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THE CURRENT AND FUTURE STATE OF GUN POLICY IN THE UNITED STATES

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In spite of years of journalistic and public attention and debate, the United States has instituted few changes in firearms policy over the past century. Opposition diluted a brief push by the Roosevelt administration in the 1930s and resulted in two minimalist federal statutes. A second effort in the wake of the assassinations of John and Robert Kennedy and Martin Luther King produced the Gun Control Act of 1968, which largely remains the primary federal law. Even this modest control effort was subsequently diluted by the Firearms Owners Protection Act of 1986. The Clinton administration managed to pass the Brady Act, requiring background checks on purchases from licensed firearms dealers, and a law directed at "assault weapons," which sunset after ten years. For the past two decades, policy activity has shifted to the state legislatures and the courts, where concealed carry laws have flourished and the Second Amendment has been recognized as an individual and fundamental right.

Entrenched opposition in Congress and state legislatures, declining public support, well-organized institutional opposition, and constitutional constraints have limited policy options for the foreseeable future. Given these constraints, advocates should focus on limited, pragmatic goals that include reducing gun possession and carrying by high-risk individuals, restricting access to firearms by prohibited persons, and utilizing firearms laws to incapacitate violent, career offenders.

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I. A HISTORY OF EPISODIC POLITICAL FOCUS

Firearms policy in the United States has periodically entered the policy agenda for almost a century. Although federal legislation enacted in 1968 appeared to foretell a shift away from a laissez-faire approach to policy on firearms, the following half-century has seen a sharp increase in the power of gun control opponents, a rollback of regulations, and the emergence of an individual rights interpretation of the Second Amendment. Future restrictions seem unlikely in the face of constitutional and political constraints, but some modest proposals may prove possible.

A. FEDERAL

At the national level, gun control policy has remained essentially unchanged for the past twenty years. Following the 1993 passage of both the Brady Handgun Prevention Act (commonly termed the Brady Law) and federal assault weapon restrictions, the 1994 Republican congressional victories marked the end of any momentum for additional federal legislation.[1] Since then, the federal assault weapon legislation, which appears to have had little impact,[2] has sunset, and Congress has imposed

[1] ROBERT J. SPITZER, THE POLITICS OF GUN CONTROL 147–54 (2012).

[2] CHRISTOPHER S. KOPER, UNIV. OF PA. JERRY LEE CTR. OF CRIMINOLOGY, AN UPDATED ASSESSMENT OF THE FEDERAL ASSAULT WEAPONS BAN: IMPACTS ON GUN MARKETS AND GUN VIOLENCE, 1994–2003 (June 2004), *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/204431.pdf, *archived at* http://perma.cc/5STF-W9PC (noting that, though there was a noticeable drop in use of assault weapons during the commission of crimes, "the decline . . . was offset throughout at least the late 1990s by steady or rising use of other guns equipped with [large capacity magazines]," but concluding that it was "premature to make definitive assessments of the ban's impact on gun crime.").

restrictions on the use of gun tracing results.[3] Neither of these actions constituted a significant shift in the fundamental national policy relating to firearm possession and commerce.

Despite the mass shootings at Columbine High School in Littleton, Colorado; Virginia Tech in Blacksburg, Virginia; a movie theater in Aurora, Colorado; Sandy Hook Elementary School in Newtown, Connecticut; and the attempted assassination of U.S. Representative Gabrielle Giffords and accompanying mass shooting in Tucson, Arizona, no gun control legislation has passed either house of Congress since the sunsetting of the assault weapons ban.[4] On the other hand, state legislatures have been far more active, primarily in liberalizing concealed carry laws.[5] However, in the aftermath of the Sandy Hook Elementary School shooting, a few states have moved to place additional restrictions on magazine capacity of semiautomatic firearms.[6]

In fact, the history of firearms regulation in the United States over the past century reflects a consistent pattern. The early 1900s saw a number of states move to restrict handguns in various ways, followed by many of those states retreating from those restrictions.[7] This was followed by a period of quiescence, when neither the states nor the federal government took action. The 1930s marked the next period of activity. In 1934, the National Firearms Act (NFA) was passed; the Federal Firearms Act (FFA) followed in 1938.[8] This period also demonstrated another recurring pattern. The original proposals for the NFA would have incorporated both handguns and what are currently referred to in common usage as assault rifles into the law's licensing and tax requirements.[9] However, the proposed legislation

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[3] James V. Grimaldi & Sari Horwitz, *After Gun Industry Pressure, Veil Was Draped over Tracing Data*, WASH. POST, Oct. 24, 2010, at A11.

[4] Jennifer Steinhauer, *Despite Tearful Pleas, No Real Chance*, N.Y. TIMES, Apr. 18, 2013, at A1. *See generally* PHILIP J. COOK & KRISTIN A. GOSS, THE GUN DEBATE: WHAT EVERYONE NEEDS TO KNOW 105–06 tbl.6.2 (2014).

