

The Uses And Limitations Of BATF Tracing Data For Law Enforcement, Policymaking, And Criminological Research

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BATF firearms tracing data have been a tool for investigating individual crimes. And there are some clear potential benefits for using the statistics for law enforcement. There are, however, severe limitations on the utility of those data for making public policy aimed at reducing crime. Limitations include: the minimal number of guns BATF attempts to trace or succeeds in tracing, the rules for excluding guns and efforts to trace them, and the limited information on the basis for gun traces. Dr. Paul Blackman is Research Coordinator for the National Rifle Association's Institute for Legislative Action. The views expressed in this paper do not necessarily represent the views of the National Rifle Association or its Institute for Legislative Action.

INTRODUCTION

Soon after the Gun Control Act of 1968 (GCA'68) improved the paperwork trail for guns, thereby allowing law enforcement, without too much trouble, to trace possible crime guns to their first retail sale, criminologists attempted to study statistical summaries of those traces with a view toward policy recommendations, even though such tracing "was not designed to collect statistics." (Bea, 1992, p. 65)

To some extent, the paper trail had existed since 1938, when the Federal Firearms Act required inexpensive federal licenses for persons selling guns interstate. The low price encouraged some 100,000 such dealer licenses by the mid-1960s

(Zimring, 1975, pp. 140-41), even though one requirement of having a license was to keep records of transfers, and to maintain them for a specified period of time, the length of which varied between 1938 and 1968 (Zimring, 1975, p. 144).

Proportionate to the population, there were more dealers in the late 1930s than there are now, and, while serial numbers and manufacturing information were not then required to be engraved on firearms, they have almost always been placed on quality firearms. But the paper trail was not generally employed. When the Massachusetts Commissioner of Public Safety, for example, testified on the need for additional federal gun control legislation, his assertion that 87% of the state's crime guns came from elsewhere was based not on tracing them to other states but on failing to find them in Massachusetts' records. (U.S. Senate, 1965, pp. 345-46) Similarly, the staff report of the National Commission on the Causes and Prevention of Violence relied on permit applications and the like, rather than on tracing data, to determine whether the gun originated where it was misused. (Newton and Zimring, 1969, ch. 8)

Some of those early efforts, particularly by Frank Zimring, simultaneously attempted analyses and evaluation while recognizing the limitations of the criminological use of BATF (Bureau of Alcohol, Tobacco & Firearms¹) tracing data, limitations also emphasized by the Police Foundation in its study *Firearm Abuse*. (Zimring, 1975, p. 183; Brill, 1977).

For example, while using BATF tracing data to support the theory that relatively new guns are disproportionately used in crime, Zimring noted "the possibility that police and federal agency sampling procedures had produced a nonrepresentative sample of guns from New York...the bedeviling problem of sample selection...." (Zimring, 1976, p. 96) He noted that older guns were more difficult to trace; that some data were not crime-specific; that some guns had been seized merely for possessory offenses rather than for use in a crime; that prescreening prevented even tracing attempts for some firearms; and that

various other limitations impaired analyses based on tracing data. (Zimring, 1976, pp. 97-98, 101, 104-106)

For the first two decades of GCA '68, as BATF sought to assist law enforcement, it produced annual summaries of tracing efforts, including the number of traces officially attempted and successfully completed, generally accompanied by anecdotal references to a few major crimes solved with tracing and/or the speed of tracing guns involved in prominent shootings. For example, BATF proudly noted that tracing a gun from the scene of a \$3.6 million armored-car robbery "led to the arrest and prosecution of the neo-Nazi cult known as The Order," and that the gun used in the attempted assassination of Ronald Reagan was traced to John Hinckley in 16 minutes.² (King, 1988)

More recently, a list of about 100 "significant" trace requests (often involving more than one firearm), derived from the 79,000 traces overall conducted during Fiscal Year 1994, included tracing the gun used on a Long Island commuter train to kill six persons and wound another 14. BATF noted they "learned the suspect had illegally purchased the weapon in California. The results of the trace culminated with a criminal case being made, charging the suspect with violations of the Federal firearms laws, specifically, 18 U.S.C. § 922(a)(3), 922(a)(6), and 924(c)." (National Tracing Center, 1995, p. 15)

In fact, no federal charge was brought against Colin Ferguson, who was already in custody for the violent crime itself; he was tried and convicted in the New York court system.

Other "significant" traces included a gun used in a suicide, and a gun dropped by a man who wished to avoid being found armed by a magnetometer set up near where the President was to speak. "The U.S. Secret Service does not believe the purchaser intended to harm anyone with the firearm." (National Tracing Center, 1995, p. 1)

One possible inference is that the other 78,900 traces were less useful to law enforcement. "And BATF would generally acknowledge that its tracing is primarily for the purpose of aiding law enforcement in identifying suspects, establishing

whether guns were stolen, and proving ownership” (Pierce, Briggs and Carlson, 1996, p.5), rather than for the systematic analysis of crime guns or for other policy or research-related purposes.³

I. LIMITATIONS RELATED TO STATE AND LOCAL LAW ENFORCEMENT

A. Unrepresentative Nature of Guns Selected for Tracing

Most guns involved in violent crimes are not traced, and those which are represent not merely a small but an unrepresentative sample. (Bea, 1992, p. 65) This is unavoidable in a country with a relatively low clearance rate for violent crimes. Nonetheless, even most guns seized as a result of violent-crime investigations are not traced, and those traced are unrepresentative of firearms used, thus, some scholars suggest that confiscated firearms, while still flawed as a sample, provide a better sample of “crime guns” than do traced guns. (Brill, 1977, pp. 26, 42)

As Gregore J. Sambor, then Philadelphia Police Commissioner, noted: “tracing a gun by use of serial number and proofmarks from a manufacturer, through the wholesaler, to the retailer and then the purchaser, and eventually the user, is not always necessary to prove the facts of the case or the elements of the crime....[And] when a local agency has adequate information and their own means available, they can sometimes produce their own results quicker and with less chance of error.”⁴ He went on to cite a police killing where the Philadelphia police found it more expeditious to telephone the German manufacturer, and thence the Virginia dealer, leading them to the brother of the person convicted. (Sambor, 1985)

Tracing data may be unrepresentative because of the nature of criminal investigations. Jurisdictions with more thorough recordkeeping than provided by federal law have no incentive to

trace guns if their own state or local records supply all information needed for law enforcement purposes (prosecution of gun-wielding criminals, identifying stolen goods for determining whether a suspect was a thief, returning stolen property, etc.). Particularly in places with more restrictive gun laws than federal law requires, tracing through BATF could be considered both superfluous and less efficient.

For example, a Justice Department study based on surveys of police departments, reported that some jurisdictions, such as California, began with their own files on guns. The study noted that such files existed, too, for New York, New Jersey, Iowa, Maryland, in addition to several cities, including Philadelphia and Miami.⁵ (Weber-Burdin, Rossi, Wright and Daly, 1981, ch. 4, p. 9) If jurisdictions with more records first use the local records (Roth and Koper, 1997, p. 83) and only then turn to BATF for firearms not found, while less restrictive jurisdictions start with BATF, one result of BATF tracing would be to exaggerate the out-of-state sources of “crime guns” in restrictive jurisdictions vis-à-vis non-restrictive jurisdictions.

Tracing is least needed where local resources are sufficient, or the basis for access to the gun irrelevant, as with violent gun-related crimes or burglary investigations.

Tracing should prove most useful—and thus used—where local resources are insufficient and tracing information is likely to be available and useful. Such would be the case with out-of-jurisdiction guns not used in serious felonies, particularly if the trace might suggest the possibility of a less obvious serious crime, such as gun and narcotics offenses. (For example, had tracing provided evidence that John Hinckley had broken the law in his acquisition of handguns, such tracing might have allowed prosecution for a GCA’68 violation, but tracing provided no information necessary for his prosecution for the violent crime of attempted presidential assassination.⁶)

B. Law Enforcement Dissatisfaction with BATF Traces

In the 1970s, most law enforcement agencies, according to an NIJ-funded study led by James Wright and Peter Rossi, made little use of BATF and were generally dissatisfied with the results. (Wright and Rossi, 1981, p. 23)

Almost all surveyed law enforcement departments which used the National Crime Information Center (NCIC) used the NCIC for almost all firearms crime. In contrast, little more than a quarter of departments used BATF for most or every firearm either implicated in a crime or found, confiscated, or recovered. (Weber-Burdin, Rossi, Wright and Daly, 1981, ch. 4, p. 13)

And the departments which did use BATF found the Bureau much less useful than the NCIC; over 30% of departments reported the BATF trace was seldom useful or was useless. Thus, almost twice as many departments reported generally finding NCIC useful as similarly found BATF generally useful. (Weber-Burdin, Rossi, Wright and Daly, 1981, ch. 4, p. 16)

C. Crime Classification of Traced Guns

Soon after, BATF began making serious efforts to improve cooperation with local police (Vizzard, 1997, pp. 88-89), and there has clearly been a great change in the willingness of local law enforcement to use BATF's tracing services. But two facts have remained constant over the decades: There is no standardized procedure for ensuring consistent definitions for identifying the circumstances leading to a trace, and sometimes circumstances are not identified at all.

In addition, categorization might have been done hastily, because the investigation which would explain in full the reason a firearm was obtained by police had not yet been completed. (Bea, 1992, pp. 65, 70-71)

And some dramatic changes in classification figures would suggest a classification change. For example, traced military-style semi-automatics went from being traced generally for "miscellaneous" reasons (39%) in 1986 to just 1% for that reason

in 1990, with disproportionate increases both in violent crimes and gun-law violations. (Bea, 1992, p. 72)

1. Most Gun Traces not for Violent Crimes

Most guns seized by police and/or traced by BATF are not involved in violent crimes. Possessory offenses constitute the most common basis for a trace, with violent crimes only a minority of the reasons. Violent crimes explained 15% of traces in 1977, and gun-law violations (federal or state) about 45%, along with 20% unspecified “other” reasons. (Letter and documents from Paul Mosny, BATF Disclosure Branch, to Bob Dowlut, NRA, July 21, 1980) This despite the fact that, during the 1980s, the crime codes were listed in order of BATF-perceived severity, with only one crime code to be chosen. Nonetheless, property crimes, drug investigations, and gun-law violations predominated. Homicide investigations were the most common violent crime investigation associated with a trace. “Miscellaneous” and “other” explained almost as many traces as other violent crimes. (BATF tape analysis for 1989 supplied to the NRA, Feb. 9, 1990, based on coding tables effective Oct. 1, 1986) There was not even a specific category for burglary. (Bea, 1992, pp. 70-71)

The 1990s coding of the types of crimes associated with traces is much more extensive, with nearly three dozen categories, compared to ten or twelve in the 1980s. One new category is transportation/possession of untaxed cigarettes. Still, property crimes, gun-law violations, drug offenses, and other unspecified criminal investigations predominate. (Letter from BATF Director John W. Magaw, to Sen. Larry E. Craig, April 1, 1994, regarding “assault weapons.”)

In the largest recent study of BATF traces, roughly five-eighths were for weapons offenses, and just over one-seventh for violent crimes. (Pierce, Briggs and Carlson, 1996, Table 3) A study in Boston, where traces were to be conducted wherever possible on all seized guns, showed that about three-fourths of

gun seizures were for possessory rather than substantive crimes; if other reasons for guns to come into police custody (i.e., voluntary surrender) were added, the percentage of seized guns connected to a substantive offense falls to 18%. (Kennedy, Piehl and Braga, 1996a, p. 196)

A Los Angeles area study of traced guns showed two-thirds for possessory offenses and one-sixth for violent crimes. (Wachtel, 1996, p. 12) Roughly the same figures predominate in a recent BATF study of 17 cities, with most traces (exceeding 80% in some cities) involving possessory offenses and only about one-sixth of traces involving guns associated with violent crime investigations. (BATF, 1997)

2. Additional Issues related to Crime Classification

And even traces of guns as a result of a violent-crime investigation do not indicate the role of the firearm in the crime or the investigation, regardless of the reason given for the trace. The gun might have been possessed by the alleged perpetrator but not involved in the specific crime.

The most detailed statistical information from BATF simply indicates the sort of investigation associated with the trace request.⁷ A firearm simply found, turned in, or otherwise recovered, might be traced to indicate whether it might have been stolen, potentially making it a property crime investigation. Or the official reason given to BATF for the trace request might be miscellaneous or other. Nothing in the coding, or in any information collected by BATF indicates which of the guns traced were used to commit which crimes.

As BATF has made clear, with regard to the guns it traces, “ATF does not track the incidence of specific use of each one of these firearms in crimes....[T]races requested by police are not always for guns that are used in crimes. Traces are sometimes submitted for firearms recovered by police investigating crimes where the guns were found but were not necessarily used to commit a crime....We do not establish the criteria as to when

State or local law enforcement agencies initiate a trace of a firearm.” (Letter from Daniel M. Hartnett [Deputy Director for Enforcement], for the BATF Director, to Rep. Richard T. Schulze, March 31, 1992)

Traces of guns to other states would not necessarily represent gun trafficking patterns especially with the average traced gun about five years old (Pierce, Briggs and Carlson, 1996), and untraced guns presumably still older, since age is a key reason for BATF not to attempt a trace. In a mobile nation, where roughly one-fifth of the populace moves each year, guns may be brought from another state simply because persons previously lived in another state. Unsurprisingly, more guns are apt to be bought in states where paperwork for firearms purchases make the process not only less cumbersome but, in general, less expensive. The large proportion of traces for possessory offenses would support skepticism regarding the amount of trafficking suggested by traces.

D. Few Firearms are Traced

Even when BATF is encouraging tracing, as with Project Lead in New York City, relatively few firearms are traced. During the first nine months of 1992, for example, of 13,382 firearms recovered by the New York Police Department, only 1,231 (9%) were submitted for tracing, and only 824 traced (6%). (Memorandum from Project Lead to Special Agent in Charge, New York Field Division, BATF, October 22, 1992) And there is no basis for believing that the small percentage is representative. Regarding 1990, when a similar portion of New York City guns were selected for tracing, BATF indicated that “No information is available on why those 1,000 guns were selected out of the 17,000 for tracing.” (Bea, 1992, p. 67)

During the first nine months of 1992, there were about 35,000 gun-related violent crimes reported to the New York City police (Letter from Michael A. Markman, NYPD Office of

Management Analysis and Planning, to Mark Overstreet, NRA, January 21, 1993).

A BATF study in the Los Angeles area involved only about 5,000 guns traced during an eight-year period during which an estimated 13,000 guns came into police custody annually: thus the study thus based on successful traces of about 2% of the guns which came into police custody. (Wachtel, 1996, pp. 10-12)

E. Over-representation of Homicide

Traces are much more apt to involve weapons violations rather than violent crimes—roughly five-eighths of the traces analyzed by Pierce, Briggs and Carlson (1996, Table 3). Among violent crimes, homicide traces predominate, and they always have. A study based on traces from the mid-1970s found that, among violent crime-related traces, homicide investigations accounted for 45%.

A computer analysis provided to the NRA by BATF for 1989 traces suggested about one gun trace for every four gun-related homicides reported to police, compared to one trace for every 125 gun-related assaults and one trace for every 250 robberies. (FBI, 1990) More recently, with more extensive BATF efforts to persuade local authorities to use the National Tracing Center (NTC), the figure has risen to one trace for every: two gun-related homicides, 50 gun-related assaults, and 100 gun-related robberies. (Pierce, Briggs and Carlson, 1996, Table 3; FBI, 1996) The numbers for homicides, at any rate, are clearly reaching impressive size, even though the guns are not necessarily murder weapons.

The expanded tracing efforts mean that for homicide there is now a large and unrepresentative sample rather than a small unrepresentative sample.⁸ For other violent crimes, the traces remain relatively small and unrepresentative.

II. LIMITATIONS DUE TO BATF TRACING PRACTICES

BATF recognizes the limitations local law enforcement practices place on statistical analyses based on tracing data. The standard “data advisory” BATF’s NTC sends out with data requests reflects that. The NTC notes

- that their data only reflect trends relating to trace-requested guns, not to crime guns overall;
- that trace requests involve “trace requests submitted on firearms used in crimes, recovered from crime scenes, or suspected of being involved in crimes”;
- that BATF relies upon those federal, state, or local authorities submitting a request to ensure that guns are related to crime investigations;
- that not every gun recovered is traced;
- that BATF does not know the extent to which recovered guns are submitted for traces: and

BATF’s NTC notes that the accuracy of their reports is dependent upon the accuracy of data submitted. That advisory is well worth respecting.

In addition to local law enforcement limitations on the representativeness of traced guns, BATF imposes restrictions on tracing all but guaranteed to make traced guns unrepresentative of crime guns. The BATF changes in its restrictions make temporal comparisons of tracing data problematic.

- that the trace information “ONLY reflects trends relating to those firearms for which a trace request is submitted and is only as accurate as the information provided by trace requestors.”

A. BATF Refusals to Trace

BATF does not like to attempt traces when success is unlikely. The motive may be to enhance BATF's tracing success rate—in the same way prosecutors pride themselves on conviction percentages—or simply because the Bureau wishes the most cost-effective use of its resources.

BATF has thus long excluded older firearms (Brill, 1977, pp. 94-95), as well as those whose serial numbers have apparently been removed (Kennedy, Hehl and Braga, 1996a, pp. 172-73), the technical efforts needed to determine the number being deemed excessively costly.

In order to enhance the apparent success rate, local law enforcement is asked to prescreen guns, and not ask for traces on guns too old to be traced. (Brill, 1977, pp. 57-58)

B. Traces Only to Retail Sale

The same cost-effective motivation means almost never seeking to trace a firearm beyond its initial retail transfer.⁹ In the past, BATF counted a trace completed and successful “(1) where the firearm is traced to a dealer located in the same state as the requestor or (2) where the firearm is traced to an individual purchaser located in a state other than that of the requestor.” (BATF, 1978, p. 2) One explanation was that once a gun was traced to the state where the request was made, it was no longer a matter of interstate commerce and, thus, no longer a federal responsibility. (Brill, 1977, p. 83)

BATF's desire to make its tracing cost-effective severely limits its ability to provide useful data for analysis. In the past, the records of out-of-business dealers were less accessible than those of active federally-licensed dealers, so such traces would be scotched as not worth the effort (Brill, 1977, p. 125). Thus such handguns from retired dealers were underrepresented in trace samples. (Zimring, 1976, p. 105) With computerization of those records, now over half of traces use information from federal licensees who have gone out of business (Pierce, Briggs

and Carlson, 1996, p. 8). The figure is likely to rise, as the number of dealers has dropped by over 60% during the Clinton administration.¹⁰

C. Information not Reported in Traces

Tracing data rarely give much in the way of sufficient detail for analysis. For example, the make, model, and serial number of a gun may allow a quick trace, but specific information about the cosmetics of the gun may not be on record (e.g., whether a particular semi-automatic rifle has a folding stock); other information not determined by the manufacturer will also be left out, such as the capacity of the magazine in the firearm as recovered.¹¹

Information which should be readily available may be reported incorrectly or at least inconsistently. (Roth and Koper, 1997, p. 88) Tracing data for 1988, for example, list Colt's semi-automatic versions of its M16 at least a dozen different ways—with variations on spacing, hyphenation, names, letters, abbreviations, and the like, plus others where the designation is unclear, or the name and model are totally wrong. There is even more variance for listing of the Norinco semi-automatic imitation of the AK-47.

In addition, traces rarely go beyond the simple information of who bought a gun where; the trace does not investigate whether that same purchaser acquired other firearms within a relatively short period of time in the same or nearby stores. While some additional data could be elicited from traces, that would involve expenditures of manpower incompatible with BATF efforts to make tracing a cost-effective law enforcement tool.

D. BATF Recordkeeping Improvements

Improvements in BATF record keeping and computerization—some lawful and some apparently *ultra vires*—have enhanced the Bureau's ability to conduct traces,

particularly of recent sales and of out-of-business dealers. And BATF has made efforts to encourage more traces by law enforcement agencies, particularly urban agencies, increasing the number of traces from roughly 40,000 annually to closer to 100,000.

That effort has been seen by a friendly critic with decades of experience at BATF as partially politically inspired and based on a misunderstanding of the firearms market and the purposes of tracing. He argues that the current tracing efforts incorrectly emphasize trafficking, even though most crime guns move in individual transactions. (Vizzard, 1997, pp. 202, 210, 217-18)

Of course, the improvements make earlier tracing data chronologically incomparable to more recent data. The improvements are geared toward enhancing the speed with which successful traces can be conducted, and minimizing the need for labor intensive work by BATF agents. Yet it is precisely the sorts of information which might be elicited from in-depth investigation from which criminologists might hope to learn more detailed information about criminals and their guns and gun sources.¹²

E. Emphasis on Newer Guns

BATF has recognized that tracing older firearms to their first retail purchaser is not a cost-effective way to attempt to solve crimes, but that tracing more recent guns may help solve crimes and also provide information useful for allocating law-enforcement resources toward particular dealers, dealer types, or areas. Thus, BATF has more sharply limited its willingness to attempt traces. BATF has gone this decade from rejecting most attempts at pre-1985 guns to rejecting most attempts at pre-1990 guns. (Kennedy, Piehl and Braga, 1996a, pp. 170-71) Because traced guns are normally over five years old,¹³ the pre-1990 exclusion obviously undermines any confidence that traced guns are representative of crime guns. (Pierce, Briggs and Carlson, 1996, pp. 8-9 and Table 3)

The emphasis on newer guns automatically means an emphasis on semi-automatics compared to revolvers, since they have come to dominate the newly-manufactured handgun market, going from about one-quarter to about four-fifths of new handguns between 1978 and 1993. (Thurman, 1994, pp. 102-103) To some extent, such a new-gun emphasis would also emphasize the relatively newer military-style semi-automatics and relatively inexpensive semi-autos as well. (Wintemute, 1994)

F. Tracing Failures

Trace attempts are frequently unsuccessful, even after exclusions. In the 1970s, the estimate was that up to about 40% of traces were unsuccessful (Brill, 1977, pp. 84, 117; Weber-Burdin, Rossi, Wright and Daly, 1981, ch. 4, pp. 6-7), with a 45% failure rate with the massive tracing the guns of “youth offenders” in Boston.¹⁴ (Kennedy, Piehl and Braga, 1996a, p. 193) And, while the data were not presented particularly clearly, it appears that a trace study by a BATF agent in the Los Angeles area achieved only about a 42% success rate, supplementing California state records checks with traditional BATF tracing procedures. (Wachtel, 1996, pp. 10-12) More recently, an extensive effort to trace guns in 17 cities resulted in a 37% success rate. (BATF, 1997, p. 6)

G. Effect of Investigations in Skewing Trace Data

Investigations can, whether deliberately with a view toward influencing policy, or by chance, affect what tracing may indicate. As was noted by Pierce, Briggs and Carlson (1996, p. 9), when they looked at dealers with the most guns traced to them, Vermont stood out disproportionately but irrelevantly because of a “sting” operation affecting the data.

Just as a sting operation would make Vermont artificially high, a serious investigation would have the same effect on Virginia’s gun rationing law later.. When it was reported that

41% of New York City crime guns came from Virginia, the anti-gun lobbyists who used the statistics, usually failed to mention that it was variously reported that 27% of the 41% (10% of the total) (Goode, 1992), or “the vast majority” of the 41% (Hynes, 1992) came from a single gun store, which BATF was investigating in part with undercover purchases going to New York.

Regarding the one store in Virginia, there is some discrepancy between the government and the store’s owners. BATF insisted they warned the store of the problem of multiple purchasers being straw purchasers and gun traffickers and that the store was uncooperative. The owners insisted that they regularly telephoned BATF regarding multiple purchases which they thought might be suspicious and/or headed for New York, and BATF had reassured the store that they were investigating the buyers and the guns should be sold. It is clear that the data about Virginia’s guns in New York City involved some guns carefully followed by BATF to New York and then traced back, not random New York guns which just by chance happened to be traced to Virginia. (Affidavit of BATF Agent Irvin W. Moran, before U.S. Magistrate Judge David G. Lowe, August 25, 1992; letter from BATF Director John W. Magaw to Senator Olympia J. Snowe, February 23, 1996).

Speedier investigation and crackdown on the offending gunshop would have prevented the gun trafficking data from being so impressive. The Virginia data are unrepresentative because of an investigation or sting or entrapment—depending upon one’s view of the investigation.

Another clue that the investigations affected the traces is that with homicide investigations the official reason for about 8% of traces (Pierce, Briggs and Carlson, 1996, Table 3), murder investigations accounted for only 1.6% (3.7% if suicides are included as homicide investigations) of the Project Lead guns traced from New York City to Virginia. At a time period when there were over one thousand gun-related homicides in the city,

three firearms were traced to Virginia as a result of homicide investigations. (Memorandum from Project Lead to Special Agent in Charge, BATF New York Field Division, October 22, 1992)

III. POLICY-INFLUENCED LIMITATIONS ON TRACING DATA

Some of the unrepresentative nature of traces may be policy related, intentionally or unintentionally. When BATF sought, in Operation CUE (Concentrated Urban Enforcement), to buy undercover the types of guns criminals buy, they had to assume or guess or calculate the types of firearms which criminals sought out. Having predetermined that criminals tended to prefer guns then described as “Saturday Night Specials”—relatively inexpensive, lower-caliber handguns with short barrels—and long guns which were NFA¹⁵ weapons, that is what BATF wound up purchasing. Analysis of those guns, unsurprisingly, found that criminals use SNSs and NFA long guns.¹⁶ (BATF, 1977, pp. viii, 20-23) The Police Foundation, about the same time, disputed both BATF’s initial evaluation and BATF’s conclusion, the Foundation feared that focus on “Saturday Night Specials” could “confuse the police administrator in confronting the problem of firearm abuse.”¹⁷ (Brill, 1977, p. v)

A. Semiautomatics

With the rise of the military-style semi-auto issue, BATF made special efforts to check out purchasers of such arms, in projects known as “forward traces” from the manufacturer or distributor to the first retail purchaser, rather than starting with a gun seized as part of an investigation. (Personal communication from gun dealers regarding BATF investigatory practices)

Special studies may influence the sort of firearm being traced, such as one in Detroit, focusing specifically on “assault weapons.” (Bea, 1992, pp. 67-68)

In addition, whether BATF made greater efforts to have local authorities solicit traces on such arms or not, rhetorical statements by politicians and higher-ranking BATF employees that such guns were the preferred choice of drug traffickers, organized crime, etc., would presumably have spurred at least some local authorities to make greater efforts to trace such guns on the presupposed and circular reasoning that the traces were more apt to provide evidence of drug trafficking, organized crime, etc.

Such an investigative reason could be the basis for the trace request, even if the ensuing investigation demonstrated that gun possession was the most serious offense involved in particular cases. “If...law enforcement offices in certain regions have determined that certain types of firearms (such as military-style semiautomatics that accept large capacity magazines) should be traced because they are thought to be used by dangerous offenders, the data in the tracing system will reflect those specific concerns.” (Bea, 1992, p. 68)

If some law enforcement experts assert, and the media report, that certain types of guns are the preferred guns of terrorists, of drug traffickers, or the like, then some law enforcement authorities will be more inclined to trace those types of guns when they are seized. Similarly, if certain persons are said to be more apt to be involved in certain types of offenses—say, young black males and gangs—then guns found with the arrest of those persons are more apt to be traced, with the suspected characteristic the basis for the trace request.

It then becomes of self-fulfilling prophesy: If there is a greater tendency to trace certain types of guns, or guns found in the course of the arrest of certain types of persons, with narcotics, organized crime, or the like given as the type of criminal investigation, then those guns or persons will be found,

using tracing data, to be disproportionately involved in the activity in question. The trace request cites the type of investigation; nothing in BATF tracing data indicates a negative investigative conclusion.

