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Jeremy Travis

New York City Police Department

William Smarrito

Legislative Affairs Unit, New York City Police Department

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A MODEST PROPOSAL TO END GUN RUNNING IN AMERICA

Jeremy Travis and William Smarrito***

I. Introduction

Too often, the public debate over gun control becomes mired in polemics between irreconcilable parties. Neither side is able to listen to the other. Facts are interpreted in different ways to suit divergent ideological positions making constructive, intelligent dialogue nearly impossible.

The rhetoric of the gun control debate is highly charged. Public sentiment favoring strict gun control is most focussed and vociferous following a particular event — the assassination of a public figure, the slaughter of children at the hands of a deranged individual, a wave of random killings. At such times, when public outrage is high, there is a demand for immediate action. Those favoring gun control portray gun control opponents as fanatics who cling to antiquated notions of gun ownership that are properly relegated to the mythology of the Wild West.

Gun control opponents, on the other hand, argue that escalating crime rates and the ever-increasing firepower available to criminals create a legitimate need for guns in self-defense. They see themselves as hunters, sportsmen, and as individualists protecting their homes and families from criminals. Some advocates of unfettered gun ownership view themselves as the last line of defense against those who would overthrow the American form of government. Gun advocates portray proponents of gun control as wrong-headed meddlers who would ban all handguns, scrap the Second Amendment right to bear arms, and disarm the law-abiding but not the law-breaker.

In this discord, meaningful dialogue is extremely difficult. For example, an analysis showing that effective regulation of gun ownership results in less gun-related crime and fewer fatalities and injuries cannot be heard. The criminal involvement in gun trafficking, a practice made possible by loose governmental oversight, cannot be seen as an independent evil. The case for legitimate gun ownership gets

* Deputy Commissioner for Legal Matters of the New York City Police Department.

** Member of the Legislative Affairs Unit of the New York City Police Department.

drowned out in the furor; the real world obstacles to effective regulation of the gun market cannot be understood.

In this essay, we hope to sketch out a broad middle ground in the gun control debate. The position articulated here reflects, in large measure, the basis of an alliance formed over the past few years between the law enforcement community and the advocates of gun control. These two groups, historically reflecting different ends of the political spectrum, have found common purpose as they confront the easy availability of illegal firearms and the carnage these weapons cause.

II. The Scope of the Problem

We begin by describing the extent of firearm ownership in America and the strong impact of gun use upon social factors such as public safety and public health.¹

Since 1950, the number of privately owned firearms has doubled every twenty years. In 1950, there were fifty-four million firearms in this country. By 1970, the number had reached 104 million and, in 1991, over 200 million firearms were in private hands in the United States.² In 1990, three million firearms were manufactured domestically and 843,000 were imported.³ Surveys indicate that nearly half of the households in America contain a firearm.⁴

Of the 200 million firearms, sixty-six million are handguns — either a revolver or pistol.⁵ The revolver has a cylinder that loads five or six bullets, while the more rapid firing pistol can carry a feeding magazine of twenty or more bullets and fire them in less than five seconds. Such magazines can be replaced in less than two seconds. As most drug transactions occur in very close quarters, criminals prefer the more lethal spraying power and larger bullet load of the pistol to the smaller bullet capacity and relative slowness of the revolver. This preference is now reflected in manufacturers' production numbers. In 1980, 1.6 million revolvers and 764,000 pistols were made.

1. In this essay the term "firearm", "gun" or "weapon" refers to any gun capable of firing a bullet or a shell of pellets such as a rifle, shotgun, assault weapon or handgun. The term "handgun" is used only to describe revolvers and pistols.

2. Lee Daniels, *Preliminary 1991 Figures Show Drop in Homicides*, N.Y. TIMES, Jan. 3, 1992, § II, at 3.

3. BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, FIREARMS AND EXPLOSIVES OPERATIONS MANUAL, BATF - READY REFERENCE 1991 (Wash. D.C. 1991).

4. UNITED STATES DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS - 1990 Table 2.52, at 202 (1990) [hereinafter SOURCEBOOK].

