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# COMPREHENSIVE HANDGUN LICENSING & REGISTRATION: AN ANALYSIS & CRITIQUE OF BRADY II, GUN CONTROL'S NEXT (AND LAST?) STEP

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## I. INTRODUCTION

The Brady Handgun Violence Prevention Act,<sup>1</sup> which became effective in 1994, imposed a background check on prospective handgun purchasers who seek to buy handguns from federal firearm licensees (FFLs). While the handgun control groups that lobbied for the Brady law have labeled it a success, they are also pushing a supplementary omnibus bill that would create a comprehensive handgun licensing and registration system, in effect, extending Brady to the secondary market of handgun transfers between non-dealers.<sup>2</sup> This Article analyzes the constitutionality and feasibility of this bill's comprehensive handgun licensing and registration provisions.

Part II describes the main features of Brady II.<sup>3</sup> Part III argues that Brady II would be unconstitutional under the Supreme Court's decision in *Printz v. United States*, which struck down Brady I's requirement that state or local officials carry out background checks of prospective handgun purchasers.<sup>4</sup> Parts

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<sup>1</sup> 18 U.S.C. § 922 (q)-(t) (1994).

<sup>2</sup> Handgun Control and Violence Prevention Act of 1995, H.R. 1321, 104th Cong.; S. 631, 104th Cong.

<sup>3</sup> While Brady II covers everything from licensing and registration to monthly limits on handgun purchases to FFL tort liability for victims of gun violence, the scope of this article is limited to Brady II's licensing and registration provisions.

<sup>4</sup> *Printz v. United States*, 117 S. Ct. 2365 (1997).

IV and V demonstrate the practical difficulties that would be-  
devil comprehensive handgun licensing and registration.

## II. BRADY II'S REGULATORY VISION

In 1995, Congressman Charles Schumer (D-NY), and Senators Bill Bradley (D-NJ) and Charles Lautenberg (D-NJ) introduced the Handgun Control and Violence Prevention Act of 1995<sup>5</sup> (Brady II). It would require all handgun purchasers to obtain a state handgun permit; states with no handgun permit laws would have to enact them.<sup>6</sup> Brady II also requires that handguns be registered before being transferred. Brady II significantly expands Brady I by making it illegal "for any person to sell, deliver, or otherwise *transfer* a handgun to an individual who is not [an FFL] unless the transferor . . . verifie[s] that the

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<sup>5</sup> H.R. 1321, 104th Cong.; S. 631, 104th Cong.

<sup>6</sup> Many of the provisions in Brady II were based on previous proposals introduced into Congress in recent years. Multiple Handgun Transfer Prohibition Act of 1995, H.R. 964, 104th Cong. (proposing limit on purchase of handguns to no more than two per month); Handgun Registration Act of 1995, H.R. 169, 104th Cong. (proposing state and federal handgun registration system); H.R. 711, 103d Cong. (proposing handgun licensing system); Multiple Handgun Transfer Prohibition Act of 1993, H.R. 544, 103d Cong. (proposing limit on purchase of handguns to no more than two per month).

Brady II was first introduced before Congress on March 1994 as the Gun Violence Prevention Act of 1994. H.R. 3932, 103d Cong.; S. 1882, 103 Cong. Its provisions are nearly identical to the 1995 version. In addition to a licensing and registration system, the Gun Violence Prevention Act contained provisions for: (1) a seven-day waiting period; (2) making it a crime to store or leave a firearm any place where an "unsupervised juvenile" is likely to gain access to firearms, and requiring FFLs to post warning signs to that effect; (3) prohibiting an individual (other than FFLs or those who hold arsenal licenses) from possessing more than 20 firearms or more than 1,000 rounds of ammunition; (4) repealing provisions for restoration of firearm possession/purchase privileges under certain circumstances; and (5) limiting handgun purchases to one per month. The Act also provided for more stringent regulation of FFLs by increasing the license fee, making compliance with state and local law a condition precedent to obtaining a license, authorizing the Bureau of Alcohol, Tobacco & Firearms (ATF) to inspect records three time per year, requiring FFL employees to be at least eighteen-years-old, obtain a handgun license and undergo a background check. Further, FFLs are prohibited from transferring a firearm at any location other than the one specified on the license, and must report lost/stolen firearms within 24 hours after discovery. Additionally, the Act expands the class of "prohibited weapons," increases the tax on handguns and handgun ammunition, and prohibits the import or manufacture of any firearm that is not child-proofed.

transferee possesses a valid State handgun license.”<sup>7</sup> It also makes it unlawful for anyone, other than an FFL, to *receive* a handgun or handgun ammunition “unless the individual possesses a valid State handgun license.”<sup>8</sup> The proposed law would prohibit, not only sales by an FFL to an unlicensed purchaser, but handgun sales in the secondary market between private citizens, as well as non-commercial handgun transfers between friends or family members.<sup>9</sup>

Brady II does not leave it entirely up to states to determine the requirements for obtaining a state handgun license. The state handgun license must “at a minimum, meet the following requirements:” (1) licenses shall be issued by the state’s chief law enforcement officer (CLEO); (2) they shall contain the licensee’s name, address, date of birth, physical description, and a photograph; and (3) licenses shall be valid for a period not to exceed two years.<sup>10</sup> Before granting a state license, the CLEO must verify that: (1) the applicant is at least twenty-one years old; (2) the applicant is a resident of the state (the applicant must present an identification document, such as a driver’s license, and a document establishing residency, such as a utility bill or lease); (3) the applicant is not “prohibited from possessing or purchasing a handgun under federal, state, or local law based upon name and fingerprint-based research” in federal and state record systems; and (4) the applicant must have been issued a State handgun safety certificate.<sup>11</sup>

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<sup>7</sup> H.R. 1321, § 101 (y)(1) (emphasis added).

<sup>8</sup> *Id.* at §101 (y)(3).

<sup>9</sup> Although Brady II envisions a new regulatory scheme, its ultimate goal is the same as that embodied in the Gun Control Act of 1968, which set forth categories of persons prohibited from possessing handguns, and Brady I—preventing gun violence by keeping guns out of the wrong hands. Gun Control Act of 1968, 18 U.S.C. § 922(g) (1994). Transfer of firearms to or possession by the following persons is prohibited: (1) anyone under felony indictment or convicted of a felony; (2) fugitives from justice; (3) unlawful users or drug addicts; (4) illegal aliens; (5) dishonorable discharges from military; (6) anyone who renounced U.S. citizenship; (7) anyone subject to restraining order for domestic violence; and (8) anyone convicted of misdemeanor domestic violence. *Id.*

<sup>10</sup> H.R. 1321, §101(y)(5)(A).

<sup>11</sup> *Id.* at §101 (y) (5) (B). A State handgun safety certificate may be issued to residents who have completed “a course of not less than two hours of instruction in handgun safety, that was taught by law enforcement officers and designed by the

In proposing Brady II, Congressman Schumer argued that a comprehensive handgun licensing and registration scheme for all handgun owners is needed to complete the regulatory framework started by Brady I.<sup>12</sup> Handgun Control, Inc. (HCI), the citizens' organization that drafted Brady II, stated that "[l]icensing of handgun purchasers allows more thorough background checks to be conducted on gun buyers and would help expose gun traffickers by allowing for more accurate tracing of guns found at crime scenes. . . . Enacting these laws is no longer a choice; it is a necessity."<sup>13</sup>

According to HCI's former executive director, Richard Aborn, HCI decided to switch from an incremental one-step-at-a-time strategy to achieve effective gun control to a comprehensive approach that puts forward the organization's full agenda in one proposal.<sup>14</sup> HCI felt that a comprehensive approach is the only way to have a significant impact on reducing gun violence. According to Aborn, other legislative issues, for example, health care, social security, and the environment, are not dealt with in such an incremental fashion; "You have the Clean Air Act, not the Clean Air Act only over New York State."<sup>15</sup> Additionally, HCI wanted to respond to accusations by the National Rifle Association that HCI had a "secret plan" to ban all firearms and that each new piece of gun control legislation was a step in that direction. Aborn stated, "We wanted to put all our cards on the table."<sup>16</sup>

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[CLEO]; and has passed an examination, designed by the [CLEO], testing the applicant's knowledge of handgun safety." *Id.* at §101 (y) (7) (B).

<sup>12</sup> Tom Diemer, *Gun Control Group Calls for Licensing All Handguns*, PLAIN DEALER (Cleveland), Dec. 9, 1993, at A1.