The unrepresentative effect of policy-related tracing was demonstrated perhaps most dramatically with the advent of the so-called “assault weapons” issue in the late 1980s, and the Cox Newspapers analysis of BATF traces.¹⁸ While BATF tracing data indicated that military-style semi-automatic firearms constituted 19% of crime guns in Los Angeles, the highest of any of the cities studied, LAPD data indicated that such firearms constituted only 3% of crime guns seized in that city. (Cox Newspapers, 1989, p. 4; letter from Edward C. Ezell, Curator, National Firearms Collection, Smithsonian Institution, to Rep. John D. Dingell, March 27, 1989) And the actual use of “assault weapons”, two years later, in famed youthful drive-by shootings was all but non-existent, at one documented use in 677 incidents (Hutson, Anglin and Pratts, 1994, p.326). Researchers noted the “minor role” of “assault weapons” in gang killings, for which the guns were supposedly a preferred weapon, during that period. (Hutson, Anglin, Kyriacou, Hart and Spears, 1995)

B. Handgun Rationing

Policy goals may have influenced the investigation of the Virginia gun dealer and its reporting; the investigation was at least partly geared toward enhancing the likelihood that Virginia would impose a handgun-rationing plan, to limit handgun purchasers to one handgun purchase in a 30-day period. After all, the U.S. Attorney most actively involved in the investigation was also the Republican most outspokenly campaigning for the gun rationing measure which the state legislature was considering. (Goode, 1992; Johnson, 1992)

Similarly, more recent efforts involve the goal of nationalizing the rationing policy, by showing that Virginia’s role as a gun-supplying state has been curtailed (Weil and Knox)¹⁹—a goal

easily achieved by determining on which states' dealers to focus limited BATF investigatory efforts. A recent arrest suggested a single Alabama shop as the source for 2,000 guns taken to New York over a five-year period. (Associated Press, 1997)

C. Interstate Gun-Running

Working with the Atlanta office of BATF, New York City authorities arranged that an "undercover officer in New York City would place an order for handguns with the defendants, who would then travel to Georgia, use an accomplice to make a seemingly lawful purchase of firearms from a local dealer, and then immediately return to New York with the guns." Forty-eight firearms were recovered in the course of the investigation and, presumably, dutifully traced by BATF back to the place where New York authorities had arranged for many of them to be purchased. (District Attorney, County of New York, 1997) The New York authorities involved in the investigation are also actively promoting gun rationing on a national level, which is also the policy of the Clinton administration under which BATF operated.²⁰

Even if policy is not the only goal, the investigators themselves helped to determine where guns would be traced to, and, in all likelihood, determined at least some of the details (caliber, action type, and price) of the sorts of guns which would be purchased and thus traced.

IV. BATF TRACING DATA USED IN POLICYMAKING AND EVALUATION

Whether due to local law enforcement practices, BATF tracing and enforcement practices, or policy-influenced decisions on what to trace, the result is that traced guns are simply not representative of crime guns.

A. Revolvers vs. Semiautomatics

Recent figures from New York City would suggest that revolvers are not used in criminal activity there. BATF's explanation, that New York's criminals no longer use revolvers, preferring the more modern guns (personal communication from Jerry Nunziato, BATF's NTC) approaches the absurd.

The dramatic increase in the popularity of semi-automatics among the general public, and criminals, has led to their accounting for about three-fourths of new handguns, and an increasing portion of crime guns. But their use in crime lags behind their percentage of new guns, even where their popularity is greatest, among younger criminals; in Boston, the percentage of youths using semi-automatics was reportedly up to 63% of handguns; in contrast there was near parity between the two main action-types of handguns among older criminals. (Kennedy, Piehl and Braga, 1996b, pp. 149, 155)

Notwithstanding limitations on the usefulness of tracing as a means of understanding criminal sources for and preferences in crime guns, those data have been used to influence policymaking on the gun issue. Curiously, the areas where tracing data use has most reasonably been related to possible suggestions regarding policymaking, the data have not influenced policy.

Nevertheless, with some encouragement from BATF (e.g., Vince, 1997, p. 207), tracing data analyses and studies are being used to influence and evaluate policymaking. BATF's interest may involve partly a desire to support the policies of the administration overseeing its operations.

B. "Assault Weapons"

The federal ban on so-called "assault weapons"—primarily a redesign requirement since existing guns were not regulated (Roth and Koper, 1997, pp. 13-14), and virtually any banned gun could be modified to be removed from the definition of "assault

weapon” (letter from John W. Magaw, BATF Director, to Sen. Larry E. Craig, April 1, 1994)—called for an evaluation on the effects of the legislation after three years. The FBI Uniform Crime Reporting Section was asked in advance of the legislation’s enactment if it knew “of any data which exist which would provide a base for determining whether these firearms are used more, less, or the same during the next three or four years, or are more or less available to criminals?” The response was, “The UCR Section knows of no existing data to provide a basis to address the question.” (Letter from Paul H. Blackman, NRA, to J. Harper Wilson, July 20, 1990; letter from J. Harper Wilson, Chief, Uniform Crime Reporting Section, to Paul H. Blackman, September 5, 1990)

Nonetheless, the legislation was enacted, including an obligation to evaluate its effectiveness, a task assigned to the Urban Institute, with assistance received from BATF, the National Alliance of Stocking Gun Dealers, Handgun Control, Inc., and a number of other researchers and organizations.

Absent other sources of information, the Urban Institute used BATF tracing data, recognizing some of its limitations, including the nonrepresentative sampling suggesting only about 10% of gun crimes and 2% of violent crimes result in BATF trace requests. The Urban Institute further noted the lack of a comparison between traces of “specific banned assault weapon models with trends for non-banned models that are close substitutes.” (Roth and Koper, 1997, pp. 8, 82) They nonetheless defended the use as “the only such national sample” although “BATF trace data should be interpreted cautiously.” (Roth and Koper, 1997, p. 83) With no reliable data on pre- or post-legislative criminal misuse of proscribed or similar guns, the caution is more advised than nevertheless proceeding with the uncertain interpretation.

C. One Gun a Month

As was noted above, BATF tracing data were used in popular literature;—“Batman” made the Virginia state legislature

the only such body effectively lobbied by a cartoon character, certainly the only one where violence-control legislation was deliberately inspired by a cartoon character devoted to the glamorization of violence. Batman and his fellow anti-gun lobbyists used BATF trace statistics to make Virginia adopt legislation designed to support gun rationing as a means to curb gun trafficking,²¹ and then to prove the legislation's effectiveness. (Ostrander and Giarrano, 1993; Weil and Knox, 1996; Vizzard, 1997, pp. 217-18)

Even though the effort was to place chronological limits on handgun purchases in response to allegations that gun traffickers bought substantial numbers of guns at a time, no effort was made to determine whether any of the guns involved in violent crime investigations, before or after the law took effect, involved multiple purchase. This despite the fact that purchases of more than one handgun in a business week are reported to BATF by the dealer [18 U.S.C. § 923(g)(3)], and investigations of dealers, such as that which led to the prosecution of the largest alleged Virginia source of New York crime guns, was spurred by such multiple purchase reports. (Hynes, 1992)

And the number of guns associated with violent crimes was tiny. Roughly one-quarter of one-percent of New York's criminal homicide investigations resulted in a trace to Virginia. That figure is meaningless; Virginia-bought guns could have been involved in a small percentage of homicides, easily explained by normal American mobility, or a large number best explained by gunrunning, or by something in between—such as individual evasions of New York's restrictions on the private acquisition of handguns.

Project CUE, found “that the majority of the firearm movement from States is occurring on an individual basis. That is to say that an individual will acquire a firearm in another State through the actual purchase by relative or friends and then transport that firearm back” to his own metropolitan area, with self-protection the primary motive. (BATF, 1977, p. 61) That view remains the conclusion of the historian of BATF, who

voices criticism of the new focus on trafficking. (Vizzard, 1997, p. 202) Project CUE went beyond simple tracing data, which provide no particular reason to suggest any particular explanation as to where New York City's violent criminals get their guns or whether gun rationing at the state or federal level is a rational response.

BATF tracing data are nonetheless being used to support the notion that gun trafficking is widespread and requires national gun rationing. The data, although described as a "Congressional study," with words of praise by respected criminologists (Butterfield, 1997), is simply the analysis of BATF tracing data provided to Rep. Charles Schumer—as the data would be provided to anyone requesting them (Letter, with documents, from Averill P. Graham, BATF Senior Disclosure Specialist, to Mark Barnes, April 3, 1997)—broken down by state of retail dealer for each state of trace for a 12- or 13-month period beginning January 1, 1996.

As always, since only an unrepresentative fraction of guns involved in criminal activity were traced, and most traced guns are not involved in violent crimes, and no research was conducted to determine how the guns happened to reach the state from which the trace was initiated, there is no way to know the extent, if any, to which gun trafficking, specifically gun trafficking involving purchases of over one handgun in a 30-day period—already a serious federal felony [18 U.S.C. §§ 922(a)(1) and (5), 924(b), among others]—was involved.

D. Brady Act

BATF tracing data are also being used to demonstrate that gun trafficking—sometimes from the same source states—is diminishing due to the Brady Act. (Weil, 1997) Since the tracing data can show neither the problem of gun trafficking nor a contemporaneous solution, there is no more reason the data should not be able simultaneously to show both.

Crediting the Brady Act requires assuming that an Act aimed at encouraging local law enforcement officials to check criminal records of residents attempting to purchase handguns from licensed dealers also affects something at which it was not aimed: sales to non-residents. In addition its problems with data, then, there is a problem with logic. Brady was aimed not at interstate trafficking but at in-state purchases, envisioning a police check of records, not of residences.

E. Inexpensive Handguns

In addition to legislative measures addressed toward military-style firearms and gun rationing, efforts have been made by policymakers to use tracing data to support additional restrictions on small, inexpensive handguns—variously called “Saturday Night Specials,” “junk guns,” and “ring of fire” guns—and semi-automatic handguns,²² and restrictions on dealers. None of the tracing data available would allow an evaluation of the proposals or support the restrictions or, for that matter, opposition to the restrictions. Not enough is known about the sorts of crimes involved with the various small guns, nor is a sizeable enough portion of guns used in violent crimes traced by BATF.

F. Firearms Surrenders

Another study used tracing data to show, among other things, how different guns turned in during amnesties were from guns used by criminals, particularly younger criminals. So different were the guns turned in that only about one-eighth could be traced, and an effort at evaluation found that three-fourths of the guns were manufactured before the enactment of GCA’68. (Kennedy, Piehl and Braga, 1996b, pp. 156-58) The authors went on to conclude that, while tracing data gave no reason to believe turn-in programs would have crime-control value, they might be beneficial for symbolic values. (1996b, p. 165)

V. POTENTIAL POLICYMAKING AND EVALUATIVE USES OF BATF TRACING DATA AND THEIR LIMITATIONS

The improvements in tracing records and their analysis should enhance law enforcement efforts, particularly against illicit firearms traffickers, even if tracing's role is exaggerated partly for political reasons. (Vizzard, 1997, pp. 202, 218) Certainly an avid supporter of tracing for law-enforcement and analytical purposes, David Kennedy, observed with regard to Boston, "There is very little illegal trafficking interdiction going on." (Lattimore and Nahabedian, 1997, p. 223)

A. Problem Dealers

There is only one apparent policymaking utility for tracing. An evaluation of which dealers are more apt to have firearms traced to them, in addition to suggesting which dealers may be breaking the law themselves, or may be insufficiently diligent, or may simply in an area where criminal misuse by customers is more popular, might suggest the curtailment of which sorts of dealerships might disproportionately reduce illicit firearms trafficking.

Research by Glenn Pierce et al. for BATF has suggested that a tiny fraction of dealers are vastly disproportionately involved in firearms traces. (Pierce, Briggs and Carlson, 1996, Table 5) Those data could provide a basis for seeking more information about those dealers which could suggest for whom federal firearms licenses should be more difficult to obtain, or other regulations which might be appropriate.

For example, the administration, eventually with the legislative approval of Congress, has drastically reduced the number of dealers during the past few years. Data on dealer tracing could suggest whether the sorts of dealers driven out of business constitute the sort of dealer most or least apt to sell guns

eventually traced to them. Those data were not used to make the policy. And there has been no *post facto* suggestion that the policy was warranted by the data.

Indeed, with the goal of putting out of business “convenience” dealers—those who have licensed in order cheaply to purchase firearms for themselves and their friends—in order to allow BATF to focus more regulatory attention on the remaining dealers, the sharp reduction in dealers may have been akin to rescinding the drivers licenses of persons over 40 in order to allow more effective policing of the driving habits of the remaining younger drivers.

Similarly, there are current legislative efforts to authorize BATF to mandate storage requirements for licensed dealers. Tracing data, and data on stolen firearms, might allow some evaluation of whether theoretically more susceptible dealers are, in fact, more apt to be the victims of thefts. But no such attempt has yet been made. (BATF, 1995)

B. Firearms Trafficking

There would appear to be no other obvious area where policymaking might benefit from an analysis of BATF firearms tracing data as currently collected. A trafficking study could be useful for law enforcement, but not for a study of criminals’ guns or their sources, given the small number traced, the huge number of models recovered and the resultant small numbers of traces required for a gun to make it into some city’s “top ten,” and the lack of relationship of most crime guns to violent crimes. (BATF, 1997)

And thus even in a trafficking study, traces alone would be insufficient without additional information about the types of dealerships—their conformity to local zoning and other regulations, and the like—which would make traces more time-consuming and costly. With more serious follow-up research, there would, however, be other areas where cautious use of tracing data might provide the base for more extensive research.

Similarly, if BATF traces were followed up by more extensive investigation than the simple trace, the data could prove useful in learning more about where criminals get their guns and what their preferences are. For example, if data were collected on the relation of the traced firearm to the criminal investigation (used in the homicide, recovered at the scene, etc.) or follow-up information on the criminal investigation (was the criminal investigation founded? was there drug trafficking involved, or had the gun in fact been taken in a burglary, etc.? how did the firearm come to be in the state where it was recovered? what was the path of ownership and the means of transfer?), then the potential would exist for learning more about the nature at least of relatively new crime guns or criminal preferences in guns.

Most efforts by BATF, however, have been to curtail tracing to make it more cost-effective, not to expand the information gathering with labor-intensive follow-up inquiries. Thus, while the Congressional Research Service noted the problems with the tracing system in terms of statistical analysis, it made it clear that the limitations on the system should not necessarily be rectified: "the system is designed to expedite requests from law enforcement agencies on the history of firearm ownership, there would likely be little benefit in placing additional restrictions or requirements on officers submitting the trace request. The more important accomplishment of the system design...is to minimize paperwork and administrative burdens on the requesting agency." (Bea, 1992, pp. 65-66)

Efforts to encourage more detailed data collection by BATF and from local law enforcement is apt to be even less successful than the current efforts at more thorough data collection for the Uniform Crime Reporting Program. The currently envisioned expansion of tracing to include guns which cannot be traced, but are merely seized in cooperating cities, means less and less will be known about more and more firearms.

CONCLUSION: GIGO ("GARBAGE IN, GARBAGE OUT")

As currently collected—a small non-random undifferentiated sample of guns about whose involvement in crimes committed by whom little is known or asked—BATF tracing data cannot be used criminologically, with the possible hypothetical exception of giving some clues regarding dealers as sources for some misused firearms.

Suggesting sharp limitations on the utility of BATF tracing for criminological research in no way undermines either the benefits of tracing as a law-enforcement tool in general, or the benefits of recent improvements in BATF's tracing abilities. The traces were envisioned as a law-enforcement tool, not a law-making tool, and retain utility for that envisioned purpose.

To the extent it might be argued that, however weak, BATF tracing data are the only data available for certain criminological or policymaking goals, that discouraging fact would simply mean there are no data available; absence of other data does not make unrepresentative data representative. And no amount of sophisticated computer-assisted analysis changes the fact that if garbage is programmed in, garbage will be programmed out.

Analyses of tracing data, however performed, are akin to analyses of astronomical data for astrological projections. There is no need carefully to evaluate the data or the analyses; they are worthless. Tracing data can no more provide a sound basis for criminological analysis than can works of fiction.²³ Studies based on tracing data simply diminish the value of otherwise useful blank paper used for publishing the analyses.

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Endnotes

1 Until its promotion to bureau status in 1972, it was the Alcohol, Tobacco & Firearms Division of the Internal Revenue Service. For the past quarter century, its name has generally been shortened to the letters BATF or ATF, the former seeming more thoroughly descriptive, and perhaps slightly more suitable as an acronym, but both have been used extensively both outside and inside government, including the Treasury Department itself.

2 BATF offered its tracing capability to the U.S. Secret Service at 2:40 p.m. on March 30, 1981, with BATF personnel ordered to stand by for an urgent trace. The Secret Service contacted the BATF liaison to begin the tracing process at

3:20 p.m. and, following some confusion on the Secret Service's part regarding the serial number, the trace was completed by 4:30 p.m. (Office of the General Counsel, 1981, pp. 78-79.) The General Counsel found it noteworthy that the investigative activities were initiated during normal working hours, and that the tracing capability "would assume even more importance if a suspect had not been immediately apprehended at the scene." (Office of the General Counsel, 1981, pp. III and 81) The trace of the handgun used in the assassination attempt on Governor George Wallace took about 30 minutes. (Brill, 1977, p. 119)

3 Many of the limitations noted in this paper replicate the introduction to BATF's National Tracing Center (NTC) by its director, Gerald A. Nunziato, in speaking to visitors, for example, from the Homicide Research Working Group on June 10, 1997.

4 Although Commissioner Sambor did not explain, the reduction in likelihood of an error simply reflects the fact that the fewer the intermediaries, the less the likelihood of an error in the transcription of a serial number or other information essential to an accurate trace, and that no reflection on BATF personnel in particular was intended.

5 Similarly, because of Michigan's records, guns originally purchased there were prescreened and excluded from BATF's Project Identification data. (Zimring, 1976, p. 105)

6 According to the trial transcript in *United States v. Hinckley*, #81-306, pp. 1489-1559, 1751-52, when he was arrested at the Nashville airport on October 9, 1980, with three handguns in his carry-on luggage, they were seized, but he was fined only a total of \$62.50 for the misdemeanor, using his Texas drivers license as identification, which listed his address as 1612 Avenue Y, Lubbock, Texas. He used the same drivers license on October 13, when he purchased two inexpensive .22 caliber revolvers, to replace two of the seized handguns, from Rocky's Pawn Shop, although the address he put on the actual federal form 4473 was 2404 10th Street, Lubbock. The address listed for him in the November 1979 Lubbock-Slaton telephone directory was 409 University Avenue. According to a Washington Post article from March 31, 1981 (reproduced as part of a fundraising package from Handgun Control, Inc.), each of the revolvers cost about \$47.50 (although later advertisements from that organization have lowered the price to \$29). The diversity of addresses suggests that some college students—Hinckley was a sometime student at Texas Tech, as he had been in the summer sessions of 1980 (personal communication)—move around, but was irrelevant under federal law which was only concerned

with whether he was a resident of Texas. Explaining the meaning of “State of residency,” ATF Rule. 80-21 explains that “during the time the students actually reside in a college dormitory or at an off-campus location they are considered residents of the State where the dormitory or off-campus home is located. During the time out-of-state college students actually reside in their home State they are considered residents of their home State.” Had a name-check been conducted—as it likely was following BATF’s receipt of the multiple purchase form from the pawnshop—it would have found, at most, a misdemeanor record for a Texas resident. As the resident of his home state, using a Colorado identification card with an Evergreen, Colorado, address, Hinckley purchased a .38 caliber revolver from the Kawasake West gunshop on January 21, 1981, to replace the third handgun seized in Nashville. Any alleged illegalities in either purchase could have led to prosecution in Texas or Colorado until the mid-1980s, but no such charges were brought.

7 The categories are not necessarily all that revealing: “other”; “miscellaneous.” Even “weapons” or “GCA” or “Title 1” cover a multitude of possible offenses, from trivial typographical errors to gun-trafficking and violent offenses. (Bea, 1992, p. 71) A stolen weapon trace could involve the thief or a gun found and turned in to authorities. Some traces may be of police-owned firearms. (Brill, 1977, pp. 23-25) Crimes reported as the basis for traces in BATF’s Project Lead in New York City included suicide and loitering. (Memorandum from Project Lead to Special Agent in Charge, New York Field Division, BATF, October 22, 1992)

8 Murder weapons may differ from guns used in non-lethal assaults (Brill, 1977, p.71), regardless of one’s position in the motivation versus instrumentality debate.

9 Such labor-intensive tracing may be possible if deemed essential to a case. The Beretta used in about half of the so-called Zebra slayings in San Francisco in the 1970s was traced, over a period of over eight months, by BATF and then the San Francisco police beyond the first retail sale through seven private transfers. (Adams, 1978)

10 It will not necessarily rise as fast as the number of dealers has fallen, or just because of that. The vast majority of traces involve a small portion of dealers. Ninety-two percent of dealers were involved with no traces, and less than 2% of dealers accounted for over three-fourths of traces. (Pierce, Briggs and Carlson, 1996, Table 5) The records of those dealers driven out of business by increased regulations will likely not be anywhere near so useful as of those driven out of business as a result of criminal investigations of their activities.

11 The more information which is required or provided, the more likelihood for error. The author once ran a .38 caliber revolver from California through the NCIC and was told it was a .22 caliber revolver from Alabama.

12 BATF's then-Chief, Firearms Division, Joseph J. Vince, Jr., told the Homicide Research Working Group's 1997 symposium that in some cities, even though BATF could not trace all firearms, it was collecting available information on all guns seized by police. Since those data would be limited to the few cooperating cities, they would be comparable to data currently available from some cities analyzing the guns which are taken into custody. Cities can vary dramatically in a variety of data, so that there would be no reason to suppose a few cities might be representative either of cities in general or of the nation as a whole. For example, with 17 cities cooperating extensively in tracing efforts, the percentage of guns associated with firearms offenses ranged from 36% to 92%, and the number with an in-state source varied from 077%. (BATF, 1997) In addition, it is unclear whether departments which cooperate with outside studies differ from those more reluctant to cooperate. If differences exist in the way spousal violence is treated, the differences may or may not imply similar differences in way gun seizures, information, and gun-related cases are treated. (Fyfe, Klinger and Flavin, 1997). Even if the cities were typical, the information would still generally be useless for anything except telling about the sorts of guns were seized by police. If broken down by crime type, the data might give some information about the sorts of guns used by criminals in specific crimes in specific cities, but, since most of the firearms could not be traced, the data would still not provide information about the sources of criminals' guns.

13 Traced semi-automatic handguns tend to be roughly half as old as revolvers and long guns (Pierce, Briggs and Carlson, 1996, Table 3; Wachtel, 1996, Table 5), and their predominance in the marketplace is similarly relatively recent. Semiautos clearly overtook revolvers among domestically manufactured firearms only during the past decade. (Thurman, 1994)

14 The Boston police and BATF reportedly agreed to trace every firearm seized. The figures suggest about 500 trace attempts of seized guns annually, plus an additional 120 guns recovered other than for possessory or substantive crimes. (Kennedy, Piehl and Braga, 1996a, p. 196) David Kennedy says about 700-1000 firearms came into BPD custody annually during the 1990s, with the number decreasing. The estimate on firearm confiscations in Boston in 1974, on the other hand, was over 1700. (Brill, 1977, p. 27) The annual number of violent crimes remains at roughly 10,000.

15 National Firearms Act of 1934, also known as Title II, based on its incorporation into Title II of the GCA'68. The most common NFA weapons used by criminals are sawed-off shotguns. (Wright and Rossi, 1986, p. 95-97)

16 Although Operation CUE was not primarily a tracing activity, tracing was a facet of the operation. (BATF, 1977, pp. v, 58-65)

17 That conclusion was supported by the NIJ-funded survey of felons regarding their preferences in firearms. (Wright and Rossi, 1986, ch. 8)

18 The Cox Newspapers analysis of BATF traces constitutes an odd combination of a news company's policymaking goal and BATF's desire for increased access to its own data, at a time when BATF was being asked by the administration to justify restrictions on military-style semi-automatic firearms. In exchange for access to BATF tracing files, which it hoped to use to show that so-called "assault weapons" were disproportionately used in crime, Cox Newspapers assisted in getting those data onto computers, to the benefit of BATF. (Cox Newspapers, 1989, pp. 31-32; Chichioco, 1989) A somewhat different approach was taken in California where, following initial indications that information on the types of guns used in crime would show low levels of "assault weapons," collected state data indicating 1.8-2.9% use in serious crime were suppressed. BATF tracing was not involved. (Kobayashi and Olson, 1997, pp. 43-44)

19 In addition to problems with examining changes in traces to Virginia, explaining changes based on the gun rationing law would be undermined by two factors: First, the same legislative session required proof of residency for driver's license applicants (Virginia Code § 46.2-323). And the rationing, in fact, rarely applies; during the first three years, applications for multiple handgun purchase requests were denied to 3% of applicants, and another 2% withdrew their applications. (Personal communication from Captain R. Lewis Vass, Department of State Police, August 30, 1996) Captain Vass testified to a Virginia crime commission that the rationing law has "not significantly affected ... the number of multiple handgun purchases within the Commonwealth." (August 29, 1995) Subtracting the single gunshop from the 1991-92 data would suggest roughly 24-28 traces from New York City to Virginia monthly. (Hynes, 1992, p. 113; Goode, 1992) BATF tracing data from January 1, 1996, through January 31, 1997, reports 372 handguns traced to Virginia (with Florida in second place at 242, and South Carolina, another gun-rationing state, third at 220, and New York sixth), which would work out to about the same, with no data on the source of actual crime guns used in New York City before or after the Virginia law took effect. Tracing data would suggest nothing much had

changed in the past two decades. New York City guns traced to New York State has risen from 4% or 5% in 1973 to 8%, and those traced to the four Southern states of Virginia, South Carolina, Georgia, and Florida, has fallen from 56% to 46%. (BATF tracing data, January 1, 1996, through January 31, 1997; Brill, 1977, pp. 83-84, 91-93; Zimring, 1975, pp. 181-82) Traces of Boston crime guns to Massachusetts has gone from 35% to 37%. (Brill, 1977, p. 84; Kennedy, Piehl and Braga, 1996a, p. 196) And Los Angeles crime guns traced to California has gone from 82% to 81%. (Brill, 1977, p. 84; Wachtel, 1996, Table 6) Tracing data, however, do not provide a reliable measure of changes in gun sources, especially relative to recent changes in federal or state laws, and a time frame involving substantial changes in BATF tracing practices.

20 Those suspecting a possible public relations aspect of the investigation would also note that the BATF Special Agent in Charge of the Atlanta field division is Jack Killorin, who for a long time headed BATF's public affairs office in Washington.

21 The actual punishment for massive numbers of trafficked guns can be relatively small, with relatively short prison terms (14 months not being unusual) and/or probation. (Wachtel, 1996, Table 7)

22 One generally invalid criticism of the use of tracing, and more localized similar, data on firearms is that those using it provide no reports on the proportionate availability of the guns, only data on the use of some guns in crime; that is, there are no data provided on non-crime guns. (Kobayashi and Olson, 1997, p. 49) In fact, those using traces to attack particular guns do provide some information on the traces proportionate to availability.