[5] Alan Berlow, *Concealed Carry*, POLITICO (Dec. 12, 2013), http://www.politico.com/magazine/story/2013/12/gun-law-concealed-carry-permit-utah-101113.html, *archived at* http://perma.cc/HXM6-86UR. As Berlow discusses, only California, Connecticut, Delaware, Hawaii, New Jersey, New York, Maryland, Massachusetts, and Rhode Island retain discretionary permit laws as of 2013. *Id.*

[6] *See* Karen Yourish & Larry Buchanan, *State Gun Laws Enacted in the Year Since Newtown*, N.Y. TIMES, Dec. 11, 2013, at A20.

[7] *See* WILLIAM J. VIZZARD, SHOTS IN THE DARK: THE POLICY, POLITICS AND SYMBOLISM OF GUN CONTROL 87–88 (2000).

[8] *Id.* at 89–91.

[9] "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That for the purposes of this act the term 'firearm' means a pistol, revolver, shotgun having a barrel less than sixteen inches in length, or any other firearm capable of being concealed on the person, a muffler or silencer therefor, or a

was quickly amended to include only machine guns, sawed-off rifles and shotguns, silencers, and a few other odd firearms.[10]

Subsequently, public and legislative attention turned away from the issue of firearms regulation. It would take a presidential assassination to rekindle it.[11] Although Senator Dodd had introduced a bill to restrict mail order sales of handguns prior to the assassination, the bill had not moved. Following the assassination of President John F. Kennedy, Dodd amended the bill to cover all firearms and began a series of hearings.[12] Between 1963 and 1968, a combination of rising crime rates, administration support, and the murders of Martin Luther King, Jr. and Robert Kennedy finally generated enough antigun political support to push the Gun Control Act of 1968 (GCA) through Congress.[13] The GCA, with subsequent amendments, remains the primary federal statute governing the possession of, and commerce in, firearms.[14]

Although a number of unsuccessful bills expanding control of firearms were introduced during the 1970s, and some symbolic legislation relating to so-called "cop killer bullets" and "plastic guns" became law,[15] no significant new legislation passed Congress for almost two decades after the passage of the GCA.[16] During that time, organized opposition to firearms regulation intensified.[17] When new federal legislation was enacted in 1986, it reflected both the conservative political turn of U.S. politics and the increased organization and intensity of the pro-gun lobby.[18]

The Firearms Owners Protection Act (FOPA) significantly modified the GCA in several ways. Among the most significant changes were reducing a licensed dealer's record, reducing record falsification and failure to record from felonies to misdemeanors, and redefining engaging in the

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machine gun. The term 'machine gun' means any weapon designed to shoot automatically or semiautomatically twelve or more shots without reloading." H.R. 9066, 73d Cong. (1934) (enacted).

[10] 26 U.S.C. § 5845(a) (1934); Carol Skalnik Leff & Mark H. Leff, *The Politics of Ineffectiveness: Federal Firearms Legislation*, 455 ANNALS AM. ACAD. POL. & SOC. SCI. 48, 60–61 (1981).

[11] VIZZARD, *supra* note 7.

[12] *Id.* at 93–94.

[13] *Id.* at 93–105.

[14] 18 U.S.C. §§ 921–931 (2012); 26 U.S.C. §§ 5801–5861, §§ 5971-5872 (2012). See William J. Vizzard, *The Gun Control Act of 1968*, 18 ST. LOUIS U. PUB. L. REV. 79 (1999), for a broader discussion of the GCA.

[15] VIZZARD, *supra* note 7, at 129–32.

[16] *See* COOK & GOSS, *supra* note 4, 105–06 tbl.6.2.

[17] VIZZARD, *supra* note 7, at 59–72.

[18] *Id.*

business of dealing in firearms.[19] The new definition required proof of conducting a "regular course of trade or business with the principal objective of livelihood and profit through the repetitive purchase and resale of firearms."[20] In addition, the change specifically exempted anyone making "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."[21] The federal government was specifically prohibited from implementing regulations to require reporting of gun purchases or to create a gun registration system, and inspections of dealers were limited to one per year.[22]

With one significant addition, the GCA, as revised by the FOPA, remains the primary federal law regulating commerce in and possession of firearms. That addition, the Brady Law, requiring a waiting period and criminal records check before a dealer may deliver a handgun to a purchaser, passed both houses of Congress and was signed by President Clinton in 1993.[23] An amendment to the bill inserted a sunset clause on the waiting period and mandated its replacement by an instant check system for all firearms sales by licensees within five years.[24] Although a federal ban on certain firearms defined as assault weapons and on the future production of firearm magazines with a capacity exceeding ten rounds was enacted the following year, the law contained a ten-year sunset clause. Congress failed to renew the assault weapons ban in 2004, allowing it to expire.[25]

Thus, federal policy relating to firearms possession and commerce has experienced only three notable changes in the past seventy-five years. Since the 1968 enactment of the GCA, one of these policy changes, FOPA, has significantly weakened gun policy. Although the issue has recurrently intruded on the public policy agenda, received significant media attention, and stirred passions, particularly among opponents of control, Congress has not acted on any significant legislation for two decades.[26] Given that a Democratic Senate failed to pass any legislation in the aftermath of the Sandy Hook Elementary School shooting,[27] it appears unlikely that legislation of any substance will emerge from Congress any time soon.