<sup>13</sup> Sarah Brady, *Re: Our Country's Claim to Shame: United Nations Study Finds U.S. is a Leading Source of Firearms for International Gun Smugglers*, PRESS RELEASE (Handgun Control, Inc., Washington, D.C.), May 5, 1997, at 1, 2.

<sup>14</sup> Telephone Interview with Richard Aborn (Feb. 19, 1998). HCI, unlike the Coalition to Ban Handguns, does not seek the prohibition of private ownership of handguns as the ultimate goal of gun control.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

## III. CONSTITUTIONALITY

The Supreme Court's decision in *Printz v. United States*<sup>17</sup> makes the constitutionality of Brady II as currently drafted very doubtful. In *Printz*, chief law enforcement officers (CLEOs) in Arizona and Montana challenged the Brady I requirement that state law enforcement officials conduct background checks of prospective handgun purchasers.<sup>18</sup> In declaring Brady I's use of CLEOs to conduct background checks unconstitutional, the Court stated that "[t]he federal Government may not compel the States to enact or administer a federal regulatory program. The mandatory obligation imposed on CLEOs to perform background checks on prospective handgun purchasers plainly runs afoul of that rule."<sup>19</sup> The Court reasoned that the Framers rejected the concept of a central government that would act upon and through the states, and instead designed a system in which the state and federal governments would exercise concurrent authority over the people.

The Constitution's structure reveals a principle that controls these cases: the system of "dual sovereignty."

Although the States surrendered many of their powers to the new Federal Government, they retained "a residuary and inviolable sovereignty" [that] is reflected throughout the Constitution's text . . . . Residual state sovereignty was also implicit . . . in the Constitution's conferral upon Congress of not all governmental powers, but only discreet, enumerated ones, which implication was rendered express by the Tenth Amendment's assertion that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."<sup>20</sup>

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<sup>17</sup> 117 S. Ct. 2365 (1997).

<sup>18</sup> Brady's five day waiting period applied only to those states which did not have either an "instant check" system for conducting background checks or a state license or permit requirement for handgun purchases. Twenty-five states are so-called "Brady states," while twenty-seven states have an instant check system or a licensing scheme. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SURVEY OF STATE PROCEDURES RELATED TO FIREARM SALES 1996, Appendix Table 2, at 64 (1997).

<sup>19</sup> *Printz*, 117 S. Ct. at 2383 (citations omitted). The use of CLEOs to conduct background checks is a temporary measure until the National Instant Background Check System becomes effective, at which point FFLs will conduct checks via computer or telephone. 18 U.S.C. § (t)(1) (1994).

<sup>20</sup> *Printz*, 117 S. Ct. at 2376-77.

Further, the Court rejected the claim that the Brady Act was constitutional pursuant to Congress' power to enact all laws necessary and proper to carrying out its gun control objectives under the Commerce Clause. The Court held that when a law purporting to regulate commerce "violates the principle of state sovereignty . . . , it is not a 'Law . . . proper for carrying into Execution the Commerce Clause,' and is thus merely an act of usurpation."<sup>21</sup> Justice Scalia stated:

Congress cannot compel the States to enact or enforce a federal regulatory program . . . [nor may it] circumvent that prohibition by conscripting the States' officers directly. The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.<sup>22</sup>

The decision, of course, left it open to CLEOs to voluntarily continue conducting background checks. Following *Printz*, ATF issued a press release and letter to all FFLs explaining that they were still required to: (1) have potential purchasers fill out the Brady Form; (2) forward the Brady Form to the CLEO (who may conduct a voluntary background check); and (3) hold up sale of the handgun until they receive a green light from the CLEO or wait five business days, whichever comes first.<sup>23</sup> Nevertheless, *Printz* dealt a serious blow to the federal government's ability to enlist state law enforcement personnel to enforce federal gun control regulations. Brady II, as currently drafted, would almost certainly be unconstitutional because it violates the Supreme Court's holding in *Printz*, that the federal government may not commandeer state officials to enforce or administer a federal regulatory scheme. Brady II requires much more action on the part of state officials than Brady I. Under Brady II, state officials would have to set up and administer a huge li-

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<sup>21</sup> *Id.* at 2379 (quoting The Federalist No. 33 (A. Hamilton)).

<sup>22</sup> *Id.* at 2384.

<sup>23</sup> *Supreme Court Decision*, ATF NEWS (Bureau of Alcohol, Tobacco & Firearms, Washington, D.C.), June 27, 1997, at 1; John W. Magaw, *Open Letter to All Federal Firearms Licensees*, LETTER FROM DIRECTOR (Bureau of Alcohol, Tobacco and Firearms, Washington, D.C.), June 27, 1997, at 1.

censing system, design curriculum for and conduct handgun safety classes, issue safety certificates, process the applications of huge numbers of firearms owners and revoke the registrations of certain owners.<sup>24</sup> The Bill also specifies that a handgun license would only be good for two years;<sup>25</sup> therefore, there would be a continuous process of reviewing and renewing licenses. In a post-*Printz* world, Congress must find some other way to implement this licensing scheme.

Future federal law could try to tie state participation to receipt of federal funds; in other words, if a state wants federal money for more police, improved technology and new programs, then that state must administer and enforce the gun control regulations specified in the Brady II proposal. Such tactics are not unusual. For example, Congress has made receipt of federal transportation and highway money contingent on states passing a twenty-one-year-old minimum drinking age and laws requiring the wearing of seat belts and the use of infant/child car seats, among others.<sup>26</sup> The same strategy could be used to assure state participation in handgun control. This strategy would be unlikely to succeed, albeit not because of constitutional infirmities. First, states with strong pro-gun citizenries and lobbies, i.e. the very states that have no state handgun regulations, would surely choose to forego the federal funds.<sup>27</sup> This would be a major, probably fatal problem.<sup>28</sup> If even a few states do not participate, handguns could continue to migrate from states with relaxed gun laws to states with strict gun con-

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<sup>24</sup> Handgun Control and Violence Prevention Act of 1995, H.R. 1321, 104th Cong. §101.

<sup>25</sup> *Id.* at §101 (y) (5) (A) (iii).

<sup>26</sup> *South Dakota v. Dole*, 107 S. Ct. 2793, 2798 (1987).

<sup>27</sup> Today, 15 states require a license for handgun purchases; seven states have both a handgun licensing system and a registration requirement; registration in three states is mandated by local ordinance; in Indiana registration is voluntary; and in Washington, D.C., handgun purchases and possession are prohibited, except by police officers. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SURVEY OF STATE PROCEDURES RELATED TO FIREARM SALES, 1996, 2 (1997).

<sup>28</sup> According to a General Accounting Office study, 23 states failed to pass truth-in-sentencing legislation despite the lure of federal funds. U.S. GENERAL ACCOUNTING OFFICE, TRUTH IN SENTENCING: AVAILABILITY OF FEDERAL GRANTS INFLUENCED LAWS IN SOME STATES (1997).



trols. Indeed, the resulting patchwork of control and non-control states might not look much different than the current situation in which some states do require handgun and firearm licenses, while the majority do not. In states with strict gun controls, guns traced by the police often originated from another state with more permissive gun control laws.<sup>29</sup>

Alternatively, federal legislators could go further and create a *federal administrative system* of gun control, such as a licensing and registration system. Such a system would establish a uniform national handgun policy that would solve the problem of handguns flowing from states with permissive gun laws into states with strict gun laws. On the other hand, it would be legislatively complex and expensive to create a federal nationwide system of handgun licensing and registration.

#### IV. BRADY II & HANDGUN LICENSING

Supporters of Brady II's licensing scheme frequently stress that guns should be regulated at least as much as automobiles.

Like cars, guns are dangerous. Cars are not designed to kill, and yet are heavily regulated: drivers must be of a minimum age, take a training course, pass a proficiency test, get a license; obtain insurance, and register the car. Guns carry none of these restrictions. In the interest of saving lives, Brady II would require gun owners and manufacturers to adopt safety measures similar to those required of car owners.<sup>30</sup>

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<sup>29</sup> For example, guns used in crimes in Washington, D.C. were traced to nearby Virginia which had relatively permissive gun controls. Following passage of a new gun control measure in Virginia limiting handgun purchases to one per month, Virginia became a less popular source for Washington, D.C. crime guns. Jon Jeter, *Maryland Tops Virginia as D.C. Gun Supplier, Crime Report Boosts Proposal to Limit Sales*, WASH. POST, JAN. 28, 1996, at A1; Jerry Thomas, *Tracking the Georgia Connection*, BOSTON GLOBE, Apr. 30, 1990, at Metro 1; Jerry Thomas, *Most Guns Bought Outside State*, BOSTON GLOBE, May 27, 1989, at Metro 25.