5. Daniels, *supra* note 2.

Ten years later, the figures were nearly reversed — 629,000 revolvers and 1.4 million pistols.⁶

Each year nearly 30,000 Americans are killed and 90,000 injured as a result of firearms incidents; the majority of these deaths and injuries are inflicted by handguns. Within this group, 2,000 people are killed accidentally, 16,000 commit suicide, and 12,000 are murdered.⁷ To put these numbers in perspective, consider that during the Vietnam War, 58,000 American soldiers died, yet during that same period, 82,000 Americans were murdered by handguns alone. Furthermore, in the last decade, twenty-seven New York City police officers have been murdered in the line of duty by firearms;⁸ nationwide, the toll reached 735 officers.⁹ Although New York City police officers are required to wear bullet-proof vests, two officers were murdered by firearms in 1991 and twenty were wounded.¹⁰

Criminal justice data support the common sense observation that the presence of a firearm changes the nature of a confrontation and transforms it into a more dangerous interaction. Not surprisingly, the fatality rate of attacks with firearms is about five times higher than the fatality rate of attacks with knives, the next most dangerous weapon used in homicide.¹¹

Data from New York City also confirm the increasing use of guns and the relationship between guns and homicide. In 1960, nearly 100 persons, or nineteen percent of the total homicides, were murdered by handguns. By 1990, the number murdered by handguns reached 1495 persons, sixty-seven percent of the total homicides.¹²

Firearms are also used in violent crimes that do not result in death. In the United States, in 1990, there were 243,673 gun-related assaults and 233,973 gun-related robberies.¹³ In that same year in New York

6. Gordon Witkin, Ted Gest & Dorian Friedman, *Cops Under Fire*, U.S. NEWS AND WORLD REPORT, Dec. 3, 1990, at 36.

7. LEE NESBIT, GUN CONTROL DEBATE 12 (1990).

8. NEW YORK CITY POLICE DEPARTMENT, POLICE ACADEMY, FIREARMS AND TACTICS SECTION, FIREARMS DISCHARGE ASSAULT REPORT (1980-1990).

9. SOURCEBOOK, *supra* note 4, Table 3.141, at 393.

10. NEW YORK CITY POLICE DEPARTMENT, POLICE ACADEMY, FIREARMS AND TACTICS SECTION, FIREARMS DISCHARGE ASSAULT REPORT (1990).

11. FRANKLIN ZIMRING & GORDON HAWKINS, THE CITIZENS GUIDE TO GUN CONTROL 15 (1987).

12. New York City Police Department, Office of Management Analysis and Planning, Crime Analysis and Program Planning Section (Jan. 1992). *See also* NEW YORK CITY POLICE DEPARTMENT, ILLEGAL FIREARMS: LEGISLATION, QUESTIONS AND ANSWERS [hereinafter ILLEGAL FIREARMS].

13. UNITED STATES DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS FOR THE UNITED STATES - 1990, at 21, 24 (Wash. D.C. 1990).

City, there were 16,576 gun-related assaults and 34,122 gun-related robberies.¹⁴ The Family Court of New York City, which deals with children age fifteen or younger, hears an average of forty to sixty cases a month involving children who have been arrested for carrying a loaded weapon. This represents a 400% increase over five years ago when the number averaged ten a month.¹⁵ The National School Safety Council estimates that 8.7 million American youngsters have access to handguns and that 135,000 bring handguns to school daily.¹⁶ The increasing use of firearms by adolescents introduces a deadly finality to fleeting impulses previously acted out by words or fisticuffs.

Increasingly, gun violence is being viewed as a public health concern. For example, use of guns by women as a method of suicide rose 116% during the period from 1960 to 1980. For children and adolescents, there was a 299% increase in suicide by gun.¹⁷ A recent study published in the *Journal of the American Medical Association* shows that the presence of firearms in a home of a suicidal or potentially suicidal adolescent increases the odds of death by suicide seventy-five fold.¹⁸

The year 1988 marked a morbid watershed of sorts: in that year, gunfire replaced all natural causes as the primary cause of death for teenage males; for males between the ages of fifteen and nineteen, there were a total of 1,641 firearm murders and 3,226 accidents and suicides. This represented a forty percent increase in the firearms death rate over the preceding four years.¹⁹ A United States Public Health Service report found that immediate access to firearms was among the causes of the rise in homicides of inner-city youth and recommended firearms control as one of the solutions. The other contributing factors — racial discrimination, poverty, alcohol and substance abuse, drug trafficking, and an environment with violent behavior — address some of the reasons why individuals turn to

14. NEW YORK STATE DIVISION OF CRIMINAL JUSTICE SERVICES, 1990 CRIME AND JUSTICE ANNUAL REPORT 12 (Albany 1991).

15. Personal communication with Stephen Bogacz, Deputy Chief, New York City Law Department, Family Court Division (Jan. 1992).

16. DADE COUNTY PUBLIC SCHOOLS, OFFICE OF VOCATIONAL, ADULT, CAREER AND COMMUNITY EDUCATION, HANDGUN SAFETY (Fla. 1991).

17. Zimring & Hawkins, *supra* note 11, at 61-62.

18. David Brent, Joshua Perper, Christopher Allman, Grace Moritz, Mary Wanella & Janice Zelenak, *The Presence and Accessibility of Firearms in the Homes of Adolescent Suicides - A Case Control Study*, JAMA, Dec. 4, 1991, at 2989-95.

