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KEEPING GUNS OUT OF THE "WRONG" HANDS: THE BRADY LAW AND THE LIMITS OF REGULATION

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Keeping firearms out of the hands of dangerous and irresponsible persons is one of, if not *the* primary goal of United States gun control policy.¹ The logic of restricting gun ownership to responsible, law-abiding citizens is immediately apparent and relatively uncontroversial, even to the National Rifle Association.² It reflects a widely-shared belief that members of certain social categories pose an unacceptably high risk of misusing firearms.³ As in the case of denying a driver's license to people who are legally blind, there is a strong consensus that people who have demonstrated certain kinds of irresponsible and unstable behavior should not possess weapons which are capable of injuring or killing the possessor or others.⁴ Federal gun

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¹ Gun Control Act of 1968, 18 U.S.C. §§ 921-922 (1994).

² The NRA Member Guide states, "[a]ny type of licensing or computer registration scheme aimed at *law-abiding citizens* is a direct violation of Second Amendment rights, serves no law enforcement purposes, and ultimately could result in the prohibition and/or confiscation of legally owned firearms." ERIK LARSON, *LETHAL PASSAGE* 185 (1994) (emphasis added).

³ These assumptions can be challenged as over-inclusive. Is it really so obvious that a person who was once hospitalized for depression or a person who renounced U.S. citizenship could not be a responsible firearms owner? For that matter, does a forgery conviction or even an assault conviction when John Doe was 20 years old really bear upon his reliability as a gun owner 20 years later? Congress, however, created a mechanism by which non-violent convicted felons can petition the Bureau of Alcohol, Tobacco & Firearms (BATF) for a waiver giving them the right to purchase and possess a firearm. 18 U.S.C. § 925(c) (1994). Furthermore, these assumptions are also under-inclusive. Simply because a person has never been *convicted* of a felony, hospitalized for a mental illness, or otherwise recorded as irresponsible hardly guarantees his or her reliability and maturity with respect to gun ownership.

⁴ 18 U.S.C. § 922(b) & (d)(1)-(8) (1994). A representative sample of state statutes with similar prohibitions includes: ALASKA STAT. § 11.61.220 (Supp. 1994); ARIZ. REV. STAT. ANN. § 13-3112 (Supp. 1994); CONN. GEN. STAT. § 29-30, 29-32 (Supp. 1995); FLA. STAT.

control law attempts to strike a balance between permitting law-abiding citizens to obtain firearms with relative ease and preventing certain categories of presumptively irresponsible people from purchasing and possessing firearms. Those that are conclusively presumed irresponsible include ex-felons, former mental patients, drug addicts, juveniles, and illegal aliens.⁵

Both federal substantive criminal law and federal administrative law contribute to the regulatory effort. The former makes it a crime for ex-felons and other ineligible persons to possess a firearm. The federal "felon-in-possession" law makes it a crime for any person convicted of a state or federal felony to possess a firearm;⁶ the same prohibition also applies to drug users, former mental patients, and illegal aliens.⁷ Such criminal laws, in theory, work *ex-ante* by deterring ex-felons and other ineligible persons from purchasing or even possessing a firearm and *ex-post* by confiscating their weapons and punishing them for unlawful possession.⁸

Federal regulatory law, especially the recently enacted Brady law, seeks to regulate firearms transfers in such a way that ineligible persons will not even be able to obtain a firearm and therefore, will never have an opportunity to violate the criminal law.⁹ Congress established the federal regulatory foundation in the Gun Control Act of 1968,¹⁰ which prohibits the sale of long guns (rifles and shotguns) and handguns to anyone who is: (1) not a resident of the state in which the federal firearms dealer does business;¹¹ or (2) under eighteen years

ANN. § 790.06 (West Supp. 1995); GA. CODE ANN. § 26-2904 (Harrison 1993); IDAHO CODE § 18-3302 (Supp. 1995); MISS. CODE ANN. § 45-09-101 (1993); MONT. CODE ANN. § 45-8-321 (1993); N.J. STAT. ANN. § 2C:39-7 (West Supp. 1995); N.C. GEN. STAT. § 14-404 (1993); OR. REV. STAT. § 166.291 (1993); PA. STAT. ANN. § 6109 (1989); VA. CODE ANN. § 18.2-308 (Michie Supp. 1995); W.VA. CODE § 61-7-4 (1992); WYO. STAT. § 6-8-104 (Supp. 1995).

⁵ There is less consensus on whether firearms should be available as-of-right to all persons who do not fall into the irresponsible categories. In some states and cities, of course, firearms are much more strictly regulated. Not only must a prospective owner not be a member of a disfavored social category, he must convince a law enforcement official that he is a person of good character and has a good reason to possess a firearm. See D.C. CODE ANN. § 6-2313 (1995); N.Y. PENAL LAW § 400.00 (McKinney Supp. 1995); RULES OF THE CITY OF NEW YORK § 5-02 (1991); N.J. STAT. ANN. § 2C:58-3 (Supp. 1995). Some commentators have referred to this kind of gun control regulation as *restrictive licensing*, which is in contrast to *permissive licensing*. See GARY KLECK, POINT BLANK: GUNS AND VIOLENCE IN AMERICA 328-32 (1991).

⁶ 18 U.S.C. § 922(g)(1) (1994).

⁷ *Id.*

⁸ 18 U.S.C. § 924(a)(2) (1994) (providing a fine, up to 10 years in prison, or both); 18 U.S.C. § 3665 (1990) (providing for confiscation of firearms possessed by felons).

⁹ Pub. L. No. 103-159, 107 Stat. 1536 (1993) (codified as 18 U.S.C. § 922(q)-(t) (1994)).

¹⁰ 18 U.S.C. § 922 (1994).

¹¹ § 922(b)(3).

old for long gun purchases and twenty-one years old for handguns.¹² In addition, the Act prohibits the sale of firearms to anyone who is: (1) under indictment for or has been convicted of a "crime punishable by imprisonment for a term exceeding one year";¹³ (2) a fugitive from justice;¹⁴ (3) an illegal narcotics user or addict;¹⁵ and (4) either an adjudicated mental defective or someone who has been committed to a mental institution.¹⁶ The Act also prohibits those listed under § 922(d) from possessing firearms.¹⁷ In 1987, Congress expanded the category of persons ineligible to purchase or possess firearms to include illegal aliens, persons dishonorably discharged from the armed forces, persons who have renounced United States citizenship, and anyone subject to a restraining order for domestic violence, harassment, or stalking.¹⁸ Under this regulatory scheme, a person who seeks to purchase a handgun from a federally licensed dealer must provide the dealer with a written assurance that he or she is not an ineligible purchaser.¹⁹ It is a criminal offense for a dealer to make a sale without such an assurance,²⁰ or to knowingly sell a firearm to an ineligible person.²¹

The Brady Handgun Violence Prevention Act of 1993²² furthers this regulatory goal by prohibiting federal firearms licensees (FFLs)²³ from selling handguns to persons who fall into a few categories conclusively presumed to be dangerous and/or irresponsible. These categories include ex-felons, adjudicated mental defectives, former mental

¹² § 922(b)(1).

¹³ § 922(d)(1).

¹⁴ § 922(d)(2). "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." 18 U.S.C. § 921(a)(15) (1994).

¹⁵ § 922(d)(3).

¹⁶ § 922(d)(4).

¹⁷ § 922(g)(1)-(4).

¹⁸ § 922(d)(5)-(8), (g)(5)-(8) (1994). 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.

¹⁹ § 922(s)(1)(A)(i)(a), (3).

²⁰ § 924(a)(5) (providing fine, up to one year imprisonment, or both for knowing failure to comply).

²¹ § 924(a)(2) (providing fine, up to 10 years imprisonment, or both for knowing sale to ineligible person).

²² Pub. L. No. 103-159, 107 Stat. 1536 (1993) (codified as 18 U.S.C. § 922 (q)-(t) (1994)).

²³ Federal law prohibits any unlicensed person from engaging in the business of selling firearms. 18 U.S.C. § 923 (a)(1)-(2) (1994). Individual gun owners who want to sell a few of their guns need not obtain a license, but they may not sell to an ineligible person. Section 922(d) provides that "it shall be unlawful for *any person* to sell . . . any firearm . . . to any person knowing or having reasonable cause to believe that such person" belongs to one of the prohibited classes. § 922(d) (emphasis added). Violations of § 922(d) are subject to a fine, up to 10 years imprisonment, or both. 18 U.S.C. § 924(a)(2).

patients, illegal drug users and addicts, juveniles, persons dishonorably discharged from the armed forces, persons who renounced U.S. citizenship, and illegal aliens.²⁴ Brady requires that firearms dealers hold off a proposed handgun sale for up to five business days in order for a background check to be carried out by the chief law enforcement officer (CLEO) in the jurisdiction where the dealer is located. The purchase and sale may only be consummated if the CLEO notifies the dealer that the would-be purchaser is not ineligible or if five business days pass without a response from the CLEO. It is important to stress that Brady's waiting period and background check provisions apply only to the purchase of handguns. Brady does not apply to rifles and shotguns.²⁵

An article in this Symposium explicitly endorses and recommends reinforcements and extensions of this combined criminal and administrative regulatory system for keeping firearms out of the hands of irresponsible persons.²⁶ Philip J. Cook, Stephanie Molliconi and Thomas B. Cole, in *Regulating Gun Markets*, argue that the gun control legislation applicable to purchases through FFLs should be extended to the secondary gun market.²⁷ While such a proposal may have surface appeal, when one examines the logic, practicality, and effectiveness of keeping firearms out of the "wrong hands" through regulation of the primary market, much less the secondary market, it is hard to be optimistic. This Article questions whether the federal regulatory strategy for regulating firearms purchases or possession is likely to be successful. In so doing, it provides a case study of how regulatory goals far exceed regulatory capacity and thus generate inexorable pressure for more regulation. Section I illuminates the gaps and unenforceability of the regulatory regime governing the purchase and sale of handguns. Section II illuminates the practical difficulties that would be involved in attempting to expand the federal regulatory apparatus over handguns to the secondary market.