Interestingly, despite Washington D.C.'s ban on handguns, it leads the nation in the percentage of handgun related homicides—76%. Holly Yeager, *Guns in America, Part I: Scattershot Statutes*, HEARST NEWSPAPERS, Oct. 24, 1997, available at <<http://www.chron.com/content/chronicle/nation/guns/gunpart1.html>>.

<sup>30</sup> Handgun Control, Inc., *The Gun Violence Prevention Act—Brady II Questions and Answers* (visited Sept. 21, 1998) <<http://www.handguncontrol.org/about-main.htm>>.

In effect, Brady II seeks to create a drivers' license-like system for handgun owners by requiring a license to purchase or otherwise receive handguns. Brady II establishes a federally mandated (but state-run) licensing system whereas drivers' licensing is state authorized and administered. Brady I regulates FFLs in an effort to prevent retail sale of handguns to convicted felons and other ineligible. Brady II expands the regulatory reach to cover all non-FFL handgun and handgun ammunition sellers/transfersors and purchasers/transferees.<sup>31</sup> Brady II does not require the millions of current handgun owners (approximately 29% of American households), who currently possess an estimated eighty to ninety-million handguns,<sup>32</sup> to be licensed unless and until they seek to make another handgun purchase or seek to sell or otherwise transfer a handgun. Prospective sellers/transfersors have to verify that the prospective purchaser/transferee has a handgun license, confirm with a CLEO that the license has not been revoked, and fill out and submit registration forms documenting the sale or transfer.<sup>33</sup>

Under Brady II, the licensing scheme would, in effect, pre-certify the prospective purchaser as an eligible handgun purchaser and she would be able to purchase a handgun from an FFL upon showing her handgun license and an additional photo identification document. There would be a type of second background check, since the seller would need confirmation from the CLEO that the prospective purchaser's handgun license has not been revoked.<sup>34</sup> A person who sells or transfers a handgun in violation of the Brady II requirements would be subject to a fine, imprisonment of not less than six months or more than three years, or both. If a person violates Brady II with respect to five or more handguns during a thirty day pe-

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<sup>31</sup> In addition, Brady II seeks to reduce the number of FFLs selling handguns by: (1) requiring FFL's to demonstrate that they are meeting "a significant unmet economic demand" before they are authorized to deal in handguns; and (2) raising the business license fee from \$200 to \$3,000. H.R. 1321, §103., 104th Cong.; S. 631, 104th Cong.

<sup>32</sup> GARY KLECK, *TARGETING GUNS: FIREARMS AND THEIR CONTROL* 97 (1997).

<sup>33</sup> Handgun Control and Violence Prevention Act of 1995, H.R. 1321, 104th Cong. §101.

<sup>34</sup> *Id.* at §101 (y) (5) (A) (iii).

riod, the penalty increases to a fine, imprisonment of not less than three years, or both. An unlicensed person who receives a handgun is subject to the same penalties as the seller.<sup>35</sup> To reiterate, however, current handgun owners do not need a license to continue ownership and possession of their handguns; they will need a license if they want to sell or transfer their handguns or purchase additional handguns.<sup>36</sup>

The real advance that the Brady II licensing requirement makes over Brady I is that it seeks to extend the Brady I regulatory controls to the secondary market's non-FFL sellers. Under Brady I, a private individual, not in the business of selling firearms, who wishes to sell or even give her firearm to another individual could do so by placing an ad in the paper or going to a gun show and transferring the handgun to any interested purchasers, *as long as the seller did not know that the purchaser was ineligible to purchase a handgun.*<sup>37</sup> This gap in Brady I has been criticized as a major loophole.<sup>38</sup> "The principal shortcoming of the law is that it does not cover non-dealer transactions, which probably account for the majority of transfers of guns to criminals."<sup>39</sup> Under Brady II, it is a crime for a handgun owner to sell or otherwise transfer a handgun to an unlicensed person.

#### A. WHAT WILL COMPREHENSIVE LICENSING ACHIEVE?

Like drivers' licensing, Brady II handgun licensing is a permissive system. Anyone is eligible to obtain a handgun license as long as she is older than twenty-one and does not fall within one of the prohibited categories (*e.g.* felony criminal re-

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<sup>35</sup> *Id.* at §204 (a)(B). Brady II does not specify the amount of the fine.

<sup>36</sup> *Id.*

<sup>37</sup> It unlawful for anyone (FFLs and private individuals) to sell or transfer a firearm knowing or having reasonable cause to know that the prospective purchaser is ineligible to possess or purchase a handgun. 18 U.S.C. § 924 (1994).

<sup>38</sup> See, *e.g.*, Philip J. Cook, et al. *Regulating Gun Markets*, 86 J. CRIM. L. & CRIMINOLOGY 59 (1995); James B. Jacobs & Kimberly Potter, *Keeping Guns Out of the "Wrong" Hands: The Brady Law and the Limits of Regulation*, 86 J. CRIM. L. & CRIMINOLOGY 93 (1995).

<sup>39</sup> KLECK, *supra* note 32, at 375-76. See Cook et al., *supra* note 38, at 59.

cord).<sup>40</sup> This system resembles the drivers' licensing systems in every state which permit individuals who meet the minimum age to obtain drivers' licenses after demonstrating minimal driving skills and knowledge of traffic laws.<sup>41</sup> There is no serious attempt *ex ante* to prevent irresponsible or dangerous people from obtaining drivers' licenses. There is no background check into characteristics that may make someone a dangerous driver, such as immaturity, bad-temperedness, anti-social personality, alcohol or drug abuse, or mental illness. *Ex ante*, the drivers' licensing system weeds out practically no one. The drivers' licensing system only has teeth *after* the driver demonstrates dangerous driving by violating a serious traffic law. At that point, of course, injury and even death may already have happened. It is estimated that one in five traffic fatalities are caused by unlicensed drivers.<sup>42</sup> Only after individuals violate the traffic laws are their licenses suspended or revoked. However, license suspension and revocation by no means assures the removal of the dangerous driver from the road. Does the weak licensing system work? There are more than 40,000 motor vehicle deaths annually and hundreds of thousands of serious injuries.<sup>43</sup> In comparison, fatalities due to gun accidents (*e.g.*, accidental discharges) number approximately 1400-1500 per year.<sup>44</sup>

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<sup>40</sup> Additional state requirements also have to be satisfied, such as the "restrictive" (good cause) requirements of a few states like New York. N.Y. PENAL LAW § 400.00 (McKinney 1989); NEW YORK CITY, N.Y. RULES § 5-02 (1991).

<sup>41</sup> However, drivers' licensing statutes may make drug addicts, persons with uncorrectable severe vision impairments, or persons with convictions for driving while intoxicated ineligible for a driver's license.

<sup>42</sup> See Emily Sachar, *Unlicensed Drivers' Bill Near*, NEWSDAY, June 16, 1993, at 7.

<sup>43</sup> National Center for Injury Prevention and Control, U.S. Dep't of Health & Human Servs., *Unintentional Motor Vehicle Traffic-Related Deaths and Rates Per 100,000* (visited Jan. 24, 1998) <<http://www.cdc.gov/ncipc/osp/us9592/umvtr.htm>>.

<sup>44</sup> KLECK, *supra* note 32 at 323-24 tbl.9.2. According to Gary Kleck, "[p]erhaps the most widespread myth about gun accidents is that gun accidents primarily involve children. This is a dangerous misdiagnosis of the problem, which can misdirect control efforts into ineffective or irrelevant paths." *Id.* at 298. In 1993, 119 children under 13 years old were killed in gun accidents. Many studies report much higher numbers (for example, 1,000 children die from gunshot wounds). This is because "child" is defined as anyone between the ages of 0-24! *Id.* at 299.