Unfortunately, those data are often combined with rhetoric and the supposed uselessness of the guns in question for legitimate purposes. Wintemute, for example, asserted that what he called "ring of fire" handguns—predominately small and inexpensive—"truly are weapons of choice for criminal use," because they were traced disproportionate to their production. While his data support the disproportionality, they also show traces accounting for 0.33% of the guns manufactured rather than the 0.1% for major manufacturers in Connecticut. (Wintemute, 1994, p. 63)

While higher percentages of both groups of manufacturers' products may well have been involved in crime, tracing data provide no real confidence that the "ring of fire" handguns are misused relatively more than the "Gun Valley" handguns. The data suggests that vast numbers of the handguns in question are "weapons of choice" for non-criminal use.

Another dishonest effort at comparison, albeit not one relying upon tracing data, involved using overall domestic manufacturing data over a 20-year period to suggest disproportionate involvement of .25 caliber pistols in a big-city's suicides and homicides—10% of manufacturing vs. 14% of reported involvement (and 13% if unknown calibers were not apportioned). (Hargarten et al., 1996)

That use of comparative data ignored the fact that protection-type calibers are more apt to be owned in big cities, where sporting uses of handguns are less available, and that a shorter time frame (more in keeping with the fact that relatively newer guns are used in crime) would similarly record that 13% of manufactured handguns are .25 caliber pistols. (Thurman, 1994, pp. 101-102)

The Cox Newspaper analysis, while asserting that “assault weapons” were ten times more likely to be misused relative to their availability, did not emphasize that this was based on four thousand traces of what it asserted to be about one million guns. In addition, the availability data may not be accurate. Cox Newspapers assertion of one million “assault weapons” (1989, p. 1), conflicted with the estimate of at least 3.7 million such arms by the Smithsonian Institution's firearms expert, Edward Ezell (letter to Rep. John D. Dingell, March 27, 1989), and the Cox Newspapers' elsewhere counting the M1 Garand as an assault gun and reporting the availability of 1.5 million of those. (1989, p. 10)

23 This view is not necessarily universally shared. Actress Demi Moore told the television show “Entertainment Tonight” that her movie “GI Jane” proved that women could successfully serve in elite military combat forces. Gun control opponents, who believe some of their points about the evils of firearms registration were proven in the film “Red Dawn,” more recently have been promoting the novel *Unexpected Consequences* (Ross, 1996) as evidence that gun control could be dangerous to American society.

On the other side, in the mid-1980s, when then-Rep. Robert Torricelli was introducing legislation aimed at semi-automatic handguns which could be readily converted to machineguns, his source for believing such firearms were a crime problem was the “Miami Vice” television show. (Orr, 1985)

Like effective fiction, tracing data may provide rhetorical support for criminological or political views. This does not mean that fiction and tracing data are of no utility to criminology. One could use Erle Stanley Gardner's novels to supplement his other writings to summarize and evaluate his criminological beliefs, and one could use BATF tracing data to evaluate how

traces are used for crime control. Those data, however, do not provide information useful for studying how criminals obtain firearms or the firearms criminals use to commit crimes.

24 The report has no date, but internal evidence suggests it was produced in 1995.

25 According to Lois Mock of the NIJ, there was no final draft published, leaving the preliminary draft, paginated within each chapter, the only one available.

Ideological and Civil Liberties Implications of the Public Health Approach to Guns, Crime and Violence

by Raymond G. Kessler

Public health advocacy for severe gun control and gun prohibition has become an increasingly important part of the firearms policy debate. In this article, Raymond Kessler analyzes, from a critical or Marxist perspective, the ideology that underlies antigun public health campaign. Professor Kessler is the Chair of the Department of Criminal Justice at Sul Ross State University in Alpine, Texas.

Introduction

A. Background

According to former U.S. Surgeon General C. Everett Koop, (1991: vi) “[i]dentifying violence as a public health issue is a relatively new idea.” This approach started appearing in the literature in the 1970s (see Foege 1995: viii) with a series of articles in medical and public health journals (e.g., Rushforth et al., 1975, 1977; Hirsh et al. 1973) on homicide, gunshot wounds, firearms accidents, etc. In 1979 the U.S. Surgeon General published the first national agenda for health promotion and included reducing interpersonal violence among the top 15 priorities (Prothrow-Stith and Weissman 1991: 136).

In 1990 Harries (1990: 187) wrote that “over the last decade or so, violence has increasingly become a topic of interest to the public health community, both in the United States and abroad . . .” The public health approach continues to flourish, bolstered by

involvement of the federal Center for Disease Control (CDC) (Rosenberg and Mercy, 1991: 7), and as evidenced by coverage in recent criminology textbooks (e.g., Sacco and Kennedy 1996), semi-scholarly publications such as *America* (e.g., Anderson 1995); edited scholarly works (e.g., Rosenberg and Fenley 1991) popular magazines (e.g., *Rolling Stone* 1993); and a variety of medical and public health journals such as the *Journal of Trauma* (e.g., Wintemute 1987); *American Journal of Epidemiology* (e.g., Lee, et. al 1991); *The New England Journal of Medicine* (e.g., Loftin, et al 1991); *Texas Medicine* (e.g., Zane et al. 1993), and an entire issue of the *Journal of the American Medical Association* (see Koop and Lundberg 1992: 3075).

The public health approach has been given a certain amount of legitimacy by being treated in publications of the National Institute of Justice (e.g., Roth and Moore, 1995, Hawkins 1995) and in a 1994 NIJ film (#152238) "NIJ Research in Progress: Understanding and Preventing Violence: A Public Health Perspective," which features Arthur L. Kellerman, M.D., M.P.H.¹ Although the film contains a disclaimer that the speaker's views do not necessarily represent government policy, Dr. Kellerman is introduced as "one of America's leading researchers" and he returns the compliment by referring to the current administration as an "enlightened" one. This approach also had a significant impact on federal Violent Crime Control and Law Enforcement Act of 1994 (Roth and Moore, 1995: 5).² Many grants for research along public health lines have been awarded (Rosenberg and Mercy 1991: 7). Dr. Deborah Prothrow-Stith, a public health perspective author (Prothrow-Stith and Weissman 1991), was appointed to President Clinton's National Commission on Crime Control and Prevention (NRA 1995: 20). Support for this approach by the CDC and NIJ suggests the public health approach is part of the Clinton administrations "ideology of crime" (a term that will be explained below).

A statement by Dr. Mark Rosen of the CDC that "guns are first and foremost, a public health menace" (quoted in

Wilkinson 1993: 37), and similar statements by other physicians (e.g., Wintemute 1987: 534) have brought a not unexpected strong reaction from the National Rifle Association (Baker 1994). This dispute has received national coverage in at least USA Today, (Levy 1995).

Involvement of the CDC and medical profession in these issues has spawned at least two new physicians groups, Doctors for Integrity in Research in Public Policy and Doctors for Responsible Gun Ownership, which appear to be opposed to the main thrust of the public health perspective (Baker 1994), and a pro-control group called the “Handgun Epidemic Lowering Plan” (HELP) Network (Help Network 1995).

B. Purpose

Given the increasing visibility and impact of this relatively new approach to violent crime and gun control policy, a preliminary examination of the ideological and civil liberties implications of this perspective is necessary to begin airing of its merits and demerits in the context of American society. That is the purpose of this article. The peer review, methodological, logical and other problems with the approach have been covered elsewhere (Kates *et al.*, 1995, Kopel 1995; Suter 1994) and will not be treated here.

In the sections that follow the author will: present a brief overview of the public health approach; explain the “methodology” of this article; analyze the ideological implications of the approach (Part I); and present some of the civil liberties implications of this perspective (Part II).

C. Overview of the Public Health Approach to Violence

In an article entitled “Let’s Be Clear: Violence is a Public Health Problem” three physicians from the CDC (Rosenberg, O’Carroll and Powell (1992: 3071) state: “The public health

approach consists of a health event surveillance, epidemiological analysis and intervention design and evaluation, focused unwaveringly on a single, clear outcome—the prevention of a particular illness or injury.”

This approach was initially developed to deal with infectious diseases, and has, according to Rosenberg, O’Carroll and Powell, (1992: 3071) “been successfully applied” to other causes of premature death such as lung cancer, heart disease and motor vehicle accidents.

According to Roth and Moore (1995: 4) in a National Institute of Justice Publication, even “the leaders in the public health community find it difficult to define this particular approach” Nevertheless, according to these authors, (1995: 4) there are 7 common themes that appear in the writings of medical or public health practitioners:

1. Violence is a threat to a community’s health and social order.
2. Medical and Public Health personnel are in positions where they can see violence that is not reported to authorities.
3. Prevention and reducing harmful effects requires that attention be paid not only to the perpetrator but also to victims and witnesses.
4. The methods of epidemiology can be useful in identifying patterns and levels of violence and in identifying features correlated with violence.
5. Emphasis should be on prevention rather than amelioration. Primary prevention—measures that prevent violent events from happening in the first place and do so across a large portion of the population should be the primary focus. Secondary prevention—the early identification and improvement of situations that could lead to violence if not addressed immediately—should be the secondary priority. Tertiary prevention—responses

that repair the damage associated with violence that has already occurred—should be only the last resort.

6. There are many opportunities to prevent violence that do not depend on rehabilitating or controlling offenders. For example, just as traffic deaths can be reduced by making cars and roads safer as well as by arresting careless or drunk drivers, some violence may be preventable by making vulnerable convenience stores harder to rob, by teaching nonviolent ways to solve disputes, by deglamorizing violence in the media, or by modifying trigger mechanisms on guns.

7. It is important to involve the community in preventing violence and mobilizing political consensus for legislation.

In the sections below, other aspects of the public health approach will be discussed.³

D. Methodology

In an attempt to analyze the civil liberties and ideological implications the author has read, what, to this author's knowledge, are the first two commercially published books to appear that are totally about and are self-identified as utilizing a public health approach.

In 1991, Dr. Mark Rosenberg of the CDC and Dr. Mary Ann Fenley published an edited collection of articles in a book entitled *Violence in America: A Public Health Approach*. No information is given on Ms. Fenley.

Also in 1991 Deborah Prothrow-Stith M.D. and Michael Weissman published *Deadly Consequences*. At the time of the book, Dr. Prothrow-Stith was Assistant Dean of the Harvard School of Public Health and before that she served as Massachusetts Commissioner of Public Health. In 1989 Dr. Prothrow-Stith wrote an article in *The Criminologist* entitled "The Fight Against Adolescent Violence: A Public Health

Approach” (1989: 1). Ms Weissman is listed as a free-lance writer (Prothrow-Stith and Weissman 1991: 270). Dr. Prothrow-Stith writes (Prothrow-Stith and Weissman 1991: 10): “The more I learned, the more I was convinced that a new multi-disciplinary approach to violence, one beginning with the perception that violence is an assault on the public health was required to save the endangered lives of our young.”

There is no way of telling if these two books represent the field or not. They however, appear to be the first two books published.

To obtain additional perspective, the author perused *Index Medicus* 1990-1995 for additional articles whose listed titles suggested that they dealt primarily and directly with the subject of this paper. Attention was primarily directed toward the *Journal of the American Medical Association*, which is the official journal of the American Medical Association and the prestigious *New England Journal of Medicine*. Attention was also particularly directed toward the journal *Pediatrics* because background reading suggested this journal was heavily involved in the Public Health Approach. This was not a random or systematic search of *Index Medicus*. These articles may, or may not be, representative of the field as a whole. Also surveyed were elucidations (e.g., Roth and Moore 1995) and critiques of the public health approach (Blackman 1990, 1992, 1994, 1995, Kopel, 1995; Kates *et al.*, 1995) found outside the medical and public health literature.

Finally, concerning the “implications,” they, like beauty, exist “in the eye of the beholder.” Implications are subjective, and thus this paper will outline the author’s basic perspective on ideology and civil liberties so the reader may understand the implications.⁴ Those with different perspectives on ideology and civil liberties will obviously disagree with this writer’s implications. Those who agree will hopefully join with this author in supporting a non-hypocritical, expansive interpretation of *all* civil liberties, not just those that are politically correct at the time.

Part I. Ideology

A. Author's Perspective on Ideology

The approach to ideology in this context generally follows Kessler (1988), Walker (1985), Reiman (1990), and Miller (1973). For our purposes, and at the risk of oversimplification, ideology is composed of socio-political-economic beliefs that ultimately function to support or challenge the current distribution of resources in society. The status quo is supported by an ideology, called the "dominant ideology," and a corollary of this is a "dominant ideology of crime" (Kessler 1988). As Kessler (1988: 1) states:

In general, those who control the economic or material forces in a society, control that society's intellectual forces thus, the ideology of the dominant classes becomes the dominant ideology (Marx and Engels, 1970: 64-67). This control of consciousness is the most important nonviolent mechanism by which elites maintain their positions and justify social and economic inequality. Ideological hegemony is sustained in part by the constant diffusion and elaboration of the dominant ideology and exclusion of competing ideologies (see Wolfe, 1974: 50; Milbrand, 1977: Ch. 3). "Ideologies foster the suppression and repression of some interests, even as they give expression to others"(Gouldner, 1976: 28). Further, the interests of the dominant class appear to be common interests of all members of society. These interests are expressed in ideal form and appear to be the only rational, universally valid one (Marx and Engels, 1970: 65-66; Gouldner, 1976: 28). However, this does not necessarily mean that there is conscious deception or manipulation by those involved in the creation and dissemination of ideas and information, including the mass media. They sincerely believe in the accuracy of

their version of reality, and because of their power, their ideology becomes that of most individuals (Reiman, 1984: 130-31).⁴

Contemporary American thinking about policy issues is dominated by those who support capitalism in one form or another. The consensus is, however, imperfect and there is disagreement over specific policies among various powerful procapitalist factions (Domhoff, 1978: 117-19). In the “political arena one sees not only classes, but fractions of classes and alliances of classes and class fractions” (Greenberg, 1981: 193). To the extent there is any meaningful debate about issues, it centers on the differences between liberals and conservatives over their differing version of the ideal capitalist society (Gordon, 1977: Ch. 1; Kessler, 1988).

According to Kessler (1988), one portion of the dominant ideology is an explanation of crime which is consistent with the dominant ideology. This component of the dominant ideology is an “ideology of crime” (Quinney, 1979: 194) that includes conceptions of both the causation and cure for crime. The dominant ideology of crime in America has two major forms, and a number of aspects of these “liberal” and “conservative” approaches to crime (i.e., “ideologies of crime” have been discussed elsewhere (Gordon, 1977: Ch. 6; Miller, 1978; Walker, 1986: Pt. 2, 4). Suffice it to say that while each form includes criticisms of different allegedly criminogenic details of American society, neither seriously addresses the role of the political economy of a capitalist society in the creation of violence. While liberal rhetoric focuses on the need for major social reforms to combat crime, liberal policies rarely go beyond “social tinkering” (Walker, 1986: 212, 220). For instance, “neither liberal democrats nor conservative republicans have offered a realistic program for massive job creation” (Walker, 1986: 220) or any program that seriously dealt with basic structural problems (Walker, 1986: 212) or class dominance (Kessler, 1988):

Most of the public, social scientists, and politicians subscribe to the dominant (i.e., contemporary American capitalist) ideology of crime. This ideology includes assumption that it is possible to create an effective but still humanitarian system of crime control under the present economic and political framework. Proposals for reform are invariably formulated within a structure of corporate capitalism and designed to shape new adjustments to existing political and economic conditions. Radical solutions to the crime problem are rejected and labeled “utopian” (see Platt, 1974: 357-359; Greenberg, 1981: 9; Reiman, 1984: 118-135) (Kessler 1988: 2).

Ideology is supported, propagated and elaborated because it serves personal, group and/or class interests:

Conceptions of crime and crime control are perpetuated because they serve a variety of group and individual psychological interests, not just the system-maintenance interests of élites. Analysis must extend beyond elite interests, and public support for the dominant ideology can be explained at least in part by the fact that this ideology also serves other interests including the short term interests of the public (see Bohm, 1986: 199-200; Grundy and Weinstein, 1974: 307) (Kessler 1988: 3).

B. Major Ideological Perspectives

For our purposes, there are 4 ideological positions on crime. (See Kessler, 1988, Walker 1985, Miller 1973).

On the far political left is a position referred to as “radical.” This generally and roughly includes those schools of criminological thought referred to as “critical,” “Marxist,” “radical,” or “conflict” (See Senna & Siegel 1994: 222-230, e.g., Reiman 1990, App. A).

The radical position sees contemporary capitalism and its resulting evils, poverty, racial discrimination, alienation, elite dominance, etc. as the primary factors in crime. Its solutions call for radical changes in the American political economy. Major modifications, if not abolition of a capitalist economy, are advocated. Some seek a "Socialist" society.

Slightly left of center is the "Liberal" position. Liberals complain about defects in the America's political economy and urge mild reform that could be referred to as "social tinkering" and "marginal social engineering" (Walker 1985: 212). Poverty, racism, insensitive government and corporate America are blamed, but the solutions are ones which generally do not require major changes in the political economy. Examples are welfare and education programs (e.g., Head Start), and improved opportunities for the poor and minorities (e.g., affirmative action).

Slightly right of center is the "conservative" position which tends to blame the individual, or a breakdown of family or conservative values. Biological and psychological defect theories, and rational choice theory are examples (Senna and Siegel 1994: 128). Blaming the individual and the social malaise caused by liberals and radicals, does not require any major social changes. Conservatives believe that status quo capitalism is the best of all worlds and that the crime problem can be solved by quick and sure punishment, individual (rather than social) change, and/or a return to conservative values.

To the right of conservatism is a position that will be referred to as "reactionary." Reactionaries want to do more than just maintain the status quo, they want to return to an earlier time when government did not attempt to regulate business, punishments were swift, public and severe, (e.g., public hanging). A return to the values and practices of an earlier America are the solutions to all problems.

Radicals like to point to crimes of the state (such as police and prison brutality, political assassination and the death penalty) and corporations (such as pollution, death in the workplace, dangerous products).

Liberals are generally concerned, but less upset than radicals about state and corporate crime. They point to these as arguments for reform. They tend to focus on child abuse, hate-crime, and decriminalizing “victimless” crime.

Along with liberals, conservatives tend to focus on traditional crimes, but generally do not want to hear about corporate and political crime because they support the corporate and political status quo.

C. Analysis of the Two Books

In Rosenberg and Fenley (1991) the main topics covered, as per the chapter titles, are assaultive violence, child abuse, child sexual abuse, rape and sexual assault, spouse abuse, violence against the elderly and suicide. These are certainly not radical topics. In the “Introduction” Rosenberg and Mercy (1991) set out “Year 2000 Objectives for Violent and Abusive Behavior.” None of these topics call for significant change in the political economy. They talk about reducing homicides and suicides but never state how this is to be done. In the section on “Services and Protection Objectives” (1991: 10-11), they propose liberal-style programs such as expanded battered women's shelters, teaching non-violent conflict resolution skills, etc. A radical would say these programs are “Band-Aids.” There is no talk about programs to provide punishment or deal with moral decay. The recommendations look basically liberal.

In the chapter on “Assaultive Violence,” (Rosenberg and Mercy 1991) perhaps the one most relevant to our inquiry, there is concern expressed about poverty and racial discrimination (1991: 15), but no major reforms. Their list of “potential strategies” (1991: 16) are basically liberal strategies.

In Prothrow-Stith and Weissman (1991), there is no coverage of state or corporate crime. Smoking is seen as a public health problem but there is no blame heaped on tobacco companies or the government (1991: 141-42).

One chapter is devoted to the corrupting effects of media (1991 ch. 3). Guns, especially handguns, are viewed as contributing to the crime problem (1991: 197-9) In addition to strict gun control laws (discussed below), she touts child-proof safety devices for handguns (1991: 199). There is concern about drugs (1991: ch. 7 and 8), and a liberal sounding chapter entitled “An endangered species: young Men of Color living in poverty.” Although there are concerns about poverty and the underclass mentioned (e.g., 1991: 71), there are no proposals of a radical nature to deal with them. Among the proposals are (1991: 200) universal health care, subsidized child care, nutritional services for the poor, pre-school programs for children at risk, after—school and 24 hour school programs. However, Prothrow-Stith and Weissman's main proposed solution to the problem of violence is teaching people, especially young people, to manage anger and aggression better (1991: 28). All of these proposals fall into the mainstream liberal agenda.

D. Analysis of Other Literature

Among the solutions mentioned by Roth and Moore (1995: 4) in an NIJ publication, are making convenience stores harder to rob, teaching non-violent ways to settle disputes, deglamorizing violence and safety mechanisms on guns.

In an article by Adler, et al. (1994: 1282) we find the following: “The root causes of violence, especially poverty, substance abuse and unemployment, must be addressed over the long term to deal adequately with violence in our society. A continuing, multifaceted approach is clearly required.”

Unfortunately, that is the last sentence in the article and no proposals to deal with poverty and unemployment are made or cited. Adler et al. prefer to advocate gun control.

In an article entitled Reducing Violent Injuries: Priorities for Pediatrician Advocacy, Dolins and Christoffel (1994) outline their top 3 priorities: banning corporal punishment in schools, gun

control, and addressing the needs of adolescent assault victims. No need for radical reform is seen here.

Other topics treated in the literature that suggest liberal or conservative approaches are bans on “assault weapons” (Council on Scientific Affairs, 1992, corporal punishment (Wissow and Rotr, 1994), and witnessing domestic violence during childhood (Wolfe and Korsch, 1994).

Of the articles surveyed by the author, perhaps the closest to a radical approach is one on the L.A. riots (Shoemaker, et al. 1993). In their abstract, they state that it is now time for the medical profession to “enter the debate on policies of health improvement, violence deterrence and the general field of social reconstruction.” In addition to pointing out the evils of guns and drugs, they point to inadequate health care, economic opportunities and education. They criticize the “law and order” approach yet advocate their own version—gun control. They argue that money should be shifted from the war on crime to solving social problems. “As a society, we tend to look at social ills piecemeal with a focus on cosmetically fixing the apparent result without correcting the root causes of the problem.”(Shoemaker et al. 1993, 2386).

What do they offer in the way of specific changes to correct root causes or commence “social reconstruction”—only the following vague statement:

We cannot afford to stand by and watch human resources wasted or diverted to the world of illicit commerce and its accompanying violence. With imaginative and creative approaches, it may yet be possible to fulfill the real human needs even though this may require major rethinking and overhauling of the bureaucratically driven public educational and health care apparatuses that have been designed top-down (Shoemaker *et al.*, 1993: 2386).

E. Discussion of Ideological Implications

Although there is much moaning and groaning and gnashing of teeth about poverty, racism, etc., except perhaps for attacks on the media (which seem to be more associated with conservatives), the solutions are uniformly liberal tinkering rather than radical reform.

As Whitman pointed out (quoted in Harries 1990: 189), “if violence is a health issue, then its prevention will be pursued honestly when major medical journals begin to publish articles that cite capitalism, racism, and sexism as causes.”

Interviews with leaders of the movement also provide insight into the ideology of the perspective. CDC Director James Mason was interviewed about crime in a 1984 article in *Science* (Meredith 1984). The interviewer, Meredith, pointed out that “[s]ome researchers claim that although the concept is out of fashion, the only way to reduce homicide appreciably is to ‘do something’ about unemployment or poverty.”

According to Meredith (1984: 45):

CDC Director James Mason resists this sort of global approach. He points out that other public health measures have been successful with poverty related problems—such as venereal disease, lead poisoning and tuberculosis—without trying to alleviate the social problems related to them. “In the same way, I think we can do something about violence without having to come up with the solution to poverty.”

Meredith also notes (1984: 45) that CDC official Mark Rosenberg and others talk vaguely about improving social and cultural factors. These goals sound uncomfortably like some of those of Lyndon Johnson’s war on poverty—noble in purpose but less than impressive in effecting significant social change.

Rosenberg notes (quoted in Meredith 1984: 45) “Some people have suggested that young black men have little to live for

and that consequently their lives or the lives of their friends may not be worth much to them.”

What is Rosenberg’s solution to the problem he poses? “Maybe starting with very young kids in schools and churches and giving them the message that their lives are worth something might make a difference” (quoted in Meredith 1984: 45).

James Mercy M.D., Director of the Violence Prevention Division of the CDC, was interviewed in *America* magazine (Anderson 1995). When the topic of more attention being paid to “some of the deeper social causes of gun violence like poverty . . .” was brought up (Anderson 1995: 29) he responded that new policy approaches would be necessary, but at least with the new emphasis on gun violence as a health, regulatory and safety products issue, a beginning has been made in the search for a solution to a problem that is old and worsening (Anderson 1995: 29 paraphrase of response).

Dr. Mercy offers no proposals for dealing with the deeper social issues. He is apparently too busy with his public health agenda. Social reform can be put off. A radical would say that Mercy “fiddles while Rome burns” and is so obsessed with Band-Aids that he doesn’t have time to work on the cancer.

The failure of most of the literature to address the possibility that central features of the American political economy are among the causal factors in violence (Kopel 1995: 273), is not surprising, and illustrates the diversionary or scapegoating function of ideologies of crime, including gun control ideology (Kessler 1988). One of the nation’s wealthiest and influential occupational groups is not likely to call for radical change that could threaten their affluence and influence. A focus on gun violence and other forms also divert attention from allegations that there are thousands of deaths each year from unnecessary surgeries, unnecessary injections and prescriptions of drugs. In addition to the lives lost and

ruination of health, millions of dollars are wasted (Reiman 1990: 64-67).

Part II. Civil Liberties And Gun Control

A. Author's Civil Liberties Perspective

In this paper the term “civil liberties” refers to a perspective which contends that all rights enunciated in the U.S. Constitution and its amendments should be interpreted liberally in favor of the individual citizen. It argues for what LaFave and Israel (1992: 73-4) term a “preference for expansive interpretations” of constitutional protections. This perspective argues that although most rights are not absolute, currently recognized limits on government power must be respected and not reduced. However, this perspective is not limited by current Supreme Court or lower court holdings that are not expansive. A historical example would be to continue to urge in 1897 that equal protection is not satisfied by separate but equal in spite of the U.S. Supreme Court’s holding to the contrary in *Plessy v. Ferguson* (1896).

Two contemporary examples would be the Fourth and Second Amendments. For example, in *Acton v. Veronia School District* (1995) and other cases, the court has upheld searches and seizures without warrants, probable cause or any individualized suspicion. Despite these decisions, this perspective would argue that at least in the free world, a warrantless search or seizure involving a person must be based on at least some incriminating information relating to this particular individual. In the Second Amendment context, this approach would argue for an expansive, individual right to keep and bear arms in spite of extensive legal authority to the contrary.

B. First Amendment Freedom of Speech and Press

1. Background

In 1976, at least partly in response to an article in the Journal of the American Medical Association, the American Medical Association (AMA) House of delegates passed resolution 38 which provided: “The House declares TV violence threatens the health and welfare of young Americans, commits itself to remedial actions with interested parties, and encourages opposition to TV programs containing violence and to their sponsors” (quoted in Centerwall 1992: 3059).

Other organizations such as the American Academy of Pediatrics and American Psychological Association have also condemned violence in the media (Centerwall 1992: 3059).

2. Analysis Of The Two Books

Prothrow-Stith and Weissman (1991: ch. 3) devote an entire chapter (“Teaching Our Kids to Kill”) to media violence. They claim that the “mass media lie about the physical and emotional realities of violence” (1991: 34), promotes sexism (1991: 37), desensitize children “to the wrongness of what they are seeing” (1991: 45), and are “one of the factors that causes some young people to behave violently (1991: 41). Her solutions are vague. Prothrow-Stith makes no calls for government intervention. This is consistent with a civil liberties perspective. On the other hand there is no cautionary statement that any government action against the media must meet First Amendment requirements. Such cautionary statements should have been included because some who read the book and are convinced that the media are a problem, may advocate government action inconsistent with the First Amendment.