19. *Gun Toll Soaring for Black Youth*, N.Y. NEWSDAY, Mar. 14, 1991, at 15; Paul Taylor, *HHS's Grim Statistics; More Male Teens Die From Bullets Than Natural Causes Combined*, WASH. POST, Mar. 14, 1991, at A1.

crime in the first instance.²⁰

The proliferation of firearms and their increasing use have created greater risks to the innocent public, giving rise to the phrase "drive-by shooting". Thirty-four bystanders were shot in New York City from 1977 to 1979; nearly ten years later, from 1986 to 1988, 128 bystanders were shot.²¹ In the summer of 1990 alone, ten New York City children, innocent bystanders, were slain.²² In 1991, 4500 persons were wounded by gunfire in New York City, 530 of them under the age of sixteen.²³ As a result, New York City emergency room medical personnel are developing a new expertise, borrowed from battlefield experiences, in delivering babies of pregnant women caught in the crossfire. One city hospital alone, Brookdale Hospital, treats an average of three persons a day for gun shot wounds. Ninety percent of their operations on young adults aged nineteen or twenty were for gunshot wounds while ten percent of their operations on children under eleven were for gunshot wounds. Because of this expertise, the Brookdale doctors trained a specialized military force in trauma treatment prior to the unit's participation in Operation Desert Storm.²⁴

The increased firepower on the nation's streets is a particularly sobering concern. A decade ago, the gun control debate centered on the easy availability of the "Saturday night special", a small, easily concealed, low-quality handgun capable of firing five to six bullets without reloading. Such a gun was used in the assassination attempt and wounding of President Ronald Reagan on March 30, 1981. Today, that concern sounds almost quaint in light of the awesome array of weaponry present in our communities. Semi-automatic rifles and pistols spew enormous firepower within seconds. An individual, like Patrick Purdy, is transformed into a neighborhood terrorist when armed with such a weapon. Purdy murdered five children, age six to nine, and wounded twenty-nine other children and their teacher in a Stockton, California, schoolyard on January 17, 1989, using a semi-automatic version of the AK-47 assault rifle. He outfitted his gun with a seventy-five round drum magazine, fired, re-loaded and

20. United States Department of Health and Human Services - Public Health Service, *Homicide Among Young Black Males - United States 1978-1987*, CENTER FOR DISEASE AND MORBIDITY AND MORTALITY WEEKLY REPORT Vol. 39, No. 48 (Dec. 7, 1990).

21. Jonathan Greenberg, *All About Crime*, N.Y. MAG., Sept. 30, 1990, at 28.

22. *Id.*

23. Ian Fisher, *When Bullets Pierce the Body, Mind and Soul*, N.Y. TIMES, Jan. 7, 1992, at B1.

24. *Id.*

sprayed 106 rounds in less than two minutes.²⁵

A new phrase — “assault weapons” — has entered the public lexicon. These semi-automatic rifles and pistols are direct descendants of military weaponry that were designed for destructive power, as man-killing machines, and not for accuracy or precision. These weapons generally have large, detachable magazines, capable of holding thirty bullets and, in some cases, up to 100 rounds. Assault weapons typically have pistol grips so they can be spray-fired “Rambo-style” from the hip. They may have bayonet mounts and grenade launchers, enhancements that have no legitimate civilian use. They may have flash suppressors which enable nighttime use without detection, again a feature with military applications. Semi-automatic pistols have their ammunition magazine located forward of the pistol grip which is more characteristic of an assault weapon than a sporting handgun. Much of the rising rate in the killing and wounding of innocent bystanders is due to the large bullet load and spraying power of assault weapons.

Although assault weapons represent a small fraction of the firearms owned in this country, they are disproportionately involved in criminal activity. Semi-automatic assault weapons account for one million, one half of one percent, of the 200 million privately owned firearms. Yet in 1989, the Bureau of Alcohol, Tobacco and Firearms²⁶ (“BATF”) estimated that of all guns which were used in crime and subsequently traced, 9.9% were assault weapons. The rate of use of these weapons has risen forty-nine percent over the prior two years.²⁷ In increasing numbers of encounters with criminals, police officers are simply being out-gunned. Congressional gun control hearings bear witness to testimonies of police officers describing how they desperately sought cover to escape the deadly fusillades from semi-automatic weapons.²⁸

These data suggest to us that the unchecked proliferation of guns represents a significant crisis in terms of public safety and public health. Yet, there are those who observe that “guns don’t kill people, people kill people.” This states a small truth, but at the expense of a

25. Robert Reinhold, *After Shooting, Horror but Few Answers*, N.Y. TIMES, Jan. 19, 1989, at B6.

26. The Bureau of Alcohol, Tobacco and Firearms is the federal agency that administers national gun laws.

27. Jim Stewart & Andrew Alexander, *Firearms: Assault Weapons in America*, COX NEWSPAPERS (Special Report, Wash. D.C.); *ILLEGAL FIREARMS*, *supra* note 12, at 9.

