period before detection, a single dealer can divert numerous firearms before action can be taken to stop him.⁷⁸ Although effective prevention through systematic monitoring offers numerous advantages over dependence on deterrence through criminal prosecution, by default the current legal and regulatory structure places primary dependence on prosecution. Yet the law contains significant barriers to effective prosecution of licensed dealers engaged in unlawful transactions and traffickers who act as conduits between the dealers and ultimate purchasers.

Two significant changes to the federal law by the 1986 McClure-Volkmer amendments substantially weakened ATF’s capacity to prosecute illegal trafficking.⁷⁹ The first of these changes applied solely to licensed dealers. Falsification of records

by dealers was reduced from a felony to a misdemeanor, regardless of quantity of firearms or circumstances.⁸⁰ Although transfers to prohibited persons remained a felony, such transfers are far more difficult to prove than falsification of, or failure to maintain, records.⁸¹

Prosecuting unlicensed traffickers also became considerably more difficult after McClure-Volkmer because of revisions in the definition of what activity constituted engaging in the business. The revised definition requires the expenditure of time, attention and labor as a regular course of business, with the principal objective of livelihood and profit, and excludes transactions for the purpose of enhancing a collection.⁸² This definition has afforded such rich potential for defenses against charges of unlicensed dealing that prosecutions declined precipitously and have remained rare.⁸³

A direct result of the McClure-Volkmer amendments was to curtail radically virtually all prosecutions of unlicensed dealers and place additional dependence on undercover investigations of licensed dealers.⁸⁴ In addition to the usual difficulties created by issues of logistics and entrapment, undercover investigations of licensed dealers are complicated further by current interpretation of the law prohibiting delivery of firearms to prohibited persons. Prohibited purchasers seldom are motivated to cooperate and lack credibility. No audit trail exists to substantiate transactions. Thus, in the majority of cases, the only option is to utilize an agent, or an informant under an agent's control, to make purchases of firearms from the dealer⁸⁵—a tactic used sparingly by ATF because of ATF's political sensitivity to gun interests.⁸⁶

Because agents provide greater credibility, superior understanding of the law and far more reliability, they are the better choice, yet informants are the only option in most instances.⁸⁷ Although the law prohibits the transfer of firearms to persons a dealer knows, or has reasonable cause to believe, is in one of the prohibited categories, current interpretation requires that the recipient actually be a member of the prohibited class for

the crime to be complete.⁸⁸ Thus, ATF must regularly depend on actual felons or other prohibited persons, rather than on trained agents, to make undercover purchases and later to testify in these politically sensitive cases. Such informants often prove to be less than ideal witnesses.⁸⁹

Because record falsification was reduced to a misdemeanor, however, such complex investigations are routinely necessary to establish a felony violation that will be prosecuted. The existing law and regulations, therefore, provides neither regulatory controls nor criminal deterrents effectively to prevent unlicensed dealing or unlawful trafficking by licensed dealers. Additionally, sanctions for these offenses are quite lenient.⁹⁰ In spite of this, most licensed dealers apparently make a diligent effort to comply with the law.

IV. Improving the Existing System

Cook et al and other gun control advocates have focused substantial attention on the failure of ATF to reduce the large number of so-called “kitchen table dealers,” who obtain licenses for their own convenience but do not, in fact, engage in the firearms business.⁹¹ The additional licensing requirements included under the Brady Amendment, which require fingerprints and a photograph from each firearms dealer applicant and raise the cost of an initial three-year license from 30.00 to 200.00 dollars, have significantly reduced the number of dealers. That reduction appears to be concentrated among those not engaged in commercial enterprises.⁹²

License demand, therefore, appears to be rather inelastic, at least among marginal dealers. Pricing structure appears to offer an effective means for regulating the number of dealers without bureaucratic intervention. A fee that would cover the costs of a reasonable level of regulatory oversight, say one thorough inspection per year, would further reduce the number of dealers, be equitable and be likely politically palatable.

The exact level of such a fee would require some analysis; however, a rough estimate is about 350 dollars per year, with a larger fee for initial processing.⁹³ Current fees are 200 dollars for the initial three-year license and 30 dollars per year for a three year renewal.⁹⁴ Thus, any fee based on the minimum cost of administrating licenses would likely reduce the number of licensees significantly.

Such a change would also shift the cost of administration to those who benefit: the dealers. It is likely that the number dealers remaining under such a system would not overtax ATF's existing resources. If, however, additional resources were needed, licensing fees would provide revenue to offset the needed increases in staff.⁹⁵ A likely side effect of a decreased number of licenses would be an increase in the value of a license to the remaining dealers. The increased opportunity cost of losing a license would provide greater incentive to comply with law and regulations.

Since the passage of the GCA in 1968, ATF has attempted to identify licensees not legitimately engaged in the business and to convince them to surrender their licenses. In a few cases, ATF has refused to renew licenses to individuals who cannot provide evidence of being engaged in the business. This strategy has been a multifaceted failure.⁹⁶

The requirement to issue a license to any qualified individual who declares an intention to engage in the business from a premises puts ATF at a distinct legal disadvantage.⁹⁷ The criteria have always been ambiguous; volume alone is no indicator of intent to do business.

In addition to difficulties of administration, the engaged-in-the-business standard created serious credibility problems for ATF's enforcement efforts.⁹⁸ Administratively, ATF advised individuals who sold only a few firearms to friends and associates that they did not meet the standard for engaging in the business and should turn in their licenses. At the same time, agents were using a like number of sales to undercover agents to prove other

individuals were engaged in the business without a license. Although examination of the details of the cases revealed far less contradiction than appeared on the surface, such actions undercut ATF's legitimacy and held it up to ridicule by interest groups and Congress.⁹⁹

The majority of these licensees, who are not engaged in active commerce, are also not engaged in illegal trafficking.¹⁰⁰ The primary difficulty they create is the regulatory burden generated by their numbers and the cover those numbers provide to the few illegal traffickers who hide among their ranks.