Rosenberg and Fenley (1991) have no chapter on the media and violence and the issue is mentioned briefly in chapter 2,

“Assaultive Violence”, by Rosenberg and Mercy (1991). They neither call for legislation nor mention First Amendment issues.

3. Analysis of Other Literature

As in the two books, Rosenberg, O'Carroll and Powell (1992: 3072) note that among the “distinctive features of American society” that are “impediments” to reducing violence is the depiction of violence in the media. They note (1992: 3072) that:

Exposure, especially of impressionable children and youths, to the creatively captivating scenes of aggression and violence depicted in the media fosters our acceptance and expectation of violence in America and probably contributes to the frequency of aggressive acts themselves.

Nowhere in the article, not even in a footnote, is there any expression of concern about the need for media control to conform to First Amendment requirements.

On the other hand, at least two articles do mention the First Amendment. Another critic of media violence, Brandon Centerwall (1992) calls for voluntary citizen action and a rating system for violence and expresses concern for First Amendment values. Sege and Dietz (1994) criticize media violence and, like Centerwall, recognize the First Amendment problem.

4. Discussion

The record examined above is a mixed one. There is some reluctance to utilize the government to control the media and some discussion of First Amendment issues. On the other hand, there is also some failure to recognize the issues. In general, the civil liberties implications for the First Amendment are very troubling given the current atmosphere in which First Amendment

values are under attack. The massive communications bill signed by President Clinton on Feb. 8, 1996 contains many provisions for “cleaning up” TV and the Internet (Beck: 1996). Key portions of the act were found in violation of the First Amendment by the U.S. Supreme Court in *Reno v. American Civil Liberties Union* (1997). Many of these provisions raise troubling First Amendment issues (Beck 1996, Bash 1996, Zoglin 1996). Equally troubling is the move by gun control advocates to use federal law and the federal trade commission against advertisements for firearms for self-defense. The move to stop the advertisements is based in part on public health studies which attempt to show that guns kept at home are more likely to cause harm to innocent family members than they are to intruders (Odessa American 1996). Among the sponsors of the action was the American Academy of Pediatrics (Silver City Daily Press 1996).⁵

C. Gun Control, Second Amendment and Enforcement Issues

1. Background

Consistent with the definition of a “civil liberties” perspective, for this paper it is assumed that, contrary to the weight of most legal authority, (but consistent with the weight of most scholarly authority Kates 1995: 242 and n 48) that the Second Amendment is incorporated against the states and gives individuals *some* rights to purchase, keep, possess and utilize commonly owned firearms. It is assumed the Amendment would allow laws limiting access by children, the mentally ill, retarded or impaired, and convicted felons. It is not necessary to flesh out the contours of this right as most of the public health literature assumes that there are no rights granted to individuals under the Amendment.

Enforcement of gun laws often involves privacy, search and seizure, due process and entrapment issues which implicate civil

rights (See Kessler 1980, Walker 1985: 157). Some examples are discussed below.

In 1993 the Chicago Housing authority began warrantless, suspicionless searches of public housing apartments and their tenants for weapons. A U.S. District Judge overturned the policy (Grossman: 1994).

An example of insensitivity to privacy issues comes from President Clinton's Interdepartmental working group on violence that took a public health approach to violence and suggested, in part, a mental health background check as part of the Brady Bill's five-day waiting period. Wright (1995: 50) points out the problems with a "mental health background check":

Unlike felony records, which are public by definition, mental health records are highly privileged and extremely confidential. The same is true of alcohol and drug histories. A national data system containing everybody's "mental health background" and directly accessible to every gun dealer in the country poses some serious privacy issues to say the least.

Many of the problems we face in the "War on Drugs" will surface in a "War on Guns" (See Bovard 1994: ch. 7). The U.S. Senate Subcommittee on the Constitution investigated BATF enforcement tactics and concluded that "enforcement tactics made possible by current firearms laws are constitutionally, legally and practically reprehensible" (quoted in Bovard 1994: 221).

In January 1994 the ACLU, NRA and other groups jointly sent a letter to President Clinton about specific documented cases of federal law enforcement abuse and expressing concern about civil liberties. Among the incidents cited were the infamous siege at Waco and the Ruby Ridge incident—both of which involved alleged violations of federal gun laws (NRA 1994; See Appendix A for a copy of the letter).

Finally, a U.S. Circuit Court Judge (Wilkey: 1977) called for abolition of the exclusionary rule and wrote that the exclusionary rule has made unenforceable the gun control laws we have and will make ineffective any stricter controls that may be revised.

2. Analysis of the Two Books

Prothrow-Stith writes: “My own view on gun control is simple. I hate guns and cannot imagine why anyone would want to own one. If I had my way, gun for sport would be registered and all other guns would be banned.” (Prothrow-Stith and Weissman 1991: 198).

She is not optimistic about seeing her program put into legislation, but is more optimistic about a ban on assault weapons (later enacted by Congress) and making handguns childproof (1991: 199). She writes that “. . . a connection between the proliferation of handguns and the mounting homicide rate seems hard to deny (1991: 18).

In the Introduction to *Violence in America*, Rosenberg and Fenley contend that “Violence is a Public Health Problem” and that reducing firearms injuries are “A Public Health Priority” (1991: 3, 5). In terms of specific recommendations, they (1991: 9) seek a goal of reducing weapons carrying by adolescents and reducing the proportion of firearms that are stored in an unsafe fashion.

In the Chapter on “Assaultive Violence,” Rosenberg and Mercy (1991: 44) suggest that we create “strategies to reduce injuries associated with firearms.” They write (1991: 46):

Common approaches to the prevention of firearms injuries include: (1) strict licensing, (2) prohibitions against buying, selling or possessing guns, (3) prohibitions against carrying (but not owning) guns; and (4) mandatory penalties for the use of a gun in the felony and for carrying unlicensed firearms. There is little scientific evidence to show definitively that legislative approaches

such as those listed above are effective in controlling firearms injuries.

In contrast to Prothrow-Stith, these authors seem to take a more agnostic approach on gun control.

3. Analysis of Other Literature

Although there are exceptions (*e.g.*, Caruth 1994, Faria, 1994, Pratt 1994), it appears that the dominant position in the literature is anti-gun. (Kates, 1995). For instance, three editors of the prestigious *New England Journal of Medicine*, have endorsed further gun control (Kassirer 1991: 1649).

According to Kates *et al.* (1995: 234):

In 1979 the federal government's public health forces adopted "the objective to reduce the number of handguns in private ownership," the initial target being a 25 percent reduction by the year 2003. Based on studies and leadership from the Centers for Disease Control and Prevention (CDC), the objective has been broadened so that it now includes: banning and confiscation of all handguns, and restrictive licensing of owners of other firearms, with the goal of eventually eliminating firearms from American life, excepting (perhaps) only an elite of wealthy collectors, hunters or target shooters (footnotes omitted).

In a "Commentary" in the *Journal of the American Medical Association*, (Adler *et al.*, 1994: 1281), 19 physicians and public health officials call for a number of gun control strategies. They recommend that "a national firearms control program should be implemented to focus on restricting firearms ownership through limitations of licensing to those who can rigorously justify a purpose for owning a gun." They would also ban civilian access to "military-style assault weapons."

In an article entitled “Toward Reducing Pediatric Injuries From Firearms: Charting a Legislative and Regulatory Course,” Christoffel (1991: 297-9) discusses the pros and cons of various gun control strategies. Among the options discussed is a Handgun ban (1991: 302). There is no discussion of possible difficulties or constitutional problems in enforcing these proposals.

In a 1992 editorial in the *Journal of the American Medical Association*, former U.S. Surgeon General C. Everett Koop and another physician (1992: 3075) recommend, among other things, registration and licensing of gun ownership.

None of the sources consulted above even mentioned possible Second Amendment issues or the inevitable search and seizure and privacy-related problems that would accompany such strict measures (see Kessler 1988).

4. Treatment Of The Second Amendment In The Medical And Public Health Literature.

In the materials on gun control discussed above, there is no treatment at all of the Second Amendment. Those authors apparently feel it is irrelevant.

Christoffel (1991: 295) argues that the Second Amendment does not grant any individual rights. Dolins and Christoffel (1996: 648) apparently feel the Second Amendment is no problem for gun controllers and attribute the idea to the “gun lobby”.

Vernick and Teret (1993) concluded:

At some time in the future, the Supreme Court may, in fact, overrule *Presser* and *Miller* and grant to the NRA and others the interpretation of the Second Amendment they seek. Until that time, however, public health advocates should understand that the Second Amendment poses no real obstacle to the implementation of even broad gun control legislation.

These authors interpret the *Presser* and *Miller* cases in a fashion inconsistent with an individual right to keep and bear arms. However, there are other equally rational interpretations of those two cases that lead to opposite conclusions (e.g., Halbrook 1984: ch. 6). The fact that there is an impressive amount of scholarly authority that supports an individual rights interpretation (Kates 1995: 242 and n. 48, e.g., Halbrook 1984) is not mentioned. Their narrow reading is inconsistent with the expansive reading that a civil liberties perspective would demand.

On the other hand, four articles in 1994 the *Journal of the Medical Association of Georgia*, (Caruth 1994, Faria, 1994, Pratt 1994, Suter, 1994) take an individual rights position.

5. Discussion

The potential civil liberties problems in enforcement of stringent gun control are generally ignored. Although there are some few and far between exceptions, most of the literature seems to feel that the Second Amendment is irrelevant, thus implicitly denying that it grants any rights to individuals. When the Amendment is specifically discussed, which appears to be a rarity, opinion is split but, on balance, appears to deny individual rights under the Second Amendment.

Another disturbing sub-theme in the literature is the contention that firearms are useless for protection and are much more likely to result in harm to innocent people than criminals (e.g., Kellerman and Reay 1986, Kellerman *et al* 1993). (This was one of the main points in the NIJ film discussed above). This is the basis of the attempt to ban certain firearms advertising (Odessa American 1996). Subject to serious methodological problems (Suter 1994: 136-37), this research is used to justify handgun bans or other severe restrictions, and serves to reduce resistance to civil liberties abuses. As the ability of people to defend themselves is reduced and they become more and more dependent on government for protection (and other services), the

likelihood that they will challenge abuses of government power are diminished (Kessler 1984: 460-62).

Finally, as Suter (1994: 145-46) points out:

The deceptions in the medical literature are not restricted to scientific issues. The insurmountable practical and constitutional impediments to gun control are either offhandedly or deceptively discounted. Neither practical matters, such as the massive expense and civil rights violations necessary to enforce gun bans, nor historic matters such as the racist and oppressive roots of gun control are discussed by medical politicians who advocate gun bans.

Part III. Conclusion

By and large, the public health perspective is ideologically liberal. There is much anguish expressed about poverty, lack of opportunity, etc., but no significant solutions are proposed. Crimes of the medical profession and state are generally ignored. This serves the interests of a powerful and wealthy profession.

In general, protecting civil liberties and the values of a free society are not high priorities. There is some concern about First Amendment values, but probably not enough given the current attack on the First Amendment values. The civil liberties problems of enforcing gun bans, background checks, etc. are virtually ignored. Second Amendment rights are denigrated or ignored in most of the literature.

The overall picture is one of advocacy of more top-down federal government programs and laws that do more to foster dependence than to empower those who need help (See Walker 1985: 223).

In this authors opinion, the public health approach should appeal to those with liberal leanings who lack a broad-based

commitment to civil liberties. Those who prefer a safe and orderly society controlled by a massive government over a free society should find this approach congenial.

ENDNOTES

The author would like to acknowledge assistance in the way of materials provided by the American Civil Liberties Union and the National Rifle Association. The views expressed herein are not necessarily those of these organizations or the author's employer. Any errors are the sole responsibility of the author.

1. This same film has also been released by NIJ under the title "Kellerman: Violence a Public Health Perspective." The actual title of Dr. Kellerman's presentation was "A Public Health Perspective on Firearms Violence." It is disturbing that NIJ has not released a film by equally or better qualified researchers whose research is in some respects inconsistent with Dr. Kellerman's (e.g., Dr. Gary Kleck). If NIJ is really seeking knowledge in a disinterested fashion (rather than becoming a mouthpiece for the administration's pet theories) they should seek to provide balance in their coverage.

2. The American Civil Liberties Union branded the bill "draconian and poorly conceived," a "civil liberties nightmare come true," full of "constitutional defects" and a response to "public hysteria." (American Civil Liberties Union 1994: 2). The U.S. Supreme Court has already found one portion of the act unconstitutional *U.S. v. Lopez*, 115 S.Ct. 1624 (1995).

3. Other overviews can be found in Prothrow-Stith and Weissman (1991: ch. 9) Anderson (1995) and Meredith (1984).

4. See also Kessler (1980, 1984). In response to Kates 1995: 263, n. 165, and to clarify a misunderstanding between Kates and this author, the following is offered. Although the author believes a "Marxist" or "critical" or "conflict" approach is currently the best one to *understand* ideology, and political economy, the author is a "Marxist" to that extent only. The author is not a "Marxist" in the political advocacy sense. A Marxist perspective provides useful analytical tools. However, in the real world of political, Marxism is authoritarian and utopian. It is inconsistent with a sincere commitment to civil liberties (as witnessed by the Russian and Chinese experiences). The massive government apparatus necessary to carry out socialist or Marxist reforms will inevitably weaken, if not destroy, civil liberties. An imperfect capitalist democracy is preferable to a repressive Socialist or Communist regime. Politically,

the author would describe himself as a “liberal” on some issues (supporting Head Start and Social Security) who also believes that an expansive interpretation of all civil liberties (including the Second Amendment) such that these rights must take precedence over liberal social engineering.

With regard to the causation of crime, the issue for those interested in ideology is not what actually causes crime, but what people *think* causes crime. What people think cause crime will be consistent with their ideology. For analytical purposes, this paper starts with the left-wing assumption that certain features of a capitalist political economy “cause” crime. However, it should be obvious that crime is a feature of all types of political economies. The political economy probably shapes the form of crime rather than causing it. For instance, in the old Soviet Union there probably wasn’t much big-time private sector white-collar crime as compared to the U. S. In terms of “causation” this author believes that family and socialization experiences are the key “causes” of crime. However, this does not authorize large-scale government intrusion into the lives of families.

5. For some background on this FTC action see Anderson 1995: 28.

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APPENDIX A

SOURCE: NRA 1994

ON THE ISSUE OF GOVERNMENT VIOLENCE AND THE NEED FOR A NATIONAL OVERSIGHT COMMISSION

January 10, 1994

President William J. Clinton
The White House
1600 Pennsylvania Ave.
Washington, D.C. 20500

Dear Mr. President:

We are writing to you to urge you to appoint a national commission to review the policies and practices of all federal law enforcement agencies and to make recommendations regarding steps that must be taken to ensure that such agencies comply with the law. This review is necessitated by widespread abuses of civil liberties and human rights committed by these agencies and their failure to undertake meaningful and ameliorative reforms.

Federal police officers now comprise close to 10 percent of the nation's total law enforcement force. Today, some fifty-three separate federal agencies have the authority to carry firearms and make arrests. This represents an enormous expansion in recent years in terms of both personnel and jurisdiction. What has led to numerous cases of serious abuse—some well-publicized and some relatively unknown—in which the following problems have been evident:

- improper use of deadly force;
- physical and verbal abuse;
- use of para-military and strike force units or tactics without justification;
- use of “no knock” entrances without justification;
- inadequate investigation of allegations of misconduct;
- use of unreliable informants without sufficient verification of their allegations;
- use of “contingency payments” to informants, giving them an incentive to fabricate information since payment is usually contingent upon a conviction;
- entrapment;
- unnecessary inducement of criminal activities as an investigative technique;
- inappropriate and disproportionate use of forfeiture proceedings to obtain financing for law enforcement equipment and activities;
- use of military units and equipment in the course of domestic law enforcement;
- pretextual use of immigration laws and Immigration and Naturalization Service personnel for non-immigration law enforcement.

There is a precedent for the appointment of a national commission to look into such abuses. In 1929, after a decade of corruption and lawlessness in federal law enforcement, President Hoover appointed the eleven-member National Commission on Law Observance and Enforcement under the chairmanship of

George Wickersham, a former U.S. Attorney General. The 1931 Wickersham Commission Report, "Lawlessness in Law Enforcement," exposed a pattern of pervasive police brutality and helped stimulate major reforms in federal law enforcement practices.

We propose the appointment of a national commission similar to the Wickersham Commission: an independent body, appointed by the President and staffed by some of the nation's most prominent experts on law enforcement. Such a commission would be charged with reviewing the problematic federal law enforcement policies and practices noted above. These problems are graphically illustrated by the following cases, among many others, that have come to our attention:

DONALD CARLSON

On August 25, 1992 at about 10: 30 p.m., Donald Carlson returned to his home in Poway, California, opened his garage door with a remote control device, simultaneously illuminating the garage so that Drug Enforcement Administration agents conducting surveillance from nearby could see inside. Just after midnight, when Carlson was asleep, a group of DEA agents burst into his home. Thinking they were robbers, Carlson grabbed his pistol to defend himself. He also dialed 911 for help. The agents shot Carlson three times, twice after he was down and clearly disabled. Carlson spent seven weeks in intensive care, fighting for his life. No drugs were found on the premises.

It was later learned that the Federal Customs Service, the DEA and the U.S. Attorney's Office in San Diego had relied on an informant who was known to be untrustworthy and who claimed Carlson's garage contained 2,500 kilograms of cocaine (a large amount which would have taken up most of the garage) and four armed guards. The agents conducted the raid in spite of the fact they could see the informant's information was erroneous.

As of this writing, none of the federal agents involved in the incident have been sanctioned, nor has Mr. Carlson been compensated for his injuries.

SINA BRUSH

Just after dawn on September 5, 1991 some sixty agents from the DEA, U.S. Forest Service, Bureau of Alcohol, Tobacco and Firearms (BATF), and National Guard, complete with painted faces and camouflage and accompanied by another twenty or more National Guard troops with a lighted armored vehicle, raided the homes of Sina Brush and two of her neighbors near Montainair, New Mexico. Brush and her daughter were still asleep. Hearing noises outside, Ms.

Brush got up and was only halfway across the room when the door was

kicked in by agents. Clad only in their underwear, Ms. Brush and her daughter were handcuffed and forced to kneel in the middle of the room while the agents searched the house. No drugs were found. Just as in the Carlson case, the police had obtained a warrant using information furnished by an unreliable informant and had entered Brush's home without knocking first.

DONALD SCOTT

On October 2, 1992 DEA agents and the Los Angeles Sheriff's Department staged a raid on the Scott ranch in the Santa Monica Mountains near Malibu, California. When Scott emerged carrying a gun, a deputy sheriff shot and killed him. Although the agents claimed they were searching for marijuana plants, none were found. The Border Patrol, which had participated in the investigative work leading up to the raid, later claimed they were looking for undocumented aliens. None were found.

An independent investigation by the Ventura County District Attorney's Office concluded that the Sheriff's Department was motivated, in part, by a desire to seize and forfeit Scott's ranch. The investigation also questioned the DEA's claim that marijuana was observed through aerial surveillance.

BUREAU OF INDIAN AFFAIRS POLICE

In the fall of 1993, the Associated Press reviewed 17 complaints of brutality filed in six Western reservations against the Bureau of Indian Affairs Police. They included complaints of choking, improper use of mace, and broken limbs. After this six month investigation the AP found that "BIA police officers routinely use force when arresting suspects and are rarely disciplined for assaulting them."

In another case which occurred in 1991, Milton Trosper, an Arapaho Indian, was seriously injured by BIA police who broke his arm during an incident on the Wind River Indian Reservation in Wyoming. Charges of disorderly conduct and resisting arrest against Trosper were dropped by the Shoshone and Arapaho Tribal Court, and in 1993 Trosper's civil suit against the government was settled for damages.

According to the Civil Rights Division of the U.S. Justice Department, although the BIA, with only 412 officers, is the smallest federal police force, it engenders the second highest number of complaints of misconduct. The BIA has no internal affairs unit and no complaint procedure.

IMMIGRATION LAW ENFORCEMENT OFFICERS

The Justice Department receives the largest number of complaints of federal police misconduct against Immigration and Naturalization Service (INS) agents, particularly Border Patrol Officers. A 1992 report by Americas Watch, entitled "Brutality Unchecked," documented "appalling" levels of misconduct in which "(b)eatings, rough physical treatment, and racially motivated verbal abuse are routine." Acts of abuse included unjustified shootings, torture and sexual abuse. In a second report issued in May 1993, Americas Watch found that "the abuses continue and current mechanisms intended to curtail abuses and discipline officers are woefully inadequate."

THE BRANCH DAVIDIANS

Last year's tragic confrontation between the Branch Davidians and federal agents has been reviewed by both the Treasury and Justice Departments. While these reviews find fault with the planning and execution of the government's attack on the Waco compound, they both accept the notion that armed confrontation was unavoidable. This is in spite of the fact that several independent experts who participated in the reviews seriously questioned the assault's inevitability.

For example, Alan Stone, a Harvard Professor of Psychiatry and Law, disagreed with "the view within the FBI and in the official reports that suggests the tragedy was unavoidable. n In his report, he noted that the FBI's own behavioral experts on the scene advised against the use of "all-out psycho-physiological warfare" and the abandonment of "any serious effort to reach a negotiated solution. n But the FBI ignored this advice, and launched a paramilitary attack that jeopardized the lives of the very children whose health and safety it claimed it wanted to protect. In particular, Professor Stone criticized the use of toxic levels of CS gas over a period of 48-hours in a building occupied by so many children. As Professor Stone writes, "The question is: did a 'military' mentality overtake the FBI?"

Another independent expert, Professor Nancy Ammerman of Princeton University, pointed out in her report that the FBI did not consult "a single...expert on the Branch Davidians or on other marginal religious movements..." She also noted that the psychological warfare tactics employed by the FBI, including the sounds of dying rabbits, the use of flood lights, and helicopters hovering overhead, were not favored by the Bureau's own Behavioral Science Services Unit. In fact the Unit advised that the "ever increasing tactical presence...could eventually be counter productive and could result in loss of life."

A third independent expert, New York University Professor of Psychiatry Robert Cancro, questioned whether the military model used by the federal agents for the assault was “an appropriate model for dealing with a group such as the Branch Davidians.”

At this time it is not clear that the reviews conducted by the Treasury and Justice Departments will lead to any meaningful changes in the way the FBI or Bureau of Alcohol, Tobacco and Firearms (BATF) will handle such situations in the future.

RANDY WEAVER

Randy Weaver became a fugitive in 1992 after the BATF tried to compel him to infiltrate a neo-Nazi organization. BATF agents originally targeted white separatist Weaver, a veteran with no criminal record, because they erroneously believed him to be a member of the organization. A BATF informer convinced Weaver to saw off two shotguns and then sell them to him. The BATF then told Weaver he would be indicted on the gun charge unless he served as a government informant. After receiving inconsistent information concerning his trial

date from the court clerk, and fearful that the government intended to harm his family, Weaver failed to appear in court, remaining with his family in his isolated mountain cabin in Idaho.

The U.S. Marshal's Service attempted to apprehend Weaver. In August 1992 the Weaver's dog began to bark at six camouflaged marshals in the vicinity of the cabin who were carrying fully automatic assault weapons. When Weaver's fourteen-year-old son went to investigate, the marshals shot the dog. In an exchange of gun fire, Weaver's son was shot in the back and killed, and a deputy marshal was killed.

The FBI Hostage Rescue Team arrived the following day and issued extraordinary orders to its agents to shoot any armed adult on sight whether or not he posed an immediate danger. no attempt was made to talk with Weaver. When Weaver, his teenage daughter and a friend went from their cabin to an outbuilding where the son's body lay, an FBI sharpshooter opened fire, killing Weaver's wife as she stood in the cabin doorway holding her 10-month old daughter. Nine days later Weaver and his friend, Kevin Harris, surrendered and were charged with the murder of the U.S. Marshal and criminal conspiracy.

Ultimately, a federal jury acquitted Weaver and Harris of all charges, except for Weaver's failure to appear for trial on the original gun charges. Judge Edward J.

Lodge fined the FBI, charging that the Bureau's conduct had "served to obstruct the administration of justice" and that "(t)he actions of the Government, acting through the FBI evidence a callous disregard for the rights of the defendants and the interests of justice."

We recognize that the majority of federal officers strive, often under dangerous and demanding circumstances, to carry out their duties in a restrained, lawful and professional manner. But the cases described above demonstrate the need for leadership and accountability in order to prevent future incidents of abuse.

Therefore, we urge you to appoint a national commission composed of law enforcement experts, constitutional scholars, criminal defense lawyers and prosecutors, judges, representatives of federal law enforcement professional and labor organizations, and representatives of organizations that monitor police practices. Several of the undersigned organizations can provide you with the names of potential commission members for your consideration.

For more than fifty years the federal government has provided leadership, training and resources in the ongoing effort to improve the nation's system of law enforcement. The creation of a high level national commission will contribute greatly to the continued improvement of federal police agencies by helping to ensure that federal police not only enforce the law in an effective, humane and constitutional manner, but that they also serve as models. for local and state law enforcement agencies.

Sincerely,

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A JOINT LETTER FROM A COALITION OF DIVERSE ORGANIZATIONS CONCERNED ABOUT CIVIL RIGHTS

April 26, 1995

In the current climate of understandable fury at the bombing in Oklahoma City and of justifiable pride in the accomplishment of the FBI and other law enforcement organizations, we urge you to examine any new counterterrorism proposals with calm deliberation and in light of their constitutional implications.

Our hearts go out to the people of Oklahoma. Like all Americans, we want to see all those responsible for the bombing brought to justice and a quick rebuilding of the Oklahoma community affected by this disaster. The national government has a responsibility to provide for the safety of the American people, but you are now considering measures that threaten our basic freedoms.

We are strongly opposed to provisions of the Omnibus Counterterrorism Act of 1995, H.R. 896 or S. 390, which allow the government to engage in activities contrary to constitutional principles of due process, free speech, and freedom of association. We are also strongly opposed to proposals to increase the government's authority to monitor groups, domestic and international in the absence of reasonable suspicion of criminal activity.

We are fully supportive of law enforcement, but history is clear that when the nation has overreacted in moments of crisis, the results have been bad for basic freedoms and have diverted law enforcement from its basic mission of apprehending criminals.

If federal law enforcement agencies need more resources, we support that, as long as they are well thought-out, focused on criminal conduct and otherwise consistent with constitutional principles. We urge you not to act rashly. We urge you to allow full public participation in your hearings and deliberations on any legislation. Finally, we urge you to avoid undermining constitutional protections.

This joint statement was endorsed on April 26 by officials from the following organizations:

- American Civil Liberties Union.
- Americans for Tax Reform.
- American Friends Service Committee.
- American Immigration Lawyers Association.
- Center for Democracy and Technology.
- Citizens Committee for the Right to Keep and Bear Arms.
- Gun Owners of America.
- Law Enforcement Alliance of America.
- National Association of Criminal Defense Lawyers.
- National Rifle Association of America.
- Presbyterian Church (SA) Washington Office.
- Second Amendment Foundation.

Has the Gun Deterrence Hypothesis Been Discredited?