²⁴ 18 U.S.C. § 922(b)(1), (d)(1)-(8) (1988).

²⁵ Francisco Martin Duran, who, in October 1994, sprayed the White House with bullets from an SKS semi-automatic rifle, initially attempted to purchase a handgun but was rejected based on the criminal records check required by Brady. Duran was able to legally purchase a rifle (from the same FFL that rejected his handgun purchase application), because Brady does not apply to long gun sales. Jim Kirksey, *Duran Bid to Get a Pistol Rejected*, THE DENVER POST, Nov. 10, 1994, at A1.

²⁶ See Philip J. Cook et al., *Regulating Gun Markets*, 86 J. CRIM. L. & CRIMINOLOGY 59, 90-91 (1995) (proposes extending Brady and other federal gun control laws to the secondary market and regulating federal licensing more stringently).

²⁷ As used by Cook et al., the term "secondary market" includes sales, purchases and transfers of firearms by persons other than FFLs. The term "primary market" means sales, purchases and transfers of firearms by FFLs. Cook et al., *supra* note 26, at 68-70.

I. REGULATING THE PRIMARY MARKET IN FIREARMS

A. PASSAGE OF THE BRADY BILL

A few years after John Hinkley's attempted assassination of President Ronald Reagan and Press Secretary James Brady on March 30, 1981, proponents of stricter gun control, led by Handgun Control Inc.,²⁸ began a vigorous lobbying effort for a federal law that would prevent criminals, the mentally disturbed, and other irresponsible or dangerous individuals from obtaining handguns. Gun control advocates proposed a waiting period and a background check to be carried out by the CLEO in the particular FFL's jurisdiction to determine whether a prospective gun purchaser fell into one of the ineligible categories.²⁹ Although it was already a serious felony for an ineligible person to purchase a handgun, supporters of the Brady bill predicted that the bill would save lives by preventing dangerous people from obtaining handguns. This position was seemingly based upon two assumptions: (1) that under the existing regulatory system, ineligible persons were illegally purchasing handguns from FFLs by falsely claiming to be eligible; and (2) that the delay in effectuating the purchase/sale caused by the background check would prevent some misuse of firearms by imposing a "cooling-off period,"³⁰ during which time the would-be purchaser, whether eligible or not, would get his or her murderous impulses under control.³¹ Gun control advocates and

²⁸ Handgun Control, Inc. was founded in the early 1970s. Sarah Brady, James Brady's wife, first became involved with the organization in 1985. OSHA GRAY DAVIDSON, UNDER FIRE 170-75 (1990).

²⁹ H.R. REP. NO. 47, 102d Cong., 1st Sess. 4-5 (1991).

³⁰ During congressional hearings, Congressman Bill Hughes stated:

The records of the courts are peppered with tragedies in which jealousy or arguments of some kind touch off a murderous rage. The enraged person goes to a sporting goods store, buys a handgun, and almost immediately shoots someone. . . . A waiting period . . . certainly would have the effect of reducing the number of cases of handgun violence specifically and the number of crimes of passion homicides generally.

Waiting Period Before the Sale, Delivery or Transfer of a Handgun, 1988: Hearings on H.R. 975 and H.R. 155 Before the House Subcomm. on Crime of the Comm. of the Judiciary, 100th Cong., 1st & 2d Sess. 20 (1988) [hereinafter 1988 House Hearings] (statement of Bill Hughes, Representative from New Jersey).

Senator Howard Metzenbaum echoed these views,

[i]t is often easier in our society to buy a gun than it is to cash a check. . . . A waiting period. . . would help spot criminals and mentally disturbed individuals, and it would provide a cooling off period for that individual who is hot under the collar. . . .

Id. at 25 (statement of the Hon. Howard Metzenbaum, Senator from Ohio).

³¹ This Article does not deal with the effort to impose a cooling-off period as an independent regulatory strategy aimed, not necessarily at keeping handguns out of the wrong hands, but at making an eligible gun purchaser wait some period of time before effectuating a purchase so that, in the event that the purchase was stimulated by a murderous rage, there would be an opportunity to calm down.

Many people do not realize that in the form that Brady ultimately passed, the waiting

some politicians and editorial writers claimed that the Brady bill would "save lives—potentially thousands of lives":³² "[i]f the Brady bill were enacted this afternoon, it could begin saving lives within hours. . . ."³³

Brady was first introduced in the 100th Congress in February 1987 by Representative Edward F. Feighan and Senator Howard Metzenbaum, both Democrats from Ohio,³⁴ but was defeated by a House vote of 228-182.³⁵ In the 101st Congress, the same bill³⁶ died without a floor vote.³⁷ In the 102d Congress,³⁸ the House passed the bill by a vote of 239-186,³⁹ but a Senate filibuster prevented passage.⁴⁰ Finally, on November 25, 1993, after a long and contentious struggle in the 103d Congress, Brady became law.⁴¹

B. THE BRADY REGULATORY MACHINERY

To prevent the sale of handguns to irresponsible persons, Brady requires FFLs to obtain from would-be handgun purchasers photo identification and a written statement.⁴² If the FFL is satisfied that the

period, *up to five days*, is the period of time it takes the CLEO to approve the sale. Moreover, the law provides that by 1998, a nationwide instant background check system will be established that will eliminate any waiting at all. In states with an on-line criminal records system, a handgun purchase may be immediately approved.

³² 137 CONG. REC. H 2834 (daily ed. May 8, 1991) (statement of Rep. Sangmeister). *See also, Brady Bill Will Save Many Lives*, USA TODAY, May 7, 1991, at 10A ("If Congress can muster a little courage and common sense, it can save hundreds of lives that otherwise will be lost to gunfire.")

³³ 137 CONG. REC. H 2850 (daily ed. May 8, 1991) (statement of Rep. Annunzio).

³⁴ H.R. 975, 100th Cong., 1st Sess. (1987); S. 466, 100th Cong., 1st Sess. (1987).

³⁵ 134 CONG. REC. H 7654 (daily ed. Sept. 15, 1988).

³⁶ H.R. 467, 101st Cong., 1st Sess. (1989); S. 1236, 101st Cong., 1st Sess. (1989).

³⁷ Richard M. Aborn, *The Battle Over the Brady Bill and the Future of Gun Control Advocacy*, 22 FORDHAM URB. L.J. 417, 420-21 (1995).

³⁸ 1H.R. 7, 102d Cong., 1st Sess. (1991); S. 257, 102d Cong., 1st Sess. (1991).

³⁹ 137 CONG. REC. H2879 (daily ed. May 8, 1991).

⁴⁰ Aborn, *supra* note 37, at 422-24.

⁴¹ The vote in the House was 238-189, and the vote in the Senate was 63-36. 139 Cong. Rec. S17083 (daily ed. Nov. 24, 1993).

⁴² 18 U.S.C. § 922(s)(3) (1994). The statement must contain the would-be purchaser's name, address, and date of birth, as well as an affirmation that the purchaser does not fall into a prohibited category. The prohibited categories include those under indictment for or convicted of a felony, fugitives from justice, illegal drug users or addicts, people who have been committed to a mental institution, illegal aliens, those dishonorably discharged from the military, people who have renounced their citizenship, and people subject to a court order "that restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person. . . ." § 922(d)(1)-(8).

Some of these categories are problematic. For example, the law makes no distinction between violent and non-violent felonies, nor does it provide any time limits. Thus, a thirty year old conviction for car theft would make a person ineligible to purchase a gun. Furthermore, the "drug user" category is ambiguous because the Gun Control Act of 1968 neither defines the term, nor identifies how recent the illegal drug use must be for the

would-be handgun purchaser's identification is legitimate, the FFL must forward to the CLEO within one day the completed U.S. Bureau of Alcohol, Tobacco & Firearms' (BATF) "Brady Form."⁴³ The purchase is then delayed until approved by the CLEO, or until five business days have passed without a response from the CLEO, in which case the sale may proceed.⁴⁴

There has been some controversy over what kind of background check the CLEO must conduct. The law states only that the CLEO "shall make a reasonable effort to ascertain within five business days whether receipt or possession would be in violation of the law, including research in whatever state and local recordkeeping systems are available and in a national system designated by the Attorney General."⁴⁵ On its face, this law could mean an effort as cursory as checking local criminal records or as comprehensive as making inquiries of federal, state, local, and private institutions and agencies responsible for dealing with crime, mental health, immigration, and drugs.

The requirement that the CLEO conduct a background check has been challenged by some local law enforcement officials, who claim that, under the Tenth Amendment, Congress lacks authority to require local government officials to set up and carry out federally-imposed regulatory operations.⁴⁶ In defending the background check

prohibition to apply. No court has addressed this issue. According to the Bureau of Alcohol, Tobacco and Firearms, there must be "current evidence of use." Possible examples of evidence . . . include needle marks, current enrollment in a drug treatment center, or urine test." JAMES M. TIEN & THOMAS F. RICH, IDENTIFYING PERSONS OTHER THAN FELONS INELIGIBLE TO PURCHASE FIREARMS: A FEASIBILITY STUDY 16 (1990). Surely the FFL does not have to administer a urine test! And, how would a FFL or CLEO find out if an individual recently took a urine test? Tien and Rich adopted the definition of "drug user" used by the National Institute on Drug Abuse. It defines a current user as anyone who has used drugs within the past month. However, they recognize that "the same individual could be ineligible to purchase a firearm one week, eligible the next, and so on." *Id.* at 16.