Although the increase in licensing fees is likely the least complex and controversial means of reducing the number of dealers, it does not address all the weaknesses in the current licensing process. While current law requires that applicants certify that the business would not be prohibited by state or local law, no provision is made for ensuring that dealers comply with such laws as a condition for obtaining and retaining a license.¹⁰¹ No authority is granted for ATF to deny, revoke or suspend a license for reasons of public interest. A modest expansion of ATF authority to deny or revoke licenses for violation of state or local law or for the public interest, with a right of appeal, would address these issues.¹⁰² In light of the significant role that stolen firearms appear to play in the secondary market, minimum requirements for business premises security also deserve consideration.¹⁰³

If fees were raised, oversight increased and minimum security standards enforced, there would be no reason to continue the requirement that a licensee be engaged in the business. This requirement has created substantial complexities in enforcing the law and undercut ATF's legitimacy. If compliance with record keeping and reporting requirements is reasonably assured and the dealer licensing fees cover the cost of that assurance, the requirement cannot be justified on the grounds of utility or equity. Nearly 30 years of experience with the engaging-in-the-business requirement has demonstrated that this criterion is neither workable nor useful.¹⁰⁴

V. Moving Beyond Brady

Jacobs and Potter cite a number of structural weaknesses that undercut the utility of the current Brady background checks of handgun buyers, beginning with the potential for use of false identities by handgun buyers.¹⁰⁵ They characterize the problematic result of false identity solely as the frustration of the background checks of persons purchasing handguns from dealers. In addition to this obvious problem, the use of false identities undercuts the utility of current law by thwarting firearms tracing, aiding traffickers acquiring firearms for sale in the secondary market, and facilitating false records keeping and illegal transactions by dealers. Audits become difficult or impossible when dealers can simply portray themselves as victims of falsified documents. In cases involving dealers who have sold numerous firearms unlawfully, subsequent audits of their records routinely reveal sales to non-existent persons.¹⁰⁶ Although these entries are likely efforts by the dealers to disguise illegal transactions, there is virtually no means of determining this.¹⁰⁷

The best means of addressing the identity problem was anticipated by Jacobs and Potter. Purchasers could be identified and licensed in advance. This approach virtually assures an accurate search for criminal records through the use of fingerprints and precludes obtaining multiple licenses under false identities.¹⁰⁸ Licensing gun owners in advance would facilitate more efficient background checks, eliminate confusion in identification due to similar names and dates of birth, prevent the use of false identities and eliminate the need for repetitive checking of records with successive firearms purchases.¹⁰⁹

Such a system would present serious political and organizational difficulties. Some entity would have to conduct this function, and funds would be required to support the activity. Establishing a new bureaucracy in an era so hostile to

government seems an unlikely feat. There are, however, several structures already in place that could be utilized to implement licensing without beginning from scratch, and license fees could offset any added costs.

Ironically, pro-gun organizations already have succeeded in establishing potential precedent procedures in the form of permissive license-to-carry statutes in a majority of states.¹¹⁰ The procedures for issuing these licenses generally consist of requiring applicants to be fingerprinted and then checking their backgrounds to assure that they are not prohibited from possessing firearms.¹¹¹ A demonstration of some basic competency with firearms and a minimal knowledge of law regarding the carrying and use of firearms is also routine.¹¹²

Even before such permissive license-to-carry laws began to sweep the country, many states required hunter safety training for juveniles and, in some cases, adults, as a prerequisite for obtaining a hunting license.¹¹³ These programs have the backing of the firearms lobby, and the NRA has long supported mandatory hunter safety training since its inception in 1949.¹¹⁴

Drivers licensing provides an equally applicable model which applies to a larger population than gun owners. Motor vehicle departments could incorporate firearms licensing into their operations. They already have widely dispersed offices and routines for testing and licensing.¹¹⁵

Creation of an owner licensing system would not essentially overcome all efforts to acquire firearms using a false identity; theoretically, one could utilize a fraudulent license to defeat the system. This would be far more difficult than defeating the current system, however, because purchaser's identification would be matched to a known, finite population of identified individuals. A requirement for online verification of license status and information at the time of sale would necessitate that a fraudulent license duplicate the number, name and description of a valid license to be useable.¹¹⁶ Requirements that the dealer obtain a thumb print would provide a highly effective means of

identifying and prosecuting a fraudulent purchaser once suspicion was drawn to the sale for any reason.¹¹⁷

Any national licensing system should meet several criteria. It would be best administered by the states, subject to minimum federal standards. The states have the apparatus and the experience to perform this function and the federal government does not.¹¹⁸ Any federal effort to mandate or encourage state systems would have to meet the most recent interpretation of the Tenth Amendment restrictions on federal mandates.¹¹⁹ The most expedient and direct means of doing this would be to require states to establish such procedures as a condition for the continued issuance of firearms dealers licenses in the state.¹²⁰

A less coercive, and likely more politically palatable, option would be to create a federal license but waive the requirement in states that provide essentially equivalent procedures. By requiring minimum standards for licensing, Congress could assure uniformity and establish a basis for reciprocity.¹²¹ These standards should include fingerprinting and records checks to preclude persons prohibited by state or federal law from receiving or possessing firearms, some minimal but reasonable test of proficiency and knowledge, and application of the license to all firearms in any legal class.¹²²

Although the Brady Act's first phase only addressed handguns, as do the majority of advocates for firearms controls, licenses should apply to all firearms and not just handguns.¹²³

States could establish any additional standards for licensing they deem appropriate, although current law would imply that all states would issue licenses for rifles, shotguns and handguns to any applicant meeting the minimum standard, although Washington, D. C., would not issue handgun licenses.¹²⁴

Reciprocity among states could be guaranteed under the interstate commerce authority so long as the non-resident is not engaged in an activity prohibited for residents of that state.¹²⁵ Such a provision would guarantee law abiding gun owners the ability to transport their firearms to other states for lawful

purposes, without fear of encountering burdensome licensing requirements, just as licensed drivers are now assured such reciprocity without the need for a new federal bureaucracy.

The keys to winning the acceptance of uniform firearms regulation with the majority of firearms owners are simplicity and uniformity. Local option for regulating firearms possession at the city or county level directly undercuts that principle. While there is no constitutional means for Congress to mandate preemption statutes in the states, advocates of firearms control could drop their historic opposition to such laws in favor of more comprehensive legislation.