Vast numbers of drivers with suspended and revoked licenses continue to drive.<sup>45</sup> In New York State alone, approximately 100,000 persons are convicted of unlicensed operation of a motor vehicle each year, and this is probably a small proportion of the actual number of people who drive without a valid license.<sup>46</sup> A person arrested for driving without a license is rarely punished seriously.<sup>47</sup> Another intractable problem plaguing the motor vehicle regulatory machinery is the number of uninsured drivers on the road. It is estimated that uninsured drivers cause approximately one-eighth of all serious traffic accidents.<sup>48</sup> Nevertheless, many people believe this is a regulatory system that works and that ought to be a model for handgun licensing.

Arguably, a handgun licensing system, with its tougher licensing requirements, would weed out ineligible more effectively than the drivers' licensing system. Additionally, Brady II's federal criminal penalties for possession of a handgun without a license are much tougher than punishments for driving without a license and may do a better job of deterrence. However, it is questionable whether the federal law enforcement system and federal courts would have the resources, capability, and will to enforce the law vigorously.<sup>49</sup>

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<sup>45</sup> See JAMES B. JACOBS, *DRUNK DRIVING: AN AMERICAN DILEMMA* 120 (1989).

<sup>46</sup> See NEW YORK STATE STATISTICAL YEARBOOK 455 (1994). Even the New York City government has difficulty keeping dangerous and unlicensed city employees off the road. According to New York City Comptroller Alan Hevesi, 1200 city employees who drive vehicles in the course of their municipal duties are unlicensed. Further, those with poor records are permitted to drive on municipal business, including 784 city employees with drunk driving convictions and 1869 who had two or more accidents. See Paul Moses, *City Lets 1,200 Drive with No License*, NEWSDAY, Sept. 6, 1996, at A33.

<sup>47</sup> In two extreme cases, a New York City driver remained on the road despite 633 license suspensions over the course of five years, and a Long Island, NY driver continued to drive despite 74 license suspensions in seven years. Both men were arrested and charged with aggravated unlicensed operation of a motor vehicle, a felony subject to a maximum of one and one-third to four years imprisonment. See Karen Freifeld, *City's Top Scofflaw Pulled Over*, NEWSDAY, Nov. 14, 1994, at A21; Michele Salcedo, *74 Suspensions Land Scofflaw in Jail*, NEWSDAY, Nov. 17, 1993, at A27.

<sup>48</sup> Michael deCourcy Hinds, *Uninsured Drivers Create Other Kinds of Wreckage*, N.Y. TIMES, Sept. 3, 1990, at A1.

<sup>49</sup> See *infra* notes 53-56 and accompanying text discussing problems enforcing the federal felon-in-possession law.

## B. EVADING THE BRADY II LICENSING SYSTEM

A person ineligible for a handgun license could evade the Brady II licensing system by persuading a gun owner to sell or "lend" him a handgun or he could use a counterfeit, stolen, or borrowed license.<sup>50</sup> Further, an unlicensed person could use a licensed "straw man" to purchase the handgun on his behalf, although the straw man's subsequent transfer to the ineligible person would be illegal. Finally, the unlicensed person could steal a handgun.

As long as the unlicensed purchaser is never caught with the handgun, the unlawful sale will go unnoticed.<sup>51</sup> The risk of detection is negligible.<sup>52</sup> If the unlicensed handgun owner is arrested, he could claim that he did not need a license because he had owned this handgun before Brady II went into effect. Of course, if the handgun had been manufactured subsequent to

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<sup>50</sup> As federal licenses become necessary to purchase handguns from FFLs, phony handgun licenses will become a hot commodity, just as fake drivers' licenses and green cards are now. See generally, *Implementation of Employer Sanctions: Hearings on H.R. 521 Before the Subcomm. on International Law, Immigration, and Refugees of the House Comm. on the Judiciary*, 103d Cong., 1st Sess. 282 (1993) (statement of Dan Stein, Executive Director, Federation for American Immigration Reform, noting ready availability of phony identification documents); Art Barnum, *Curbing Fakes: State Targeting Traffic in Phony Driver's Licenses*, CHI. TRIB., Sept. 13, 1993, at D1; William Branigin, *New Law Fails to Stem Flow of Mexicans Into California: Loophole May Add to Illegal Crossings*, WASH. POST, June 23, 1988, at A30 (discussing "booming market" in phony identification papers); Jeffrey Roberts, *ID Cards Used to Buy Guns Illegally*, DENVER POST, Jan. 17, 1994, at A1. Especially in the secondary market, a fake handgun license could be used to dupe the unsophisticated seller. Alternatively, a fake driver's license could be used to obtain a valid handgun license, although this is less likely to succeed because of Brady II's background check requirement which includes a fingerprint-based search in federal and state records.

<sup>51</sup> The vast majority of handgun owners do not use their weapons to commit crime. KLECK, *supra* note 32, at 71.

<sup>52</sup> In testimony before Congress, Jo Ann Harris, Assistant Attorney General, Criminal Division, U.S. Department of Justice, stated:

[T]he most common way we come across a 922(g) [felon-in-possession] violation is when the person has committed another crime. It is difficult for law enforcement to learn about and be able to prosecute a 922(g) without their having committed another crime because it is very difficult to find them in possession.

*Prosecution of Federal Gun Crimes: Hearings Before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary*, 103d Cong., 2d Sess. 49 (1994) [hereinafter *Prosecution of Federal Gun Crimes*].

passage of Brady II, the arrestee could not rely on that tale. Nevertheless, it seems unlikely that federal prosecutors will be eager to bring prosecutions against otherwise law-abiding citizens who failed to comply with Brady II's licensing requirements. Currently, federal prosecutors do not eagerly accept for prosecution *felon-in-possession* cases unless the felon is a hardened criminal who represents a threat to the public.<sup>53</sup> A study of cases presented to the U.S. Attorney's Office for the Northern District of Illinois found that the prosecution rate for weapons and explosives offenses was 24%.<sup>54</sup> In 1993, U.S. Attorneys' offices nationwide declined to prosecute 27.6% of weapons offenses.<sup>55</sup> According to the head of the Justice Department's Criminal Division, prosecuting every felon-in-possession case would not be "good law enforcement policy."<sup>56</sup> In 47% of weapons cases declined for prosecution, the reason provided by the screening prosecutor was that the case involved a "minor offense."<sup>57</sup> Moreover, juries may be unwilling to convict if the defendant's only crime is unlicensed possession of a handgun.<sup>58</sup>

If the unlawful handgun transfer did come to light, the seller (assuming he could be traced and found) could untruthfully claim that he did not realize the gun was missing; had he realized it, he certainly would have reported it as lost or stolen.<sup>59</sup> He could claim that the person to whom he transferred the handgun did have a valid license and that he did fill out and file

<sup>53</sup> See Daniel C. Richman, *Old Chief v. United States: Stipulating Away Prosecutorial Accountability?*, 83 VA. L. REV. 939, 982-85 (1997).

<sup>54</sup> Richard S. Frase, *The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion*, 47 U. CHI. L. REV. 246, 258 tbl.3 (1980).

<sup>55</sup> UNIFORM CRIME REPORTS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS - 1995, at 465 tbl. 5.16 (1996). The U.S. Attorneys' offices declined to prosecute 30.9% of all crimes presented.

<sup>56</sup> See *Prosecution of Federal Gun Crimes*, *supra* note 52, at 50.

<sup>57</sup> See Frase, *supra* note 54, at 269 tbl.10.

<sup>58</sup> See David N. Dorfman & Chris K. Iijima, *Fictions, Fault, and Forgiveness: Jury Nullification in a New Context*, 28 U. MICH. J.L. REFORM 861, 888 (1995). Between 1990 and 1993 in Brooklyn, New York, juries acquitted 56% of all defendants in state gun possession cases. The acquittal rate for all crimes was approximately 35%. *Id.* at 886-87.

<sup>59</sup> Brady II requires that within 24 hours after discovery that a handgun has been stolen or lost, the licensed person shall report the theft or loss to the Secretary of the Treasury, the CLEO, and local law enforcement. Failure to do so is punishable by a civil penalty of not less than \$1,000. See H.R. 1321, § 101(y)(5)(G)(i)-(ii).

all the relevant forms; he could also claim to be the victim of a fraud by the arrested person or of a bureaucratic screw up.

The Brady II licensing system is unlikely to prevent criminals from obtaining handguns. First, many criminals already own handguns or have ready access to handguns through a friend, family member, or a gang associate.<sup>60</sup> Many guns are obtained through theft or purchase from drug dealers or addicts.<sup>61</sup> Motivated criminals (who are not deterred by existing criminal laws) are hardly going to worry about committing the crime of illegally selling or transferring a handgun.