⁴³ 18 U.S.C. § 922(s)(1)(A)(i)(IV). Submission of a potential purchaser's fingerprints is not required. The "Statement of Intent to Obtain A Handgun(s)," referred to as the "Brady Form" by the BATF, also contains an "optional information" section that need not be filled out by the would-be purchaser. The optional information includes social security number, height, weight, sex, and place of birth. The FFL fills out the bottom half of the form, which includes the FFL's name, address, phone number, license number, and the type of identification used by the would-be purchaser, either a driver's license or "other," as well as the driver's license number or identification number. The FFL must also identify the CLEO to whom the form was sent and the method of transmission (phone, fax, in person, or other). BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, ONE-YEAR PROGRESS REPORT: BRADY HANDGUN VIOLENCE PREVENTION ACT, App. (Feb. 28, 1995) [hereinafter, ONE-YEAR PROGRESS REPORT].

⁴⁴ 18 U.S.C. § 922(s)(1).

⁴⁵ § 922(s)(2). Brady mandates that the national system be operational by November 1998.

⁴⁶ Mack v. United States, 1995 WL 527616, 64 USLW 2169 (9th Cir. 1995) (holding background check provision constitutional); Frank v. United States, 860 F. Supp. 1030 (D.

provision, the government has argued that the meaning of reasonable effort is left to the discretion of each CLEO and that it should be "left to the discretion of the CLEO to establish enforcement standards based upon the jurisdiction's resources which, depending on the area, could entirely negate the research obligation."⁴⁷ Further, BATF interprets the reasonable effort language as requiring "some minimal effort to check commonly available records."⁴⁸ Therefore, it seems that a reasonable background check means whatever the CLEO wants it to mean, depending on available resources and the type of records available in that jurisdiction.

Once the background check is complete, and if the sale is approved, all records of the purchaser's application and background check must be destroyed by the CLEO, including the purchaser's statement and any other record containing information derived from that statement.⁴⁹ Failure to comply with these provisions is a criminal offense punishable by a fine of not more than \$1,000, imprisonment for not more than one year, or both.⁵⁰ If the sale is disapproved and the rejected purchaser requests an explanation, the CLEO must provide the rejected purchaser with a written explanation within twenty days of rejection.⁵¹ 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.⁵² It is unlikely, however, that a rejected purchaser would be arrested and

Vt. 1994) (holding background check provision unconstitutional); *Koog v. United States*, 852 F. Supp. 1376 (W.D. Tex. 1994) (holding background check provision constitutional); *McGee v. United States*, 863 F. Supp. 321 (S.D. Miss. 1994) (holding background check provisions unconstitutional).

⁴⁷ *Mack v. United States*, 856 F. Supp. 1372, 1376 (D.Az. 1994), *aff'd in part, rev'd in part, discussed in part*, 1995 WL 527616, 64 USLW 2169 (9th Cir. 1995).

⁴⁸ *Id.*

⁴⁹ 18 U.S.C. § 922(s)(6)(B) (1994). The FFL is not required to destroy the Brady Form.

⁵⁰ § 924(a)(5). In *Printz v. United States*, the court held that the criminal penalties contained in § 924 do not apply to the CLEO. *Printz v. United States*, 854 F. Supp. 1503, 1510 (D. Mont. 1994), *aff'd in part, rev'd in part, dismissed in part sub. nom. Mack v. United States*, 1995 WL 527616, 64 USLW 2169 (9th Cir. 1995). Moreover, the Assistant Attorney General for the Office of Legal Counsel officially opined that the criminal penalties do not apply to the CLEO. *Mack*, 856 F. Supp. at 1376, *aff'd in part, rev'd in part, discussed in part*, 1995 WL 527616, 64 USLW 2169 (9th Cir. 1995).

⁵¹ 18 U.S.C. § 922(s)(5)(C) (1994).

⁵² § 924(a)(1)(A).

charged for making false statements.⁵³ As one BATF official stated, "[t]ry getting a U.S. attorney to take that case."⁵⁴

C. EVALUATING BRADY

Gun control advocates hailed Brady as the most important federal gun control legislation of this generation. Its passage was greeted with predictions of a safer, more secure society.⁵⁵ President Clinton called Brady "step one in taking our streets back, taking our children back, reclaiming our families and our future."⁵⁶ Sarah Brady said, "It will begin to make a difference. It will begin to save lives."⁵⁷ James Brady stated, "What we are witnessing today is more than a bill signing, it is an end of unchecked madness and the commencement of a heart-felt crusade for a safer and saner country."⁵⁸ Even John Hink-

⁵³ Bill Bridgewater, Executive Director for the National Alliance of Stocking Gun Dealers, stated that the people prevented from purchasing a gun by Brady "were only stopped at that store at that time. They weren't arrested. So all they had to do was go out on the street corner at midnight and pay more to get a gun." Fox Butterfield, *Survey Reveals Success of New Brady Bill*, HOUST. CHRON., March 12, 1995, at A1. According to a CBS News survey of nineteen states, approximately 551 would-be purchasers were arrested by local police. *Id.* These numbers, however, are questionable. It is not clear whether these individuals were fugitives from justice, or whether they were arrested under the felon-in-possession law, or for making false statements. The most likely explanation for their arrest would be the existence of outstanding warrants for their arrest. No federal agency was able to confirm the accuracy of the CBS survey, but a BATF official agreed that outstanding arrest warrants were the most likely explanation. Telephone Interview with Nancy Cook, Specialist, Firearms and Explosives, Operations Division, BATF (July 13, 1995).

⁵⁴ Telephone Interview with Nancy Cook, *supra* note 53.

⁵⁵ When Brady was enacted, at least eighteen states already had handgun waiting periods or instant background checks. *See* ALA. STAT. § 13A-11-77 (1994) (48-hour waiting period); CAL. PENAL CODE § 12071 (West 1992) (15-day waiting period); CONN. GEN. STAT. ANN. § 29-37a (West Supp. 1995) (14-day waiting period); DEL. CODE ANN. tit. 11, § 1448A (Supp. 1994) (instant telephone criminal background check and 3-day waiting period); FLA. CONST. art. I, § 8(b); FLA. STAT. ANN. §§ 790.065-.0655 (West 1992) (instant telephone criminal background check and 3-day waiting period); HAW. REV. STAT. § 134-9 (Supp. 1994) (permit system and 14-day waiting period); ILL. COMP. STAT. ch. 720, § 5/24-3 (1994) (permit system and 72-hour waiting period); IND. CODE § 35-47-2-8 (1986) (7-day waiting period); IOWA CODE ANN. §§ 724.15, 724.20 (West 1993) (permit system and 3-day waiting period); MINN. STAT. ANN. § 624.7132 (West 1987) (7-day waiting period); OR. REV. STAT. § 166.420 (1993) (15-day waiting period); 18 PA. CONS. STAT. ANN. § 6111 (1983) (48-hour waiting period); R.I. GEN. LAWS § 11-47-35 (1994) (7-day waiting period); S.D. CODIFIED LAWS ANN. § 23-7-9 (1988) (48-hour waiting period); TENN. CODE ANN. § 39-17-1316 (1991) (15-day waiting period); VA. CODE ANN. § 18.2-308.2:2 (Michie Supp. 1995) (instant telephone criminal background check); WASH. REV. CODE ANN. § 9.41.090 (West 1988) (permit system and 5-day waiting period); WIS. STAT. ANN. § 175.35 (1989) (48-hour waiting period).

⁵⁶ Nancy Mathis, *Emotional Ceremony Marks President's Signing of Brady Bill*, HOUST. CHRON., Dec. 1, 1993, at A1.

⁵⁷ *Id.*

⁵⁸ *Id.*

ley, Jr. praised the new law.⁵⁹

Before the Brady law officially went into effect on February 28, 1994, gun control advocates predicted that 100,000 handgun purchases, out of 3.5 million, would be prevented annually.⁶⁰ For supporters of Brady, every rejection of a handgun sale to an ineligible person constitutes one less armed and potentially dangerous person to threaten others. One year after Brady became effective, the law was declared a success. According to a survey by BATF, Brady prevented 41,000 people from purchasing handguns.⁶¹ BATF examined a random sample of 441,545 applications for handgun purchases from February 1994 to February 1995.⁶² It found 15,506 denials, for the following reasons: 4,365 felony records; 945 fugitives from justice; 97 people under indictment; 649 drug users; 152 illegal aliens; 63 people

⁵⁹ John Hinkley, Jr. stated: "I believe I would not have gone forward with the effort to shoot the President of the United States if state and federal laws had required a waiting period before buying a handgun." *Id.* at 5.

Ironically, Brady would not have prevented Hinkley from purchasing a handgun from a dealer. The gun used in the assassination attempt, a .22 caliber pistol, was purchased legally at a Dallas pawn shop in October 1980—five months before the shooting. See Charlie Brennan, *Brady Bill Wouldn't Have Helped Brady, Reagan*, ROCKY MOUNTAIN NEWS, Feb. 20, 1994, at 6A. In the year preceding the assassination attempt, Hinkley purchased at least five handguns. Three of these guns were purchased before his misdemeanor conviction in Nashville for boarding a plane carrying three handguns, so these sales would not have been picked up in a background check. *Id.* Since Brady does not make misdemeanants ineligible for future handgun purchases, Hinkley's subsequent purchase of two more handguns, including the one used in the shooting, would not have been prevented either. Even if Brady had been in effect, Hinkley would have passed the background check because he was not under indictment for or convicted of a felony; he was not an illegal alien, fugitive from justice, or dishonorably discharged; and he had not been certified a mental defective or committed to a mental institution.