28. *See, e.g., Hearing on Semiautomatic Assault Weapons Before the House Subcommittee on Crime and Criminal Justice*, June 12, 1991, at 255 (testimony of Lt. Randy W. Beans, Dayton, Ohio, Police Department).

larger one. While it is true that a person must pull the trigger, what would be the result if no gun were at hand? A bitter and deranged person, carrying an assault rifle, enters a parent's nightmare when he steps into a playground full of schoolchildren. A man armed with a rifle, peering out at a presidential motorcade from a Dallas, Texas, book conservatory, alters history.

In the face of all this, we arrive at the inescapable conclusion that guns are getting into the wrong hands and are being used for the wrong reasons; both advocates and opponents of gun control would agree with this conclusion. The question then becomes, what methods of intervention should be used to keep those guns out of the wrong hands? On this point, the views of the two groups diverge: opponents of gun control argue for stiffer punishment of those who illegally possess and use guns, while proponents of gun control call for stricter licensing systems, including background checks for license applicants. We believe that there is room for agreement here — that punishments for illegal gun possession and use should be more severe while the governmental systems that regulate gun distribution and ownership should be more comprehensive. We note, however, that while tougher sentences for gun possession and use serve to keep criminals in prison somewhat longer, tighter gun purchasing regulation keeps guns out of the wrong hands in the first place and therefore has a potentially greater impact on reducing crimes committed with guns.

Consequently, we wish to make the case for a stronger governmental regulatory system for gun distribution and ownership. To do so, we must first answer the question of how illegal guns get into the wrong hands. In effect, we will describe an extensive, interstate black market in firearms. We believe that a more strictly regulated interstate market would significantly reduce the flow of guns to criminals. If left unregulated, local gun control measures, even with enhanced punishments for illegal possession and use, will yield only minimal results in terms of improving public health and safety.

III. The Illegal Trafficking of Firearms

In 1911, New York State passed the Sullivan Law, one of the earliest and toughest gun control laws in America.²⁹ Yet, today, New York City is faced with increasing firearm violence and crime. Do we

29. N.Y. PENAL LAW §§ 265.00, 400.00 (Consol. 1984 & Supp. 1991) (original version at 1911 N.Y. Laws 195 (J.B. Lyon Co., Albany)).

conclude that such strict laws are ineffective? Do these laws, as some argue, merely disarm the law-abiding person but not the law-breaker?

In New York City, the Sullivan Law allows the Police Department to regulate tightly handgun purchase and possession. Those who wish to purchase and carry a handgun must show "proper cause" and good character. This requires completing a detailed questionnaire, providing valid identification and supplying documentation to substantiate need. The applicant is fingerprinted, a police check of criminal history files is conducted and an inquiry is made of the New York State Department of Mental Hygiene.³⁰ Additional verifications are conducted as needed and an administrative review is performed. Those wishing to possess handguns in their home or business, but not carry them on the street, must also undergo the background check and review. Upon approval, the applicant is issued a pistol license and a purchase form indicating the specific weapon he can buy legally from a locally licensed firearms dealer. Each gun purchase is registered with the Police Department. The law has proven to be very effective; of all the handguns seized by the Police Department that were used in crime in New York City, only four percent were legally purchased in New York State.

From the New York City perspective, we have concluded that the lack of cohesive, national regulations has created a highly effective interstate black market — an astounding ninety-six percent of the handguns used in crimes in New York City were purchased elsewhere.³¹ In 1983, the BATF found that four states alone, Florida, Virginia, Texas and Georgia, were the source of more than fifty percent of the illegal handguns reaching New York City.³² In testimony before a congressional subcommittee, Police Commissioner Lee P. Brown drew an analogy from epidemiology to describe the situation. He noted:

Public health officials. . . learned that the way to combat malaria was not to swat mosquitos, but to drain the swamp. Although we confiscated over 17,500 guns in New York last year [1990], we are still swatting mosquitos. The swamps are in States where it is easy

30. The New York City Police Department contacts the New York State Department of Mental Hygiene since federal law prohibits sale of a firearm to a person adjudicated as mentally ill or involuntarily hospitalized due to mental illness. *See infra* note 34 and accompanying text.

31. STEVEN BRILL, FIREARMS ABUSE - A RESEARCH AND POLICY REPORT 84 (Police Foundation, Wash. D.C. 1977) (reporting findings of 1973 Bureau of Alcohol, Tobacco and Firearms Project Identification Study).