Since 1968, it has been a federal crime for a person with a felony record to possess a firearm.<sup>62</sup> Nevertheless, gun ownership levels among convicted felons is higher than among the general population.<sup>63</sup> A 1986 survey sponsored by the National Institute of Justice found that five out of six gun-owning felons obtained handguns from the secondary market and by theft,<sup>64</sup> and that "[t]he criminal handgun market is overwhelmingly dominated by informal transactions and theft as mechanisms of supply."<sup>65</sup> According to a more recent National Institute of Justice survey of juvenile felons and inner-city juveniles, conducted by Joseph F. Sheley and James D. Wright, 54% of the inmates and 37% of the students indicated they could easily obtain a handgun "off the street."<sup>66</sup> An even greater percentage reported that they could get a handgun from a friend or family member

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<sup>60</sup> See KLECK, *supra* note 32, at 86-88. See also JEFFREY A. ROTH, U.S. DEPT. OF JUSTICE, FIREARMS AND VIOLENCE 3 (1994); JOSEPH F. SHELEY & JAMES D. WRIGHT, U.S. DEPT. OF JUSTICE, GUN ACQUISITION AND POSSESSION IN SELECTED JUVENILE SAMPLES 6 (1993); U.S. DEPT. OF JUSTICE, NAT'L INST. OF JUSTICE, ARRESTEES AND GUNS: MONITORING THE ILLEGAL FIREARMS MARKET (1995) [hereinafter NIJ, ARRESTEES AND GUNS]; MARIANNE W. ZAWITZ, U.S. DEPT. OF JUSTICE, GUNS USED IN CRIME (1995).

<sup>61</sup> See SHELEY & WRIGHT, *supra* note 60, at 6; KLECK, *supra* note 32, at 90-91.

<sup>62</sup> See 18 U.S.C.A. § 922(g) (1) (West 1998).

<sup>63</sup> See SHELEY & WRIGHT, *supra* note 60, at 6.

<sup>64</sup> JAMES D. WRIGHT, U.S. DEPT. OF JUSTICE, THE ARMED CRIMINAL IN AMERICA: A SURVEY OF INCARCERATED FELONS 2 (1986).

<sup>65</sup> *Id.*

<sup>66</sup> SHELEY & WRIGHT, *supra* note 60, at 6. Sheley and Wright's study focused on juvenile felons and inner-city juveniles "because these groups are popularly thought to engage in and experience violence at rates exceeding those of most other groups." *Id.* at 1.



(45% of inmates and 53% of juveniles).<sup>67</sup> The survey found that the top sources for handguns in order of preference were: (1) borrowing from a family member or friend (45% of inmates, 53% of juveniles); (2) buying a handgun from a family member or friend (36% of inmates, 35% of juveniles); (3) buying "off the street" (54% of inmates, 37% of juveniles); (4) buying from a drug dealer or addict (36% of inmates, 22% of juveniles); (5) buying from a gun shop (12% of inmates, 28% of juveniles); and (6) theft (17% of inmates, 8% of juveniles).<sup>68</sup> Eighty-five percent of inmates owned a gun just prior to their arrest, while 22% of juveniles owned a gun at the time of the survey. Interestingly, the authors noted that "focusing on ownership results in an *under-estimation* of the number of guns in the hands of the students in the study. . . . Among the student sample, carrying a gun at least occasionally was *more common* than gun ownership [35% report carrying]."<sup>69</sup>

Quite possibly, imposing stricter handgun control measures on the retail market may have minimal impact on preventing felons and juveniles from obtaining handguns. While the inmates and juveniles in Sheley and Wright's survey viewed FFLs as a potential source for handguns, they also thought it unnecessary to resort to retail dealers. Indeed, the informal market for illegal guns (*i.e.*, family, friends, drug dealers, and addicts) makes it unlikely that licensing and registration requirements applicable to the secondary market would have a significant impact. Sheley and Wright concluded that:

Informal commerce in small arms involving purchases and trades among private parties . . . is difficult to regulate . . . and successfully subverts legal measures designed to prevent guns from falling into the wrong hands. In the final analysis, the problem may not be that the appropriate laws do not exist but that the laws that do exist apparently are not or cannot be enforced, and that persons involved in firearms transactions with juveniles are not concerned with the legality of the transaction.<sup>70</sup>

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<sup>67</sup> *Id.* at 6 tbl.2.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 5.

<sup>70</sup> *Id.* at 10.

Theft is one of the primary ways that handguns end up in the hands of criminals. Each year, an estimated 500,000 to 1.4 million firearms are stolen.<sup>71</sup> In addition to the eighty million handguns currently owned, approximately 4.5 million new handguns are sold each year, thus adding to the stock of handguns available for theft.<sup>72</sup> Further, most stolen guns are not obtained as part of an organized large-scale gun trafficking operation, but in small-scale deals or simply by chance during the course of committing crimes.<sup>73</sup> Some researchers have found that 40-70% of convicted felons obtained their most recent handgun through theft.<sup>74</sup> Other statistics indicate that 47% of felons had stolen guns at least once, while 32% of felons had obtained their most recent handgun through theft.<sup>75</sup> While criminals are not necessarily experts in gun theft, and may not commit a burglary or theft with the goal of obtaining a gun, the majority of handguns possessed by criminals are stolen, although not necessarily by the current owner.<sup>76</sup> According to sociologist Gary Kleck:

Even if one could completely eliminate all voluntary transfers of guns to criminals, including lawful or unlawful transfers, involving either licensed dealers or private citizens, and even if police should completely confiscate all firearms from all criminals each year, a single year's worth of gun theft alone would be more than sufficient to rearm all gun criminals and easily supply the entire set of guns needed to commit the current number of gun crimes.<sup>77</sup>

### C. LICENSING CONCLUSIONS

Brady II seeks to bolster the Gun Control Act of 1968 and the Brady Handgun Control Act of 1993 by establishing a comprehensive handgun and handgun ammunition licensing

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<sup>71</sup> See Cook et al., *supra* note 38, at 81.

<sup>72</sup> KLECK, *supra* note 32, at 87.

<sup>73</sup> KLECK, *supra* note 32, at 91; SHELEY & WRIGHT, *supra* note 60, at 6.

<sup>74</sup> JAMES D. WRIGHT ET AL., UNDER THE GUN: WEAPONS, CRIME, AND VIOLENCE IN AMERICA 193-97 (1983).

<sup>75</sup> See WRIGHT, *supra* note 64, at 2.

<sup>76</sup> KLECK, *supra* note 32, at 91; SHELEY & WRIGHT, *supra* note 60, at 6.

<sup>77</sup> KLECK, *supra* note 32, at 92-93.

scheme that would further the goal of keeping handguns out of the hands of criminals while leaving everyone else free to own as many handguns as they like. Even if all ineligible persons could be prevented from obtaining handguns from FFLs, enforcing a licensing scheme in the secondary market would require a massive law enforcement effort. The question is whether we have the regulatory tools and resources to implement such a policy.

One reason to be pessimistic is the existence of eighty to ninety million unregistered handguns currently in the possession of tens of millions of people, including criminals. This vast number would undoubtedly increase if it ever appeared that Congress was likely to pass Brady II. A rush to buy handguns before the licensing system became effective would likely occur, just as there was a rush to buy handguns before Brady's five-day waiting period went into effect.<sup>78</sup> By the time Brady II went into effect there would likely be more than one-hundred million handguns in private hands, tens of thousands of them stockpiled for future sales when they might fetch a real premium.

Hard core criminals would be little affected by the licensing system. Moreover, their current possession of firearms puts them in violation of federal criminal law and, typically, state criminal law as well. Nevertheless, according to a significant body of research they have little trouble obtaining handguns.<sup>79</sup> Much of their stock comes through stolen guns and through informal transfers from family members, friends, and gang associates.<sup>80</sup> The licensing system would have minimal impact on the criminal gun market.

## V. BRADY II'S REGISTRATION SYSTEM

Brady II seeks to establish a comprehensive handgun registration system. This is a completely new policy initiative. Other

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<sup>78</sup> See Kim Bell, *Brady Bill Triggered Jump in Pistol Sales, Police Officers Say*, ST. LOUIS POST-DISPATCH, Jan. 18, 1994, at B1; See also Steve Bates, *Gun Shops Get Shot in the Arm, Brady Bill Fears Said to Spur Surge in Sales*, WASH. POST, Nov. 27, 1993, at B1.