⁶⁰ This prediction was based on extrapolations from statistics compiled by the state of Florida which, prior to Brady, imposed background checks on would-be gun purchasers. Florida conducted 265,440 background checks in 1992 and rejected 2.5% of the would-be sales. Dennis Cauchon, *Brady Law is More "Symbolic" Than Substance*, USA TODAY, Dec. 1, 1993, at 8A. Florida is the only state to have a constitutionally mandated background check and three day waiting period. FLA. CONST., art. 1, § 8(b) (1991). In California, which has a fifteen day waiting period, of the 500,000 requests for handgun purchases in 1991, 6,000 were rejected; of those, 3,000 rejected purchasers had a prior assault record and thirty-four rejected purchasers had a homicide record. Erik Eckholm, *Thorny Issue in Gun Control: Curbing Responsible Owners*, N.Y. TIMES, April 3, 1992, at A1, A15. No reasons were given for the remaining 1,976 rejections. Since 1989, Virginia's instant background check rejected 5,879 sales, and Maryland's seven day waiting period and background check rejected 3,647 sales. Pierre Thomas, *Checks on Gun Buyers Foil Some Criminals*, WASH. POST, Nov. 30, 1993, at A1, A18. In Illinois, which requires a handgun owner identification card and a seventy-two hour waiting period, 319,365 background checks from 1992-93 have led to 2,062 rejections, but most of these rejections were due to expired identification cards. William Recktenwald & Jan Crawford, *Brady Bill Not as Tough as 25-Year-Old Illinois Gun Law*, CHI. TRIB., Nov. 23, 1993, at A1, A8.

⁶¹ ONE-YEAR PROGRESS REPORT, *supra* note 43, at 9.

⁶² *Id.* at 6.

subject to restraining orders; 36 dishonorable discharges; 23 mental defectives; 2 juveniles; and 1 person who renounced U.S. citizenship.⁶³ It is unclear whether these numbers include "false positives" or "false hits" based upon mistakes in the name checks and other problems in the data bases and checking procedures.⁶⁴ It is possible that the many people found to be ineligible to purchase handguns were misidentified because they had the same name as a person who is ineligible.

Assuming that under the Brady regulatory machinery up to 41,000 would-be handgun sales have been rejected, must we conclude that an equal number of presumptively dangerous persons have been prevented from obtaining handguns? Obviously not. Some percentage of the rejected purchasers already possessed a handgun and were merely attempting to add to their arsenal.⁶⁵ More importantly, some unknown percentage of rejected purchasers subsequently may have obtained a handgun by submitting a false application to another FFL, by having a "straw man"—an eligible friend or relative—purchase the handgun for him, or by purchasing a handgun on the secondary market. Cook, Molliconi & Cole estimate that "there are roughly as many [private] transactions of used guns as there are sales of new guns,⁶⁶ . . . and that more than half a million guns are stolen each year."⁶⁷

Dangerous criminals are disproportionately likely to purchase their handguns on the secondary market. A 1986 survey sponsored by the National Institute of Justice found that five out of six of a sample of gun-owning felons obtained handguns from the secondary market and by theft.⁶⁸ About 80% of these convicted felons, both gun owners and non-owners alike, believed they would have little difficulty ob-

⁶³ *Id.* at 1; BATF TABLE OF REJECTIONS (providing breakdown of rejections and reasons for rejections from 30 law enforcement jurisdictions) (on file with *The Journal of Criminal Law & Criminology*). There is a numerical discrepancy between the number of rejections and the reported reasons for the rejections. Many jurisdictions did not provide any reasons for their rejections, and still others provided reasons for only a portion of their rejections.

⁶⁴ It is estimated that using names, as opposed to fingerprints, for background checks results in false positives in 50% of the rejections. See *infra* notes 105-06 and accompanying text.

⁶⁵ It is estimated that the average gun owner owns more than one gun. Estimates range from an average of 2.24 firearms per weapon-owning household, JAMES D. WRIGHT ET AL., UNDER THE GUN: WEAPONS, CRIME, AND VIOLENCE IN AMERICA 35 (1983), to four firearms per weapon-owning household. KLECK, *supra* note 5, at 21. Among handgun-owning households, the average number of handguns owned is 2.8. KLECK, *supra* note 5, at 21.

⁶⁶ Cook et al., *supra* note 26, at 70.

⁶⁷ *Id.* at 81.

⁶⁸ JAMES D. WRIGHT, U.S. DEP'T OF JUSTICE, THE ARMED CRIMINAL IN AMERICA 2 (1986) [hereinafter, WRIGHT, THE ARMED CRIMINAL]. See KLECK, *supra* note 5, at 46-47 (discussing Wright survey).

taining a handgun upon release from prison.⁶⁹ The survey concluded that “[t]he criminal handgun market is overwhelmingly dominated by informal transactions and theft as mechanisms of supply.”⁷⁰ Interviews of incarcerated juvenile offenders in North Carolina revealed that handguns are easy to obtain using “straw men” who purchase from FFLs, purchases or loans from friends or relatives, street purchases, and thefts.⁷¹ Thus, there is substantial reason to doubt that the Brady law each year is preventing 40,000 dangerous persons from obtaining handguns.

D. GAPS IN THE BRADY REGULATORY REGIME

Brady supporters may have underestimated the ease with which this regulatory system can be circumvented and they may have overestimated the ability of government agencies to enforce these regulations. The first difficulty with the current regulatory system is its reliance on the deeply flawed system of federal licensing for gun dealers. Federal law requires that any person who intends to engage in the business of selling firearms must obtain a federal license.⁷² But the federal licensing system is all smoke and mirrors. Upon payment of a small fee, practically anyone can obtain a federal license to sell firearms.⁷³ A person *must* be granted a license⁷⁴ after submitting to BATF: a photograph and fingerprints, a signed application form⁷⁵ declaring that he is over twenty-one years and not ineligible to purchase or possess firearms, a proposed business name, a business location and hours of operation,⁷⁶ and a \$200 fee (recently raised from \$30).⁷⁷ BATF has no discretion to reject a license application unless it determines that the information provided is not truthful or accurate.

⁶⁹ WRIGHT, *THE ARMED CRIMINAL*, *supra* note 68, at 2.

⁷⁰ *Id.*

⁷¹ Cook et al., *supra* note 26, at 83-84, 85-86. One Chicago gang member summed up the ease with which guns can be obtained: “[i]t’s like going through the drive-through window. ‘Give me some fries, a Coke and a 9-millimeter.’” Don Terry, *How Criminals Get Their Guns: In Short, All Too Easily*, N.Y. TIMES, March 11, 1992, at A1.

⁷² 18 U.S.C. § 923(a) (1994).

⁷³ It is worth recalling that some followers of David Koresh, late head of the Branch Davidian cult, were federally licensed firearms dealers and used their licenses to amass a huge armory of weapons for his group. See DEPARTMENT OF THE TREASURY, REPORT ON THE BATF INVESTIGATION OF VERNON WAYNE HOWELL, ALSO KNOWN AS DAVID KORESH 21-23 (1993).

⁷⁴ See 18 U.S.C. § 923 (1994) and 27 C.F.R. 178.47 (1995) (providing that a license *shall* be issued if the information appears, after investigation, to be correct).

⁷⁵ 27 C.F.R. 178.44 (1995).

⁷⁶ See 18 U.S.C. §923(a), (d)(1) (1994); 27 C.F.R. 178.32, 178.41-42 (1995); 57 Fed. Reg. 24,301 (1992).

⁷⁷ 18 U.S.C. § 923(a)(3) (1994). The license is good for three years, after which it may be renewed for another three year period for \$90.

BATF has no reliable way to determine if license applicants have lied on their applications.⁷⁸ BATF sends the license applicant's name, social security number, and fingerprints to the FBI for a criminal records check.⁷⁹ However, the FBI's data base of criminal records is far from comprehensive; of the twenty-six million criminal records in the FBI system, little more than 54% are fully computerized.⁸⁰ Many states do not provide the FBI with updated and complete information for Interstate Identification Index (III). An estimated 2.8 million criminal records from California alone are not available through the III.⁸¹ Thus, if willing to lie, a drug user, ex-felon, former mental patient, or person under the age of twenty-one has a good chance of obtaining a license.⁸² An unsuccessful, but determined applicant could obtain a *de facto* license and all the advantages of a licensee by having a relative or friend obtain the license.

A large percentage of federally licensed dealers are not "dealers" at all, at least not in the sense that a dealer is the owner and operator of a store.⁸³ As Cook, Molliconi & Cole point out, the majority of the 284,000 dealers do not operate legitimate businesses.⁸⁴ They are individual gun enthusiasts who, for one reason or another, desire a dealer's license in order to purchase an unlimited number of firearms

⁷⁸ Cook et al., *supra* note 26, at 74.

⁷⁹ The FBI maintains the Interstate Identification Index (III), which is an "index-pointer" system for serious misdemeanor and felony criminal records. III provides information on federal felony criminal records and State Identification Numbers (SIDs) for state criminal records. To access complete information on state criminal records, the SID must be run through each state records system in which the individual has a criminal record. BRADY ACT TASK GROUP, NATIONAL INSTANT CRIMINAL BACKGROUND CHECK SYSTEM 17 (1994) [hereinafter BRADY TASK GROUP REPORT].

⁸⁰ 1988 House Hearings, *supra* note 30, at 22 (statement of Paul J. McNulty, Acting Director, Office of Policy Development, Department of Justice).

⁸¹ BRADY TASK GROUP REPORT, *supra* note 79, at 10. Other states with large numbers of records missing from the III include Illinois and Texas. *Id.*

⁸² According to William Earle, BATF Deputy Associate Director for Regulatory Programs, the BATF is making an effort to visit and interview all new applicants and thoroughly check the information contained in the license application. Mr. Earle indicated, however, that if an individual really wanted to "scam the system," it probably could be done. Telephone interview with William Earle, BATF Deputy Associate Director for Regulatory Programs (July 6, 1995).