A Reply to McDowall et al., *Criminology*,
November 1991

by Gary Kleck

*In the November 1991 issue of Criminology, authors David McDowall, Alan Lizotte, and Brian Wiersema analyzed several of the more famous cases--such as Orlando and Kennesaw--in which increased attention to defensive gun ownership is often said to have resulted in sharply reduced crime. Applying statistical analysis, McDowall and his co-authors concluded that in no case had gun ownership led to a statistically perceptible drop in the crime rate. Here, Gary Kleck answers the McDowall article. Gary Kleck is a Professor of Criminology at Florida State University, in Tallahassee. His 1991 book **Point Blank** was awarded the American Society of Criminology's Hindelang Prize, for the most significant contribution to criminology in a three-year period.*

In a number of places, I have suggested that, in addition to any crime-increasing effects gun ownership among criminals may have, widespread gun ownership among noncriminals may exert various beneficial effects, including the reduction of some kinds of crime through deterrent effects (e.g. Kleck and Bordua 1983; Kleck 1986; 1988; 1991; Kleck and Sayles 1990; Kleck and DeLone 1993). David McDowall and his colleagues (1991) tried to test for deterrent effects using simple univariate times series analyses of crime rates, and have presented these tests as if they were tests of my ideas.

In a 1988 article published in *Social Problems*, I offered some anecdotes in which I noted decreases in rape following implementation of a highly publicized Orlando gun training program for women, a dampening of robbery increases in Kansas City after implementation of a gun training program for grocers, and decreases in residential burglaries after Kennesaw, Georgia required its citizens to keep guns in their homes (Kleck 1988, pp. 13-15). McDowall et al. responded to these anecdotes by performing low power statistical tests on very small samples, hypothesis tests using inappropriate dependent variables, and tests of hypotheses that do not follow from, and have no bearing on, my ideas about the deterrent effects of civilian gun ownership. They concluded that there "is no solid empirical support" for any deterrent effect of civilian gun ownership (McDowall et al. 1991, p. 556).

Increases in actual gun ownership are ordinarily fairly gradual, making it hard to detect any effects of increases in civilian gun ownership levels on crime. However, highly publicized programs to train citizens in gun use amount to "gun awareness" programs that could conceivably produce sharp changes in prospective criminals' awareness of gun ownership among potential victims. There are advantages to assessing the impact of these programs because they have distinct times of onset and spans of operation that make it easier to say when they might be most likely to affect crime.

The *Social Problems* article presented some very limited data on crime trends before and after the implementation of programs of this type, as well as other highly publicized events related to defensive gun use and ownership. The data were not offered as part of an attempt to formally test a deterrence hypothesis, but rather as illustrative anecdotes, albeit statistical ones. Unfortunately, these anecdotes, perhaps because they contained quantitative information, were misunderstood, and McDowall and his colleagues (1991) followed up on them by

attempting formal hypothesis tests using the same very limited data.

One can interpret their efforts in either of two ways. First they might have believed that their analyses were themselves useful formal tests of the deterrence hypothesis. If so, I believe they are wrong, because the samples are too small for even strong deterrent effects to be detected, and because there were no data allowing controls for other confounding factors that might have influenced crime trends.

Second, McDowall et al. might have merely been making the point that the changes I noted in my anecdotes could be attributable to random chance factors. If so, this is a trivial technical point that they need hardly have bothered making, given that it is largely a product of the arbitrary factor of how many crime observations happened to be available, rather than any lack of merit in the deterrence hypothesis. Since it was not I who presented the information in connection with a formal hypothesis test, the issue of statistical significance is irrelevant. Further, it is hard to see any justification for a twenty page journal article for making this minor point, which could have been made adequately in a sentence, such as "With only 14 annual observations in the Orlando rape data, or 26 annual observations of Kansas City robbery rates, almost any patterns Kleck observed might be attributable to random chance rather than deterrent effects."

Given the use of the anecdotes for illustrative purposes, the only valid criticisms one could make would either be that they are not very illustrative of, or germane to, the point being made (clearly not the criticism McDowall et al. made) or that point itself is known to be false. Since neither McDowall et al. nor I have presented or cited any strong evidence one way or the other on the deterrence hypothesis, it remains an open question whether the point is false, i.e. whether there are deterrent effects of civilian gun ownership. About all one can say is that the evidence, including (for reasons made clear later in the paper) that presented by McDowall et al. is consistent with that hypothesis. In short, we may legitimately continue to draw

precisely the same weak conclusion that I drew in the Social Problems article, that “gun ownership among prospective victims may ... have ... a crime-inhibiting effect” (Kleck 1998, p. 17, emphasis added).

I now take up each of the analyses performed by McDowall et al., to address whether their results are in fact consistent with a deterrence hypothesis.

Rape and the Orlando Gun Training Program

McDowall et al. applied tests of statistical significance to 14 years of annual rape counts for Orlando, to test the idea that the highly publicized gun training program offered to women in Orlando had reduced rape. Both the direction and magnitude of their impact estimates confirmed my “statistical anecdote,” indicating about a 76% drop in rape,¹ i.e. a proportionally enormous reduction. (I had reported a simple 88% drop in rape—Kleck 1988, p. 13). The authors, however, chose to emphasize only the significance tests results—however huge the drop, it was not statistically significant.

What the authors did not report was that no matter how correct the deterrence hypothesis was, and no matter how strong the impact of the training program and associated publicity was, it would have been impossible for the deterrence hypothesis to pass their significance testing procedures. Even if the program had directly caused a complete elimination of rape in Orlando, it could not have achieved a statistically significant result, given a sample size of just 14 annual time points.² In effect, the authors were demanding the impossible of the hypothesis, given the limits of the data. In a very technically worded remark, buried in a footnote, the authors effectively conceded this point, noting that with so few observations, their test provided “low power against a maintained hypothesis” (McDowall et al. 1991, p. 546, fn. 9).

Robbery and the Kansas City Gun Training Program

With respect to Kansas City robberies, they found a nonsignificant drop in robberies after a gun training program for Kansas City grocers, accompanied by significant increases in robbery in the surrounding region and in the United States. I had interpreted this pattern of findings as an indication the program might have prevented, in Kansas City, the robbery increases that occurred elsewhere, i.e. that it had a dampening effect on previously increasing robbery rates. I did not assert that Kansas City robberies decreased after the training program, but rather I explicitly stated that they “leveled off” (Kleck 1988, p. 13).

Oddly enough, when McDowall and Wiersema obtained the exact same combination of findings in a 1991 study of a gun control law (no change in the target crime series, accompanied by increases in the control series), they too interpreted it as indicating that the law “had a dampening effect on the increasing incidence of” robberies (O’Carroll, Loftin, Waller, McDowall, Bukoff, Scott, Mercy and Wiersema 1991, p. 578). In sharp contrast, when the “intervention” in question was a gun training program, they merely concluded that it had no effect that could “be distinguished from chance from chance variation” (McDowall et al. 1991, p. 549), not even mentioning the dampening effect interpretation.

Burglary and Kennesaw's Ordinance Requiring Guns in the Home

In 1982, the city of Kennesaw, Georgia passed an ordinance requiring its residents to keep a gun in their home. With respect to the McDowall et al. analysis of Kennesaw burglary trends, I have shown elsewhere that the appearance of no impact was created by the authors largely by mismeasuring the dependent

variable. Instead of measuring the per capita rate of residential burglaries, they measured the raw counts of all burglaries. The failure to compute rates, in which population is taken account of, caused any burglary rate reductions to be obscured by the 70% increase in population Kennesaw experienced between 1980 and 1987 (Kleck 1991, pp. 136-138).

More significantly, the use of total burglaries rather than just residential burglaries was inappropriate in light of the fact that my hypothesis of a deterrent effect pertained specifically to *residential* burglaries, for the obvious reason that the Kennesaw ordinance applied only to the keeping of guns in residences, not in stores, offices, factories, etc. (Kleck 1988, p. 15) I also hypothesized in this article that the keeping of guns in homes may induce burglars to either shift to nonresidential targets or to burglarize residences only after they made sure that no one was home (pp. 15-16). If burglars were deterred from entering occupied homes; this would not necessarily reduce the total burglary rate, but could instead cause a redistribution of burglary targets that would be beneficial because it reduced victim-burglar confrontations and thus burglary-linked injuries. Consequently, a test of my hypothesis of the deterrent effect of the Kennesaw ordinance (and/or associated publicity) would necessarily have to focus on residential burglaries separately. The McDowall et al. analysis did not. Consequently, they did not test the hypothesis that I had stated.

These issues are not mere quibbles—the difference in change scores between the correct and incorrect measures is enormous. When the correct dependent variable, the residential burglary rate, is used, the 1981-1986 percent decrease is *twice* as large as when one uses the inappropriate measure McDowall and his colleagues used (Kleck 1991, p. 137).

The Morton Grove and Evanston Handgun Bans

With respect to handgun bans in Morton Grove and Evanston, McDowall et al. constructed their own hypotheses, rather than (as in the Orlando, Kansas City and Kennesaw cases) addressing episodes I had discussed. If they believed that their hypotheses were derived from my ideas, or contradicted the deterrence thesis, they were mistaken.

McDowall et al. asserted, rather simplistically, that if gun ownership exerts a deterrent effect on burglaries, there should be an increase in burglaries if handguns are banned (“disarmament policies might raise [crime rates]”—McDowall et al. 1991, p. 552). This hypothesis was implicitly based on the assumption that burglars would believe that passing a handgun ban would reduce their risk of facing a gun-armed victim.

It is more likely that burglars believed that handgun-owning residents would adapt to handgun bans in either of two ways. First, many burglars would assume that prospective victims would react to the ban the same, as they would, i.e. simply ignore it. This was especially easy to do in light of the local authorities’ public promise that they had no intention of searching homes for illicit handguns (*Chicago Tribune* 9-14-82, p. 1-3). Second, some burglars might anticipate that prospective victims who did surrender their handguns would adapt by substituting long guns such as shotguns and rifles, just most felons say they would do if they could not get a handgun (Wright and Rossi 1986, p. 217).

I have argued that if one restricts only the ownership of handguns, the most likely adaptation by those denied handguns would be to substitute long guns such as rifles or shotguns (Kleck and Bordua 1983; Kleck 1991; Kleck 1997; but esp. Kleck 1986). Thus, if handgun ownership were banned, criminals would substitute long guns, and some would presumably assume that their victims had done the same. While it would be hard to substitute long guns for handguns for purposes of carrying guns concealed in public places, there is little reason to expect anything less than complete substitution of long guns in residences, among those who gave up handguns in the first place. Consequently, there is no sound reason to expect that burglars would perceive

lower rates of home gun ownership among their prospective victims as a result of a ban applying only to handguns, and hence no reason to expect a decline in the deterrent effect of gun ownership or an increase in burglaries. Quite the contrary, given that long guns are more lethal than handguns (Kleck 1986), if burglars' perceptions of risk were altered at all, they could even have increased.

In addition, one of the themes that is invariably a part of the public debate preceding handgun bans is that there are “too many guns out there,” that “we are a gun-ridden society,” and so on. Thus, the highly publicized debate typically preceding passage of a gun ban inadvertently serves to remind prospective criminals of how likely it is that their victims own a gun. In combination with the expectation that the law would not reduce total gun ownership, this should increase any deterrent effects of gun ownership, at least in the short run.

Thus, my perspective leads to the prediction that there would be short-term decreases in burglaries following handgun bans, if there were any effects at all. These decreases would occur not because burglars need handguns to commit burglaries (they do not), but rather because the preceding public debate inadvertently serves to remind them of the risks of victim gun use, and because some of them might anticipate the substitution of more lethal long guns among their prospective victims. Burglary decreases are precisely what McDowall et al. found following the Morton Grove and Evanston handgun bans, thereby supporting this perspective. Needless to say, this is not the conclusion McDowall and his colleagues drew.

Conclusions

In sum, their *non sequitur* interpretations notwithstanding, all of the McDowall et al. findings supported the deterrence hypothesis. Nevertheless, it should be reiterated that I did not cite

these episodes for purposes of hypothesis testing, but rather only as anecdotes that illustrated the deterrent and displacement processes that I believed operated in connection with civilian ownership and use of guns.

More generally, univariate analyses of time series data on crime or violence counts are not adequate for purposes of assessing the impact of gun laws, gun training programs, or other gun-related events. As discussed in detail elsewhere (Kleck et al. 1993; Britt et al. 1996; Kleck 1997, Chapter 11), univariate interrupted time series studies are close to worthless, and sometimes counterproductive, for assessing the impact of laws, programs, and other interventions. Although results (including those of McDowall et al. 1991) have been consistent with the gun deterrence hypothesis, “natural experiments” nevertheless provide only the weakest sort of evidence available on the issue.

On the other hand, much stronger individual-level evidence consistently supports the hypothesis that actual defensive uses of guns by victims “disrupt” criminal attempts, i.e. reduce the chances that the victim will be injured or lose property (Kleck 1988, pp. 79; 1991, pp. 122-126, 149; 1997, Ch. 5; Kleck and DeLone 1993, pp. 68-69; Cook 1991, p. 57; Southwick 1996) and that these defensive gun uses occur quite frequently in the U.S.—perhaps 2.5 million times a year (Kleck and Gertz 1995, and the thirteen earlier surveys reviewed therein; Kleck 1997, Chapter 5).

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ENDNOTES

1 McDowall et al. reported an annual average of 15 rapes (p. 547), and their impact parameter indicated a drop of 11.3846 rapes after the gun training program was implemented (p. 548); $11.3846/15=0.759$.

2 Since Orlando averaged only 15 rapes per year over this period, a 100% reduction would imply an "impact" parameter of about -15. With a standard error of 10.1188 for their estimate of the intervention's impact (McDowall et al. 1991, p. 548), even a 100% reduction would imply a t-ratio test statistic of only -1.48, less than the -1.771 needed for statistical significance with 13 degrees of freedom.

“BRADY” OR NOT?

A Comprehensive Examination of the Brady Bill

By Wesley Lasseigne¹

This article examines the effectiveness of the Brady Act, and the recent constitutional challenge to the Act. Wesley Lasseigne is a law student at the University of Arkansas at Little Rock.

Is the “Brady Bill,”² which imposes a background check and a five-day waiting period on retail handgun purchasers, an effective way of keeping handguns out of the hands of convicted felons? Ask Reilly Johnson, a prisoner serving a life sentence in New Mexico. In 1991, during debates on the Brady Bill, Johnson asked some of his fellow inmates about their thoughts on the issue and how they would go about getting a handgun upon release:

- “Where do I get a gun? That’s easy. I steal it or I buy one from someone who stole it.”
- “Once I’m outta’ the joint, it’ll take me maybe an hour to get a gun. If you know a junkie, you know where to buy one. Junkies are the residential burglars.”
- (When told that California’s waiting period law had caught felons trying to buy guns in gun stores) “You gotta be kiddin’! Somebody that tried to buy a gun from a place where you have to give your real

name has taken one too many pulls on the Krylon silver.”³

The statements of these prisoners are consistent with polling data of felony prisoners in other states.⁴ In these polls, prisoners reported that a background check system would not hinder them from obtaining a handgun upon release.⁵ In support of this data, a study funded by the National Institute of Justice confirms the conclusion that criminals predominately obtain their handguns from sources other than retail outlets. In their survey of 939 convicted felons, James Wright and Peter Rossi found that only 147 of the criminals obtained their most recent handgun from a source that would be concerned about the legality of the transaction.⁶ Therefore, no more than one out of every five criminals can be expected to purchase a handgun from a licensed dealer.⁷ Those with criminal minds are the very ones we wish to prevent from obtaining a handgun, but are also the ones who seem most capable of circumventing any background check system that is put into effect.

The current background check system, under the Brady Bill, can be circumvented in several ways. The person wanting to obtain a handgun can utilize the services of a “straw-man.” The “straw-man” can be anyone who does not have a criminal record and can otherwise pass a background check, usually a friend or relative of the actual purchaser. After the “straw-man” obtains the handgun from the dealer, he or she turns it over to the actual purchaser, thus frustrating the system.

The background check is also susceptible to prohibited purchasers who obtain and use false identification. A prohibited purchaser would go about this by having his or her photograph placed on a drivers license or other state issued identification card along with the information of someone who is able to pass the background check. The criminal then presents this “fake identification” to the dealer he wishes to purchase a handgun from. The dealer then takes the information from the identification presented to run a background check, after which

the criminal will be allowed to purchase the handgun, again frustrating the system.

The preceding hypothetical scenarios, as well as the New Mexican prisoners' suggestions on how they would obtain a handgun, are just a few examples of how easily someone can get around the current background check system. The background check provisions of the Brady Bill apply only to sales by licensed firearm dealers, and therefore do not cover private sales at gun shows or through classified ads.⁸ Furthermore, while the Brady Bill contains eight categories of prohibited purchasers, the background checks being conducted in most states focus primarily on felony convictions.⁹ Accordingly, the background check provision of the Brady Bill is not an effective way to prevent prohibited purchasers from obtaining handguns.

The other virtue touted by supporters of the Brady Bill was the waiting period provision. Gun control advocates championed the provision as a "cooling-off" period which would reduce the number of handguns being used in crimes of passion, as well as the number of suicides, by forcing the individual to take time to reevaluate his choice.¹⁰ Congress implicitly disagreed with this rationale because, under the terms of the Brady Bill, the waiting period will lapse in November 1998, when the Attorney General is supposed to have in place a national instant background check system.¹¹ Apparently, Congress thought of the waiting period only as a "facilitator" to the background checks.¹²

De-emphasizing the usefulness of the waiting period provision as a "cooling-off" period was probably wise. According to criminologist Gary Kleck, a number of conditions need to be fulfilled for a "cooling-off" period to prevent a homicide:

- (1) The gun the killer uses is the only one he owns or the only one he could have used in the crime; (2) the killer acquires the gun from a source that would be expected to obey gun control laws (i.e., a licensed dealer); (3) the gun was purchased and used in the

homicide in a time period shorter than the “cooling-off” period.¹³

Kleck also suggests that a waiting period will not be effective in preventing homicides unless several other criteria are met:

(1) The killer is the kind of person who would not be willing to kill even after waiting; in other words, the killing is an isolated act rather than the culmination of a long history of assaults by the killer; (2) the killer could not acquire and successfully use a gun that does not require a cooling off period (such as a long gun in most states); (3) the killer would not be able to complete the homicide with any weapon other than a gun; (4) the killer would not be able or willing to obtain a gun from a [non-retail] source.¹⁴

This article will explore: (1) the requirements of the Brady Bill; (2) data on the Brady Bill’s implementation and effectiveness; (3) the U.S. Supreme Court’s recent decision that the background check provision of the Brady Bill is unconstitutional; and (4) the states’ reaction to that defeat. The conclusion will present some of the problems with the current system under the Brady Bill and some concerns that must be addressed in order to have a more effective system.

I. IT TOOK AN ACT OF CONGRESS . . .

The Brady Handgun Violence Protection Act of 1993,¹⁵ commonly referred to as the “Brady Bill,”¹⁶ became effective on February 28, 1994. Prior to that date, there was nothing in the federal law to prevent an individual from purchasing handguns, other than being required to fill out a form which stated that the potential purchaser was not a felon, ever dishonorably discharged

from a branch of the armed services, under indictment, or a fugitive.¹⁷ Despite this lack of federal law, when the Brady Bill was passed, twenty-two states already required some form of background check for would-be handgun purchasers.¹⁸

Keeping firearms out of the hands of those persons whom society deems to be dangerous and irresponsible is one of the primary goals of the United States gun control policy.¹⁹ This goal is evidenced by the Gun Control Act of 1968,²⁰ which prohibits a federal firearm licensee (FFL) from transferring handguns to any person who is either under twenty-one, not a resident in the dealer's State, or prohibited by state or local law from purchasing or possessing firearms.²¹ The Gun Control Act also forbids possession of a firearm by and transfer of a firearm to convicted felons, fugitives from justice,²² unlawful users of controlled substances, persons adjudicated as mentally defective or committed to mental institutions, aliens unlawfully present in the United States, persons dishonorably discharged from the Armed Forces, persons who have renounced their citizenship, and persons who have been subjected to certain restraining orders or who have been convicted of a misdemeanor offense involving domestic violence.²³ Public policy deems persons who fall into one of the prohibited categories as inherently irresponsible.

Federal gun control law seeks to establish a balance between preventing those persons in the previously mentioned categories from purchasing and possessing firearms and allowing law abiding citizens to obtain firearms with relative ease.²⁴ In 1993, Congress furthered this regulatory goal by enacting the Brady Bill which implements measures to enforce existing prohibitions.²⁵ The Brady Bill requires the Attorney General to establish a National Instant Criminal Background Check System (NICS) by November 30, 1998 and immediately put into place interim provisions until that system becomes operative.²⁶

Under the interim provisions, a FFL must receive from the potential purchaser a written statement, referred to as the "Brady Form," containing his or her name, address, and date of birth, along with a sworn statement that the purchaser is not a member

of any of the prohibited categories.²⁷ The FFL is directed to verify the identity of the purchaser by examining an identification document such as a driver's license or passport.²⁸ Within one day, the FFL must provide the chief law enforcement officer (CLEO) of the purchaser's residence with notice of the contents and a copy of the Brady Form.²⁹ The sale may be consummated when the FFL has been notified by the CLEO that the sale is approved or when five business days, measured from the time the CLEO receives the requisite information, have passed without a response from the CLEO.³⁰

Several alternatives to the interim provisions are provided by the Brady Bill. A FFL may sell a handgun immediately if the purchaser possesses a state handgun permit that was issued subsequent to a background check³¹ or if state law provides for an instant background check.³² Those purchasers who present a written statement from the CLEO that their need for the handgun is based on a *threat to life* are also exempt from the background check and waiting period provisions of the Brady Bill.³³ The background check may also be waived if it is determined that compliance would be impractical for the CLEO.³⁴

In states that do not provide for instant background checks or for handgun permits to handgun purchasers, the CLEOs must perform certain duties before the sale of a handgun may be consummated. Upon receipt of the required notice from the FFL, the CLEO "shall make a reasonable effort³⁵ to ascertain within five business days whether receipt or possession would be in violation of the law, including research in whatever state or local record-keeping systems are available, and in a national system designated by the Attorney General."³⁶ The Brady Bill does not require that the CLEO take any particular steps in conducting these background checks. Therefore, it seems that "reasonable" is in the discretion of the CLEO, depending on the types of records available in that jurisdiction and the resources that he may use.³⁷

CLEOs who determine that a pending transaction would be unlawful *may* notify the FFL to that effect, but are not required to

do so.³⁸ Those CLEOs who choose to notify a FFL that a transaction would be unlawful and that the prospective purchaser is ineligible to receive a handgun must, upon request and within twenty days of the rejection, provide the denied purchaser with a written statement of the reasons for that determination.³⁹ If no information is discovered by the CLEO that would render the purchase unlawful, he must destroy any records in his possession relating to the transfer, including his copy of the Brady Form.⁴⁰ It must be noted that there is some controversy as to whether the attempted possession of a handgun by a felon is a crime under federal law, and whether the Brady Bill gives law enforcement officials grounds to arrest one who makes such an attempt.⁴¹ A rejected purchaser can be prosecuted for knowingly making a false statement to a FFL if he lied on the Brady form regarding his felony record or one of the other disabling categories.⁴²

II. IT WAS A SPLIT DECISION . . .

The procedures that a FFL must follow before consummating the sale of a handgun vary between each state. A state is classified as either a “Brady State” or a “Brady-Alternative State.” The Brady States, which numbered twenty-three at the end of 1996, are subject to the procedures and requirements of the Brady Bill.⁴³ The remaining twenty-seven states are classified as Brady-Alternative States by the Bureau of Alcohol, Tobacco and Firearms (BATF) and are exempt from the Brady Bill due to the enactment of state legislation that meets or exceeds the requirements of the Brady Bill.⁴⁴

According to the BATF the original Brady-Alternative States are: California, Connecticut, Delaware, Florida, Hawaii, Illinois, Indiana, Iowa, Maryland, Massachusetts, Michigan, Missouri, Nebraska, New Jersey, New York, Oregon, Virginia, and Wisconsin.⁴⁵ These states have provisions that met the requirements for the Brady Bill on the date it became effective.