<sup>79</sup> WRIGHT, ET AL., *supra* note 74, at 193-97; see generally KLECK, *supra* note 32; NAT'L INST. OF JUSTICE, *ARRESTEES AND GUNS*, *supra* note 60; ROTH, *supra* note 60; SHELEY & WRIGHT, *supra* note 60; WRIGHT, *supra* note 64; ZAWITZ, *supra* note 60; Cook et al., *supra* note 38, at 81.

<sup>80</sup> *Id.*

than the federal registration scheme for machine guns that has existed since 1934, the federal government has never tried to maintain a firearms registry.<sup>81</sup> Only eight states have attempted to maintain handgun registries.<sup>82</sup>

Nowhere in the Brady II bill do we find the words "national handgun registry," but this is undoubtedly what the proponents envision.<sup>83</sup> Under existing regulations, manufacturers must engrave a serial number on the barrel of each handgun.<sup>84</sup> Manufacturers, wholesalers, and dealers must maintain records on handgun sales and supply such information to the Secretary of the Treasury upon request.<sup>85</sup> Brady II would supplement the paper trail on every handgun by requiring every seller/transferor (after verifying the prospective buyer's handgun license and eligibility) to fill out a registration form. The form includes the purchaser's handgun license number, name,

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<sup>81</sup> National Firearms Act of 1934, 26 U.S.C. § 5861(d) (1994); 18 U.S.C. 922(o) (1994) (prohibiting transfer or possession of machine guns); 27 C.F.R. 178.101-105 (1996). As of 1995, there were approximately 240,000 machine guns registered in the United States. Half of these registered machine guns are owned by police departments and other governmental agencies; the other half belong to private citizens. KLECK, *supra* note 32, at 108. The Firearms Owners Protection Act of 1986 "froze" the number of machine guns legally possessed by private citizens at the 1986 level. Pub. L. 99-308 (1986).

<sup>82</sup> The states with handgun registries are Hawaii (handguns and long guns), BUREAU OF JUSTICE STATISTICS, *supra* note 18, at 11; Indiana (voluntary registration), *id.* at 14; Maryland (owner registration not required, but state maintains record of all sales by FFLs), *id.* at 20; Massachusetts (handguns), *id.* at 21; Michigan (handguns), *id.* at 22; New Jersey (handguns), *id.* at 30; New York (handguns), *id.* at 32; Pennsylvania (owner registration not required, but state maintains record of all sales by FFLs), *id.* at 38. In some states, registration is required on a local or county basis: Illinois (required by some local governments), *id.* at 13; Missouri (required by some local governments), *id.* at 25; Nevada (required only in Clark County (Las Vegas)), *id.* at 28.

<sup>83</sup> For other handgun registration proposals, see, for example, The Handgun Registration Act of 1995, H.R. 169, 104th Cong. (1995) (proposing federal handgun registration in states that do not have state registration systems). This bill was reintroduced in 1997 as the Handgun Registration Act of 1997, H.R. 186, 105th Cong. (1997).

<sup>84</sup> 27 C.F.R. 178.123-178.124 (1996); H.R. 1321, § 205 (1995) (proposing that "each licensed manufacturer shall, in accordance with regulations prescribed by the Secretary [of Treasury], maintain records of the ballistics of handgun barrels made by the licensed manufacturer and of the serial numbers of such barrels and make such records available to the secretary.")

<sup>85</sup> 18 U.S.C. § 923(g) (1994); 27 C.F.R. 178.121, 178.123, 178.126 (1996).

and address; and the handgun's make, model, and serial number.<sup>86</sup> The same procedure must be followed by all subsequent sellers or transferors.<sup>87</sup>

Brady II requires that "State law provide the CLEO shall furnish information from completed handgun registration forms to federal, state, and local law enforcement authorities upon request."<sup>88</sup> Strangely, Brady II speaks of state handgun registration systems, but not a national system. A federally-mandated state-based registration system would be unwieldy and inefficient, in addition to being unconstitutional.<sup>89</sup> Under such a system, if a Vermont handgun owner sold his handgun to a New York State purchaser and never registered the sale, the handgun could not be traced in New York's system. Of course, if the New York police sent in a request to ATF, they could trace the gun (assuming the serial number had not been obliterated) back to a first sale in Vermont. The New York police could then contact the Vermont registration system to determine the identity of the handgun's last registered owner.

Presumably, a post-*Printz* version of Brady II will require that all FFLs and private sellers send handgun registration information to ATF headquarters in Washington, D.C., where it will be stored in a database that would, in effect, constitute a national handgun registry.<sup>90</sup> The goal would be to achieve an easily accessible ownership record for every handgun in the U.S. Since many owners would not sell their handguns for years, perhaps decades, it would take a long time for the registry to become complete. But, when fully mature, the system would look like

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<sup>86</sup> H.R. 1321, § 101(6) (1995).

<sup>87</sup> H.R. 1321, § 101(6)(C) (1995) (registration forms are to be sent to the CLEO, who may charge a registration fee).

<sup>88</sup> H.R. 1321, § 101(6)(B) (1995).

<sup>89</sup> *Printz v. United States*, 117 S. Ct. 2365 (1997).

<sup>90</sup> In 1986, Congress passed the Firearm Owner's Protection Act which prohibited retaining firearms transaction records for "any system of registration of firearms, firearms owners, or firearms transactions." 18 U.S.C. 926(a)(3) (1994). Brady II effectively nullifies this law. Section 202 provides that: "The Director of the Bureau of Alcohol Tobacco and Firearms shall centralize all records of receipts and dispositions of firearms obtained by the Bureau and maintain such records in whatever manner will enable their most efficient use in law enforcement." H.R. 1321, 104th Cong.; S. 631, 104th Cong.

the registration systems we now have for real property and for automobiles, except that Brady II would be a federally mandated system.<sup>91</sup>

#### A. GOAL OF THE HANDGUN REGISTRATION SYSTEM

A national handgun registry would play an important role in supporting the handgun licensing system, because without registration it would be nearly impossible to establish a chain of ownership. Keeping in mind that the underlying goal of Brady II is to reduce gun violence by keeping guns out of the wrong hands, registration is a strategy of deterring licensed owners from selling handguns to ineligible. Ideally, a registration system would enable law enforcement and ATF to keep track of handgun transfers. Arguably, it would also further law enforcement investigations by making it possible to trace guns to their registered owners, and by providing a paper trail to black marketeers. It would also make it possible to tax firearms sales and ownership.

The registration requirements play an important role in furthering the efficacy of the licensing system. Without registration, it would be very difficult to trace an unlawful sale back to the seller. Therefore, without comprehensive registration, many sellers might feel that they could ignore with impunity the requirement that they only sell handguns to licensed persons.

It is hard to imagine a handgun sale to an ineligible person coming to light other than after the apprehension and/or arrest of an unlicensed person in possession of a handgun.<sup>92</sup> Suppose that the police arrest a criminal suspect who is found to have a handgun manufactured after the effective date of Brady II. If the suspect does not have a handgun license, he must have obtained this handgun illegally, but from whom—an unscrupulous FFL? a casual arm's length seller? a black market gun dealer? a drug dealer? a criminal comrade? Without a registration sys-

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<sup>91</sup> Given the Supreme Court's decision in *Printz v. United States*, it seems unlikely that state maintained registries and CLEO processing of registration forms would be constitutional.

<sup>92</sup> Admittedly, a sting operation could also lead to the identification of a person who sells a handgun (or handguns) to an unlicensed purchaser.

tem to provide a paper trail on that handgun's history, there would be no way to figure out who sold or gave the handgun to the criminal suspect.

With a handgun registration system, the police could quickly determine the identity of the handgun's last lawful owner. They could confront (brow beat!) that person, demanding to know how it is that there is no record of the handgun having been transferred to someone else nor any record of the handgun having been reported as stolen or lost. Of course, the registered owner could say he was unaware that he lost it and so forth, but he would be under some pressure and would be subject to a civil fine of \$1,000 for failure to timely report a lost or stolen handgun.<sup>93</sup>

#### B. SOLVING CRIMES

Would a national handgun registry aid in preventing or solving crime? If the police recovered a gun left at the crime scene they could send the serial number to the National Tracing Center which could identify the registered owner.<sup>94</sup> The police would then have a suspect.