⁸³ To a certain extent, federal regulations regarding dealers appear contradictory. On the one hand, regulations require a dealer to operate out of "business premises," which are defined as "the property on which the . . . dealing in firearms is or will be conducted. A private dwelling . . . shall not be recognized as coming within the meaning of the term." 27 C.F.R. §178.11. On the other hand, a dealer may be "any person who engages in such business or occupation on a part-time basis." *Id.*

⁸⁴ Cook et al., *supra* note 26, at 75-76. The BATF claims that the number of licenses has fallen from 284,000 in 1993 to 207,000 in 1995. Telephone interview with William Earle, *supra* note 82.

through the mail.⁸⁵ Cook, Molliconi & Cole also report that BATF generally inspects owners of gun stores, but not licensed individuals who deal out of their homes.⁸⁶ Absent the threat of BATF inspections and license revocations, many license holders may sell, barter, lend, or give away handguns without regard to the Brady requirements.⁸⁷

The second significant gap in the Brady regulatory regime is that the would-be purchaser of a handgun from an FFL is not required to provide fingerprints, but merely proof of identity based upon an "identification document."⁸⁸ If the FFL is satisfied that the identification document matches the person standing in front of him, he forwards the would-be purchaser's name, address, and eligibility information contained in the Brady Form to the CLEO for the background check.⁸⁹

An ineligible person who wished to purchase a firearm from an FFL could use readily available phony identification, i.e., a driver's license or some other identification that has the correct photo but an alias rather than the prospective purchaser's real name. There is a brisk market in such documents.⁹⁰ We do not know how scrupulously FFLs will try to match the photo I.D. to the person standing before them. We can certainly anticipate that some FFLs will accept as bona fides whatever identification is presented to them. Even a legitimate dealer, or the dealer's employee, who is making a good faith effort to comply with Brady, might not be able to match a poor photo to the person standing in front of him. Moreover, the dealer may be disinclined to turn down a prospective sale and alienate a customer if the photo is "in the ball park." It takes a certain amount of fortitude to

⁸⁵ The Gun Control Act of 1968 prohibited mail order sales of firearms except from manufacturers to federally licensed dealers. 18 U.S.C. § 922(a) (1994). In effect, only licensed dealers can buy directly from manufacturers.

⁸⁶ Cook et al., *supra* note 26, at 75.

⁸⁷ Terry, *supra* note 71, at A1 (describing how one Chicago-based FFL sold firearms out of parking lots and alleys).

⁸⁸ BATF regulations define an "identification document" as "[a] document containing the name, residence, address, date of birth, and photograph of the holder, and which was . . . issued by . . . the United States government, a State . . . or a foreign government. . ." 27 C.F.R. § 178.11.

⁸⁹ If a would-be purchaser knowingly makes a false statement on the Brady Form, he could be prosecuted under 18 U.S.C. § 924(a)(1) (1994).

⁹⁰ *Implementation of Employer Sanctions: Hearings on H.R. 521 Before the Subcomm. on International Law, Immigration, and Refugees of the House Comm. on the Judiciary*, 103d Cong., 1st Sess. 282 (1994) (statement of Dan Stein, Executive Director, Federation for American Immigration Reform, noting ready availability of phony identification documents); Art Barnum, *Curbing Fakes: State Targeting Traffic in Phony Driver's Licenses*, CHI. TRIB., Sept. 13, 1993, at D1; William Branigin, *New Law Fails to Stem Flow of Mexicans Into California*, WASH. POST, June 23, 1988, at A30 (discussing "booming market" in phony identification papers); Jeffrey A. Roberts, *ID Cards Used to Buy Guns Illegally*, DENVER POST, Jan. 17, 1994, at A1.

challenge a customer, in effect, calling that person an imposter and a liar.

The third gap in the Brady regulatory apparatus is the ability of a would-be gun purchaser to use a straw man to effect the purchase for him. One can circumvent the entire Brady apparatus by having a spouse, friend, or fellow gang member, who does not have any disqualification, purchase the firearm and hand it over to the real purchaser.

The fourth, and perhaps most important, gap in the Brady regulatory scheme is its inapplicability to the secondary market. This market is the most common way criminals obtain handguns. An ineligible person can avoid Brady by purchasing a firearm in the secondary market from a street dealer, friend, relative, or person advertising in the newspaper.⁹¹

The fifth gap in the Brady regulatory regime is the inability of the CLEO to determine whether the would-be purchaser is an illegal drug user, an ex-mental patient, an illegal alien, or a dishonorable dischargee.⁹² Such data do not exist in any coherent or accessible form, and to the extent they do exist, they are not readily obtainable by CLEOs.⁹³ In fact, the CLEO need not attempt to contact hospitals and treatment centers since Brady provides only that the CLEO make a "reasonable effort" to determine whether the would-be purchaser falls into a prohibited category.⁹⁴ The BATF interprets this obligation as requiring "some minimal effort to check commonly available records."⁹⁵ A determined CLEO might direct an inquiry to the state department of mental health or even local mental hospitals (or psychiatric wings of general hospitals) and drug treatment centers, but

⁹¹ Cook et al., *supra* note 26, at 87. A few states have attempted to regulate private transfers of firearms. See MASS. GEN. L. ch. 140, § 129C (1991) (providing that private transfers of rifles and shotguns must be reported to the commissioner of public safety); MINN. STAT. § 624.7132 (1994) (providing a five day waiting period before private transfers); Terry, *supra* note 71, at A1 (explaining that in Illinois private transfers of handguns are supposed to comply with a three day waiting period).

⁹² TIEN & RICH, *supra* note 42, at 29, 43, 44, 59, 70; see generally, *id.* at 29-74. The Department of State maintains complete records of all 9,800 people who have formally renounced citizenship. This data base, used primarily by State Department personnel, may not be readily accessible to CLEOs until the National Instant Criminal Background Check System (NICS), required by Brady, is up and running. *Id.* at 75-76.

⁹³ Moreover, it seems unlikely that a national data base containing such information will be created in the near future. The mental health and drug treatment communities would strongly oppose the collation of lists of mental and drug abuse patients on the ground that it infringes privacy and deters people from seeking treatment. *Id.* at 31, 47.

⁹⁴ 18 U.S.C. § 922(s)(2) (1994) (reasonable efforts include "research into whatever state and local record keeping systems are available . . .").

⁹⁵ Mack v. United States, 856 F. Supp. 1372, 1376 (D. Ariz. 1994), *aff'd in part, rev'd in part, dismissed in part*, 1995 WL 527616, 64 USLW 2169 (9th Cir. 1995).

such information is frequently deemed confidential.⁹⁶ Even if willing to provide information identifying patients, hospital and treatment centers may not maintain records in a form that allows easy and accurate identification of patients. Some state and federally funded drug treatment centers and hospitals maintain "client admission profiles" so this patient information may be sent to state record-keeping agencies.⁹⁷ The client admission profiles sent to these agencies, however, do not contain the name of the client, and are of limited use.⁹⁸

Mental health records present equally difficult problems for the CLEO and the creation of the National Instant Criminal Background Check System (NICS). Local court records contain information on adjudications of mental defectives and commitment hearings, but these records are difficult to search because of the decentralized nature of local court systems.⁹⁹ Further, many state mental patient data bases do not contain patient names, and private psychiatric hospitals do not provide patient information to state mental health agencies.¹⁰⁰

Obtaining information on illegal aliens is equally difficult. Although some records on illegal aliens are maintained by the Immigration and Naturalization Service (INS), it is impossible to determine exactly how many illegal aliens are in the United States. "Unfortunately for the purpose of identifying persons ineligible to purchase firearms, most illegal aliens enter the country clandestinely and have not been apprehended or identified by the INS. Therefore, we do not have records that identify the vast majority of persons who are illegal aliens in this country."¹⁰¹

Records of dishonorable discharges are similarly inaccessible.

⁹⁶ The Brady Act Task Group, in a report examining the progress of the National Instant Background Check System (NICS) required by Brady, conceded that "it will be difficult to obtain this information [on drug use] because of legal restrictions and because of the large number of [state and local hospital] data bases that must be integrated. . . . Changes in state confidentiality laws would be needed before states could readily transfer information about mental defectives and commitments to the NICS." BRADY TASK GROUP REPORT, *supra* note 79, at 3-4. See also Michael Sznajderman, *Crime Bill Leaving Loopholes*, TAMPA TRIB., Jan. 1, 1993, at A1 (explaining that Florida privacy laws regarding medical records prevent CLEOs from determining whether a purchaser is a former mental patient).

⁹⁷ TIEN & RICH, *supra* note 42, at 31.

⁹⁸ *Id.* at 31. Tien & Rich speculate that if the facilities do not provide this information to state-level agencies, "it seems unlikely that they would provide such information" to federal agencies. *Id.* Further, Tien & Rich claim that the "sheer number of local treatment facilities makes it impractical for firearms dealers or law enforcement officials to directly access these local data bases." *Id.* at 30.

⁹⁹ *Id.* at 43-44. See also Philip J. Cook & James Bloese, *State Programs for Screening Handgun Buyers*, 455 ANNALS AM. ACAD. POL. & SOC. SCI. 80, 87 (1981). Cook & Bloese also mention that such records are "expensive to search." *Id.*

¹⁰⁰ TIEN & RICH, *supra* note 42, at 46-47.

¹⁰¹ *Id.* at 63.