States which later became Brady-Alternative States (with date of exemption) are: Colorado (3/94), Georgia (1/96), Idaho (6/94), Minnesota (8/94), New Hampshire (1/95), North Carolina (12/95), Tennessee (5/94), Utah (3/94), and Washington (6/96).⁴⁶ Only eleven of the Brady-Alternative States are exempt because of state law provisions requiring an instant background check prior to the purchase of a handgun and include: Colorado, Delaware, Florida, Georgia, Idaho, Illinois, New Hampshire, Oregon, Utah, Virginia, and Wisconsin.⁴⁷ The remaining sixteen states are exempt because of permit requirements for handgun purchases. Idaho, Illinois and Oregon are exempt for both reasons.⁴⁸

The provisions of the Brady Bill or its alternative state provisions are applicable to FFLs⁴⁹ in all fifty states.⁵⁰ The alternative provisions also apply to pawnshop redemptions⁵¹ in twelve states, including: Alaska, Colorado, Connecticut, Florida (after 90 days), Georgia (after 1 year), Illinois, Minnesota, Missouri, New York, Rhode Island, Tennessee, and Utah.⁵² Private sales⁵³ are also covered by alternative provisions in fourteen: California, Hawaii, Indiana, Iowa, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, North Carolina, North Dakota, Pennsylvania, Rhode Island, and Tennessee.⁵⁴

A. Background Checks

All fifty states have access to the federally operated National Crime Information Center (NCIC) database and can check its information to see if an individual is “wanted.”⁵⁵ Likewise, every state can access the NCIC’s Interstate Identification Index (III) database, which is a national system containing information provided by each state on individuals who have a criminal record.⁵⁶ Those who are authorized to access the system will be made aware of the states that have a record on a particular individual and information regarding the individual’s criminal history in that state. At the end of 1996, every state was making

use of these two federal databases in relation to background checks for the sale of handguns.⁵⁷

The existence of databases and their coverage varies at the state level. Computerized criminal history databases, which contain at a minimum felony arrests and dispositions, were maintained and checked by forty-nine states at the end of 1996, with Mississippi being the only exception.⁵⁸ Databases containing “fugitive” information were maintained and checked by forty-five states at the end of 1996, with Hawaii, Indiana, Kansas, Mississippi, and Oklahoma being the only states which did not have such databases.⁵⁹ At the end of 1996, databases covering restraining orders were maintained and checked by only thirty-two states.⁶⁰ Those states which did *not* utilize such databases include: Alabama, Arizona, Delaware, Georgia, Hawaii, Indiana, Kansas, Louisiana, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Mexico, Oklahoma, Pennsylvania, South Carolina, and Wyoming.⁶¹ The coverage of mental health information in databases is less common and at the end of 1996 only sixteen states were using them for background checks including: California, Delaware, Georgia, Hawaii, Illinois, Iowa, Massachusetts, Michigan, Minnesota, New Jersey, New York, Oregon, Rhode Island, Virginia, Washington, and Wisconsin.⁶²

B. Waiting Periods

Under the Brady Bill, a FFL must wait five business days after the CLEO has received the copy of the Brady Form before he can transfer a handgun to a purchaser.⁶³ However, if a state is exempt from the Brady Bill it is not required to have in place a waiting period before the consummation of a sale of a handgun. Despite this, twelve of the Brady-Alternative States require a waiting period under state law before a handgun can be transferred from an FFL to a consumer. These states are (with length of waiting period in days): California (15; 10 as of April 1, 1997), Connecticut (14), Florida (3), Hawaii (14), Illinois (3), Indiana (7), Iowa (3), Maryland (7), New Jersey (7), Tennessee

(15), Washington (5), and Wisconsin (2).⁶⁴ Of the twenty-three Brady States, six require additional waiting periods on top of the five day waiting period that the Brady Bill requires, which include (with additional waiting period on top of Brady Bill in days): Alabama (2), Kentucky (5), Ohio (5), Pennsylvania (2), Rhode Island (7), and South Dakota (2).⁶⁵

III. IT'S A MATTER LEFT TO THE STATES . . .

In a recent 5-4 decision, the United States Supreme Court struck down the Brady Bill's requirement for background checks prior to handgun purchases.⁶⁶ The sheriffs of Ravalli County, Montana and Graham County, Arizona challenged the background check on the grounds that Congress lacks the constitutional authority to require local law enforcement officers to set up and carry out federally imposed regulatory operations.⁶⁷ The Court ruled that the provisions of the Brady Bill requiring the CLEOs to perform the background checks are unconstitutional in that they violate our system of dual sovereignty.⁶⁸

Under this ruling, the CLEOs are not required to perform the background checks under the Brady Bill or accept copies of the Brady Form from FFLs.⁶⁹ However, it should be noted that the states and their respective CLEOs can voluntarily continue to follow the provisions of the Brady Bill.⁷⁰ The Court did not address the validity of the requirements that FFLs forward to the CLEO the requisite notice of the contents and a copy of the Brady Form or whether the FFLs must continue to wait five business days before consummating the sale.⁷¹ Sending notice of the contents and a copy of the Brady Form only burdens the FFL, and waiting five business days only burdens the purchaser.⁷² Neither group was involved in the litigation.⁷³ Accordingly, these provisions are still intact and FFLs must continue to follow them.⁷⁴

The government sought to sustain the Brady Bill on the grounds that: (1) early statutes imposed obligations on state courts;⁷⁵ (2) the Brady Bill does not run contrary to the principle established in *New York v. United States*⁷⁶ because it does not require the states to make policy, but only requires them to “assist in the implementation of federal law” and “provide only limited, non-policymaking, help in enforcing the law”⁷⁷ (3) requiring state officials to perform ministerial duties is not contradictory to the principle of *New York* because it does not diminish the accountability of state or federal officials;⁷⁸ and (4) the Brady Bill only places a minimal and temporary burden on state officers.⁷⁹

The Court began its analysis by characterizing the Brady Bill as directing state law enforcement officers “to participate, albeit only temporarily, in the administration of a federally enacted regulatory scheme.”⁸⁰ Because there is no constitutional text that addresses the unconstitutionality of congressional action that compels state officers to execute federal laws, the Court looked to the historical understanding and practice, structure of the Constitution, and its prior jurisprudence to rule on the issue at hand.⁸¹

In addressing the government’s first argument, the Court could find no evidence that the early Congresses assumed that the federal government could command the state’s executive power through legislation, unless specifically authorized by the Constitution.⁸² The Court, in its review of legislation brought to its attention by the government, concluded that the earliest laws required judges, not executive officers, to enforce federal directives relating to judicial power in accord with the Supremacy Clause of the Constitution.⁸³ The Court felt that it could be argued that the number of statutes imposing obligations on state courts, “contrasted with the utter lack of statutes imposing obligations on the States’ executive (notwithstanding the attractiveness of that course to Congress),” suggests that one may assume the absence of such power.⁸⁴

The Court stated that the other, more recent federal statutes, brought to its attention by the government, can be best described as “conditions upon the grant of federal funding than as mandates to the States.”⁸⁵ In referring to the most recent legislation cited by the government, the Court stated that:

Even assuming they represent assertion of the very same congressional power challenged here, they are of such recent vintage that they are no more probative than the statute before us of a constitutional tradition that lends meaning to the text. Their persuasive force is far outweighed by almost two centuries of apparent congressional avoidance of the practice of requiring state officials to implement federal regulatory schemes.⁸⁶

The Court next examined the structure of the Constitution in search of a controlling principle.⁸⁷ The Court found that implicit in the structure of the Constitution is a system of “dual sovereignty.”⁸⁸ According to Madison in *The Federalist* No. 39, the states retained a “residuary of inviolable sovereignty,” even though they surrendered many of their powers to the new Federal Government.⁸⁹ Furthermore, the Tenth Amendment to the Constitution explicitly asserts that “the 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.”⁹⁰

The Court noted that according to *The Federalist* No. 15, “The Framers’s experience under the Articles of Confederation had persuaded them that using the States as the instruments of federal governance was both ineffectual and provocative of federal-state conflict.”⁹¹ The Court set forth the historical record concerning dual sovereignty in *New York v. United States*, 505 U.S. 144, 166 (1995), concluding that “The Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States.”⁹² The Court noted that the separation of the two sovereigns is one of the Constitution’s

structural protections of liberty and that “The power of the Federal Government would be augmented immeasurably if it were able to impress into its service — and at no cost to itself — the police officers of the 50 States.”⁹³ Furthermore, the Constitution specifically places the responsibility of administering and executing the laws enacted by Congress on the President and his appointees.⁹⁴ The unity of the executive department, insisted upon by the Framers, insures both vigor and accountability.⁹⁵ That unity would be shattered, and the power of the President reduced, if Congress could act as effectively without him by requiring state officers to execute its laws.⁹⁶

The Court found precedent in *New York v. United States*, where it was “confronted squarely” with a statute that unequivocally required the states to enact a federal regulatory program through the “take title” provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985.⁹⁷ In *New York*, the Court held that the “Federal Government may not compel the States to enact or administer a federal regulatory program.”⁹⁸

The government attempted to distinguish *New York* with its third argument, claiming that the Brady Bill does not require the states to make policy, but only requires them to “assist in the implementation of federal law” and “provide only limited, non-policy-making help in enforcing the law.”⁹⁹ The Court stated that the line the government was asking the Court to draw was reminiscent of “the line that separates proper congressional conferral of Executive power from unconstitutional delegation of legislative authority for federal separation-of-powers purposes.”¹⁰⁰ The Court felt that the line between “making” and “enforcing” law, and between “policy-making” and “implementation,” would be equally difficult to draw, and noted that even if the Brady Bill “leaves no ‘policy-making’ discretion with the States,” it would still result in an intrusion on state sovereignty.¹⁰¹ The Court stated that:

It is no more compatible with [the States'] independence and autonomy that their officers be "dragooned" into administering federal law, than it would be compatible with the independence and autonomy of the United States that its officers be impressed into service for the execution of state laws.¹⁰²

The Court also rejected the government's third argument that requiring state officials to perform ministerial duties does not run contrary to the principle of *New York*, because it does not diminish the accountability of state or federal officials.¹⁰³ The Court stated that:

By forcing state governments to absorb the financial burden of implementing a federal regulatory program, members of Congress can take credit for "solving" problems without having to ask their constituents to pay for the solutions with higher federal taxes. And even when the States are not forced to absorb the costs of implementing a federal program, they are still put in the position of taking the blame for its burdensomeness and for its defects.¹⁰⁴

The government's fourth and final argument that the Brady Bill only placed a minimal and temporary burden on the state officers was, likewise, found to be unpersuasive.¹⁰⁵ The very principle of separate state sovereignty is offended by such a law as the Brady Bill, and balancing the various interests can not overcome such a fundamental defect.¹⁰⁶ Furthermore, the Court stated in *New York v. United States*, 505 U.S. 144, 187 that:

Much of the Constitution is concerned with setting forth the form of our government, and the courts have traditionally invalidated measures deviating from that form. The result may appear “formalistic” in a given case to partisans of the measure at issue, because such measures are typically the product of the era’s perceived necessity. But the Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day.¹⁰⁷

The United Supreme Court’s ruling on the Brady Bill in *Printz v. United States* only affects the twenty-three Brady States.¹⁰⁷ The Brady-Alternative States, by definition, are exempt from this ruling.¹⁰⁸ According to a report from Rep. Charles E. Schumer (D-Brooklyn and Queens), ninety-four percent of the CLEOs affected by the Court’s ruling support the Brady Bill and will voluntarily continue the background checks for handgun purchases.¹⁰⁹ Schumer’s researchers contacted all 1,450 designated CLEOs in the Brady States by telephone.¹¹⁰ Of those contacted, 1,179 reported that the background checks would continue, 70 reported that the background checks had stopped, and 203 CLEOs did not respond or could not be reached.¹¹¹ Most of the CLEOs that have stopped the background checks are from small jurisdictions.¹¹² According to the report, the total population living within these small jurisdiction is 1,695,090 people, representing just 0.6% of the United States population.¹¹³

States are currently performing background checks for handgun purchases on a voluntary basis. Originally, Arkansas and Ohio refused to continue the background checks after the United States Supreme Court struck down the Brady Bill provision in *Printz v. United States*.¹¹⁴

A. Arkansas

The Arkansas State Police, as the designated CLEO, have refused to continue conducting background checks for handgun purchases, citing a lack of statutory authority.¹¹⁵ Initially, the Arkansas Attorney General's office advised the State Police that continuing the checks, for which the agency charged a \$15.00 fee, could lead to lawsuits under the Arkansas Constitution as an "illegal exaction."¹¹⁶ Arkansas Attorney General Winston Bryant later issued an opinion that the background checks would not be illegal under the Arkansas Constitution or Arkansas Code.¹¹⁷ Seven months after the decision in *Printz v. United States*, the Arkansas Attorney General's office decided that they would resume the background checks.¹¹⁸

The Attorney General's effort, while admirable, did not solve the problem due to state law which prohibits the Attorney General's office from sharing information learned from the Arkansas Crime Information Center with non-law enforcement agencies.¹¹⁹ However, through an agreement with the Arkansas State Police, the Attorney General's office will conduct the background check and pass on any information along with a copy of the application to the State Police which will review the information and warn gun dealers of individuals flagged by the background check.¹²⁰ While the State Police are still not comfortable with their participation in the background checks, the Attorney General's office agreed to defend the agency in any related litigation.¹²¹ Final approval of the agreement is contingent on approval by the Arkansas Crime Information Center's board of directors.¹²²

B. Ohio

According to Ohio Attorney General Betty Montgomery, she has no authority under state law to require background checks.¹²³ However, after facing a torrent of criticism and discussions with United States Attorney General Janet Reno, Montgomery announced that the background checks could continue on a voluntary basis.¹²⁴ As a result, background checks were

suspended for only three days before being reinstated.¹²⁵ Ohio's Bureau of Criminal Identification and Investigation, as the designated CLEO, will continue to conduct background checks on individuals who give their consent, by having the purchaser sign a waiver along with the required Brady Form.¹²⁶ As an incentive to consent to the background checks, Montgomery's office is guaranteeing the results will be back within two days, making those who do not consent wait the five business days required by the Brady Bill.¹²⁷ Furthermore, Ohio still imposes a \$13.00 fee on those who consent to the background check, as well as those who do not.¹²⁸ According to Mark Weaver, Deputy Attorney General for Ohio, 65-70% of the purchasers are voluntarily consenting to the background checks.¹²⁹

IV. A LOOK AT THE NUMBERS . . .

According to the Bureau of Justice Statistics (BJS), there were approximately 7.8 million applications to purchase handguns, and an estimated 173,000 rejections between the inception of the Brady Bill and end of 1996.¹³⁰ During 1996 alone, 70,000 out of an estimated 2,593,000 applications for the purchase were rejected as a result of presale background checks, constituting a rejection rate of 2.7%.¹³¹ The rejection rate for the Brady States did not differ significantly from that of the Brady-Alternative States. The Brady States rejected 25,000 out of 816,000 applications, or 3.1%, while the Brady-Alternative States rejected 45,000 out of 1,778,000 applications, or 2.5%.¹³² The most prevalent reason for rejection was that the applicant had a prior felony conviction or was under indictment, and accounted for 67.8% of rejections in all states.¹³³ The next most prevalent reasons for rejection, was the applicant being a fugitive from justice, accounting for 6.0%, and violations of state law prohibitions, accounting for 5.5%.¹³⁴ Rejections due to the applicant being under a restraining order accounted for 3.9%.¹³⁵

Mental illness accounted for 3% of the handgun application rejections in the sixteen states which checked such databases, and accounted for 1.5% of all rejections.¹³⁶ Drug addiction accounted for 1.2% of the rejections, while local law prohibitions only accounted for 0.7%, leaving 13.4% to be attributed to the other prohibited categories of purchasers under the GCA.¹³⁷

V. PROGRESS YET TO BE MADE . . .

Background checks and waiting periods are, for the most part, ineffective. The Brady Bill, while aimed at a growing concern, is not getting the job done. The current system, under the Brady Bill, provides for eight categories of prohibited purchasers.¹³⁸ Of those eight categories, felony convictions is the only one that is being checked nationwide.¹³⁹ The remaining seven categories, remain unchecked in most states. This appears to be a fatal flaw in the Brady Bill.

While this federally implemented program seeks to achieve uniformity in the law throughout the 50 states, it fails in that each state chooses for itself which categories of prohibited purchasers are worthy of being maintained in databases and checked for handgun purchases.¹⁴⁰ This problem will be alleviated, to some extent, by the implementation of the National Instant Criminal Background Check System (NICS) but the federal government must look to the states to provide the information that will be loaded into the database.¹⁴¹

In order for a background check to be effective, it must check all categories of prohibited purchasers. Therefore, every category of prohibited purchasers must be maintained in the NICS database that FFLs will be checking prior to consummating the sale of a handgun. This will require the States to maintain and provide to the NICS database information on individuals who fall into any one of the prohibited categories. Requiring the States to maintain this information could prove be problematic, in that the

States might bring a Tenth Amendment challenge similar to that in *Printz v. United States*,¹⁴² on the theory that requiring the States to maintain this information could be viewed as requiring them to implement a federal regulatory program. Furthermore, maintaining such databases will bring up “privacy” issues. Do we really want a database that includes mental health records, etc.?

The Brady Bill is also flawed in that it only applies to handgun purchases from FFLs.¹⁴³ Criminals, and presumably other prohibited purchasers, do not buy their handguns from FFLs, they buy them in the secondary markets or steal them.¹⁴⁴ In order for any gun control measure to be effective, it must apply to all transfers of ownership of handguns. This includes private sales,¹⁴⁵ trades, pawnshop redemptions,¹⁴⁶ and any other transfer of ownership other than a sale to a FFL.¹⁴⁷ This could prove to be impractical in that there is no effective way to police compliance short of requiring the registration of handguns in a manner similar to the current registration and transfer of title requirements for automobiles. Registration, of course, is another issue strongly opposed by control opponents. The only way this could work, without a registration provision, would be to impose strict penalties on those who fail to comply with such a requirement. While this might compel the compliance of law abiding citizens, there would still be no way to police such compliance, leaving no incentive for criminals to play by the rules. By definition, criminals are accustomed to breaking the law. Why would this law be any different?

I am of the opinion that background checks have some utility. However, the current background check system, under the Brady Bill, is ineffective in preventing the majority of prohibited purchasers from obtaining a handgun. As previously mentioned, those with criminal minds are the ones we want to prevent from obtaining a handgun but, are also the ones most capable of circumventing a background check system.¹⁴⁸ Before we can have an effective federal background check system, Congress must deal with the previously mentioned problems, as well as reducing the ways that the current system can be circumvented.

The other major provision of the Brady Bill is the waiting period. According to the terms of the Brady Bill, the waiting period requirement will terminate on November 30, 1998.¹⁴⁹ Therefore, there will not be a “cooling-off” period intact in the Brady States, or the Brady-Alternative States that have not implemented their own waiting periods, when the interim provisions of the Brady Bill expire. However, if one takes the view of criminologist Gary Kleck, this will have little effect on preventing murders or suicides.¹⁵⁰ This is not to say that a cooling-off period does not save some lives. However, a waiting period might also cost the lives of those who are not able to acquire a handgun to protect themselves from imminent danger.¹⁵¹ In this sense, we must weigh the effects of waiting periods, and determine whether they actually save or cost more lives before making a conclusion on their effectiveness.

If a cost-benefit approach is taken on this issue, a waiting period should be provided for if it actually saves more lives than it costs. However, there is no accurate way to collect such data since there are hundreds, if not thousands, of unreported instances that would be relevant to this issue. If it were found that it saves more lives than it costs, I would support a waiting period provision. This again could be seen as a “cooling-off” period which would aid in the reduction of suicides and crimes of passion. However, I think that such a period should be limited to two days, meaning that a purchaser could pick up his or her handgun on the third day following the purchase.

In order to have effective background checks and waiting period laws, they must be dealt with at the federal level to insure that the requirements will be uniform throughout the nation. For this to be done, Congress must find some way to address the above concerns without infringing upon state sovereignty and further burdening the rights of law abiding citizens. Our representatives have decided that we need some form of background check system, and arguably a waiting period, for handgun purchases. If we are to be burdened with such requirements, it is only just that the system be revised to operate

correctly. “Brady” or not, any background check or waiting period, that places a burden on law abiding citizens, should accomplish the purpose for which it is intended.¹⁵²

ENDNOTES

1. Third-year law student, University of Arkansas at Little Rock School of Law. This paper was originally submitted as a project for Professor Andrew McClurg’s course in “Gun Violence and the Law.” I extend my appreciation to Professor McClurg in helping me arrive at my goal of publication. I dedicate this article to all of my devoted family, especially Paul and Dorothy Lasseigne of Rayne, Louisiana, and in memory my grandfather, Tom Region of Alexandria, Louisiana.

2. Brady Handgun Violence Protection Act of 1993 codified at 18 U.S.C. § 922(q)-(t) (1994) (*hereinafter* Brady Bill). *See infra* notes 13-40 and accompanying text for a full discussion on the Act’s provisions.

3. David B. Kopel, *Background Checks and Waiting Periods, in GUNS: WHO SHOULD HAVE THEM?* 53, 76-77 (David B. Kopel ed., 1995) (citing Reilly Johnson, “Brady Bill” Gets Guffaws from Guys Behind Bars, SANTE FE NEW MEXICAN, June 30, 1991). “[O]ne too many pulls on the Krylon silver” is presumably a reference to huffing paint in order to get a cheap high.

4. *Id.* at 77.

5. *Id.*

6. JAMES D. WRIGHT AND PETER H. ROSSI, U.S. DEPT. OF JUSTICE, THE ARMED CRIMINAL IN AMERICA: A SURVEY OF INCARCERATED FELONS 36 (1985).

7. *Id.*

8. *See infra* notes 20 and 24 for a discussion on who is required to obtain a license to sell firearms.

9. *See infra* notes 54-61 and accompanying text for a discussion on what categories the states are checking; *see also infra* notes 164-171 for a discussion of the categories for which handgun purchase applications are denied.

10. Kopel, *supra* note 2, at 85.

11. Kopel, *supra* note 2, at 85. *See infra* note 25 and accompanying text for a discussion on the expiration of the interim provisions of the Brady Bill.

12. Kopel, *supra* note 2, at 85.

13. Kopel, *supra* note 2, at 85. Kleck's gun policy book POINT BLANK, the most significant contribution to criminology in a three year period, won the American Society of Criminology's Hindelang Prize. Kopel, *supra* note 2, at 85. Kleck also found, in reviewing 1982 Florida homicides, that 0.9% of homicides fit all three criteria, estimating that nationally 0.5% would fit all three criteria. Kopel, *supra* note 2, at 85.

14. Kopel, *supra* note 2, at 85. Kleck did not find any Florida homicides which a "cooling-period" would have prevented. Kopel, *supra* note 2, at 85. Kleck, a supporter of the background check, believes that a "cooling-off" period does no good itself and offers no advantages to an instant check. Kopel, *supra* note 2, at 85.

15. 18 U.S.C. § 922(q)-(t) (1994).

16. The Brady Bill was originally named for Sarah Brady. Later, it was said to be named for the former White House Press Secretary James Brady who was shot and left partially paralyzed in the assassination attempt on President Ronald Reagan on March 30, 1981. Following his recovery, Brady and his wife Sarah became passionate gun control advocates and lobbied heavily for the passage of the Brady Bill. *See* Kopel *supra* note 2, at footnote 1(citing Handgun Control, Inc., *What You Should Know about the Brady Bill* (brochure, 1987)). *See also* Steven A. Holmes, *Old Ally Wounds Gun Control Foes*, N.Y. TIMES, March 30, 1991, at A1; 139 CONG. REC. 16, 417 (daily ed. Nov. 19, 1993).

17. Richard M. Aborn, *The Battle Over The Brady Bill And The Future of Gun Control Advocacy*, 22 FORDHAM URB. L.J. 417, 418 (1995).

18. *Id.* at 418 n.11. The 22 states were not listed and do not conform to the original Brady-Alternative States since there were only 18 of them.

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

20. 18 U.S.C. §§ 921-922 (1994).

21. *Id.* § 922(b). A Federal Firearm Licensee (FFL) is referred to as a "dealer" in the United States Code. The term "dealer" includes any person engaged in the

business of selling firearms at the wholesale or retail levels, any person engaged in the business of repairing firearms or of making or fitting special barrels, stocks, or trigger mechanisms to firearms, or any person who is a pawnbroker. 18 U.S.C. § 921(a)(11). A “pawnbroker” is defined as any person whose business or occupation includes the taking or receiving, by way of pledge or pawn, of any firearm as security for the payment or repayment of money. *Id.* § 921(a)(12). Furthermore, no person can engage in dealing firearms until he has filed an application with and received a license to do so from the Secretary of the Treasury. *Id.* §§ 923(a), 921(a)(18).

22. *Id.* § 921(a)(15). “The term fugitive from justice means any person who has fled from any State to avoid prosecution for a crime or to avoid giving testimony in any criminal proceeding.” *Id.*

23. *Id.* § 922(d), (g). The provisions dealing with domestic violence, applicable to intimate partners and children, are known as the “Lautenberg Amendment” and did not become effective until 1996. The restraining order prohibition applies only if there was a hearing and factual findings by the court issuing the restraining order that the restrained individual represents a threat or by its terms explicitly prohibits the use, attempted use, or threatened use of physical force that would reasonably be expected to cause bodily injury, or the individual was convicted of a misdemeanor crime of domestic violence. *Id.* § 922(d)(8)-(9), (g)(8)-(9).

24. Jacobs & Potter, *supra* note 18, at 93.

25. Jacobs & Potter, *supra* note 18, at 95; *see also* 18 U.S.C. § 923 (a)(1)-(2) (1994). Federal law prohibits any unlicensed person from engaging in the business of selling firearms. Individual gun owners wishing to sell a few of their guns need not obtain a license, but they may not sell a firearm to a person whom they know or have reasonable cause to believe that such person belongs to a prohibited class. 18 U.S.C. § 922(d). Violations of §922(d) are subject to a fine, up to 10 years imprisonment, or both. 18 U.S.C. § 924(a)(2).

26. Pub. L. 103-159, *amended by* Pub. L. 103-322, 103 Stat. 2074 (Sept. 13, 1994) (found in note titled National Instant Criminal Background Check System following 18 U.S.C.. § 922 (1994))

(b) Establishment of System. Not later than 60 months after the date of the enactment of this Act, the Attorney General shall establish a national instant criminal background check system that any licensee may contact, by telephone or by other electronic means in addition to the telephone, for information, to be supplied immediately, on

whether receipt of a firearm by a prospective transferee would violate section 922 of title 1, United States Code, or State law.

Id. It appears that the waiting period will expire on November 30, 1998, even if the national instant background check system is not operational. *See* Aborn, *supra* note 16, at 426. "Under the provisions of the Brady Act, the NICS [National Instant Criminal Background Check System] must be established no later than November 1998, at which time the procedures related to the 5-day waiting period of the interim system will be eliminated." BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, NCJ-16570, PRESALE HANDGUN CHECKS, 1996, at 4 (1997). "Section 103(b) of the Brady Act requires that the National Instant Criminal Background Check System (NICS) become operational in November 1998. At that time, Federal waiting period requirements will no longer be applicable and presale firearm inquiries will be based on an inquiry to the NICS." BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, NCJ-165589, NATIONAL CRIMINAL HISTORY IMPROVEMENT PROGRAM: FISCAL YEAR 1997 PROGRAM ANNOUNCEMENT 2 (1997). According to an article in *Government Computer News* the Department of Justice will have the national instant check on-line next year. NRA-ILA FAX ALERT, FBI CLAIMS INSTANT CHECK TO BE ON-LINE IN 1998, VOL. 4, NO. 35, (AUG. 29, 1997).

27. 18 U.S.C. § 922(s)(1)(A)(i)(I), (s)(3) (1994).

28. *Id.* § 922(s)(1)(A)(i)(II).

29. *Id.* § 922(s)(1)(A)(i)(III). "For purposes of this subsection, the term 'chief law enforcement officer' means the chief of police, the sheriff, or an equivalent officer or the designee of any such individual." *Id.* § 922(s)(8).

30. *Id.* § 922(s)(1)(A)(ii).

31. *Id.* § 922(s)(1)(C).

32. *Id.* § 922(s)(1)(D).

33. 18 U.S.C. § 922(s)(1)(B) (1994). This alternative provision seems to be somewhat impractical. It is doubtful that the poor and minorities, who are the victims of most violent crimes, will be able to promptly obtain an appointment with the CLEO administrator who can issue an authorization to bypass the Brady Bill requirements. Kopel, *supra* note 2, at 65. If the CLEO administrator who is authorized to issue these immediate permits is out of town, busy, or uninterested, the potential victim is out of luck. Kopel, *supra* note 2, at 65. Furthermore, there must be a direct *threat to life*. Threats of rape, aggravated

assault, or mayhem are not grounds for even a sympathetic CLEO administrator to bypass the requirements of the Brady Bill. *Kopel*, *supra* note 2, at 65.

34. 18 U.S.C. § 922(s)(1)(F). Compliance may be impractical if:

(i) the ratio of the number of law enforcement officers of the State in which the transfer is to occur to the number of square miles of land area of the State does not exceed 0.0025; (ii) the business premises of the transferor at which the transfer is to occur are extremely remote in relation to the chief law enforcement officer; and (iii) there is an absence of telecommunications facilities in the geographical area in which the business premises are located.

Id. § 922(s)(1)(F)(i)-(iii).

35. The Bureau of Alcohol, Tobacco, and Firearms interprets the reasonable effort language as requiring “some minimal effort to check commonly available records.” *Mack v. United States*, 856 F.Supp. 1372, 1376 (D. Ariz. 1994).

36. 18 U.S.C. § 922(s)(2) (1994).

37. *Jacobs & Potter*, *supra* note 18, at 99.

38. *Printz v. United States*, 117 S. Ct. 2365, 2369 (1997). *See* 18 U.S.C. § 922(s)(7)(A)-(B) (1994).

(7) A chief law enforcement officer or other person responsible for providing criminal history background information pursuant to this subsection shall not be liable in an action at law for damages--(A) for failure to prevent the sale or transfer of a handgun to a person whose receipt or possession of the handgun is unlawful under this section; or (B) for preventing such a sale or transfer to a person who may lawfully receive or possess a handgun.

Id.

39. 18 U.S.C. § 922(s)(6)(C) (1994).

40. *Id.* § 922(s)(6)(B)(i).

41. *See Jacobs & Potter*, *supra* note 18, at 100.

It is important to note that Brady does not provide for arrest of an ex-felon who has attempted to purchase a handgun. In fact, there is no federal law making attempted possession by a felon a crime. A rejected purchaser can be prosecuted only for making a false statement; if the rejected purchaser lied on

the Brady Form regarding a past felony record or one of the disabilities, he could be prosecuted for knowingly making a false statement to an FFL.

Jacobs & Potter, *supra* note 18, at 100. *Cf.* Kopel, *supra* note 2, at 81. “Any person with a felony conviction who attempts to purchase a gun commits...in almost all states, a state felony.” Kopel, *supra* note 2, at 81.