Although municipal autonomy provides control advocates with a tactical advantage,¹²⁶ the resulting patchwork of city and county ordinances needlessly burdens law abiding gun owners by imposing widely varied requirements and standards for possession, ownership, and transportation within states and even within metropolitan areas. Such a melange of statutes eliminates all the benefits of a standardized licensing scheme, with little practical value in controlling the commerce in firearms.¹²⁷ One need only imagine the impact of city and county licensing of drivers, without reciprocity, to understand the impractical nature of such laws.¹²⁸

VI. Balancing Interests

A shift by control advocates from the strategy of supporting any gun control measure to a more focused agenda that rejects options which serve primarily to burden gun owners or buyers, without corresponding potential for benefits, would undercut the perception that control advocates seek only to harass gun owners with little concern for utility.¹²⁹ A standardized licensing system would also benefit gun purchasers by eliminating the need for any sort of waiting period and restrictions on most out of state firearms purchases. Current technology would allow instant verification of the current validity of any license, and the use of

thumbprints on records of transfer would provide irrefutable evidence of identity.¹³⁰

Although it would be unreasonable to assume any political support for national licensing from firearms interest groups, every effort should be made to craft proposals to minimize the burden on gun owners and maximize benefits to them for several reasons. First, all public policy in a democracy should seek to minimize the burden on citizens, and gun owners are citizens deserving of respect. Second, public policy that is simple to comprehend and easily complied with will surely be easier to administer and generate more voluntary compliance than policy that is confusing and difficult to comply with. Finally, proposals for unreasonable, arcane, complex or burdensome regulations and procedures serve to enhance opposition to all firearms regulation. Gun owners are not of one mind on firearms regulation, and much of their opposition apparently is rooted in an assumption that all regulation will lead to confiscation.¹³¹

Although constant public debate of some sort of gun regulation may serve to reinforce interest in and support for organizations advocating gun control, such debates also reinforce the opponents of controls and legitimate the argument that all control proposals are elements in an effort to prohibit all private gun ownership. Gun control has hovered at the margins of the public policy agenda in the United States because the system will not pursue policy that impacts such a large portion of the population until acceptance of the need for and utility of the policy is overwhelming.¹³² Gun control policy will undergo meaningful change only if the majority of the American public, including gun owners and those who viscerally dislike guns, accept that not every control proposal is a stalking horse for prohibition.¹³³

A. The Role of Records and Registration

A critical weakness of the Brady Act was the prohibition against retention of sales records. Sales records allow identification of repeat “straw purchasers”¹³⁴ or anyone buying

large numbers of firearms in the primary market for resale in the secondary market. Such records also preclude licensed dealers from being able to destroy evidence of illegal transactions by suddenly losing their records before an audit.¹³⁵ They also facilitate instant tracing of firearms, rather than the currently laborious and often unsuccessful process of tracing through calls and visits to dealers.¹³⁶ An immediate trace often proves more useful to an investigator than information at a later date.¹³⁷

Dealer sales reporting systems provide strong incentives for dealers to comply with the law by creating a permanent record of past transactions and by requiring dealers to either report questionable transactions or risk documenting their knowledge and intent by not reporting the transaction. Failure to report a transaction involving a prohibited person strongly implies knowledge and illegal intent. However, sales records are not registration. Registration requires compliance by not just a limited population of licensed and regulated dealers but by millions of people.

Sales records only record transactions by dealers, leaving all transactions in the secondary market unrecorded. Since the secondary market is the primary source of firearms used in crime, any comprehensive system of market regulation should logically address these transactions. To do so leads almost inevitably to registration, without which secondary transactions disappear into oblivion once completed. Cook et al's recommendation for the extension of the Brady background checks to all private transactions includes no requirement for registration.¹³⁸ California has already experimented with such a requirement and the results have been disappointing.¹³⁹ Inevitably, critics of registration will cite the task of accomplishing registration of the existing inventory of over 200 million firearms as the primary barrier to any such suggestion. Creating incentives to register existing firearms does present more difficulties than accomplishing automobile registration.¹⁴⁰ Efforts to accomplish voluntary registration of assault rifles in California have been less than fully successful.¹⁴¹

Unquestionably, many persons would not initially register their firearms. The perception that registration will lead directly to confiscation is apparently rather widespread among gun owners. This would be a major difficulty for both policy makers and implementers. However, it is not insurmountable. Although it would be impractical and probably counter-productive to prosecute most persons who simply failed to register a firearm, other alternatives for incentives exist. For violators who were not otherwise prohibited from firearms possession or engaged in commercial transactions, seizure and forfeiture of unregistered firearms would provide a strong incentive for compliance, without the need for costly criminal litigation.¹⁴²

Over time, as more people came to understand that registration was not linked to confiscation but that non-registration was, compliance likely would grow. Policy should be predicated on the assumption that gun owners represent a broad cross-section of the population, most of whom are law abiding and rational. If provided with incentives and treated with respect, tolerance and patience, most will presumably comply with the law as they always have.

The example of assault weapons in California offers an imperfect experiment with mixed results. Although all the covered firearms were apparently not registered, a substantial number were,¹⁴³ in spite of the fact that the owners of these weapons are very likely drawn from the most ardent opponents of gun control and that the law imposed significant burdens on registrants.¹⁴⁴

Presumably, there would always be some illicit market composed of individuals who could not lawfully possess firearms. The point of a more regulated market would be to impose as many obstacles as possible to the acquisition of firearms by these persons and to increase the risks and costs for the unlawful possession, carrying and trafficking of firearms. The goals would be two-fold: to cause the less determined members of this population to acquire, possess and carry fewer firearms, and to

remove from circulation the maximum number of serious offenders who persist in doing so.

If the standard for success is universal compliance, no system of firearms regulation could ever be justified. Jacobs and Potter cite the failure of numerous individuals to comply with drivers licensing and vehicle registration requirements as precedents for the firearms licensing.¹⁴⁵ They are, no doubt, correct in their analogy. Yet they make no suggestion that drivers licensing be terminated nor that automobile registration cease. The overwhelming compliance with these laws among the majority of the population may be an equally apt analogy for firearms licensing and registration. Likewise, the utility of vehicle and driver regulation in opening investigative doors to more serious crimes parallels the potential for similar benefits from firearms regulation.

B. A Questions of Incentives

Ultimately, the impact of regulation on firearms markets depends upon the linkage between the primary and secondary markets and the ability of policy makers to shape incentives in both markets. Molding incentives for licensed dealers is not difficult. By limiting the population of the licensees through fees, stricter licensing procedures and security requirements, the value of a firearm dealer license would be increased, thus raising the cost of losing a license.¹⁴⁶ By concurrently increasing supervision of dealers, allowing a variety of sanctions for non-compliance and creating a records system that both reveals and documents violations, the potential cost of illegal transactions by dealers could be significantly increased. If effective regulatory action minimized the number of violations, the probability of criminal prosecution would increase for the remaining, more willful violations of law.¹⁴⁷ It is, therefore, likely that a system can be designed to significantly reduce the direct flow of firearms from the primary to the secondary market. Unfortunately, this does not address individual casual sales or traffic in stolen firearms.