32. Barry Meier & Sylvia Moreno, *Ohio's Gun Trail to New York*, N.Y. NEWSDAY, Aug. 1, 1988, at 3.

to get guns. We have tough gun control laws in New York. Other States don't. The way to control guns in New York or anyplace for that matter is to drain the swamps that surround us, and that can be accomplished only through Federal gun control.³³

Presently, federal gun law prohibits the sale of a firearm anywhere in the United States to a convicted felon, a fugitive from justice, a person adjudicated as mentally ill or involuntarily hospitalized due to mental illness, an illegal substance abuser, a dishonorable dischargee, an illegal alien, or a person under the age of twenty-one for handguns and under eighteen for other weapons.³⁴ These criteria, if rigorously applied, would disqualify millions of people. A study conducted for the Department of Justice estimates that there are currently, at a minimum, 14.5 million drug abusers and 2.5 million persons adjudicated as mentally ill or involuntarily admitted into a mental health facility. In addition, several million people have felony convictions.³⁵

To purchase a gun, an individual must go to a federally licensed firearms dealer where he must complete a federal form, known as the Firearms Transaction Record. On this form, the purchaser identifies himself and avers that he does not fall within any of the proscribed categories for gun purchase. He also shows the dealer proof of residency in the state where he is buying the gun. The form is completed on the honor system. The dealer does not verify the information submitted by the gun purchaser and the form is kept solely with the dealer.

Pursuant to the Sullivan Law, New York City has added tighter restrictions to this minimum federal floor. Yet these restrictions can be undermined if, as in many parts of the United States, a person can purchase a pistol or semi-automatic weapon of choice, on the spot, by merely presenting an unverified piece of identification and completing the Firearms Transaction Record.

As an illustration of how the present system fails to identify proscribed persons, consider that Patrick Purdy had an extensive arrest

33. Testimony of New York City Police Commissioner Lee. P. Brown before House Subcommittee on Crime and Criminal Justice, Mar. 19, 1991.

34. 18 U.S.C. § 922 (1988 & Supp. 1991).

35. JAMES TIEN, THOMAS RICH & ENFORTH CORPORATION, IDENTIFYING PERSONS OTHER THAN FELONS INELIGIBLE TO PURCHASE FIREARMS (May 1990) (completed for United States Department of Justice, Office of Justice Programs). The exact figure for convicted felons is presently not known because state criminal history records are currently being updated and computerized. It is estimated that nearly 30 million persons have been arrested for a felony or serious misdemeanor in the United States since 1974. See TASK FORCE ON FELON IDENTIFICATION IN FIREARM SALES, REPORT TO THE ATTORNEY GENERAL ON SYSTEMS FOR IDENTIFYING FELONS WHO ATTEMPT TO PURCHASE FIREARMS (Wash. D.C. 1989).

history when he used false identification to illegally purchase an assault weapon in Oregon and subsequently murder five children and wound twenty-nine others in a California schoolyard. He did not have to comply with any waiting period for a check of the false identification he presented to the dealer nor a check of the false answers he provided on the federal Firearms Transaction Record. Previously he had been arrested for sexual solicitation, drug possession, gun possession, receiving stolen property and attempted robbery. Had he not killed himself at the schoolyard site, he would have been charged with an additional felony for falsifying the federal form; keeping the gun out of his hands in the first place could have saved five lives.

Similarly, consider John Hinckley, who wounded President Reagan in the 1981 assassination attempt and previously had been expelled from the American Nazi Party because he espoused too much violence. Earlier, Hinckley had been arrested in Nashville, Tennessee for carrying three concealed weapons and fifty rounds of ammunition and was sentenced to time served, fined sixty-two dollars and fifty cents, and released. Several months before the assassination attempt, he obtained the pistol he used by walking into a Dallas pawn shop and lying on the Firearms Transaction Record.³⁶

Since the Firearms Transaction Record is completed under the honor system and is filed, unverified, only with the dealer, both law abiding citizens and criminals have no difficulty buying guns pursuant to the federal scheme. A Department of Justice survey of prisoners found that twenty-one percent of the convicts obtained their firearms by simply walking into a gun store, showing either legitimate or false identification, lying on the federal form, and selecting a gun.³⁷

Further exacerbating the problem is the fact that it is not even necessary for criminals to go into a gun dealership to get a gun. In many states, an illegal gun runner can "straw purchase" a gun by paying a collusive state resident ten to twenty dollars to walk into a firearms dealership and purchase the gun for him. The ease with which this interstate black market operates has been the subject of numerous newspaper investigative stories. One such article described the ring operating between Lorain, Ohio, and New York City as a typical gun-running operation.³⁸

Over a seventeen-month period starting in September 1985, 454 re-

36. Ron Rosenbaum, *The Brady Offensive*, VANITY FAIR, Jan. 1991, at 69.

37. JAMES D. WRIGHT, *THE ARMED CRIMINAL IN AMERICA - A SURVEY OF INCARCERATED FELONS* 35 (1986) (survey taken for the United States Department of Justice).