The Defense Manpower Data Center in California maintains a computerized data base of all persons discharged, dishonorably or otherwise, from the armed forces.¹⁰² Currently, these records are not readily accessible by CLEOs. Persons discharged from the armed forces wishing to obtain a service record must make a written request to the National Personnel Records Center in St. Louis, which receives approximately 30,000 requests per week.¹⁰³ Even if CLEOs had access to the California data base, the lag time between discharge and entry into the computer system (two to four months) provides a dishonorable dischargée with sufficient time to purchase a firearm.¹⁰⁴

Despite defining a number of social categories whose members are too irresponsible to be permitted to purchase a firearm, the Brady machinery really only deals with one category, that of ex-felons. However, even checking criminal records is not without difficulty, given the varying degree of completeness from state to state.¹⁰⁵ Furthermore, name checks, unlike fingerprints, are notoriously inaccurate.

[A]pproximately 50 percent of the cases in which persons appear to have a criminal history record based upon an initial name search are eventually found to be false hits. Conversely, it is likely that some purchasers with criminal records will go unidentified as they use fictitious information. In short, name searches are not as accurate as fingerprint identifications.¹⁰⁶

The large number of false hits as a result of name checks makes one wonder how many of the 40,000 sales allegedly rejected under Brady

¹⁰² *Id.* at 70.

¹⁰³ *Id.* at 69.

¹⁰⁴ *Id.* at 70.

¹⁰⁵ The accuracy of criminal records was a prominent issue in the history of the Brady bill. Congressional Republicans favored an electronic on-line system that would enable either the firearms dealer or the CLEO to approve or disapprove a proposed handgun sale immediately. The U.S. Department of Justice produced several reports showing that only a few states had the capacity to implement such a system and that nationally, 40-60% of felony criminal records were not readily accessible via computer. In fact, as of 1989, only ten states had fully computerized criminal record systems. Ultimately, the Brady bill requires all states to develop such on-line systems by November 1998. At that point, it is anticipated that the name check will resemble a credit card check and the waiting period aspect of Brady will disappear.

The BATF is optimistic that NICS will be implemented by 1998. Telephone Interview with William Earle, *supra* note 82. Currently, \$200 million has been earmarked for grants to state and local governments to update and computerize criminal records. Additionally, the BATF is working with other federal agencies, such as the INS and the Departments of Defense and State, to create data bases on illegal aliens, dishonorable military discharges and individuals who have renounced U.S. citizenship. *Id.*

¹⁰⁶ 1988 *House Hearings*, *supra* note 30, at 22 (statement of Paul J. McNulty, Acting Director, Office of Policy Development, Department of Justice). According to police in Austin, Texas, 85% of rejected sales are later approved. The initial rejection is due to similarities between the purchaser's name and the name of a convicted felon. *Clintonites Spin Brady Act Success*, *AM. RIFLEMAN*, Sept. 1994, at 24.

are attributable to false hits.

E. ENFORCING THE BRADY LAW

How is the Brady law to be enforced? Is it even meant to be enforced? How will anyone know if a licensed gun dealer sells a handgun without following the rules laid down in Brady? What happens if the dealer fails to follow the rules?

As the Cook, Molliconi and Cole article indicates, neither state nor local law enforcement agencies devote significant resources to monitoring the federally imposed regulation of handgun sales and may be unable and/or disinclined to enhance their monitoring efforts.¹⁰⁷ Indeed, some CLEOs who resent being ordered by Congress to take time out from their other law enforcement duties to conduct the Brady background checks, and to write letters of explanations to rejected handgun purchasers, have brought suits challenging the background check provision on Tenth Amendment grounds.¹⁰⁸ We can safely assume that these CLEOs would be actively hostile to any directive requiring an even more ambitious monitoring effort. Even CLEOs who harbor no resentment against Congress are unlikely to have the necessary resources to devote to a significant monitoring effort. In other words, a significant enforcement effort would either require a major infusion of police resources or a major re-ordering of police priorities.

BATF is the federal agency in charge of enforcing Brady and all other federal gun control laws and regulations, and is the agency in charge of regulating the alcohol and tobacco industries. But with only 1,000 inspectors and 1,200 agents in the firearms area, BATF hardly has the capacity and resources to monitor more than 200,000 firearms licensees.¹⁰⁹ After the passage of Brady, no additional funds were appropriated for new agents and inspectors. In effect, the agency was told to add the enforcement of Brady to its other responsibilities. It responded by diverting resources from tobacco and alcohol enforcement, and from headquarters and office operations to Brady enforce-

¹⁰⁷ Cook et al., *supra* note 26, at 76-78.

¹⁰⁸ Mack v. United States, 1995 WL 527616, 64 USLW 2169 (9th Cir. 1995) (holding background check provisions constitutional); Koog v. United States, 852 F. Supp. 1376 (W.D. Tex. 1994) (holding background check provisions constitutional); McGee v. United States, 863 F. Supp. 321 (S.D. Miss. 1994) (holding background check provisions unconstitutional); Frank v. United States, 860 F. Supp. 1030 (D. Vt. 1994) (holding background check provisions unconstitutional).

¹⁰⁹ Cook et al. use the figure of 284,000 FFLs. Cook et al., *supra* note 26, at 74. William Earle of the BATF states that since 1994, the number of FFLs has dropped from 280,000 to 207,000. Telephone interview with William Earle, *supra* note 82.

ment.¹¹⁰ Of course, there are limits to the amount of diversion that can be accomplished. The resources devoted to Brady enforcement still fall far short of what would be even minimally necessary for a credible enforcement effort, which should include an annual inspection of every FFL. To be sure, BATF does not have the resources each year to inspect every FFL. In fact, only 10% of all FFLs have ever been inspected.¹¹¹ BATF inspections tend to concentrate on the large department stores and legitimate businesses, not the fly-by-night operators.¹¹² To speak of "monitoring" or "inspecting" the FFLs gives no indication of the task that would be involved; there is no easy way to enforce Brady by monitoring sales or auditing sellers.¹¹³ In fact, any audit of sellers would probably require a coordinated audit of the CLEO in that jurisdiction as well, and would begin with an inspection of records required to be kept by FFLs, principally BATF Form 4473 and the Brady Form.¹¹⁴

In theory, to audit compliance with Brady, the BATF inspector could compare the number of purchases using Form 4473 with the number of background checks conducted by the CLEO.¹¹⁵ This assumes that the FFLs are scrupulously honest and accurate in their record keeping. Even if they are, all that would be revealed would be a numerical discrepancy, not the identity of a prohibited purchaser. It would be extremely time consuming to go through each sales record and attempt to match it with completed background check. The next step would be to somehow prove that the FFL had *knowingly* made an illegal, unapproved sale. An unscrupulous dealer would undoubtedly fail to record illegal sales. Therefore, in many cases discrepancies between sales and checks could easily be explained by negligence or poor record-keeping.

In theory, violations could also be detected through a compari-

¹¹⁰ Telephone interview with William Earle, *supra* note 82.

¹¹¹ U.S. BUREAU OF ALCOHOL, TOBACCO, AND FIREARMS, OPERATION SNAPSHOT FINAL REPORT (1993); Cook et al., *supra* note 26, at 74-75.

¹¹² U.S. BUREAU OF ALCOHOL, TOBACCO, AND FIREARMS, OPERATION SNAPSHOT FINAL REPORT (1993); Cook et al., *supra* note 26, at 74-75.

¹¹³ Under the McClure-Volmer amendments of 1986, the BATF is limited by law to one inspection of a FFL per year, unless a warrant is obtained. 27 C.F.R. 178.23.

¹¹⁴ See *supra* note 43 and accompanying text for a description of the information contained in the Brady Form. Form 4473 is the primary form used by FFLs to maintain a chronological record of all sales. Like the Brady Form, Form 4473 contains the list of prohibited purchasers, the purchaser's name and address, as well as the type and make of firearm and the manufacturer serial number. The FFL must retain copies of both the Brady Form and Form 4473. Telephone interview with William Earle, *supra* note 82. Although Brady provides for destruction of the Brady Form by the CLEO, the CLEO keeps a numerical record of the number of background checks requested by each FFL. *Id.* If the sale is rejected, the CLEO need not destroy the Brady Form. *Id.*

¹¹⁵ Telephone interview with William Earle, *supra* note 82.

son of inventory records with sales.¹¹⁶ FFLs are required to maintain records of all firearms shipped to them by the manufacturer. A BATF inspector could compare the number of firearms received from the manufacturer with the number of sales and the inventory of firearms on the premises.¹¹⁷ Again, if a numerical discrepancy resulted, it could be due to illegal sales, selling without recording the sale on Form 4473, or poor record keeping.

Another difficulty in enforcing Brady arises in criminal prosecutions. Perhaps some criminal suspect or defendant will turn the state's evidence against an FFL in exchange for a favorable plea bargain, or perhaps BATF will mount a sting operation in which agents pose as ineligible buyers and try to affect purchases.¹¹⁸

If the BATF could prove that a dealer knowingly carried out an unapproved firearms transfer, and if the U.S. Attorney could be persuaded to prosecute the case, there could be a successful prosecution.¹¹⁹ A BATF official whom we interviewed told us that if the Bureau presents a case to the U.S. Attorney's Office based solely on Brady violations, it is "unlikely to have much prosecutorial appeal."¹²⁰ According to this official, the Bureau relies more on the deterrent aspect of Brady rather than on using Brady as a prosecutorial weapon; this casts doubt on Brady's effectiveness.

II. "THICKENING" THE REGULATORY WEB

This brief exegesis demonstrates that there is no reason to be optimistic that Brady will successfully keep firearms away from dangerous persons. Thus, gun control advocates probably will attempt to thicken the regulatory web. Indeed, when Brady passed, many gun control advocates and observers noted that it represented the "first step" in the fight against gun-related violence.¹²¹ This raises the question of what further steps are envisioned.