The secondary market, however, appears to be the more important source of firearms illegally possessed and used by both juveniles and adult offenders.¹⁴⁸ Low volume, dispersed transactions in the secondary market are particularly difficult to regulate. If the transfer is a private transaction and the recipient is an unwilling witness, no evidence is available to prove the crime. Although repeat traffickers may be deterred through undercover law enforcement operations, those transferring an occasional firearm to an acquaintance or relative face no risk.

Several possible strategies exist to deter these transactions in all but the most criminally prone portions of society. Transfers in violation of law would subject the transferor to potential civil liability in cases of subsequent misuse. Firearms not registered or lawfully transferred could be subject to seizure and forfeiture, thus losing all value in the primary market. Perhaps the greatest potential incentive, for the substantially law abiding citizen, would be to impose a loss of future license eligibility upon conviction for a firearms offense.

Alternatively, many persons living at the edge of the law or engaged in crimes not requiring firearms likely would be deterred from making transfers or even possessing firearms by concern that these actions might bring unwelcome police attention. Any registration system presumably would become progressively more effective as the inventory of unregistered firearms declined and the likelihood of sanctions would likewise increase as the number of violations dropped.

C. Stolen Firearms

The least predictable outcome to an expanded system of regulation would be the impact upon gun thefts and traffic in stolen guns. Presumably, an effective regulatory system would reduce the supply of firearms in the secondary market and increase the value of those remaining. Thus, the value of stolen firearms should increase, at least to the criminally prone. This might increase thefts, although burglars and thieves routinely take guns whenever they encounter them already.¹⁴⁹ Dealers would

likely become even more inviting targets for theft than they are currently, thus the need for security standards as a part of the licensing process.

If the supply of firearms in the secondary market could not be increased through theft, the result would be higher prices and more competition for the limited number of guns available. This should push marginal purchasers, such as young offenders, out of the market. If this pattern developed, the secondary market progressively would be perceived as illicit and demonized. Such demonization is normally associated with increased public condemnation, police attention, and severity of sanctions. Any of these reactions would increase the cost of trafficking in stolen or unregistered firearms and raise the price.

A more costly and scarce market would surely have some impact on individuals who routinely use or carry firearms illegally, although, the level of that impact is an exercise in supposition. The quality of arms used and carried by those excluded from the primary market would likely decline. Although determined offenders would continue to obtain firearms, they would have to invest more time and resources, and many would have to settle for whatever was available. This pattern is observable in states that currently restrict firearms access.¹⁵⁰ The logical reactions for such a situation are to use, carry and transfer of firearms less often. Indiscriminate carrying, which can result in arrest and confiscation of the firearm, would be the activity most likely to be reduced. Although retention of firearms after illegal use would increase the risk of conviction, disposal of a firearm would represent a greater loss of stored value and would often generate the need to locate a scarce replacement.

A registration and licensing system would have one certain result in relation to stolen firearms. Currently, many stolen firearms either are not reported, or the victims fail to provide serial numbers to police.¹⁵¹ Thus, these firearms are not subject to seizure and forfeiture unless found in possession of a prohibited person. A registration system would increase the incentive of legal owners to report thefts accurately and would assure serial

number availability when reports were made. Even in cases where thefts were not reported, guns would be subject to seizure for non-registration or would be traceable to their legitimate owners.

VII. Conclusions

Although all outcomes of a well-crafted registration and licensing system are surely unknowable, a few conclusions can be drawn. Any such system would cost money to operate and impose some burden on gun owners. Tying licensing and transfer fees directly to the cost of system operation would protect gun owners by limiting fees and preventing the utilization of exorbitant fees as a de facto system of prohibition and would remove the cost of operation from other taxpayers. The regulatory burden need be no more than that imposed on drivers and vehicle owners, and gun advocacy groups already have supported similar licensing requirements for hunters and persons licensed to carry concealed weapons. Concurrently, all waiting periods for gun purchases could be eliminated, and issues of identity and unresolved status could be resolved once and not revisited.¹⁵² The public would be assured that firearms licensees met some minimum level of competency and that licenses could be revoked upon a change in status.

Adjusting fees and moderately modifying laws governing dealers could reduce the number of licensed firearms dealers and increase the risks associated with diverting firearms from the primary market to the secondary market increased, all without arbitrary and intrusive action by regulators. Thus, the supply of firearms in the secondary market would be reduced, and costs would increase. The semi-legitimate secondary market of gun shows and private sales through newspapers would cease or be greatly altered. The more casual secondary market would be affected in ways not easily predicted but would become more like

other illegal markets. The human reactions to these changes are the most difficult to predict.

For police, the proposed changes would provide enhanced mechanisms for using firearms statutes to arrest and convict career offenders. Police also would have more information on stolen firearms, more justification for firearms confiscation and more information in investigations where firearms were involved. Like all regulatory schemes, firearms registration and licensing would shift some power to the state. Thus, for libertarians of either the right or left, it is not appealing. Yet, in a society that requires licensing and registration for activities bordering on necessity, such as vehicle ownership and driving, these intrusions seem rather modest. Universal licensing and registration would not constitute the introduction of gun control but the replacement of the current patchwork of regulation with fewer, more uniform controls.

Many opponents of firearms control will oppose any initiative.¹⁵³ Minimalist strategies have not succeeded in winning them over and may have enhanced their opposition by following an incrementalist model that they interpret as leading to prohibition. The model offered here is neither minimalist nor incrementalist. It is offered neither as a symbolic nor real step toward some future agenda, but as an end in itself, with the understanding that it will not eliminate firearms violence in the United States. A system of firearms regulation places some burden on gun owners. This proposal accepts that reality but attempts to balance those burdens with a system that is simpler, more understandable, more uniform and more effective than the current system.

ENDNOTES

1 William J Vizzard, *Evolution of Gun Control Policy in the United States* 281 (1993).

2 *Id.* Franklin E. Zimring, *Reflections on Firearms and the Criminal Law*, 86 J. Crim. L. & Criminol. 7-9 (1995).

3 William J. Vizzard, *The Impact of Agenda Conflict on Policy Formulation and Implementation The Case of Gun Control*, 55 Pub. Admin. Rev. 346 (1995).