38. Meier & Moreno, *supra* note 32.

volvers and rapid firing pistols were illegally purchased in Lorain, Ohio, and transported into New York City. At the time of the newspaper story (August, 1988), at least forty-five crimes, including murder, were traced to these weapons. This three-man ring would use relatives, friends, drug addicts and others to "straw purchase" weapons from firearms dealers in Ohio. These weapons, having been custom-ordered by New York drug dealers and other criminals, would be transported to New York City by cars, vans or trains. Once the weapons arrived, they would be exchanged for cash and the profits used to buy marijuana and cocaine. The drugs would then be transported back to Lorain to be sold, the resulting drug profits would be used to buy more weapons, and the cycle would begin anew.

The Bureau of Alcohol, Tobacco and Firearms noted at the time that the Lorain-New York City gun running scheme typified a new wave of high-profit smuggling operations that have brought tens of thousands of illegal handguns into New York City in recent years. They observed that laws in other states made it relatively easy for both law-abiding citizens and criminals alike to obtain unlimited numbers and types of firearms. The BATF estimated that eighty percent of the illegal weapons smuggled into New York City were purchased through a scheme similar to the Lorain operation.

This interstate black market in guns is further facilitated by the ease with which, in some states, non-residents can obtain valid-looking identification to take advantage of that state's less restrictive gun laws. The non-resident simply walks into a motor vehicle office, presents his out-of-state license, gives a false local address and is handed, not mailed, a resident driver's license. In many localities he then shows this license, completes the federal form and another illegal weapon is on its way to the streets of New York.³⁹

Another method of illegal gun running is through the abuse of a federal Firearms Dealer License ("FFL"). This license is required of any person who wishes to order weapons from manufacturers and wholesalers to sell at retail. The federal statute requires that an applicant must be issued an FFL if he does not fit into any of the proscribed categories for gun purchase described earlier. The applicant is also required to show an address from which he will, or contemplates that he will, set up a business. The BATF administers the license and conducts a check of federal records to verify that the person is not a convicted felon or a fugitive. After passing this check, the individual pays a thirty dollar fee and is issued a FFL which permits him to

39. Pierre Thomas, *Va. Driver's License Is Loophole for Guns: Fake Addresses Used in No-Wait Sales*, WASH. POST, Jan. 20, 1992, at A1.

receive shipments of any type or amount of weapons from manufacturers and wholesalers. In the United States there are currently 235,000 FFLs although only 30,000 of these licensees operate out of a retail gun store or firearms section of a department or sporting goods store. Many others operate out of barber shops, grocery stores, flea markets and the like. Others work out of their homes.⁴⁰

In New York City, the standards for certification as a dealer in firearms under state law are much more stringent. The individual must possess not only an FFL but also a New York City firearms dealer license issued by the Police Department. To obtain the local dealer license, the Police Department conducts a background check of the applicant as described earlier for a New York City gun license. Additionally, the Police Department inspects the applicant's proposed business premise and verifies that it complies with local zoning resolutions regulating commercial establishments and fire codes regarding storage of ammunition. A survey is made to see that the premise has adequate security devices such as burglar alarms, safes, steel doors, gated windows and other appropriate anti-theft devices. The Police Department confers with the local community board for their feedback concerning the applicant and the proposed business. A check is also made to ensure that the business will not be located in a high crime area.

Despite these local efforts, federal law does not require a federally licensed dealer to comply with local firearms dealer licensing requirements as a condition to obtaining an FFL. What this means is that presently, 675 New York City residents possess a federal firearms dealer license yet only thirty-one of them are locally licensed to sell handguns and forty-two locally licensed to sell rifles and shotguns.⁴¹

This gulf between lax federal licensing of dealers and stringent local licensing allows for significant abuses of the federal license. For example, one New York City resident, possessing only an FFL, used his license to mail order weapons and flood the streets with over 1000 illegal handguns. This same federal licensee had an extensive New York arrest history including five misdemeanor convictions for illegal drug and gun possession which would have prevented him from receiving a New York City firearms dealer license. However, these misdemeanor convictions did not prevent him from obtaining a federal license, since his convictions were not felonies. Without breaking any

40. UNITED STATES CONGRESS, OFFICE OF TECHNOLOGY ASSESSMENT, AUTOMATED RECORD CHECK OF FIREARMS PURCHASERS - ISSUES AND OPTIONS (1991).