42. Jacobs & Potter, *supra* note 18, at 100; *see* 18 U.S.C. § 922(a)(6) (1994).

43. REGIONAL JUSTICE INFORMATION SERVICE, U.S. DEPT. OF JUSTICE, NCJ-163918, SURVEY OF STATE PROCEDURES RELATED TO FIREARM SALES, 1996, at 64 (1997).

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *See* 18 U.S.C. § 922(b) (1994); *see also supra* notes 20 and 24 for a discussion on who is required to be licensed.

50. REGIONAL JUSTICE INFORMATION SERVICE, *supra* note 42, at 67.

51. Pawnshop redemptions differ from sales in that the transferee owns the gun which was pledged as collateral on a loan and is regaining possession of the gun after repaying the loan. Pawnbrokers are required to be licensed as an FFL if they participate in any firearm transactions. *See* 18 U.S.C. §§ 921(a)(11)-(12), 923(a) (1994).

52. REGIONAL JUSTICE INFORMATION SERVICE, *supra* note 42, at 67.

53. A person is not considered to be engaged in the business of dealing in firearms if they make “occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby, or who sells all or part of his personal collection of firearms” 18 U.S.C. §921(a)(21)(C) (1994).

54. REGIONAL JUSTICE INFORMATION SERVICE, *supra* note 42, at 67.

55. REGIONAL JUSTICE INFORMATION SERVICE, *supra* note 42, at 66. The NCIC consists of 17 files which contain more than 10 million records, plus 24 million criminal history records contained in the Interstate Identification Index (III) which are accessible through NCIC. *National Crime Information Cen-*

ter: 30 Years on the Beat, THE INVESTIGATOR (FBI, Washington D.C.), Dec. 1996/Jan. 1997, at 2. Some of the more notable files contained in NCIC include: Missing Persons, Unidentified Persons, Interstate Identification Index, U.S. Secret Service Protective (names & other information on those believed to pose a threat to the President), Foreign Fugitive, and Violent Gang/Terrorist. *Id.* The NCIC computer is currently housed in the FBI headquarters with connecting terminals throughout the United States, Canada, Puerto Rico, and the U.S. Virgin Islands in police departments, sheriffs' offices, state police facilities, Federal law enforcement agencies, and other criminal justice agencies. *Id.* NCIC users access the NCIC computer through state computer systems known as "control terminal agencies." *Id.*

56. REGIONAL JUSTICE INFORMATION SERVICE, *supra* note 42, at 66.

57. REGIONAL JUSTICE INFORMATION SERVICE, *supra* note 42, at 66.

58. REGIONAL JUSTICE INFORMATION SERVICE, *supra* note 42, at 66.

59. REGIONAL JUSTICE INFORMATION SERVICE, *supra* note 42, at 66.

60. REGIONAL JUSTICE INFORMATION SERVICE, *supra* note 42, at 66. In Arkansas the CLEO has access to the following data on a fully automated statewide computer network: fugitive, criminal history, court restraining order, and some domestic violence information. REGIONAL JUSTICE INFORMATION SERVICE, *supra* note 41, at 4.

61. REGIONAL JUSTICE INFORMATION SERVICE, *supra* note 42, at 66.

62. REGIONAL JUSTICE INFORMATION SERVICE, *supra* note 42, at 66.

63. 18 U.S.C. § 922(s)(1)(A)(ii) (1994).

64. REGIONAL JUSTICE INFORMATION SERVICE, *supra* note 42, at 64.

65. REGIONAL JUSTICE INFORMATION SERVICE, *supra* note 42, at 64.

66. *Printz v. United States*, 117 S.Ct. 2365, 2384 (1997).

67. *Id.* at 2369.

68. *Id.* at 2384.

69. *Id.* at 2384; *see supra* notes 28-29 and accompanying text for a discussion of these statutory provisions.

70. *Printz*, 117 S.Ct. at 2384. “These two provisions have conceivable application to a CLEO, in other words, only if he has chosen, voluntarily, to participate in administration of the federal scheme.” *Id.*

71. *Id.*

There is involved in this Brady Act conundrum a severability question, which the parties have briefed and argued: whether firearms dealers in the jurisdictions at issue here, and in other jurisdictions, remain obliged to forward to the CLEO (even if he will not accept it) the requisite notice of the contents (and a copy) of the Brady Form, §§ 922(s)(1)(A)(i)(III) and (IV); and to wait five business days before consummating the sale, § 922(s)(1)(A)(ii). These are important questions, but we have no business answering them in these cases. These provisions burden only firearms dealers and purchasers, and no plaintiff in either of those categories is before us here. We decline to speculate regarding the rights and obligations of parties not before the court.

Id.

72. *Id.*

73. *Id.*

74. Mark Waller, *Police Lack Proof But Hate to See Gun Check Go*, ARK. DEMOCRAT-GAZETTE, July 3, 1997, at 1B. The Bureau of Alcohol Tobacco and Firearms issued an “Open Letter to All Federal Firearm Licensees” telling all dealers to continue to have buyers fill out a form providing background information and to continue sending the form to the state’s CLEO. *Id.*

75. *Printz*, 117 S.Ct. at 2370.

76. In *New York v. United States*, 505 U.S. 144 (1992), the Court concluded that the “Federal Government may not compel the States to enact or administer a federal regulatory program.” *Id.* at 188.

77. *Printz*, 117 S.Ct. at 2380.

78. *Id.* at 2382.

79. *Id.* at 2383.

80. *Id.* at 2369.

81. *Id.* at 2370.

82. *Id.* at 2372.

83. *Id.* at 2371. “[T]he Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby.’ It is understandable why courts should have been viewed distinctively in this regard; unlike legislatures and executives, they applied the law of other sovereigns all the time.” *Id.* (citation omitted).

84. *Id.*

85. *Id.* at 2376. Congress may place conditions upon the receipt of federal funding, even if the effect of the congressional purpose is to regulate. The “Necessary and Proper” Clause of the Constitution is the authority typically used by Congress to justify conditions on the use of federal funds. *See* *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937) (Upheld provision of the Social Security Act allowing employers to receive a credit against federal tax for any contribution to a state-enacted unemployment plan, but only where the state passed a plan meeting congressionally defined requirements.); *South Dakota v. Dole*, 483 U.S. 203 (1987) (Upheld statute that withholds federal highway funds from states that permit persons under the age of 21 to purchase or possess in public any alcoholic beverage.).

86. *Printz*, 117 S.Ct. at 2376.

87. *Printz*, 117 S.Ct. at 2376-79.

88. *Id.* at 2376.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at 2377.

93. *Printz*, 117 S.Ct. at 2378.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*; *see* *New York v. United States*, 505 U.S. 144, 188 (1992).

98. *Printz*, 117 S.Ct. at 2378; *see* *New York v. United States*, 505 U.S. 144, 188 (1992).

99. *Printz*, 117 S.Ct. at 2380.

100. *Id.*; see *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 530 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 428-29 (1935).

101. *Printz*, 117 S.Ct. at 2380-81.

102. *Id.* at 2381.

103. *Id.* at 2382; see *supra* notes 75, 91, 96-98, *infra* note 106 and accompanying text for references to the holding of *New York v. United States*, 505 U.S. 144 (1992).

104. *Printz*, 117 S.Ct. at 2382.

105. *Id.* at 2383. According to the Court, there was considerable disagreement over the extent of the burden placed on the CLEOs, but that detail was of no significance in the case at bar. *Id.*

106. *Printz*, 117 S.Ct. at 2383.

107. *Id.*

107. See *supra* note 42 and accompanying text as to definition of “Brady States”.

108. See *supra* note 43 and accompanying text as to definition of “Brady-Alternative States”.

109. *Schumer Survey Shows Background Checks Continue Despite Supreme Court Ruling: Over 94% of Police Support Brady Law by Continuing Checks*, NEWS: CHARLES E. SCHUMER (Representative Charles E. Schumer newsletter, Washington, D.C.), July 16, 1997.

110. *Id.*

111. *Id.*

112. *Id.* (all jurisdictions considered by the survey to be “small” has a population under 150,000; the average population of the “small” jurisdictions is 24,928).

113. *Id.*

114. See Erin Gibson, *Troopers Dropping Gun Check Arkansas Reacts to Brady Ruling*, ARK. DEMOCRAT-GAZETTE, July 2, 1997, at 1A; Jim Brooks, *Gun Dealers Must Send Forms That Return “Refused,”* ARK. DEMOCRAT-GAZETTE, Aug. 9, 1997, at 1B; *Schumer Survey Shows Back-*

ground Checks Continue Despite Supreme Court Ruling: Over 94% of Police Support Brady Law by Continuing Checks, supra note 109; Alan Johnson, *Montgomery, Reno Hold Different Views of Gun Law*, THE COLUMBUS DISPATCH, Aug. 15, 1997, at 5B (According to the Ohio Revised Code (cite not given), “No state official shall command, order or direct an investigator to perform any duty or service that is not authorized by law.”).

115. *See* Gibson *supra* note 114; Brooks *supra* note 114. According to Sergeant Darrel Stayton, the Legal Affairs contact in the Director’s Office of the Arkansas State Police, there are two possible openings for potential liability. Interview with Sergeant Darrell Stayton, Legal Affairs contact in the Director’s Office of the Arkansas State Police, in Little Rock, Ark. (Nov. 25, 1997). First, there needs to be statutory authority at the state level authorizing the Arkansas State Police to conduct the background checks. *Id.* The authority cited by the Arkansas Attorney General is not specific and, therefore does not convince the Arkansas State Police that they are authorized to conduct the background checks for handgun purchases, since it is not one of the enumerated reasons for conducting such checks. *Id.* Second, liability could arise through charging a fee that is not authorized. *Id.* The enumerated authority to conduct background checks for other non-criminal law purposes contains provisions for who will be charged a fee and in what amount, handgun purchases is not included among those provisions. *Id.* To further complicate matters, if there is no authority to conduct background checks, charging a fee for the checks would be deemed a “tax” and could then be considered an “illegal exaction.” *Id.* This opens up the possibility for a taxpayers’ suit. *Id.* In suits alleging an illegal exaction, officers of state agencies are subject to personal liability and double the amount of damages, here the amount of fees collected after resuming the background checks. *Id.*

116. Joe Stumps, *Arkansas Won’t Touch Gun Checks “Unwarranted,” Chief Cop Says*, ARK. DEMOCRAT-GAZETTE, July 29, 1997, at 1A. *See* ARK. CONST. art. XVI, § 13; *Pledger v. Featherlite Precast Corp.*, 308 Ark. 124, 128, 823 S.W.2d 852, 855 (1992), *cert. denied*, 506 U.S. 826 (1992) (recognizing that an illegal exaction” can take two forms: (1) a misapplication of public funds and (2) an illegal tax).

117. *Op.* Ark. Att’y Gen. 97-253 (1997). ARK. CODE ANN. §§ 12-12-1009, -1011 (Michie Repl. 1995) grant the Arkansas State Police authority to disseminate conviction information to FFLs. *Id.* ARK. CODE ANN. § 12-12-1012 (Michie Repl. 1995) authorizes the Dept. of Arkansas State Police Identification Bureau to charge a fee for criminal history information for noncriminal

justice purposes, which cannot exceed \$20. *Id.* Such a fee does not constitute an “illegal exaction” under the ARK. CONST. art. XVI, § 13, which states: “Any citizen of any county, city or town may institute suit in behalf of himself and all others interested, to protect the inhabitants thereof against the enforcement of any illegal exactions whatever.” *Id.* “Illegal exaction” has been defined by the Arkansas Supreme Court as taking the form of (1) a misapplication of public funds, and (2) an illegal tax. *Id.* (citing *Pledger v. Featherlite Precast Corp.*, 308 Ark. 124, 823 S.W.2d 852 (1992), *cert. denied*, 506 U.S. 826 (1992)). The situation involved here clearly does not constitute a misapplication of public funds. *Id.* Such a fee would not be considered a tax because it is imposed in the government’s exercise of its police powers rather than general revenue purposes. *Id.* (citing *Barnhart v. City of Fayetteville*, 321 Ark. 197, 900 S.W.2d 539 (1995)). The Attorney General is of the opinion that the charge constitutes a “fee” rather than a “tax” and that the “illegal exaction” clause of the Arkansas Constitution will not be implicated. *Id.*

118. Rachel O’Neal, *Pasts Figure Again In Bid to Buy a Gun; Bryant Brings Back Background Checks*, ARK. DEMOCRAT-GAZETTE, January 15, 1998, at 1A.

119. Rachel O’Neal, *Chief of Records Voices Concern Over Background Checks*, ARK. DEMOCRAT-GAZETTE, January 23, 1998, at 1B. Pending, conviction and nonconviction information available through the Arkansas Crime Information Center, plus information obtained through the Interstate Identification Index or from another state’s record system, shall be disseminated to criminal justice agencies and official for the administration of criminal justice.” ARK. CODE ANN. § 12-12-1008(a) (Michie Repl. 1995). “The use of this system is restricted to serving the informational needs of governmental criminal justice agencies and others specifically authorized by law through a communications network connecting local, county, state, and federal authorities to a centralized state repository of information. ARK. CODE ANN. § 12-12-207(b) (Michie Repl. 1995).

120. Jim Kordsmeier, *State Police Agree to Tell Gun Dealers When to Halt Sales; Started Notifications Monday; Struck Tentative Deal With Bryant on Friday*, ARK. DEMOCRAT-GAZETTE, February 11, 1998, at 1B.

121. *State Police Aim to Fix Glitch in Gun Law*, THE DALLAS MORNING NEWS, February 7, 1998, at 41A.

122. Kordsmeier, *supra* note 120, at 1B.

123. *Schumer Survey Shows Background Checks Continue Despite Supreme Court Ruling: Over 94% of Police Support Brady Law by Continuing Checks*, *supra* note 109; *see also* Alan Johnson, *Montgomery, Reno Hold Different Views of Gun Law*, THE COLUMBUS DISPATCH, Aug. 15, 1997, at 5B (According to the Ohio Revised Code (cite not given), "No state official shall command, order or direct an investigator to perform any duty or service that is not authorized by law.").

124. Michael Hawthorne, *Ohio Gun Checks On Again, Under Fire Attorney General Changes Mind*, THE CINCINNATI ENQUIRER, July 1, 1997, at B01 (In defending her earlier decision to stop the checks, Montgomery said, "No one should expect Ohio's chief legal officer to take it upon herself to preempt the state legislature and invade individual privacy."); *see also* Alan Johnson, *Gun-Buyer Checks Become Voluntary; Montgomery Decides to Restart Program*, THE COLUMBIA DISPATCH, July 1, 1997, at 1A (According to Montgomery, "Obtaining individual permission resolves the problem of our lack of legal authority to conduct a check.").

125. Telephone Interview with Lonnie Rudasill, Bur. of Criminal Identification, Ohio (October 10, 1997).

126. *Schumer Survey Shows Background Checks Continue Despite Supreme Court Ruling: Over 94% of Police Support Brady Law by Continuing Checks*, *supra* note 109; *see also* Rudasill interview, *supra* note 125. The names of those who do not consent to the background check are forwarded to the BATF. Joe Hallett, *Ohio to Continue Checking On Gun Buyers Voluntarily*, THE PLAIN DEALER, July 1, 1997, at 4B. BATF still has authority to conduct criminal background checks without a gun buyer's consent. *Id.* This process is not working as planned, because the BATF is returning the forms to Ohio without doing the background checks. Johnson, *supra* note 123.

127. Hawthorne, *supra* note 124, at B01.

128. Alan Johnson, *Montgomery Offers to Pay Agency to do Brady Background Checks*, THE COLUMBUS DISPATCH, August 6, 1997, at 1C.

129. Jerry Zremski, *Kerlikowske Worried as Ohio Ends Gun Checks*, THE BUFFALO NEWS, July 17, 1997, at 1B.

130. BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, NCJ-16570, PRESALE HANDGUN CHECKS, 1996 1 (1997) (data collected by the Regional Justice Information Service (REJIS), through a cooperative agreement with BJS

under the Firearms Inquiries Statistics program (FIST); estimates of applications and rejections for handgun purchases include Brady & Brady-Alternative States; data does not indicate whether rejected purchasers later obtained a handgun through other means).

131. *Id.*

132. *Id.* at 2.

133. *Id.*

134. *Id.*

135. *Id.* (only 32 states check databases for restraining orders).

136. BUREAU OF JUSTICE STATISTICS, *supra* note 130, at 2.

137. BUREAU OF JUSTICE STATISTICS, *supra* note 130, at 2. (the other categories include illegal aliens, juveniles, persons discharged from the armed services dishonorably, persons who have renounced their U.S. citizenship, domestic violence, and other unspecified persons).

138. *See supra* notes 18-22 and accompanying text for a discussion on the categories of prohibited purchasers.

139. *See supra* notes 54-61 and accompanying text for a discussion on the categories being checked by the individual states; *see also supra* notes 133-137 for a discussion on what categories are actually prohibiting handgun purchases.

140. *See supra* notes 34-36 and accompanying text for a discussion on the background check that the CLEO must perform in conjunction with a handgun purchase under the Brady Bill; *see also* notes 54-61 for a discussion on the prohibited categories actually being checked by the individual states.

141. *See supra* note 25 and accompanying text for a discussion on the National Instant Criminal Background Check System (NICS).

142. *See supra* notes 65-106 and accompanying text for a discussion of the holding in *Printz v. United States*, 117 S.Ct. 2365 (1997).

143. *See supra* note 24 and accompanying text for a discussion of the applicability of the Brady Bill to FFLs only.

144. *See supra* notes 2-6 for a discussion on the prisoners' statements and the Wright and Rossi study.

145. *See supra* notes 52 for a definition of “private sales”; *see also supra* notes 52-53 for a list of the Brady-Alternative States that have provisions applicable to such sales.

146. *See supra* note 50 for a definition of “pawnshop redemption”; *see also supra* notes 50-51 and accompanying text for a list of the Brady-Alternative States that have provisions applicable to pawnshop redemptions. A case could be made against the applicability to pawnshop redemptions in that the individual receiving the handgun is already the owner and only relinquished its possession to serve as collateral for a loan. However, we do not want to return handguns to criminals or those who are members of any other prohibited category because of this quirk.

147. FFLs are subject to the provisions of the Brady Bill and would have to comply with them upon resale of the purchased handgun.

148. *See supra* notes 2-7 and accompanying text for a discussion on a few of the ways in which the current background check system can be circumvented.

149. *See supra* note 25 and accompanying text for a discussion on the expiration of the interim provisions of the Brady Bill.

150. *See supra* notes 9-13 and accompanying text for a discussion on the waiting period requirement and a look at the criteria that Gary Kleck says must be met in order for a waiting period to prevent homicides.

151. *See* David B. Kopel, *Background Checks and Waiting Periods*, in *GUNS: WHO SHOULD HAVE THEM?* 53, 61-65 (David B. Kopel ed., 1995) for some examples of murders that could have been prevented had there not been a waiting period and how the lack of a waiting period aided some individuals in defending their lives.

152. *See supra* notes 18-24 for a discussion on the primary goal of the United States gun control policy.

The Politics of Firearms Registration in Canada

By Gary Mauser

In this article, Gary Mauser argues that support for repressive gun control laws in Canada is quite thin. The appearance of support was manufactured by the nation's Liberal Party, but the political strategy backfired. Professor Mauser serves on the Faculty of Business Administration and the Institute for Canadian Urban Research Studies at Simon Fraser University, in Burnaby, British Columbia.

The determination of the Canadian government to bring in universal firearms registration (the 1995 Firearms Act) has proven extremely divisive. The Firearms Act, originally introduced in parliament as Bill C-68, radically transformed the criminal code, not only by requiring all firearms to be registered, but also by drastically reducing the traditional rights of Canadians to due process. In this article, I will show that a thorough analysis of Canadian public opinion towards firearms and gun control undermines the government's claim that the public demanded more gun laws. I will argue that Bill C-68 was introduced primarily for partisan political advantage, and that, despite the Liberals' use of sophisticated "political marketing" techniques, their strategy backfired as the gun bill hurt the Liberals more than it helped them in the 1997 federal election.

Public opinion is important for all modern governments for it serves to legitimize government policies. In modern democracies, public opinion is particularly important as it acts as an indicator of people's interests and desires that public officials are supposed to respect. In principle, politicians in democratic countries are responsible to the people for their policy decisions, as they must eventually face re-election. Knowing this, politicians in a

democracy would be expected to try to influence the preferences of the public. It is more than a little naive to treat public opinion as if it were an autonomous force that drives public policy. Thus, it is important to ask to what extent do the fixed preferences of the public determine public policy? Or, to put this question another way, to what extent do politicians create public opinion artificially to promote their policy decisions?

Previous research has shown that Canadians and Americans have remarkably similar attitudes towards firearms and gun control. In both countries, the public has complex and contradictory attitudes towards firearms. In both countries, the public supports so-called “moderate” gun legislation, as well as the use of firearms in self-defence. The extensive similarity of public attitudes suggests that the reason for the stricter gun laws in Canada depends more upon differences in political élites and political institutions than any real differences in public opinion (Mauser and Margolis 1992).

I will examine the politics of gun control in Canada using a model of “public opinion as a dependent variable” (Margolis and Mausers 1989b). In this model, we argue that institutional élites are much more powerful in determining public policy than the general public, and that opinions expressed in the mass media tend to reflect these institutional voices, not those of independent analysts or the citizens in general. The mass media provide the critical linkage between elite intentions and public opinion; at the very least the media plays a role as “gatekeeper,” but the media are also part of the institutional élite as well, so their impact on public opinion is not unbiased. In developing public policy, the government itself occupies a privileged role in commanding media attention. I argue that the government can and does use “marketing techniques” to influence public opinion and even to “manufacture consent” for its policies.

In this article, I will outline the politics behind the 1995 Firearms Act [Bill C-68] and examine the extent to which the new gun legislation can be said to reflect Canadian public opinion. Two questions will be addressed: first, why did the Liberals

introduce this gun control legislation [Bill C-68]? Second, did the bill achieve the Liberals' objectives? Obviously, in order to answer the second question, it will be necessary to know the answer to the first. I contend that the driving force behind firearms registration was the Liberal Cabinet's electoral strategy. To show this, I will examine the political situation facing the Liberals in Parliament and examine the extent to which the 1995 Firearms Act was dictated by Liberal partisan strategy. The analysis of Canadian public opinion will be drawn from a representative national survey of 1,505 adults that was conducted during the public debate over Bill C-68 [Mauser and Buckner 1997]. This study is the most complete analysis of Canadian attitudes towards firearms and gun control legislation ever conducted in Canada. An analysis of the results of the Spring 1997 federal elections will determine whether or not the Liberals' strategy was successful.

A brief description of Bill C-68 [the Firearms Act]

The 1995 Firearms Act (also known as SC 1995, Chapter 39 of the Canadian Criminal Code). introduced extensive changes to the Criminal Code of Canada, including: [a] the registration of all firearms; [b] the confiscation of over one-half of all handguns (without compensation); and [c] draconian infringements on the traditional rights of Canadians to due process. These infringements should frighten any civil libertarian.

The Firearms Act expands the grounds for warrantless searches, reduces restraints on issuing warrants, and requires people to testify against themselves [Sections 102 - 104]. The Firearms Act incorporates much of the language used in the Narcotics Act, and in extending this language to property that has been traditionally legal to own, it vastly extends police powers.

Even though Bill C-68 was passed by Parliament in 1995, before it can have the force of law, a staggering amount of regulations must be drawn up and reviewed by Parliament. The

Department of Justice continually delayed plans until it was finally announced that the new Firearms Act would be phased in starting October 1998 (Canadian Firearms Centre, March 1998). Such sweeping police powers would not be permitted in the United States as this legislation authorizes police procedures that violate the US Fourth Amendment's protection against warrantless searches and the Fifth Amendment's protections to due process.

CANADIAN POLITICS

Canada's Prime Minister has powers that a U.S. President can only dream about (Pocklington 1985: 255). Not only does the Prime Minister appoint all Senators, all Supreme Court Justices, but he does this without any constitutional requirement to consult any other governmental body, such as the Senate. Unlike the U.S. government, the Canadian version of the British parliamentary model includes neither checks nor balances. The Canadian political system was described best by its first Prime Minister, Sir John A. Macdonald, "Given a government with a big surplus, and a big majority, and a weak opposition, you could debauch a committee of Archangels" (Rayment 1994). Moreover, there is only a brief tradition of individual rights and liberties in Canada. The Canadian Charter of Rights and Freedoms is much weaker than the Bill of Rights in the United States and was only introduced in 1982.

The political party with a majority in Parliament can pass virtually any legislation that the party leadership desires. Furthermore, Canada has tighter party control over Members of Parliament than found even in the United Kingdom. Canadian MP's are expected to toe the line; independence is severely punished.¹

Thus, control of the Canadian political parties is traditionally tightly controlled by the party leader and his closest advisors. Majority control of Parliament, as seen from an American perspective, combines the Executive and Legislative branches of

government, and drastically simplifies the problem of passing controversial national legislation. Introducing universal firearms registration was indeed controversial, but it was merely one of a series of controversial laws passed during the past twenty years. For example, previous Liberal governments have introduced the metric system and bilingualism, abolished capital punishment, and introduced other controversial firearm laws; and former Conservative governments negotiated the “free trade agreement” with the United States and imposed the Goods and Services Tax. None of these positions was initially popular, but some gained support with the passage of time (Gallup 1975 - 1997).

The Firearms Act was rushed through Parliament by a determined Liberal leadership. The rush resulted in a very bitter debate in parliament prior to passage. When the House of Commons voted on C-68 in 1995, the Liberal Party was opposed by three of the four opposition parties [Reform, the Progressive Conservatives, and the New Democrats].² The Liberal Party also had to subdue a revolt within its own ranks over the bill. Before the vote, many Liberal MP’s had signaled their dissatisfaction with the bill, but in the end, party discipline held defections down to a minimum.

This scene was repeated in the Senate, where the issue again split both the Liberal and Conservative ranks. The Conservatives failed in their attempt to build a coalition to amend the bill, due to last-minute defections from their ranks. During the parliamentary hearings, four provincial governments testified against the bill prior to passage.³ After the bill passed, these same four provinces challenged the constitutionality of firearms registration in the Court of Appeal of Alberta. The court’s decision is still awaited.⁴

One of the important institutional differences to note between the United States and Canada is that the Canadian Constitution places the primary responsibility for drafting criminal law with the federal government rather than with the Canadian provinces. This is in direct contrast with the United States, where individual

states have this power. Such centralization vastly simplifies the problem of passing national firearms legislation.

Another important difference is that special interest groups work more closely with government in Canada and many even receive a large portion of their operating income from government (Pross 1992). The Canadian government tends to rely upon bureaucratic consultation with certain interest groups. The groups with the best access to government are typically “institutional” groups rather than “issue-oriented” groups (Pross 1975: 10-12). Some authors worry that this is “dangerous to the spirit of liberal democracy” (Prycz 1985: 370).

With respect to the issue of gun control, most of the interest groups that have traditionally opposed additional firearms legislation have been ad hoc, poorly organized, poorly financed, and tended to be somewhat evanescent (Friedland 1984: 75-85; Kopel 1992: 165-167). This contrasted with the situation on the side supporting additional legislation, where they consisted of “institutional” groups, such as the Canadian Bar Association and the Canadian Association of Chiefs of Police.

In addition, the Canadian Justice Department has worked quite closely with selected “issue oriented” pro-control groups. For example, a representative for the Coalition for Gun Control appeared at the side of the Justice Minister at public meetings during the period Bill C-68 was being debated in Parliament. Afterwards, the same representative was invited to appear at international meetings discussing gun control as “independent” spokespersons (Pankiw 1998).

WHY DID THE LIBERALS INTRODUCE C-68?