4 *Id.*

5 *Printz and Mack v. United States*, --U.S.--, 138 L. Ed 914 (1997).

6 Interview with Steven Helsley, currently California legislative representative for the National Rifle Association. Helsley served as the primary technology adviser to the California Department of Justice and legislative staffs during adoption of the assault weapon bill in California. At that time he was Assistant Director of Law Enforcement for the California Department of Justice. Helsley advised that virtually every affected firearm, with the exception of those produced by Calico, has been modified and is now available in its new form. My own observations confirm this.

7 Zimring, *supra* note 2.

8 This is based on numerous interviews of Congressional and California legislative staff members by the author in 1993, as well as on twenty-seven years experience in the Bureau of Alcohol, Tobacco and Firearms, although that agency is currently engaged in joint efforts with the National Institute of Justice to develop a data base on illegal markets. *See also* Philip J. Cook, Stephanie Molliconi and Thomas B. Cole, *Regulating Gun Markets*, 86 J. Crim. L. & Criminol. 59 (1995).

9 Examples of the critical views can be found in David Hardy, *The BATF's War on Civil Liberties* (1979) and David B. Kopel & Paul H. Blackman, *No More Wacos: What's Wrong with Federal Law Enforcement* (1997). These works do not engage in detailed analyses of the mechanics of the laws as much as they advocate the position, based on a limited number of alleged incidents, that federal firearms regulation inevitably leads to violation of individual gun owner's rights. An alternative view and analysis of the difficulties in enforcing existing law is available in William J. Vizzard, *In the Crossfire: A Political History of the Bureau of Alcohol, Tobacco and Firearms*, 45-74 (1997).

10 Mark Moore characterized the firearms market as being divided into two segments, one regulated and the other not, with the unregulated market serving as the primary source of supply for criminal activity. *See Keeping Handguns from Criminal Offenders*, 455 *Annals of the Amer. Acad. of Pol. & Soc. Sci.* 102 (1991). Gary Kleck has argued that more effective long guns will be substituted for handguns if only the latter are regulated. *See Handgun Only Gun Control: A Policy Disaster in the Making*, in *Firearms and Violence: Issues of Public Policy* (Don B. Kates, ed., 1984).

Daniel D. Polsby has presented an economic model that assumes perverse results from restricting firearms markets predicated on the assumed higher marginal value of firearms to criminals. *See The False Promise of Gun Control*, *Atlantic Monthly* (Mar. 1994), at 60-62 and *Firearms Costs, Firearms Benefits and the Limits of Knowledge*, 86 *J. Crim. L. & Criminol.* 207, 220 (1995). Philip J. Cook has offered economic model of firearms markets that supports an opposite conclusion: that regulation will impact acquisition of firearms by felons and juveniles. *See Perversity, Futility and Jeopardy: An Economic Analysis of the Attack on Gun Control*, 59 *Law and Contemporary Problems* 91 (1996). David M. Kennedy et al have also argued that raising costs can disrupt illicit gun markets, particularly those supplying youthful offenders. *See Youth Violence in Boston: Gun Markets, Serious Youth Offenders, and A Use Reduction Strategy*, 59 *Law and Contemporary Problems* 178 (1996).

11 Cook, *supra* note 8.

12 James B. Jacobs and Kimberly A. Potter, *Keeping Guns Out of the "Wrong" Hands: The Brady Law and the Limits of Regulation*, 86 *J. Crim. L. & Criminol* 93 (1995).

13 Cook and others have differentiated between the primary market, consisting of sales by licensed dealers, and all other sales, legal or illegal. *See Cook, supra* note 8.

14 Cook, *supra* note 8, 63-64.

15 *Id.* 68-71.

16 *Id.*

17 *Id.* at 73.

18 *Id.* at 78-87.

19 *Id.* at 87.

20 Jacobs & Potter, *supra* note 12, at 99.

21 *Id.* at 100-101.

22 *Id.* at 104-5.

23 *Id.* at 105-7.

24 *Id.* at 110-12.

25 *Id.* at 112.

26 *Id.* at 115-18.

27 *Id.* at 116.

28 *Id.* at 118.

29 Jacobs & Potter, *supra* note 12, at 119.

30 As examples, lowered infant mortality generates population pressures and improved health care demands for services for the elderly. This article assumes that no system will eliminate crime with firearms.

31 Although the conclusions here are the author's, a similar conclusion was expressed by Gary Kleck at the October 1997 meeting in San Diego of the American Society for Criminology in response to a question from David Kopel as to why Kleck supports controls on firearms transfers.

32 Vizzard, *supra* note 1.

33 Vizzard, *supra* note 3, at 347.

34 The author spent 27 years as a special agent, supervisor and manager in ATF. Twenty-four years of that time involved enforcement of the firearms laws or oversight of such enforcement by others. During that time, the author conducted thousands of interviews with firearms dealers and enthusiasts, illegal firearms traffickers and possessors, police and other ATF employees regarding firearms markets and the operation and impact of existing laws.

35 Cook et al *supra* note 8, at 81. Jacobs and Potter *supra* note 12, at 118. James D Wright *Ten Essential Observations on Guns in America*, Society (Mar-Apr. 1995), at 63. Gary Kleck, *Point Blank: Guns and Violence in America* 17 (1991).

36 Vizzard, *supra* note 1, at 73-74. Recent survey results also supports this trend. Although seven percent fewer households reported the presence of any firearm in 1994 than in 1973, the proportion of total households in which a handgun was reported present increased by five percent. See Robert J. Blendon, John T. Young and David Hemenway, *The American Public and the Gun Control Debate*, 275 *Journal of the American Medical Association* 1719 (1996).

37 Cook et al, *supra* note 7, at 63.

38 See James D. Wright & Peter H. Rossi, *Armed and Considered Dangerous: A Survey of Felons and Their Firearms* 183-185 (1986); and Joseph F. Sheley & James D. Wright, *Gun Acquisition and Possession in Selected Juvenile Samples* (National Institute of Justice, U.S. Department of Justice 1993).

39 Sheley & Wright, *supra* note 38, at 70.

40 Kennedy et al, *supra* note 10, at 178.

41 The NRA's Crimestrike Homepage lists the organization's agenda, which includes preventing the parole of violent offenders, truth in sentencing and three strikes and you're out; available from on the Internet at www.nra.org/crimestrike/cshome.html.