41. New York City Police Department License Division, Gun Dealers Unit (unpublished statistics as of Jan. 1992).

federal law, firearms manufacturers and wholesalers simply shipped him his mail-ordered weapons by common carrier.

Another FFL holder, using a New York City address from which he falsely claimed he conducted his business, was recently indicted on 248 counts of illegal trafficking in firearms alleging that he purchased and distributed over 2,000 firearms, which included semi-automatic weapons. Furthermore, federal law allows him, even after this arrest and indictment, to continue to use his FFL license to purchase weapons since his license can only be revoked upon conviction and exhaustion of his criminal appeals, a process that can take years.

The New York City Police Department has tried to eliminate the FFL loophole by requiring, pursuant to regulations of the Police Commissioner, that common carriers notify the Police Department when they are aware they are shipping weapons to a New York City based FFL holder. The carrier delays delivery of such weapons until the Police Department verifies that the FFL possesses a New York City firearms dealer license since it is illegal in New York City to receive weapons through interstate shipment without a local dealer license. However, federal law exempts manufacturers, wholesalers, or other FFLs from the requirement that common carriers be notified of weapons consignments. Consequently, the regulation has limited effectiveness since often the common carrier does not know in the first place that it is shipping weapons.

The present state of federal regulation of gun ownership and distribution not only allows many guns to circulate illegally in New York City but also hampers the development of proactive law enforcement strategies designed to prevent illegal gun sale or possession. Federal statutes prohibit law enforcement authorities from collecting, collating and computerizing data on the more than 7.5 million gun transactions occurring each year.⁴² As noted earlier, the federal Firearms Transaction Record, which indicates the name and address of the purchaser and the weapon purchased, can only be kept by the dealer. The law prohibits the BATF from receiving a copy. The other record that a dealer is required to maintain — the “bound book” which indicates the purchaser, weapon, serial number, date and manufacturer — also remains with the dealer. The only exception allowed by law is the forwarding to the BATF of the Multiple Purchase Form which is completed when a person buys two or more handguns in a five day period. The form is not used for multiple non-handgun purchases, such as assault weapons, nor in instances where two or more hand-

42. 18 U.S.C. § 926 (1988 & Supp. 1991). See also Steven A. Holmes, *Virginia Law Focus of U.S. Gun Debate*, N.Y. TIMES, May 5, 1991, § 1, at 29.

guns are purchased outside of a five day period. Additionally, the law forbids the BATF from entering any data from this form onto a computer database. Specifically, the federal statute prohibits "any rule or regulations concerning records required of dealers and manufacturers to be recorded at or transferred to a facility owned, managed, or controlled by the United States or any State or any political subdivision thereof, nor that any system of firearms, firearms owners, or firearms transactions be established."⁴³ Because most records of firearms transactions can only be kept by dealers, law enforcement officials are unable to discern a pattern of gun abuse, either by illegal sales by the dealer or by illegal purchase by the customer, and take preventive actions until the gun is criminally used. Since a criminal can commit many crimes with a gun before finally being apprehended, this inability to flag sources of abuse and stop the possession of the gun in the first place is a backward way of dealing with gun crime.

Additionally, when local police investigators find a weapon at a crime scene and attempt to trace it back to its last recorded sale, they must call the BATF and request that the agency conduct a manual search. Since records of firearms transactions may not be kept centrally nor computerized, these searches can be arduous, labor intensive and sometimes impossible. A BATF search that starts with a manufacturer who keeps computerized records may end with a federal agent going through musty books in order to decipher hand-written entries kept at a barber shop-gun store in a small rural town.⁴⁴

IV. Some Solutions

We propose that gun control advocates and opponents focus their debate on the immediate problem of the interstate trafficking in illegal guns. As we have demonstrated, the present federal regulatory system is, in fact, no system at all. Rather, it is a *laissez-faire* market in which virtually anyone who wants a gun can get one. Those who are inclined to illegally use a gun can obtain one, with little impediment, by simply lying on the federal form. Those who are inclined to buy guns in order to sell them illegally, can easily do so by either obtaining a federal firearms dealer license and simply mail-ordering the guns, or by making purchases using false identification or engaging the services of straw purchasers. How can one condone a system that is so po-

43. 18 U.S.C. § 926 (1988 & Supp. 1991).

44. Congressman Charles E. Schumer, Chairman of the House Subcommittee on Crime and Criminal Justice, Remarks before the New York State Assembly Codes Committee (Jan. 3, 1991).

rous; that effectively facilitates interstate gun running, and that simplifies illegal gun possession?