A. THE "COOK AMENDMENT": REGULATING THE SECONDARY MARKET

Professor Philip Cook, along with his colleagues Stephanie Molliconi and Thomas Cole, makes an important contribution to our

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ BATF would not or could not provide information on the number of dealer investigations, although a BATF official told us that "there were some on-going investigations." *Id.*

¹¹⁹ However, BATF explained that no exact number of Brady prosecutions is readily available, although it claims that FFLs have been prosecuted for Brady violations. *Id.*

¹²⁰ *Id.*

¹²¹ Mathis, *supra* note 56, at A1.

knowledge of the firearms economy by focusing on the secondary market.¹²² Cook, Molliconi & Cole estimate that 50% of all handgun transfers generally, and an even higher percentage of transfers to criminals, occur in the secondary market.¹²³ To avoid Brady, an ex-felon or other ineligible person need only purchase a handgun on the street, at a gun show, or from a seller advertising in a newspaper.¹²⁴

Having illuminated the largely symbolic significance of Brady, one might have expected Cook, Molliconi & Cole to recommend folding up the regulatory tent in favor of some other type of enforcement. To the contrary, in a show of heroic faith in regulation, they suggest that Congress expand the regulatory regime to bring the secondary market under the Brady umbrella.

While Cook, Molliconi & Cole do not provide details, they propose a system whereby all handgun transfers must go through "a licensed dealer or law enforcement agency. All legal transfers would then be governed by the same permitting and paperwork requirements as are currently required for FFL sales."¹²⁵ This presumably means that if *A* (a seller) wants to give or sell his gun to *B* (a buyer), both must appear before *C*, an FFL, and submit some documents in order to consummate the sale. As under Brady, the FFL would forward the name to the CLEO for a background check, and *A* and *B* would have to delay the sale until they were informed by *C* that the CLEO approved their transaction.

Of course, *B* (the purchaser) could evade this scheme just as he could avoid Brady, simply by having a straw man, his friend *D*, stand in his place before *C* (the FFL). But let us make the unlikely assumption that *B* has no friends or relatives eligible under Brady or willing to act as straw men. Let us further assume that, desperate to purchase a handgun, *B* tentatively strikes a purchase agreement with *A* (the seller). Nothing would prevent *A* from ignoring the law and consummating a private sale to *B*, other than the deterrence generated by Brady. Law enforcement officials would not know that *A* sold this gun

¹²² Cook et al., *supra* note 26.

¹²³ *Id.* at 69.

¹²⁴ See Gordon Witkin, *Gun Control's Limits*, U.S. NEWS & WORLD REP., Dec. 6, 1993, at 24 (describing ease with which criminals and others obtain handguns through secondary market); E.J. Montini, *You're Right, Brady Bill Won't Work*, AZ. REPUBLIC, Dec. 1, 1993, at B1 (describing easy bypass of Brady by purchasing through newspaper classifieds); Terry, *supra* note 71, at A1 (describing criminal purchase of guns in secondary market and gun shows).

¹²⁵ Cook et al., *supra* note 26, at 89-90. While they also recommend other gun control regulations and strategies, including more stringent regulation of dealer licensing, greater priority given by law enforcement to burglaries and other crimes involving firearm theft, and increased regulation or abolition of gun shows, we focus only on their proposal to regulate the secondary market.

to *B*. *A* is not an FFL and certainly is not obligated to maintain any records on secondhand sales of guns. There is no registry of the 200 million firearms owned by civilians.¹²⁶ *A* can be confident that no police officer or BATF inspector will appear at his door demanding that he produce a particular firearm or, if he cannot produce it, explain satisfactorily what happened to it. The Cook Amendment is completely unenforceable.

Suppose that, one day, authorities arrest *B*, an ex-felon, for possessing the handgun which *A* sold him. And suppose that the local police, anxious to enforce Brady, ask *B* where he obtained the handgun. This scenario is unlikely to result in *A*'s prosecution. *B* might well refuse to say anything. He might lie, saying he does not remember where he got the gun. If he had a malicious sense of humor, *B* might say that he purchased the handgun from a federally licensed dealer, but did not have a receipt.¹²⁷ In other words, he could say anything.

However, let us suppose that *B*, hoping for leniency, names *A* as the person who transferred the handgun to him in blatant disregard of the Cook Amendment. Now the police seek out *A*. Under interrogation for suspicion of knowingly violating the Cook Amendment, *A* might break down, admit knowingly selling the handgun to an ineligible purchaser, and throw himself on the mercy of the court. More likely, *A* would either remain silent or lie. No proof exists that *A* sold the handgun. Even if there were witnesses to the sale, they could not positively identify the particular handgun that *A* sold to *B*. In fact, if *A* is a street seller who does not keep careful records, he himself will have no idea whether he sold that particular handgun to *B*.

A sophisticated *A* could admit the transfer, but say that he made it lawfully through his friend *C*, who, as far as *A* knows, is or was an FFL (at least that's what *C* told him) who obtained the necessary approval from the CLEO. *A* could claim that he believed *C* and had no reason to demand a signed receipt or other proof or, if he once had such receipts, not to have kept them all this time. "No, *A* doesn't know where *C* is now." Indeed, even if *C* is found and denies knowing anything about *B*'s gun, *A* may claim that *C* is the liar, a person who masquerades as an FFL in order to collect a "broker's fee" on every street sale of a handgun.

This hypothetical demonstrates that the Cook Amendment, which would extend Brady to all handgun transfers, is likely to be un-

¹²⁶ KLECK, *supra* note 5, at 18.

¹²⁷ If *B* gave this explanation, the gun could be traced from the manufacturer to an FFL using the serial number. Once the gun enters the secondary market, however, there is no way to trace the gun from purchaser to seller.

enforceable, even if there were adequate police resources and top priority given to its enforcement. Thus, the Amendment would contribute little to keeping handguns out of the hands of dangerous people.

B. NATIONAL FIREARMS LICENSING

In the wake of Brady, a number of proposals have surfaced for more federal regulation of handguns. One failed bill, the Gun Violence Prevention Act of 1994, would have established a national handgun licensing system.¹²⁸ No person would be able to purchase or possess a firearm without such a license.¹²⁹ Persons ineligible under Brady to purchase a firearm would have remained ineligible for a license. This bill would apply to handgun sales in both the primary and secondary market, forbidding *any individual*, not just FFLs, knowingly to sell a handgun to an unlicensed purchaser.¹³⁰

Under the Act, state CLEOs would issue handgun licenses.¹³¹ Licenses would be valid for no longer than two years. Licensees could purchase and possess no more than twenty firearms.¹³² In order to obtain a firearms license, a person would have to demonstrate firearms proficiency and knowledge of safety procedures.¹³³ All license holders would be recorded in state-operated computerized data bases. Implementing such a licensing system would require a network of local firearms licensing offices in every county to determine the applicant's firearms proficiency and knowledge of firearms safety.

While the bill would create a massive bureaucratic apparatus, it would be no more successful in controlling secondary sales than the Cook Amendment to the Brady law. Presumably, under the national licensing system, a would-be handgun purchaser would have to show a valid license to the dealer in the primary market or to the seller in the

¹²⁸ H.R. 3932, 103d Cong., 2d Sess. § 2 (1994).

¹²⁹ § 101(a).

¹³⁰ *Id.*

¹³¹ § 101(a)(4)(A).

¹³² § 204(a).

¹³³ § 101(a)(4)(C)(iv). It would be complicated and expensive to create a nationwide chain of firearms offices whose major function would be to test whether purchasers (or all current owners) employ safety precautions. Quite likely, after a while, the purpose of the licensing scheme would come to be seen as assuring competence in target shooting. Arguably, it is not lack of skill or marksmanship which constitutes the firearms problem in the U.S., but the irresponsible and criminal misuse of firearms. The same is probably true of the traffic problem; irresponsibility rather than incompetency is the main problem. Consider that although the overwhelming majority of drivers have valid licenses, there are hundreds of thousands of traffic accidents a year attributable to irresponsible driving. In 1992, in New York State alone, there were 458,554 traffic accidents and 2,401 deaths. NEW YORK STATE STATISTICAL YEARBOOK 448 (1994).

secondary market. As we have seen in the discussion of the Cook Amendment, this requirement could be circumvented by: (1) having a properly licensed friend purchase the gun; (2) finding a seller who was not concerned about adhering to the licensing requirement; or (3) using a fraudulent license. A person charged with selling a handgun to an unlicensed person could claim that he thought the person did have a valid license. It would be hard to disprove this defense beyond a reasonable doubt unless the government devoted significant resources to "buy and bust" and sting operations targeting illegal gun and phony license sales. However, even buy and bust and sting operations have not succeeded in suppressing drug sales.¹³⁴

It would be even more difficult to enforce a system of handgun licensing than it is to enforce the driver's license system. Driving without a valid license is a very common offense in the United States. In New York State alone, approximately 100,000 persons are convicted of this offense each year, and this is surely just the tip of the iceberg; one can only wonder what is the true rate of driving without a valid license.¹³⁵

Finally, and most importantly, we already have considerable experience in the United States with firearms licenses. In many state and local jurisdictions it is a crime to purchase or possess a firearm without a license.¹³⁶ Obviously, these licensing laws have not prevented criminals and other people from obtaining handguns.¹³⁷

C. NATIONAL FIREARMS REGISTRATION

Perhaps the lesson to draw from the previous discussion is that even more regulation will be necessary to control the secondary mar-

¹³⁴ There is continuous pressure to divert the flow of low level drug offenders caught in buy and bust operations from the criminal justice system. It is quite likely that there would be similar, if not stronger, pressure to divert low level gun sellers from the criminal justice system. Unlike the strong consensus that exists in the drug area, the moral status of gun possession and gun commerce is sharply contested in the U.S.; a sizeable portion of the population believes there is a right to bear arms and that gun sellers and purchasers should not be treated as criminals. At least half of all households in the United States have at least one firearm. KLECK, *supra* note 5, at 21.