42 This pattern is not surprising. Many gun control advocates are not comfortable with the post facto incarceration strategies and are seeking alternatives. Opponents of gun control spend little time or effort seeking out its utility. Police also have been slow to recognize or capitalize on the utility of these laws.

43 18 USC § 924(e).

44 Cal. Penal Code § 1170.12(c)(2).

45 Waiting for serious offenders to commit such crimes presents moral and practical dilemmas. Surveillance of offenders until they commit a serious offense is very difficult to conduct successfully, and allowing suspects to carry out a potentially dangerous crime raises moral and liability questions. Additionally, arrest at or immediately after a crime is the most dangerous and difficult of tactical operations.

46 Wright & Rossi, *supra* note 36, at 13, 75.

47 *Id.*, at 100-01.

48 See National Institute of Justice, Research in Brief, *Arrestees and Guns* (1995); and *Illegal Firearms: Access by Arrestees* (1997).

49 Many police officers have been slow to recognize the potential utility of gun laws in this new environment. They also have not fully comprehended the need for more thorough investigation and trial preparation. Traditionally, firearms charges were incidental to other charges and seldom well investigated. The cultural bias against status offenses and in favor of working “real” crimes has lingered. An examination of proactive strategies, however, reveals that firearms violations play a key role. See Lawrence W. Sherman, James W. Shaw and Dennis P. Rogan, *Kansas City Gun Experiment*, Research in Brief (National Institute of Justice 1995). Gun violations played a critical role in New York Police Department’s Comstat strategy. See James Lander, *The C.E.O. Cop*, *The New Yorker* (Feb. 6, 1995), at 51 and *One Good Apple*, *Time* (Jan 15, 1996), at 56.

50 United States v. Leon 468 U. S. 897 (1984).

51 Terry v. Ohio, 392 U. S. 1 (1968).

52 Based on my observations and experiences during over 25 years of conducting, supervising and reviewing investigations and prosecutions of firearms violations.

53 This strategy is almost never encountered in parallel drug cases, presumably because the claimant would be subject to potential prosecution.

54 Interestingly, in my experience these claims never arise at the time of arrest, when witnesses fear that a firearm may be reported as stolen. They arise after the defendant has obtained counsel and devised a strategy for defense.

55 Such a resource could benefit either the prosecution or defense, but would more likely aid the prosecution, which has the higher burden of proof and limited opportunity for discovery of information known to the defendant.

56 Based on prior convictions for murder and manslaughter.

57 *Cleverness and Luck*, *Newsweek* (May 1, 1995), at 30-35.

58 Cook et al, *supra* note 8, at 73; Jacobs & Potter, *supra* note 12, at 112.

59 Cook et al, *supra* note 8, at 87; Jacobs & Potter, *supra* note 12, at 119

60 Vizzard, *supra* note 9, at 67-68.

61 Vizzard, *supra* note 3, at 343. At the time of Brady's passage, I was still employed by ATF. I discussed the potential impact with numerous experienced agents, and few were hopeful of a significant impact on acquisition of firearms by prohibited persons or control of illicit markets.

62 The number of dealers has fallen from a high of almost 300,000 to an August 1997 figure of about 100,000 according to the ATF public information officer Dennis Anderson. The reduction appears to be a direct result of higher licensing fees instituted by the Brady amendment and stricter scrutiny of applicants instituted by ATF.

63 Cook, *supra* note 8, at 75-76. Jacobs & Potter, *supra* note 12, at 110.

64 See 18 U.S.C. § 923(d)(1) (1994); 27 C.F.R. 178.32, 178.41-42 (1995). In addition to felons, persons under felony indictment, fugitives from justice, unlawful users of narcotics, persons adjudicated mentally defective or previously committed to mental institutions, aliens unlawfully in the U.S., persons dishonorably discharged from the armed forces, persons who have renounced their citizenship, some persons under restraining orders, and persons convicted of domestic violence are also prohibited from receiving licenses.

65 See 18 U.S.C. § 922(g)(1)(A) and 27 C.F.R. § 178.125(e) for records-keeping and 18 U.S.C. § 922(a)(3) (1994) for pre-sale clearance.

66 18 U.S.C. § 922(s).

67 18 U.S.C. § 922(s)(6)(B)(i).

68 Some states, such as California, do maintain records of handgun sales reports mandated under state law.

69 18 U.S.C. § 923(g)(1)(B).

70 Interview with Dennis Anderson.

71 Author's personal experience and observation.

72 Although my experience was with the law enforcement and not the regulatory component of ATF, the two functions shared office space in most locations and many cases required cooperative effort, thus providing ample opportunity to observe the regulatory function.

73 Personal experience with numerous firearms dealer investigations.

74 18 U.S.C. § 923(a).

75 Such a background would verify references, determine community reputation and verify past and present addresses. A background investigation of this nature is not conducted because of limited resources and limited authority to act on most derogatory information. ATF does conduct such investigations on applicants for licenses to manufacture and wholesale alcoholic beverages, where they possess broader authority to deny licenses.

76 See 18 U.S.C. §§ 922(a)(5), (d) and (x)(1).

77 See Cook, *supra* note 8 and Jacobs & Potter, *supra* note 12. Jacobs and Potter did address hypothetical problems in obtaining evidence for a criminal prosecution, at 113-14.

78 I am personally aware of several cases in which dealers distributed over 1,000 handguns without any records before being detected. Also see Francis Hopkins & Steve Riley, *Agents Smash Gun Ring*, Raleigh News & Observer (July 10, 1993), at A1 and Kathryn Kahler & Stephen Cain *Dealers Dodge Gun Laws*, Ann Arbor News (Sept 14, 1992), at A1.

79 Vizzard, *supra* note 3, at 92.

80 18 U.S.C. § 924(a)(3).

81 As an example, a dealer who has received several hundred firearms that have not been entered into the record has few defenses against a charge of failure to maintain a required record, but the disposition of such firearms can be impossible to prove. United States Attorneys are disinclined to file misdemeanor charges in most jurisdictions.

82 18 U.S.C. § 921(a)(21)(C).

83 Vizzard, *supra* note 3, at 92. Both investigations and prosecutions for dealing in firearms without a license virtually ceased after the passage of McClure-Volkmer.

84 Vizzard, *supra* note 9, at 92.

85 For the purpose of this discussion, the vocabulary of investigators and prosecutors has been adopted. Agent refers to an investigator, employed by the government. Informant describes a paid operative acting under the direction of an agent.