In the summer of 1990, after a series of terrible incidents in which innocent children were shot and killed, Mayor David N. Dinkins asked the Police Department to develop a legislative reform proposal to reduce gun violence. At the core of the Police Department's legislative package are four proposals to reduce the illegal interstate market in guns. If enacted, this legislation would (1) put teeth into the existing federal regulations concerning those proscribed from purchasing a gun; (2) limit interstate shipment of firearms only to those federal firearms dealers who show that they have complied with any existing local firearms dealer requirements; (3) provide tracing capabilities for interstate shipments of weapons; and (4) create an accessible database of all firearms transactions.

1. Enforce Existing Federal Regulations Regarding Firearms Purchase Restrictions

As we described earlier, the federal system is an honor system. Prospective purchasers of guns need only attest on the federal Firearms Transaction Record that they are not prohibited from owning a weapon. Accordingly, the first building block in a reasonable reform of gun laws would be to create a system to enforce existing prohibitions. Such a system is embodied in the Brady Bill, named in honor of James A. Brady, President Reagan's press secretary who was seriously wounded in the 1981 assassination attempt. The original version of the bill provides for a seven-day waiting period prior to gun purchase during which local law enforcement personnel could conduct a check to verify information contained on a Firearms Transaction Record.⁴⁵ As it worked its way through the last session of Congress, the Brady Bill was enhanced in the Senate by the Majority Leader, Senator George J. Mitchell of Maine. Instead of an optional police check of a gun purchaser, the bill now requires that a reasonable effort be made to inquire into the purchaser's background. Funds have been provided for states to update their criminal history files and, as a concession to gun advocates, the waiting period has been reduced to five days.

The Brady Bill has generated a fierce political debate. In essence, proponents have claimed that it would reduce gun-related crimes, in-

45. H.R. 7, 102nd Cong., 1st Sess. (1991) (introduced Jan. 31, 1991; passed U.S. House of Reps. on May 8, 1991; passed U.S. Senate June 28, 1991, as amended; and is now contained in H.R. CONF. REPORT 102-405, accompanying H.R. 3371 (the Omnibus Anti-Crime Bill)).

cidents, murders, injuries and suicides; opponents have argued that crimes can better be reduced by stiffer sentencing of criminals. We believe that the Brady Bill, if enacted, would clearly have the effect of reducing the number of guns in the wrong hands. More important, in terms of the debate, because the bill merely enforces existing federal regulations, it would not deny a firearm to anyone who is entitled to one under existing guidelines. The bill would merely delay that possession, with the exception that an immediate firearm purchase would be allowed when necessary to protect a life.

Some object to such a waiting period believing it "inconveniences" legitimate purchasers. James Brady, now partially paralyzed due to the assassination attempt, noted at a congressional hearing that each day he needs help getting out of bed, taking a shower, getting dressed and going to the bathroom. He added, "I guess I'm paying for their convenience."⁴⁶

2. *Limit Interstate Shipment to Federal Firearms Dealers Who Show Proof of Compliance with Local Firearms Dealer Requirements*

The second building block in our reform package would be legislation limiting interstate shipment of firearms only to those licensed federal firearms dealers who comply with existing local firearms dealer license regulations. Such a proposal is contained in a bill introduced by Representative Bill Green of New York and cosponsored by Senator Daniel P. Moynihan.⁴⁷ The bill requires that before a person can receive a federal firearms dealer license, he must present a form to the BATF signed by local law enforcement officials indicating that he has complied with any local firearms dealer licensing requirements. This requirement would mean that the FFL abuses described earlier could be significantly reduced and that gun dealers could be effectively regulated by the New York City Police Department.

3. *Trace Interstate Shipments*

In addition to requiring that all FFLs comply with local firearms dealer requirements, the City of New York has proposed that all interstate commerce in firearms by common carrier be tracked in order to determine what types of guns are being transported, where they come from and where they are going. This can only be accomplished by changing the federal statute that currently exempts manufacturers,

46. Rosenbaum, *supra* note 36, at 70.

47. H.R. 2457, 102nd Cong., 1st Sess. (1991); S. 1154., 102nd Cong., 1st Sess. (1991).

wholesalers and other federal firearms dealer licensees from providing such information to the common carrier. Presently, there is virtually no way to describe, with any degree of certainty, how guns are moving from manufacturer to dealer to purchaser.

4. Create Accessible Records of Firearms Transactions

As we have set forth in this essay, current federal law prohibits the development of a database on firearms transactions. We propose that Congress no longer prohibit the creation of a computerized database containing firearms transaction information. The movement from manufacturer to shipper to wholesale dealer to retailer to purchaser should be recorded for the simple reason that law enforcement personnel should be able to determine quickly and accurately, when a gun is used in a crime, where that gun came from and who purchased it.

These proposals are direct responses to our findings that there exists an illegal market in guns that directly feeds the public health and public safety problems we have described. We cannot restore the lives of those slain due to the easy availability of firearms but we can end the legacy of inaction that continues to claim new victims.