¹³⁵ NEW YORK STATE STATISTICAL YEARBOOK, *supra* note 133, at 455 (reporting 113,756 violations for 1989; 110,711 for 1990; 99,280 for 1991 and 107,493 for 1992).

¹³⁶ *See, e.g.*, D.C. Code Ann. §§ 6-2301-2311 (1995); HAW. REV. STAT. § 134-9 (Supp. 1992); ILL. REV. STAT. ch. 720, § 5/24-3 (1993); IOWA CODE ANN. § 724.15 (West 1993); MASS. GEN. LAWS ANN. ch. 140, § 131 (West 1995); MICH. COMP. LAWS ANN. § 28.422 (West Supp. 1995); MO. ANN. STAT. § 571.090 (Vernon 1994); 1994 NEB. REV. STAT. §§ 69-2404-2405 (Supp. 1994); N.J. REV. STAT. § 2C:58-3 (Supp. 1995); N.Y. PENAL LAW § 400.00 (McKinney Supp. 1995); RULES OF THE CITY OF NEW YORK § 5-02 (1991); N.C. GEN. STAT. §§ 14-403-404 (1993); WASH. REV. CODE ANN. § 9.41.090 (Supp. 1995).

¹³⁷ BUREAU OF JUSTICE STATISTICS, DEPARTMENT OF JUSTICE, GUNS AND CRIME (1994) (reporting that in 1992, handguns were used in 930,700 crimes).

ket so as to keep firearms out of the hands of dangerous and irresponsible persons. Thus, the last form of regulation that we will consider is firearms registration. If firearms registration were married to the Brady law, the Cook Amendment, and the national licensing system, would there finally be an effective regulatory apparatus?

Let us first consider the system of automobile registration as a model for firearms registration. If one wishes to purchase an automobile from a dealer (the primary market) or a private individual (the secondary market), one must register the automobile with the state department of motor vehicles in order to get license plates and a valid registration sticker that must be openly displayed on the windshield. The responsibility for registration is on the purchaser and registration is a mechanical process. The vehicle owner must merely pay a fee and show proof of insurance. Registration is open to all; no one is refused. There is little reason, except pecuniary, for a purchaser to seek to avoid registration since everyone is eligible to register a vehicle.¹³⁸ Registration is cancelled in the event that the individual ceases to maintain appropriate insurance or fails to pay the periodic registration renewal fee.

A secondary vehicle sale must also go through the registration system. The seller must sign over his registration to the purchaser, and the purchaser must send the signed registration, confirming the transfer, to the department of motor vehicles. The seller must turn his license plates over to the department of motor vehicles and cancel his insurance. He has a strong incentive to do so unless he wishes to continue to be responsible for insuring the transferred car and for any accidents in which it is involved.

A firearms registration system would presumably require the firearms purchaser to record his possession of the firearm (identified by serial number) with a federal, state, or local agency. In exchange for a fee, the registered firearms owner would obtain a registration card or sticker which would constitute proof of registration. Sale of the firearm would require that the agency be notified of the new owner's identity and the new owner would have to obtain his own registration card for the weapon. It is questionable whether *everyone* could register as owner of a firearm (following the automobile registration model) or whether certain categories of presumptively dangerous and irresponsible persons would be ineligible to register. If the latter course were followed, then a large number of people would have an incentive

¹³⁸ If there were a large number of persons permanently excluded from registering vehicles, it is likely that many persons in this ineligible category would seek ways to avoid the registration requirement or to register their vehicles illegally.

to avoid the registration system.¹³⁹

It would be much harder to maintain and operate a system of firearms registration than of automobile registration. First, more than 200 million unregistered firearms now in private hands would have to be brought into the new firearms registration system.¹⁴⁰ The recent effort in some states to coax owners of assault rifles to come forward and register them has been a dismal failure.¹⁴¹ Second, if the system were not open to all individuals, many highly motivated existing and would-be firearms owners would seek to evade the registration. Third, dangerous persons could obtain their firearms through theft. Fourth, evasion could be carried out simply by having a friend or relative register the weapon or by finding a seller who is not concerned about complying with the registration system. If questioned about the whereabouts of the surreptitiously transferred firearm, one could claim that the gun was "lost" or that it had been stolen.

It would also be much harder to enforce a system of firearms registration than it is to enforce automobile registration. A car without valid license plates or a valid registration sticker is readily observable on the road and its driver is subject to being stopped and ticketed at any time. Neither a gun nor its registration is readily observable. Firearms are not normally displayed openly. Therefore, neither the owner's license nor the firearm's registration is likely to be checked. This is precisely why, in states like New York, stringent licensing laws seem to have little effect on gun violence committed by unlicensed gun owners.¹⁴²

III. CONCLUSION

It is hard to see the Brady law, heralded by many politicians, the media, and Handgun Control, Inc. as an important step toward keep-

¹³⁹ Attempts at registering and licensing firearms have been less than successful in California, which requires registration of all assault weapons. There is no way to determine whether all owners have registered because no records of the number of assault rifles sold exist. Tom Philip, *Ban on Assault Weapons Growing Weak*, SACRAMENTO BEE, March 11, 1994, at A1. Similarly, in New York City, which requires a handgun license, it is estimated that in 1993, there were 200 million unlicensed weapons. LAWYERS' COMM. ON VIOLENCE, GUN VIOLENCE IN NEW YORK CITY 1 (1993).

¹⁴⁰ KLECK, *supra* note 5, at 21.

¹⁴¹ Phillip, *supra* note 139, at A1 (discussing inability to determine effectiveness of assault weapon registration because no records of number of assault weapons sold in California exist).

¹⁴² In New York City in 1992, 77% of the 1,995 reported homicides were committed with a gun. VERA INST. OF JUSTICE, ATLAS OF CRIME AND JUSTICE IN NEW YORK CITY 22 (1993). Handguns accounted for 95% of all gun-related homicides. MARIO CUOMO & RICHARD H. GIRGENTI, A STRATEGY FOR ACTION AGAINST GUN-RELATED VIOLENCE: ANNUAL PROGRESS REPORT 1 (1993).

ing handguns out of the hands of dangerous and irresponsible persons, as anything more than a sop to the widespread fear of crime and to the feeling that "something has to be done" about guns. The Brady bill apparently plays into a strong American faith in the capacity of law and regulation to shape behavior. On its face, this faith is curious given the extent of law and regulatory evasion, especially in the area of gun control.

There is little reason to accept the claim that Brady is preventing 40,000 dangerous and irresponsible persons per year from obtaining handguns. The figure itself is suspect, especially because of the name checking system's inaccuracy. Moreover, the Brady regulatory regime is easily evaded through purchases on the secondary market, which are completely unregulated. Finally, Brady is not really enforceable, and even if it were, enforcement would be dependent upon resources and commitments that have not yet been forthcoming.

It is likely that, as time passes, Brady, although once heralded as a significant step toward curbing violent crime, will be demoted to a "small step" and more regulation will be demanded. Cook, Molliconi and Cole have shown that the robust and unregulated secondary market in handguns, in effect, makes any regulation of the primary market alone essentially irrelevant. But their proposal, to bring the secondary market under the Brady umbrella, offers little reason for optimism.¹⁴³ Extending Brady to the secondary market would be complex, expensive, and ineffective. Many different types of evasion would still be quite simple.

Thus, it is likely that the regulatory mind will turn to other strategies to create a thickened web of regulation that will make it difficult for irresponsible and dangerous persons to obtain handguns. But no such plausible system has, at least to our knowledge, yet been proposed. There is no reason why a federal licensing system would be any more successful than existing state and local licensing systems. Likewise, a registration system offers little promise in terms of crime control. It would, of course, succeed in expanding the regulatory state.

Perhaps it would make sense to give up on the idea that there is some system of regulation that can prevent criminals from obtaining handguns. It might be far better to put our energy and resources elsewhere, especially in holding the line on carry permits and vigorously enforcing the criminal law against *carrying* firearms without a license.

¹⁴³ One BATF official whom we interviewed opined that extending federal gun control laws and regulations to the secondary market would be extremely complex and "maybe unworkable." Telephone interview with William Earle, *supra* note 82. It would certainly be beyond the capacity of BATF to enforce.

James Q. Wilson recently proposed that local police officers mount a more vigorous enforcement effort against illegal gun possession on the streets through "stop and frisks."¹⁴⁴ This may be a sensible strategy which has the potential to provide a number of crime control payoffs.¹⁴⁵

Unlike the matter of gun possession, on which the society is sharply divided, there is a unanimity in condemning the use of firearms to commit crimes. Thus, there is no political or practical obstacle to ensuring severe sentences for gun offenders. This should be the top priority for American law enforcement. At a minimum, it should be recognized that the premise underlying federal gun control policy—strong gun laws keep guns out of the wrong hands—has little, if any effect, in disarming ex-felons and other ineligible.

¹⁴⁴ James Q. Wilson, *Just Take Away Their Guns*, N.Y. TIMES MAG., March 20, 1994, at 47. A stop and frisk involves a pat-down of an individual's outer clothing based on a reasonable suspicion by police that the individual is carrying weapons or other contraband. *Terry v. Ohio*, 392 U.S. 1, 22-26 (1968).

¹⁴⁵ Wilson's proposal, however, would work only if a small number of people have lawful carry permits. If carry permits become as-of-right and plentiful, a police officer would have no basis for reasonable suspicion to stop and frisk an individual, much less probable cause to believe that a person carrying a gun was doing so in violation of the law. Therefore, there would be no lawful reason to investigate whether the person has a license.