This crime-solving potential is diminished by a few facts. If the gun is recovered at the scene it is usually because the police have arrested the person attached to it. Conversely, if the suspect gets away, the gun is not recovered. However, suppose the police do recover a handgun that was used in a crime, but the perpetrator is unknown. If the registration system were operating effectively and efficiently, the handgun's owner could be

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<sup>93</sup> H.R. 1321, Sec. 101 (5)(G). Not later than 24 hours after a handgun licensee discovers that a handgun has been stolen from or lost by the licensee, the licensee shall report the theft or loss to: the Secretary [of the Treasury], the chief law enforcement officer of the state, and appropriate local authorities. This provision seems to leave a big loophole for evasion if the owner says he never discovered that the handgun has been lost or stolen.

<sup>94</sup> There has been a National Firearms Tracing Center in the ATF since the early 1970's. Thus, it seems strange that Brady II purports to establish just such a center. In 1996, the National Firearms Tracing Center responded to approximately 130,000 trace requests. The main purpose is to gather intelligence on the origins (manufacturers and dealers) of crime guns and thus patterns of interstate migration. The traces are of very little use in solving individual crimes. See Paul Blackman, *The Uses and Limitations of BATF Tracing Data for Law Enforcement, Policymaking and Criminological Research*, 10 J. FIREARMS & PUB. POL'Y 27, 32-36 (1998).

identified and the police would have a suspect, i.e. the handgun's registered owner. Assuming that the registered owner could be located, he might (falsely) claim not to have realized that the gun had been lost or stolen. Such an admission would make the registered handgun owner liable for (at least) a \$1,000 civil fine for failing to report a lost handgun or for prison time for failing to abide by the Brady II licensing requirements, but the police would still have to prove commission of the crime; success is hardly guaranteed.

The enterprising criminal could also defeat the tracing system by obliterating the serial number; this is done with a large percentage of crime guns.<sup>95</sup> If he then dropped the gun at the scene of the crime, it could not be traced. It remains to be seen whether the Secretary of the Treasury could come up with a fool-proof scheme for marking guns with serial numbers.<sup>96</sup>

### C. IDENTIFYING BLACK MARKETEERS

Currently, ATF's National Firearms Tracing Center is most useful in gathering intelligence about the origins and interstate migration of crime guns, not in providing information that helps to solve individual gun crimes.<sup>97</sup> The weapons traces might be useful in identifying certain types of guns used dispro-

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<sup>95</sup> Serial numbers are relatively easy to remove by using a file. Sheley and Wright reported that the top three handgun traits cited by juvenile inmates were firepower, quality of construction, and untraceability. SHELEY & WRIGHT, *supra* note 60, at 5. ATF acknowledges that trace guns are not representative of crime guns because relatively few guns recovered by police at crime scenes are submitted for tracing; indeed, many of the guns submitted for tracing were not used in a crime at all, but simply "found" by police. An estimated 20% of guns submitted to ATF for tracing were untraceable because the serial number was obliterated. David M. Kennedy, et al., *Youth Violence in Boston: Gun Markets, Serious Youth Offenders and a Use-Reduction Strategy*, 59 L. & CONTEMP. PROBS., 147, 174 (1996).

<sup>96</sup> New technologies, such as a computer chip containing a serial number, could be developed that might make it impossible to obliterate "the gun's serial number or identity." Further, a serial number could be placed inside the barrel of the gun, as well as on the outside, making it more difficult to obliterate. Of course that would only effect the non-obliterability of guns produced once those new technologies come on line. The approximately 90 million handguns already in existence are vulnerable to serial number obliteration.

<sup>97</sup> Memorandum from Raymond F. Kelley, Under Secretary (Enforcement), to Robert Rubin, Secretary of the U.S. Department of the Treasury, Part III (Feb. 3, 1997) (on file with author) [hereinafter Memorandum].



portionately in crimes, certain manufacturers, or FFLs whose guns are disproportionately used in crime. This can be done, of course, without any elaboration of the current regulatory system. Unless the serial number has been obliterated, under existing laws and regulations, a firearm can be traced back to its manufacturer and from the manufacturer to the wholesaler and FFL retailer. If the FFL keeps its records properly and in conformity to law, the gun can be traced to its first individual owner. The current records system runs out after that point, and that is where Brady II would pick up.

Handguns get from the legitimate market into the hands of criminals through thefts, purchases in the secondary market, loans and gifts from family members, friends, and criminal comrades. There are some number of corrupt FFLs who specialize in selling handguns directly to criminals or in selling them to traffickers who, in turn, sell them to criminals.<sup>98</sup> ATF reported that in 1996, about 60% of successfully traced crime guns originated with 1% of all FFLs. Further, 5% of gun trafficking prosecutions were against FFLs.<sup>99</sup> Currently, weapons traces can be useful in identifying corrupt FFLs. During the mid-1990s, ATF joined with a number of state and local police departments to identify corrupt dealers, close them down and prosecute them. ATF's "Project Detroit" operation, in which guns confiscated by Detroit police from 1989 to 1990 were traced back to FFLs, resulted in criminal investigations of thirteen dealers and successful prosecutions against ten dealers.<sup>100</sup> ATF estimated that these dealers supplied over 3,000 firearms to black-marketeers.<sup>101</sup> ATF has since continued its efforts to crack down on corrupt FFLs and black-marketeers through Project LEAD, an automated program that assembles information from gun traces and multiple purchase forms submitted by FFLs.<sup>102</sup> In 1996, ATF recommended 2,230 trafficking defendants for

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<sup>98</sup> *Id.* at Part IV.

<sup>99</sup> *Id.*

<sup>100</sup> Erik Larson, *The Story of a Gun*, ATLANTIC MONTHLY, Jan. 1993, at 68.

<sup>101</sup> *Id.*

<sup>102</sup> FFLs are required to report to ATF all multiple sales of two or more handguns sold at one time or during any five consecutive business days. 18 U.S.C. § 923 (g) (3) (West 1998).

prosecution, including many FFLs.<sup>103</sup> It is hard to see how Brady II would significantly improve the investigation of black marketeers and gun runners.

#### D. EVADING THE REGISTRATION SYSTEM

The biggest impediment to a national handgun registry is the number of unregistered handguns already in circulation. In a world with very few handguns in private hands, one might be optimistic about the success of a handgun registration system. In the United States at the present time there are approximately eighty to ninety million handguns in private hands and 4.5 million new guns adding to that stock each year.<sup>104</sup> Undoubtedly, if and when a national handgun registration system began to look like a serious political possibility, there would be a tremendous increase in the sale of handguns in the period before the law was passed and went into effect.<sup>105</sup> Thus, it is probably conservative to assume that by the time a handgun registration system came on line, there would be at least one-hundred million unregistered handguns in private hands. The registration of these one-hundred million handguns would present a monumental task.

Brady II does not require the registration of handguns until the owner decides to sell or otherwise transfer her handgun to another person. Thus, even if compliance of post-Brady II handgun transfers were high, it would take decades for the existing stock of handguns to be registered. But will the rates of compliance be high? Given the hostility of many gun owners to registration and their belief that a registration system would subsequently be used to confiscate all handguns, (as recently

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<sup>103</sup> Memorandum, *supra* note 97.

<sup>104</sup> KLECK, *supra* note 32, at 87.

<sup>105</sup> See, e.g., Kim Bell, *Brady Bill Triggered Jump in Pistol Sales*, ST. LOUIS POST-DISPATCH, Jan 18, 1994, at B1 (citing rise in handgun sales attributable to Brady Law); Steve Bates & Santiago O'Donnell, *Gun Shops Get Shot in the Arm*, WASH. POST, Nov. 27, 1993, at B1 (same); Charlie Brennan, *Coloradans Go for Their Guns*, ROCKY MOUNTAIN NEWS (Denver), Feb 20, 1994, at A6 (citing rise in handgun sales attributable to Brady Law); Scott Shane, *Curbs on Guns Are Growing, But So Are Sales*, BALTIMORE SUN, May 15, 1994, at A1 (citing rise in handgun sales attributable to Brady law).

happened in Britain),<sup>106</sup> there would be a great deal of non-compliance. Indeed, if a current handgun owner decided to sell and wanted to avoid the registration requirement, he could easily find a buyer of like mind, and so on down the line. A single handgun could be sold again and again without being registered and with little chance of detection.