86 Because of the political sensitivity of such investigations directed at licensed dealers, ATF has required explicit management approval of all such investigation since the early 1980s. *See* Vizzard, *supra* note 3, at 91.

87 It has been my experience that informants increase the risk of entrapment, are more likely to give false testimony and often are not dependable to stay out of trouble and available until trial time.

88 *United States v Plyman*, 551 Fed. 2d 965 (5th Cir. 1977).

89 In most cases the preference is for using felons. Juveniles are normally not an option; illegal aliens are breaking the law by their mere presence; mental incompetents present obvious credibility problems and other classes are too uncommon to locate. Thus, felons are the choice by default. They present, however, credibility problems of their own and often do not remain available and out of trouble long enough to testify.

90 Federal sentencing guidelines prescribe a base level 12 for firearms violations. Unlawful dealing can extend no higher than a level 18 offense, regardless of volume, if the transactions involve otherwise legal firearms. Thus, the sale of 1,000 firearms to prohibited persons is subject to the same sentence, 27 to 33 months for those with no prior convictions, as possession of 20 grams of heroin or 1 gram of cocaine base. *See* U. S. Sentencing Commission, *Sentencing Guidelines Manual* 85, 87, 272 (1995).

91 Cook et al, *supra* note 8, at 75; Violence Policy Center, *More Gun Dealers Than Gas Stations* (1992). The primary difficulties with such a large number of casual dealers is assuring compliance by persons who have little commercial stake in compliance and the amount of cover provided to the few seriously deviant dealers by such numbers. Hobbyists, operating from their homes, are very difficult to distinguish from persons intent on purchasing large numbers of firearms at wholesale and reselling them with no records because the number and type of guns obtained by a dealer are not reported.

92 Between 1994 and 1997, the number of dealers has been reduced from nearly 300,000 to just over 100,000, according to ATF public affairs officer Dennis Anderson.

93 This assumes that two GS 11 inspectors would devote about a half day each to such an inspection and follow-up paper work. A large gun shop would require considerably more effort.

94 18 U.S.C. § 923(a)(3)(B).

95 Although legislation would be needed to direct license fees directly to ATF's compliance budget, the same end could be accomplished through providing equivalent resources from the general fund. Although the potential exists for using exorbitant fees to discourage even legitimate business, the firearms lobby has long demonstrated its ability to be heard in Congress and would provide a powerful counter-weight to any such effort.

96 The number of licensees grew to almost 300,000 and began to shrink only with higher fees.

97 How does the government make a showing that one does not intend to act in the future?

98 Vizzard, *supra* note 3, at 67.

99 The small number of sales by licensees constituted all their transactions, often to themselves, relatives and friends, while the limited number of sales by the unlicensed dealers were the sales documented by government undercover investigators and only a portion of the entire sales made. *See Vizzard, supra* note 3, at 67.

100 Based on personal experience and numerous interviews with ATF agents and inspectors.

101 18 U.S.C. § 923(d)(1)(F).

102 Given the long history of mistrust between the firearms interest groups and ATF, any extension of authority would be highly controversial. Proposals for expansion would have to provide safeguards assuring reasonableness and due process for applicants and licensees.

103 For an analysis of the impact of stolen firearms on illicit markets, *see Wright & Rossi, supra* note 36, at 207. Although the authors found that thefts from homes and vehicles were the primary source of stolen firearms, thefts from dealers and shippers were found to be significant.

104 Cook et al, *supra* note 8, at 75-76; Jacobs & Potter, *supra* note 12, at 105-06; Vizzard, *supra* note 9, at 67-68.

105 Jacobs and Potter, *supra* note 12, at 106.

106 This is based on the author's many years of experience directly conducting or overseeing firearms investigations.

107 *Id.*

108 Although some types of records would remain difficult to locate due to lack of any central index, criminal records almost always would be detected. Even such records as dishonorable discharges and mental commitments are often located through checking criminal records, as they are often preceded by an arrest.

109 A minimal check to verify the currency of the license would be required and states would have to suspend or revoke licenses immediately upon a notification by court of law enforcement agency of a disqualifying change in the licensee's status.

110 Richard Dahl, *The Sign of the Future May Be Please Check Your Gun at the Door*, 82 Am. Bar Assoc. J. 72 (Aug. 1996).

111 Jeffrey R. Snyder, *Fighting Back: Crime, Self-Defense and the Right to Carry a Handgun*, Cato Institute Policy Analysis no. 284 (1997), at 16.

112 *Id.*

113 James B. Trefethen, *Americans and their Guns: The N.R.A. Story Through Nearly a Century of Service* 311 (1967).

114 *Id.*

115 Some changes in National Crime Information Center (NCIC) regulations would be required to allow DMVs access to criminal history information, and additional resources would be required to handle the added duties.

116 By simply entering a license number, the dealer could receive a verification of currency of the license and a physical description and address in return.

117 Current technology allows single print searches of criminal databases. Investigators or auditors could check in minutes a print against the legitimate license holder's records and in most cases could positively identify any fraudulent purchaser with a criminal record.

118 The federal government has substantial experience in both collecting and distributing money but very little in large-scale licensing. States, on the other

hand, license drivers, members of many professions and occupations, hunters, and numerous types of businesses.

119 *Supra* note 4.

120 Congress would be within its jurisdiction to regulate interstate commerce. The state legislatures would be placed in the position of complying with the mandate or shutting down the primary firearms market in the state. This option is offered as a constitutionally permissible option. Its political acceptability might be another matter.

121 Substantial uniformity and reciprocity between states would be a key to acceptance of any law.

122 The requirement to obtain a license for each transaction or firearm is both burdensome for the citizen and costly for the system, yet serves little or no useful purpose. On the other hand, some states place additional restrictions on certain classes of firearms, such as machine guns, handguns or assault rifles. These states would have to create different classes of licenses for the firearms with additional licensing qualifications.