Three alternatives are the most important to consider: First, the legislation was a policy response to perceived social problems. Second, the Liberals were reacting to a strong public demand. And third, that the bill was introduced primarily for partisan strategic reasons. I will argue that the latter possibility is

the most likely reason that the Liberal government has been so insistent on firearms registration

The first alternative to be discussed is the government's claim that the bill was introduced as a policy response. This is unlikely for several reasons, even though this is precisely what the government claims. The Justice Minister, Allan Rock, who introduced Bill C-68 and who shepherded through the Parliament argued repeatedly that the primary reason for stricter gun control was that Canadians "... do not want to live in a country in which people feel they want or need to possess a firearm for protection. That is the first principle we take as a guiding principle for the preparation of legislation in terms of the regulation of firearms" (Hansard 1995, p 9706). Rock also stressed the symbolic side of Canadian gun control. Bill C-68 symbolized a 'kinder, gentler society' that "... sets us apart [from the United States]" and will prevent "... Canada's streets from deteriorating into American-style war zones where guns are the norm rather than the exception" (Vienneau 1995: A1).

The Liberals first proposed their new firearms legislation—including universal firearms registration—in 1993 just two years after the previous Progressive Conservative government had introduced sweeping firearms legislation [Bill C-17].⁵ The implementation of Bill C-17 had just begun in 1993 and was not completely in force until late in 1994. Canada's Auditor General was critical of the government for introducing additional firearm legislation without having conducted an evaluation of the previous legislation (Auditor General, 1994). Moreover, Bill C-17 was the first major overhaul of the firearms legislation since 1977 and it had been drafted to address the perceived deficiencies with the existing firearms legislation.⁶ What would later become the central feature of Bill C-68, universal firearms registration, had not been publicly demanded by any of the key institutional actors. During the debate on C-17, the Chiefs of Police, the Chair of the Justice Committee in the House of Commons, and the Justice Minister herself, had all testified that they did not need or want

firearms registration.⁷ In fact, the Chiefs of Police even testified that it would not achieve anything worthwhile (Hansard 1991).

One of the arguments made in 1991 by the Chiefs of Police was that many firearms owners would not register their firearms. This statement was empirically supported in a later survey, where nearly thirty percent of firearms owners stated they would not register their firearms (Mauser and Buckner 1997). This refusal rate is consistent with the experience in other Commonwealth countries (Kopel 1992). Opposition of this magnitude suggests that registration violates the timeless principles of policing, developed by Sir Robert Peel in 1822, that were based upon the recognition that the police must gain the cooperation of the public in order to be effective.⁸

However, the best argument that the firearms bill was motivated by policy may be that the government was more concerned about civil unrest than about criminal violence.⁹ If so, these concerns were downplayed during the parliamentary debate over C-68. Simmering just under the surface of Canadian politics are the tensions due to unresolved disputes over native land claims and the demands of Québec separatists. These disputes both have long histories, and they have the potential to erupt into violence. In 1990, a conflict between the Sûreté du Québec (the Québec provincial police) and the Mohawk Warriors at Oka resulted in the death of one police officer and a two month siege of the reserve (Wright 1992).

During the debate on Bill C-68, Allan Rock stated that, a “national registry of all gun owners and firearms will help police track paramilitary groups in Canada,” and that firearm registration, “... among other things would tell you if someone is stockpiling firearms,” (Durkan 25 April 1995). At the time, Opposition MP’s accused Rock of “trying to cash in” on the bombing at Oklahoma City that had been (falsely) linked to “militia groups,” but the government’s real concerns may have much closer to home (Durkan 26 April 1995). On 30 October 1995, while Bill C-68 was being debated in the Senate, Québec held a referendum on separating from Canada. It was a

squeaker. Barely 51% of *Québec* voters cast their ballots in support of Canada. While the majority of francophone Québécois supported a sovereign Québec, non-francophones rejected independence. Aboriginal communities in Québec even held their own referenda, and stated that they intended to remain a part of Canada, “by whatever means necessary,” and to take the northern third of Québec with them (Stewart and Contenta 1995: A1; Came 1995). It would not be surprising then that the government feared violence should Québec unilaterally declare its independence (Stewart and Contenta 1995: A1, A11).

The second alternative is that the Liberals were responding to a strong public demand. This does not appear likely either. Despite media polls showing public support for additional gun laws, there was no significant media pressure on the government urging tighter gun laws. Not only had there been no firearms tragedies since Marc Lépine shot fourteen female students to death at the *École Polytechnique* in 1989, but opinion surveys showed that the public was not particularly concerned about crime or firearm laws in the early 1990’s (See Tables 1 - 3). Even Canadian feminists, who were among the groups who had pushed for Bill C-17, and who usually are among the strongest supporters of any additional legislation, were relatively quiet at the time. There appeared to be a general satisfaction with the previous firearms legislation among most pro-control groups.

Table 1. Perceptions of Importance of Problems Facing Canada

Q1. “In your opinion, what is the most important problem facing Canada today?”

| Category | Number | Percent |
|---------------------------------|--------|---------|
| The deficit/government spending | 460 | 31% |
| Unemployment/job creation | 305 | 20 |
| The recession | 18 | 1 |
| The economy | 225 | 15 |
| Crime/violence | 46 | 3 |

| | | |
|--------------------|-------|------|
| The environment | 14 | 1 |
| Education/training | 10 | 1 |
| Other | 359 | 24 |
| Don't know | 6 | 4 |
| Total responses | 1,505 | 100% |

Source: Mauser and Buckner 1997.

Surveys showed that the public believed that violent crime was increasing, but polls also showed that the public did not view gun control as a solution to violent crime. Table 2 shows that 80% of the Canadian public who had an opinion believed that violent crime was increasing, while only 20% thought it was staying the same or decreasing. What public pressure there was lay in a popular demand for stricter sentences for violent criminals, and other Draconian changes to the justice system, including capital punishment.

Table 2. Canadian Perceptions of Violent Crime

Q2. “Would you say that violent crime has increased, decreased or stayed the same in Canada over the past ten years?”

| Answer | Number | Percent |
|------------------------|--------|---------|
| Increased a great deal | 680 | 45% |
| Increased somewhat | 531 | 35 |
| Stayed the same | 193 | 13 |
| Decreased somewhat | 55 | 4 |
| Decreased a great deal | 1 | 0 |
| Don't know | 45 | 3 |
| Total responses | 1,505 | 100% |

Source: Mauser and Buckner 1997.

Table 3 shows that while 23% wanted changes to the justice system, including increased prison sentences and even a return of the death penalty, only 4% volunteered that they wanted stricter

gun laws or wanted to ban types of firearms in order to reduce violent crime. Despite the strong public support for capital punishment, the government made no effort to bring back the noose.

Table 3. Popular Suggestions For Dealing With Violent Crime

Q3. “What do you think should be done about reducing violent crime?” [categorized responses to an open ended question]

| Response Category | Frequency | Percent of Responses |
|--|-----------|----------------------|
| Justice [including 158 - “bring back the death penalty.”] | 578 | 38% |
| Education/Television [including 81 - “reduce violence on TV.”] | 231 | 15 |
| Gun Control | 55 | 4 |
| Responses in two or more of the above categories | 59 | 4 |
| Other Responses/Don't Know | 582 | 39% |
| Total | 1,505 | 100% |

Source: Mauser and Buckner (1997)

It is curious that, even though the government claimed that the new gun bill had been demanded by the public, there were no public rallies to support Bill C-68. The government staged several media events when the bill was before Parliament, but there were no public rallies in support of tighter gun laws. On the other hand, there were dozens of rallies to oppose Bill C-68—drawing between ten and fifty thousand people each—held in almost all of the provinces. Political support for the bill came primarily from groups funded by government—the Chiefs of Police, some public health groups,¹⁰ and the Coalition for Gun Control.¹¹ The

opposition was much more diverse and drew from grassroots organizations, such as recreational firearms groups and aboriginal groups.

Finally, let us turn to the third alternative, that the bill was motivated primarily by partisan considerations and introduced in order to gain a strategic advantage. Despite the lack of enthusiastic public support, there were solid strategic reasons for introducing additional gun control legislation. The Liberals are pragmatic enough to appropriate issue positions from the opposition if they believe that adopting [or even appearing to adopt] such positions will keep them in office. The Liberal Party of Canada has earned the sobriquet of the “only natural governing party of Canada.”

Throughout the nineties, the Liberals have been under pressure from both the Reform Party and the Progressive Conservatives. Reform was attracting political support from voters to the right of the Liberal Party because of its positions on both the economy and criminal justice. Reform stressed the importance of balancing the budget as well as “getting tougher” on violent criminals. These policies were attractive to many voters, particularly in Western Canada. In response, the Liberal Finance Minister, Paul Martin, was dragging the Liberal policy to the right on budget cutting and taxation. This did not sit well with traditional Liberal voters.

As strange as it may seem, the Progressive Conservatives were threatening the Liberals from their left. Under their youthful leader, Jean Charest, the Progressive Conservatives were attracting support from young urban voters in Central and Eastern Canada. Not only was Charest a “red Tory,” but Charest’s youthfulness threatened the much older Liberal leader, Jean Chretien.¹² One of the reasons the Liberals thought was the PC’s had made inroads in urban Canada was their reputation as having passed strict new gun laws [Kim Campbell’s Bill C-17]. Given the greater political importance of Central Canada (Ontario and Québec), the Liberals decided the PC’s constituted the more dangerous threat. Realistically, they could afford to lose the

western vote, but they could not lose the urban vote. The young urban voter was, and is, at the heart of the Liberal constituency. What better way to counter any perceived “drift to the right” on economic policy than by taking a strong position on a symbolic issue, such as gun control, that appealed to their youthful urban supporters? Moreover, there was considerable support for universal firearm registration within the federal Justice Department, since it would create a large number of jobs.¹³ Thus, the Liberals could simultaneously pose as fiscal conservatives and act to expand the Ottawa bureaucracy.

Perhaps more importantly, Allan Rock, the Justice Minister was looking for an issue to ignite his drive to succeed Jean Chretien (Fife 1993, 1997; Fisher 1994). The Justice portfolio has traditionally been prized as a stepping stone that can lead directly to the Prime Minister’s office (Crosbie 1997: 269). It could not have escaped Rock’s attention that gun control appealed more strongly to the heart of the Liberal support in urban Canada than did fiscal conservatism.

The third alternative, that the introduction of the bill was primarily motivated by partisan strategy, appears to be the most likely. Allan Rock and the Liberals introduced universal firearms registration principally to gain strategic political advantage for themselves and for their party. Despite this, it was useful to claim that this policy was introduced based upon a solid policy analysis and was very popular. The Liberals used “political marketing” techniques in an effort to convince the Canadian public that this policy was both popular and endorsed by the “experts.” The nature of political marketing has been outlined earlier [Mauser 1983; Margolis and Mauser 1989a; Page and Shapiro 1987].

Some of the unsavory marketing techniques used by the Liberal government to simulate popular support for the policy included publicizing misleading polls, staging media events, and promoting biased experts. Throughout the debate on Bill C-68, the media and the Liberals referred repeatedly to only one superficial survey question, conducted for the Coalition for Gun Control, as proof of popular support for firearm registration (Reid

1993).¹⁴ The Liberals turned local visits of the Attorney General around the country into media events to gain support for Bill C-68. Ironically, these visits were billed as attempts to “consult” with various groups, but in reality they were carefully timed to correspond with public rallies against Bill C-68 in order to upstage the opponents of firearm registration. In Parliament, the federal government’s argument relied upon biased and unscientific experts (for example, Thomas Gabor, Martin Killias).¹⁵ The Justice Department justified the need to register rifles and shotguns—“field and stream” guns—by releasing its own studies that claimed that such guns constituted about half of the guns “involved” in criminal violence (Canadian Firearms Centre, July 1997).¹⁶

Table 4. Attitude Toward The Right to Own a Firearm

Q: “Do you agree or disagree that Canadian Citizens should have the right to own a firearm?”

| Responses | Atlantic | Québec | Ontario | Prairies | BC | Canada |
|-------------------|----------|--------|---------|----------|------|--------|
| Agree Strongly | 31% | 11% | 34% | 41% | 33% | 29% |
| Agree Somewhat | 40 | 25 | 28 | 33 | 29 | 29 |
| Disagree Somewhat | 13 | 22 | 11 | 13 | 10 | 14 |
| Disagree Strongly | 16 | 42 | 27 | 13 | 28 | 28 |
| (N= 1,505) | 100% | 100% | 100% | 100% | 100% | 100% |

Note: percentages may not total 100% due to rounding.

Note: only those voters expressing an opinion are included.

Before it is possible to determine the role firearm registration played in the 1997 election, it is necessary to examine Canadian opinions about firearms and gun control. The real battleground is over basic values. The most important value in determining a person’s support or opposition to firearm registration is the belief

in the right to own a firearm. Table 4 shows that Canadians are profoundly divided over whether or not there is a “right to own a firearm.” A majority (58%) of those who have an opinion think that Canadians should have the right to own a firearm, while a minority (42%) disagree, often strongly. This division is reflected for the most part all across the country, with the most rural provinces (the Prairies and Atlantic Canada) showing the most support, while the most urban provinces (Québec and Ontario) disagreeing the most strongly. It is important to point out that Canadian firearm owners are not insisting upon the “right to keep and bear arms,” as are their American cousins, but they are merely asking for the privilege to continue to own and use firearms within a framework of laws.

Table 5. Perceived Effectiveness of Further Firearms Regulations.

Q10. “If there were stricter regulations for authorized firearms owners, would you say that the violent crime rate would increase, decrease, or stay the same?”

| Responses | Atlantic | Québec | Ontario | Prairies | BC | Canada |
|---------------|----------|--------|---------|----------|------|--------|
| Effective | 44% | 55% | 38% | 29% | 41% | 42% |
| Not Effective | 56 | 45 | 62 | 71 | 59 | 58 |
| (N= 1,505) | 100% | 100% | 100% | 100% | 100% | 100% |

NB. “Increase,” and “stay the same” have been combined as “not effective.”

Canadians are also profoundly divided over their beliefs about the effectiveness of further gun legislation. First, we asked how they believed that stricter regulations on firearms owners would influence the violent crime rate. To simplify the presentation, the answers to this question have been condensed into two categories, “effective” and “ineffective,” and “don’t knows” have been dropped.¹⁷ Over half (58%) of the respondents who had an opinion, said that stricter regulations would be ineffective

in lowering the violent crime rate. Only in Québec did a majority (55%) think that stricter regulations would be effective in reducing criminal violence. (See Table 5). Prairie respondents were the most likely (71%) to think that stricter regulations would be ineffective.

Table 6. Opinion Toward Universal Firearms Registration.

Q: “Do you agree or disagree that all firearms should be registered?”

| Responses | Atlantic | Québec | Ontario | Prairies | BC | Canada |
|-------------|----------|--------|---------|----------|------|--------|
| Agree | 84% | 95% | 86% | 73% | 82% | 84% |
| Disagree/DK | 16 | 5 | 14 | 27 | 18 | 16 |
| (N = 1,505) | 100% | 100% | 100% | 100% | 100% | 100% |

Second, we asked Canadians directly about universal firearm registration. Our results mirrored those of other polls that have asked this same question. (See Table 6). We found 86% of respondents supported registering firearms, as did a survey by Angus Reid conducted for the Coalition for Gun Control (Reid 1993).

In public opinion research, a distinction must be made between mass opinion and public judgment. Many respondents will readily volunteer opinions without thinking very deeply about the question; for example, it is easy to agree that poverty should be reduced. But if they are asked to take money out of their own paycheck to do it, many quickly realize that public issues involve making difficult tradeoffs.

This is also true with universal firearm registration. Registration sounds like a good idea so long as it does not involve any cost or inconvenience. However, opinion shifts on firearm registration when the public realizes that it will cost a fair amount of money and divert police officers resources to shuffling paperwork (Wade and Tennuci 1994).

Table 7. Public Judgment of Universal Firearms Registration (high cost).

Q: “If it would cost \$500 million, would you still think that all firearms should be registered?” [Only asked of those Rs who answered they “agree strongly or somewhat.”]

| Responses | Atlantic | Québec | Ontario | Prairies | BC | Canada |
|-------------|----------|--------|---------|----------|------|--------|
| Agree | 45% | 57% | 52% | 38% | 50% | 50% |
| Disagree/DK | 55 | 43 | 48 | 62 | 50 | 50 |
| (N = 1,505) | 100% | 100% | 100% | 100% | 100% | 100% |

Table 8. Public Judgment of Universal Firearms Registration (fewer constables)

Q: “If registration would force the police to pull constables off the street to deal with the paperwork involved, would you still [agree strongly or somewhat] that all firearms should be registered?” [Only asked of those Rs who answered they “agree strongly or somewhat.”]

| Responses | Atlantic | Québec | Ontario | Prairies | BC | Canada |
|-------------|----------|--------|---------|----------|------|--------|
| Agree | 42% | 52% | 42% | 30% | 43% | 43% |
| Disagree/DK | 58 | 48 | 58 | 70 | 57 | 57 |
| (N = 1,505) | 100% | 100% | 100% | 100% | 100% | 100% |

Table 7 shows that support for firearm registration drops over thirty points (to 50%), when respondents are told that it might cost \$500 million to register all firearms in Canada, and it drops to only 43% when the trade-off is a reduction in the number of constables on the street. (See Table 8). These are not merely hypothetical trade-offs. The most recent cost of registration has been estimated as being \$480 million for the first four years. While Bill C-68 was before Parliament, the true cost

had been estimated as falling between \$500 million and \$1.5 billion (Mauser 1995 a, b). Fears of reduced police manpower appear to have been realized, even though few constables have been directly reassigned to shuffling paperwork. The RCMP budget has been virtually frozen since 1993, while the budget for firearms registration has continued to grow. At the same time the Canadian Firearms Centre has swollen to 126 employees, the total number of police officers has declined (Breitkreuz 1998). Canada now has the lowest number of police officers per capita since 1972 (Statistics Canada, 1996).

How successful was the Liberals' strategy? If universal firearms registration was introduced primarily to improve the electoral fortunes of the federal Liberal Party, then the test lies in analyzing the results of the 1997 federal elections. At first glance, it is easy to argue that the promotion of tighter gun laws helped the Liberals since they did after all win re-election in 1997, even though they did so by the smallest majority of any party this century.¹⁸ Moreover, the issue of firearms registration did help the Liberals by splitting the opposition parties. Reform strongly opposed firearm registration, the BQ supported it, while both the PC the NDP were badly divided over gun registration and so neither party took a firm position on the issue during the 1997 election campaign. The leaders of both the PC and the NDP took public stands on registration that differed from their party's official platform. Although the Liberals emerged from the election with fewer seats than before, the Liberals now face four opposition parties in the House of Commons that are badly divided. Despite their tenuous victory, the Liberals should be able to hold onto power if they can keep their own MPs in line.

A closer analysis suggests that the issue of firearms registration hurt the Liberals more than it helped them. The Liberal victory in 1997 badly divided the country. The Liberals drew the vast bulk of their seats (101 out of 155) from Ontario, without even winning a majority of the vote in that province. Nor could the Liberals win a majority of seats in any other region: they won only 13 out of 32 seats in the Maritimes, 26 out of 75 in

Québec, and a dismal 15 out of the 88 seats in the West. The Reform Party has emerged over the past decade to become the strongest opponent to the Liberals. In the 1997 elections, the Reform Party became Her Majesty's Official Opposition. This success has been driven in part by the strong public anger against firearm registration.

Despite this narrow, divisive win, firearm registration might still have contributed to the Liberals' success. The key is to find evidence that shows that the issue helped [or hurt] the Liberals win votes. The data available is scanty, but what evidence we have supports the contrary, that opposition to firearm registration helped the Reform Party, but support for registration did not win votes the Liberals.

To assess the impact of registration in the election, it is necessary to look at each region separately. In BC and the Prairie provinces, the Reform Party and pro-firearm rights groups succeeded in making Bill C-68 an issue. In BC, for example, pro-firearms groups spent hundreds of thousands of dollars on radio and print ads during the election campaign to attack the Liberals for their stand on firearm registration. In BC and in the Prairie provinces, Reform candidates increased their share of the vote, while the Liberals were reduced to winning a few seats in the downtown core of the bigger cities.

In Ontario, with fully one-third of the seats in Parliament, Bill C-68 never became an important issue. While surveys showed that support for firearm registration remained strong in Ontario, the issue was dominated by other issues, such as concern about the deficit and the high levels of unemployment. Moreover, public support for registration was divided among Liberals, PCs, and the NDP. Reform may have performed poorly in Ontario, but the Liberals did not gain votes in Ontario from bringing in firearm registration due to the split among the pro-control vote.

East of Ontario, Reform won minimal support. In Québec, Reform's message of "new federalism," fell flat. Reform has capitalized upon popular resentment against the status quo, but Québec has too much to gain by maintaining the status quo. The

issue of firearm registration was dominated by issues of national unity, and so did not become an important issue. Surveys showed that support for registration was higher in Québec than anywhere in Canada, but the Liberals could not capitalize on this sentiment because all parties campaigned in favor of stricter firearm legislation.

Reform's fiscal conservative message fell on deaf ears in the Maritimes due to their economy's traditional dependency upon federal largess. Even though opposition to firearm registration was strong, Bill C-68 did not become an important issue because economic concerns dominated the election. While opposition to the Liberals was strong, it was divided between the *PCs* and the NDP.

In conclusion, popular support for firearm registration did not materialize in the 1997 federal elections, while opposition to firearms registration was one of the factors that propelled the Reform Party to the status of Official Opposition. Support for firearm registration did not appear to emerge as an important issue in Central or Eastern Canada. Not only was firearm registration dominated by other concerns outside of Western Canada, but support for stricter gun laws was divided among several parties. Thus, no party managed to profit from their support for additional firearm controls. On the other hand, opposition to Bill C-68 was one of the important factors in the Reform Party winning many of its seats in Western Canada.

Conclusions

The Canadian decision to bring in universal firearms registration (Bill C-68) in 1995 has proven to be extremely divisive. The principal features of Bill C-68 did not have strong popular support. Importantly, support was lacking for firearm registration. The firearm legislation backfired on the Liberals in that it did not prove to be helpful in winning votes in the 1997 federal elections. Worse, from the Liberal point of view, this

legislation was the one of the most important issues propelling the Reform Party to the status of Her Majesty's Official Opposition.

I have tried to show in this article that the introduction of this Draconian firearm legislation was the result of political marketing, not sound policy analysis. Nor did the driving force for more gun legislation originate in public pressure for additional controls. It was driven instead by the government's partisan strategy; support was limited to the downtown core areas of most provinces. The results of the 1997 Canadian federal elections are consistent with the argument that pro-control opinion is more weakly held than anti-control opinion. Kleck has argued, and I think persuasively, that concrete and immediate personal costs drive behavior more powerfully than do abstract shared benefits that may or may not materialize (Kleck 1991).

Gun control is an excellent example of the pitfalls of governing by poll. A majority is always in favor of "more" gun control, since few people are familiar with the current laws, and many are concerned about violence and firearm misuse. Few will feel thankful towards the government when new laws are introduced and prove to have minimal effect on crime, violence, or perhaps more importantly, on media reports of crime. Many voters will remain ignorant of the "new" laws, even though they will still support "more" gun control. Thus, there is little reason for them to support the party that brought in the new gun control laws.

On the other hand, the gun owners, who bear the burden of complying with the new laws, will view the laws as a constant irritant and a reminder that they have been singled out for discriminatory treatment. Consequently, gun owners are motivated to vote against the government. In the 1997 Canadian elections, gun owners, even though a minority, played a decisive role in the success of the Reform Party. Even though the Liberals won, they will face another election before firearms registration becomes mandatory.

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ENDNOTES

1 Both the Liberals and the Conservatives when they were in government have expelled members who did not toe the party line. Members who vote against the government on any bill, or who even publicly disagree with the governing party, are excluded from committee assignments or they may even be expelled from the party.

2 Perhaps surprisingly, the only opposition party to support Bill C-68 was the Bloc Québécois. The Bloc is an avowedly separatist party and is very tightly controlled by its leadership. Despite strict party discipline, the BQ whip reportedly had to physically restrain some of its rural members who tried to vote against the bill. Even though polls show that Québec has the highest percentage of support for C-68, there was considerable opposition among rural Québécois.

3 These provinces were Alberta, Saskatchewan, Manitoba, and Ontario. The provincial government of British Columbia officially straddled the fence. It neither supported nor opposed the legislation or the legal challenge.

4 The court originally was expected to have announced its decision in December of 1997; no decision has been announced as of the end of June 1998.

5 The Liberals swept into power in 1993 primarily because of widespread public anger at the former PC government of Prime Minister Brian Mulroney, who stepped down immediately before the elections, handing over power to the former Attorney General Kim Campbell.

6 Political as well as scholarly opinion is that the previous firearm legislation had been ineffective in reducing criminal violence (Mauser and Holmes, 1992).

7 Interestingly, the history of Canada's previous efforts to introduce universal firearm registration did not become an issue during this debate. In 1920 and again in 1940, Canada tried unsuccessfully to register all firearms. Both times the attempts failed due to widespread non-compliance (Smithies 1998).

8 Peel's principle #3 of 9 states, "To recognize always that to secure and maintain the respect and approval of the public means also the securing of willing cooperation of the public in the task of securing observance of laws." (Rieth, 1948). And Principle #4: "To recognize always that the extent to which the cooperation of the public can be secured diminishes, proportionately, the necessity of the use of physical force and compulsion for achieving police objectives."

9 Both of the times that firearm registration has been introduced in Canada, according to recently available historical records, it may have been introduced because of fears of social unrest (Smithies 1998).

10 The Canadian medical community split over C-68. The Canadian Medical Association, the largest medical group, declined to take a position, but a few smaller groups strongly supported C-68 (e.g., Canadian Association of Emergency Physicians).

11 The Coalition for Gun Control was directly supported by several municipalities, including both Toronto and Montreal, a few police organizations, e.g., the Ottawa Police Department, and it is alleged that the CGC was also covertly funded by the Canadian Department of Justice. Not only did the CGC appear to always manage to have a speaker by the side of the Attorney General during his cross-country trips to "consult" with the public when the bill was before Parliament,

but their President, Wendy Cukier, more recently has attended United Nations' workshops on international firearm regulation chaired by the Canadian officials from the Department of Justice (Pankiw, January 19, 1998).

12 Illustrative of just loosely party labels are linked to ideology, early in 1998, Charest resigned as leader of the federal PCs to become the Leader of the Québec Liberals.

13 At the same time that over 44,000 public sector jobs were lost in Ottawa, the number of employees in the Canadian Justice Department actually increased (Government of Canada, 1993 budget).

14 The publication of biased polls in nothing new for the media (Mauser and Kopel, 1992).

15 For a thorough description of the problems with the "pseudo-research" of these authors see Gary Kleck (1997).

16 The RCMP Commissioner J.P.R. Murray objected to this misuse of their statistics in an letter to the federal Justice Minister that was eventually obtained through a Freedom of Information Request and released to the Canadian public by Reform MP Garry Breitkreuz (Worthington 1998).

17 If the respondent said he thought that stricter regulations would cause the crime rate to "decrease somewhat" or "decrease a great deal," his response was categorized as indicating he thought that the gun regulations would be "effective." If he said the crime rate would "increase somewhat," "increase a great deal," or "stay the same," his response was categorized as indicating he thought that the gun regulations would be "ineffective."

18 The Liberals won only 155 seats out of a possible 301, giving them a majority of only three seats when the Speaker of the House is deducted. (The Speaker is traditionally chosen from the ranks of the majority party).