In recent years, several states and municipalities passed laws mandating the registration of assault rifles. These laws failed miserably, primarily due to owner resistance. In Boston and Cleveland, the rate of compliance with the ban on assault rifles is estimated at 1%.<sup>107</sup> In California, nearly 90% of the approximately 300,000 assault weapons owners did not register their weapons.<sup>108</sup> Out of the 100,000—300,000 assault rifles estimated to be in private hands in New Jersey, 947 were registered, an additional 888 were rendered inoperable, and four were turned over to the authorities.<sup>109</sup>

Since 1911, Massachusetts has required the registration of handguns purchased in the primary market.<sup>110</sup> Since 1968, it has required the registration of all handguns.<sup>111</sup> Indeed, Brady II looks a lot like the Massachusetts system of licensing and registration. To date, there has not been a thorough evaluation of Massachusetts registration system, but it appears that no more than 10% of secondary market handgun sales are recorded.<sup>112</sup> The administrative agency in charge of the registration system has been chronically understaffed and short of resources.<sup>113</sup> As of March, 1996, there were approximately 750,000 unentered

<sup>106</sup> Firearms (Amendment) Act of 1997, Curr. L. Stats., Vol. 1 (London: Sweet & Maxwell, 1997).

<sup>107</sup> DAVID B. KOPEL, *THE SAMURAI, THE MOUNTIE, AND THE COWBOY: SHOULD AMERICA ADOPT THE GUN CONTROLS OF OTHER DEMOCRACIES* 231, n.210 (1992).

<sup>108</sup> *Id.*

<sup>109</sup> David B. Kopel and Christopher C. Little, *Communitarians, Neorepublicans, and Guns: Assessing the Case For Firearms Prohibition*, 56 MD. L. REV. 438, at 459.

<sup>110</sup> MASS. GEN LAWS ANN., ch. 140, § 123 (West 1995).

<sup>111</sup> MASS. GEN LAWS ANN., ch. 140, § 128A (West 1995).

<sup>112</sup> Caleb Pollack, *Massachusetts Gun Laws and a National Solution to Gun Control* 8 (Jan. 31, 1997) (unpublished manuscript, on file with *The Journal of Criminal Law & Criminology*).

<sup>113</sup> *Id.* at 15.

sales transactions dating back to 1985 when the agency ceased maintaining a computer data base.<sup>114</sup>

It needs emphasizing that even if a significant percentage of law-abiding handgun owners complied with the registration law, we can be certain that handgun-owning criminals would not comply. There are already large numbers of handguns in circulation in the criminal subculture. A criminal could use the same unregistered gun throughout his career and, when he retired, sell or give it to a relative, friend, or criminal associate. Therefore, the impact on the availability of handguns in the criminal subculture of even a well-functioning registration system might not be evident for decades.

Would young criminals who did not have handguns before passage of Brady II find it difficult to obtain unregistered handguns? Some criminals claim that it is as easy to buy a gun on the streets as it is to buy fast food.<sup>115</sup> The 500,000 firearms that are stolen each year will provide an enormous pool of handguns that cannot be traced to their new possessors. Rifles and shotguns that are cut down to the length of handguns could not be traced because they are not subject to registration. Criminals might also be able to purchase unmarked handguns that are smuggled into the country from abroad. Some number of never-registered handguns will, of course, continue to be sold by gun dealers, drug dealers, and gun owners hostile to the whole idea of handgun registration.

If non-compliance is substantial, the value of the registration system would be seriously undermined. Compliance would depend, to a large extent, on gun owners' voluntary decision to register. While Brady II calls for imprisonment of not less than six months or more than three years for gun owners who transfer their firearms without filing the appropriate registration forms, U.S. Attorneys will probably be less than eager to prosecute otherwise law abiding gun owners who have failed to regis-

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<sup>114</sup> *Id.*

<sup>115</sup> One Chicago gang member, indicating the ease with which guns may be obtained, stated, "[i]t's like going through the drive-through window. 'Give me some fries, a Coke, and a 9-millimeter.'" Don Terry, *How Criminals Get Their Guns: In Short, All Too Easily*, N.Y. TIMES, March 11, 1992, at A1.

ter their handguns.<sup>116</sup> We can anticipate that in several states (those where compliance is lowest), such actions would prove very unpopular with jurors.

#### E. REGISTRATION CONCLUSIONS

Handgun control advocates envision a registration system that would resemble automobile registration. Every automobile is registered with the state department of motor vehicles. An owner cannot get license plates without registering the vehicle. When the vehicle is sold, the seller must provide the state department of motor vehicles with the details of the sale and must turn in his license plates. The new owner must register the vehicle in his name and apply for new license plates.

The system is fairly easy to enforce. Every car must have license plates. A car without license plates would be easily spotted, stopped, and the driver ticketed; the car would be removed from the road. What if an owner just sells the car to someone else and doesn't bother with the forms and with turning in the license plates? Then the seller would remain the owner of record and would be liable for maintaining insurance on the vehicle and for accidents in which the car was involved. Obviously, the seller would have a strong interest in avoiding this liability.

One rationale for the auto registration system is that it allows the government to tax automobiles efficiently. A second rationale is that the registration system makes it difficult to steal cars. The victim of a car theft immediately reports it to the police. If a police officer sees a car with the license plate of the stolen vehicle, he will stop and apprehend the driver; the car can be returned. Moreover, if the thieves are "joyriders" and abandon the vehicle, the police can easily locate the rightful owner through the registration system.

Obviously, the deterrent potential of the vehicle registration system is fairly weak. Over one million autos are reported stolen every year; many vehicles are never recovered.<sup>117</sup> The thieves

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<sup>116</sup> See *supra* notes 53-58 and accompanying text (discussing federal prosecutors' unwillingness to prosecute felon-in-possession cases and probable reluctance of juries to convict unlicensed defendants).

<sup>117</sup> See generally UNIFORM CRIME REPORTS, CRIME IN THE UNITED STATES 1996 (1997).

may put new license plates on the vehicle, bring it to a different state, or simply bring the stolen vehicle to a "chop shop" where it is broken down for parts. There is no organized (or disorganized) movement to resist automobile registration. No one fears that it is a step toward confiscation.

In contrast to cars, handguns can last for one-hundred years or more and a handgun registration system will have to be launched when there are already nearly one-hundred million unregistered handguns in private hands. This would be a daunting regulatory challenge and policy makers ought to think carefully before undertaking it. Moreover, there can be no doubt that handgun registration would be strongly and massively resisted because of the fear that once handguns are registered, the next step in the gun control regime would be handgun confiscation.

Even with significant compliance by handgun owners, the Brady II registration system would take decades to mature into a comprehensive system. During that period, the license requirement would be difficult to enforce since it relies heavily on an efficient registration system. If significant compliance could not be achieved, the whole idea seems dubious. The result could be a bureaucratic apparatus collecting paper, but to no constructive end, much like how the system in Massachusetts operates.

## VI. CONCLUSION

Ultimately, there are two competing visions of handgun control for the United States—(1) prohibition and (2) comprehensive licensing and registration. These plans tend to be debated in the abstract, as slogans, and in principle. Surprisingly little work has been done on the mechanics and feasibility of either plan. Now, Handgun Control, Inc. and its congressional allies have offered a fully elaborated proposal for comprehensive handgun licensing and registration. The existence of this proposal enables a much more sophisticated debate than previously possible.

*Printz* is a major blow to any further national gun control regulatory initiatives. Apparently, the Commerce Clause power,

which justified the Gun Control Act of 1968 and the Brady Handgun Control Act of 1993 cannot serve as the justification for any federal plan that, like Brady II, mandates administration and enforcement by state and local officials. The best option, at least in our view, is a federally-run nationwide handgun control apparatus. But any such proposal would have to surmount logistical hurdles.

Comprehensive licensing and registration would be difficult to administer and enforce. One major problem is the existence of eighty to ninety million handguns currently owned by 26% of American households. Getting these people licensed and their handguns registered would be a monumental task, not only due to the number of handguns, but to the strong (some would say intractable) "gun culture" in the United States. Evasion would be easy and the costs of enforcement would be high. The emergence of a resistance movement would entail significant social and political costs for the nation.

The primary purpose of gun control is to prevent gun violence by criminals and other irresponsible individuals. Unfortunately, criminals will be the most difficult group to bring into compliance with any system of licensing and registration. Criminals (at least those with a felony indictment or conviction or misdemeanor domestic violence conviction) are already violating federal and state law by owning or possessing a handgun. More laws are unlikely to prevent most criminals from obtaining guns.