123 Although the National Crime Victim Survey data indicates that over 85 percent of the crimes committed with firearms involve handguns, there are a number of arguments for including long guns in any control system, see Kleck, *supra* note 33, at 432; Wright & Rossi, *supra* note 36, at 220. The first is the potential for substitution of long guns and sawed off firearms if a control effort impacts the availability of handguns. A survey of juvenile inmates conducted in 1991 revealed that 51% had owned sawed-off shotguns and 38% had owned semi-automatic assault style rifles. Joseph F. Sheley and James D. Wright, *Gun Acquisition and Possession in Selected Juvenile Samples*, Research in Brief (National Institute of Justice, U. S. Department of Justice, 1993). Much of the long gun market has moved away from sporting arms. See Vizzard *supra* note 3, at 174-75. Efforts to regulate as assault weapons long guns not designed for sporting use have resulted in the restriction of a few unpopular firearms, while mechanically identical firearms remain unaffected. Permissive licensing recognizes the futility of defining the “bad” long guns and eliminates the need for pursuing the hopeless task of reaching a workable definition of such firearms. See William J. Vizzard, *Practical Implications of Crafting for Compromise: The Case of Assault Weapons*, Paper presented at the

annual meeting of the Academy of Criminal Justice Sciences, Phoenix (Mar. 10, 1995).

124 This assumption is predicated on the fact that no state currently has a discretionary licensing system for long guns or handguns. States which issue concealed carry permits to all qualified applicants could incorporate that permit into the license to possess. This would not be popular with firearms control advocates. However, the law in these states is a reality.

125 For example, a licensed handgun owner from New Jersey could not take a handgun to New York but could take a long gun, as long as it were carried in compliance with New York law.

126 The residential composition of core cities is heavily weighted in favor of groups that support gun control. See Gary Kleck, *Crime, Culture Conflict and the Sources of Support for Gun Control: A Multilevel Application of the General Social Surveys*, 39 Am. Behav. Scientist 395 (1996).

127 Cities and counties lack the authority to impose significant penalties as a deterrent. Regulations are thwarted easily and compliance is virtually impossible in an environment where municipal boundaries are almost invisible.

128 The preemption controversy places both gun control advocates and opponents in unusual postures. Conservatives, who generally advocate local control, argue for state preemption of such control, and liberals, who have a long history of advocating intervention in areas such as welfare and civil rights, become the defenders of local prerogatives.

129 After many years of observing and dealing with the gun lobby, I have no illusions that the NRA or Gun Owners of America will endorse any control measure. This does not mean, however, that individual gun owners and even dealers might not come to accept certain control options as reasonable if they are not perceived as incremental steps toward prohibition.

130 Developing technology may allow instant verification by using a fingerprint scanner and eliminate the need for a license form.

131 Blendon et al, *supra* note 34, at 4. The assumption that all advocates of regulation seek to pursue prohibition is a constant and overriding theme among those opposed to firearms regulation.

132 Vizzard, *supra* note 1, at 346.

133 For an extensive critique of the role of gun control initiatives in sustaining organized opposition to all gun control measures, see Don B. Kates, *Bigotry, Symbolism, and Ideology in the Battle over Gun Control*, Public Interest L Rev. (1992).

134 Straw purchasers are eligible buyers who act as purchasers of record (“straw men”) for prohibited persons or traffickers.

135 Under the current federal law, the dealer is the custodian of the inventory log and the sales records. Investigators must depend on the dealer’s log and ATF Form 4473 to reconstruct transactions. The only alternative is to attempt to recreate the acquisitions by surveying wholesalers. However, only the dealer knows for sure which wholesalers have supplied him. If the dealer destroys or loses the log book and 4473 forms, no record of purchasers exists.

136 The ATF National Tracing Center reports that as of August 1997, it is tracing approximately 200,000 firearms per year, with an average tracing time of eight days. By contrast, in California, where handgun sales are reported and computerized, an investigator can determine the purchaser of any handgun in a few minutes or less.

137 Having worked and supervised numerous investigations in California, which has an automated handgun purchaser database, I have had numerous opportunities to observe the impact of instant records. They allow the investigator to conduct a follow-up investigation before alibis and explanations can be concocted. Instant records can also be very useful in interviews and interrogations by providing key background information.

138 Cook et al, *supra* note 8, at 90.

139 California Penal Code, § 12072(d), requires firearms transfer between individuals to be conducted through licensed dealers or law enforcement agencies and reported to the California Department of Justice. In 1991, only 1.3% of all reported firearms sales in the state were private party sales. By 1996 that percentage had increased to 5.2%, according to California Department of Justice, Bureau of Criminal Information and Analysis. Cook et al estimate that approximately half of all handgun transactions are private transfers, *supra* note 8, at 59. Although California records the handgun, but not long gun transactions, it does not have a registration requirement and has made no effort at public education or enforcement of the law.

140 Jacobs & Potter, *supra* note 12, at 117.

141 *Id.* at 118.

142 Such a policy would render unregistered firearms valueless in the legitimate market. This is currently the case with unregistered machine guns.

143 As of June 30, 1997, the California Department of Justice, Bureau of Criminal Information and Analysis reported that 37,842 persons had registered 62,345 assault weapons.

144 Under California law, the firearm cannot be bequeathed, sold or otherwise transferred within the state, and use of registered firearms is greatly restricted. Cal. Penal Code, § 12285 (b) and (c).

145 Jacobs and Potter, *supra* note 12, at 116.

146 Scarcity should improve profitability, and higher fees should reduce the population of those marginally involved in the business, thus increasing the number of dealers economically dependent upon the license for their livelihood.

147 Because prosecutive resources are limited, the standard for prosecution inevitably is raised as the number of violations increases. An excellent example can be seen in the immigration laws.

148 Cook et al, *supra* note 8, at 70; Wright & Rossi, *supra* note 36, at 183. Sheley & Wright, *supra* note 36, at 185; Kennedy, *supra* note 10, at 170.

149 *See* Wright & Rossi, *supra* note 36, at 207. It has also been my experience that firearms are virtually always stolen when present during a burglary or theft.

150 *See* Table 8 in Kennedy, *supra* note 10, at 195.

151 Although there are no available statistics on either of these behaviors, experience in tracing seized firearms over many years has confirmed what is accepted wisdom among police officers.

152 Under the current Brady requirements, unclear dispositions after arrests, possible mental commitments or other potentially disabling information will reappear at every check and require further clarification. This is particularly problematic for such classes as persons convicted of domestic violence and persons under restraining orders. Licensing allows a single, in-depth inquiry,

establishment of a record and the flagging of the record if there is a status change.

153. The history of opposition by organized firearms interest groups is well documented. *See Vizzard, supra* note 1, at 133-43. Given the steady decline in gun ownership and hunting and the increase in urbanization, however, this strategy eventually may prove untenable and counterproductive.