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[19] 18 U.S.C. § 921 (2012).

[20] 18 U.S.C. § 921(A)(21)(c) (2012).

[21] *Id.*

[22] 18 U.S.C. §§ 923(g)(1)(B)(ii)(I), 923(g)(1)(C)(i) (2012); 18 U.S.C. § 926(a) (2012).

[23] 18 U.S.C. § 922(s)(1) (2012).

[24] *Id.* § 922(s).

[25] Sheryl Gay Stolberg, *Effort to Renew Weapons Ban Falters on Hill*, N.Y. TIMES, Sept. 9, 2004, at A1; *see also* SPITZER, *supra* note 1, at147 .

[26] COOK & GOSS, *supra* note 4, at 105–06 tbl.6.2.

[27] Ed O'Keefe, *Gun Background Check Compromise, Assault Weapon Ban Fail in*

B. STATE AND LOCAL

Far more activity has occurred at the state and local level. In 1976, Washington, D.C. enacted the strictest handgun law in the country, essentially banning the private ownership of handguns and imposing restrictions on the possession and storage of long guns.[28] Although some anticipated that this would be the initial act in a series of strict state laws applying to handguns, this did not prove to be the case. A 1976 Massachusetts initiative, Question 5, which would have outlawed private ownership of handguns, was defeated.[29] The subsequent defeat of Proposition 15, a measure to freeze the existing California handgun population, in 1982, clearly signaled that the D.C. law did not foretell a new wave of gun restrictions.[30] Although a few states added some minor restrictions during the next thirty years, the primary trend in state law was one of liberalizing restrictions on the concealed carrying of firearms.

Until the latter part of the twentieth century, most states either prohibited carrying a concealed firearm on the person away from one's home or business or required a permit to do so.[31] Typically, the permits were issued by local sheriffs or police chiefs, who had the discretion to deny or issue a permit based upon their judgment.[32] A few exceptions existed. Vermont, for example, had no laws relating to concealed or open carry.[33] On the opposite pole, Wisconsin had no provision for issuing a permit.[34] In 1961, the state of Washington revised its statute to guarantee all applicants, except those prohibited by law from possessing a firearm

Senate, WASH. POST (Apr. 17, 2013, 6:00 PM), http://www.washingtonpost.com/blogs/post-politics/wp/2013/04/17/senate-to-vote-on-amendments-to-gun-bill-with-background-check-plan-in-doubt/, *archived at* http://perma.cc/3W9U-F5BS.

[28] *See* Meg Smith & Leah Carliner, *A History of the DC Gun Ban*, WASH. POST (June 26, 2008, 10:30 AM), http://www.washingtonpost.com/wp-dyn/content/article/2007/07/17/AR2007071700689.html, *archived at* http://perma.cc/5R5K-HX4G.

[29] SEC'Y OF COMMONWEALTH OF MASSACHUSETTS, STATEWIDE BALLOT QUESTIONS—STATISTICS BY YEAR: 1919–2012, *available at* www.sec.state.ma.us/ele/elebalm/balmresults.html#year1976, *archived at* http://perma.cc/6KD8-P22V.

[30] The law would have required registration of all handguns in the state at time of passage, but prohibited private individuals from acquiring new ones. *See* VIZZARD, *supra* note 7, at 128.

[31] *See* JAMES B. JACOBS, CAN GUN CONTROL WORK? 34 (2002).

[32] JEFFREY R. SNYDER, CATO INST., FIGHTING BACK: CRIME, SELF-DEFENSE, AND THE RIGHT TO CARRY A HANDGUN 4 (Oct. 22, 1997), *available at* http://object.cato.org/sites/cato.org/files/pubs/pdf/pa284.pdf, *archived at* http://perma.cc/BM5H-U3B5.

[33] *See id.* at 28 n.1.

[34] *See* Patrick Marley & Bill Glauber, *Wisconsin Senate Passes Concealed-Carry Bill*, MILWAUKEE J. SENTINEL (June 14, 2011), *available at* http://www.jsonline.com/news/statepolitics/123826279.html#ixzz2wFg9PORF, *archived at* http://perma.cc/T7HH-6C8U.

such as violent felons, the right to a permit.[35] The change in the law apparently attracted little national attention. However, when Florida passed a similar liberalization in 1987, the new policy attracted nationwide attention and initiated a national trend.[36] The move to so-called "shall issue" states accelerated rapidly during the 1990s.[37] By November 2013, only nine states retained discretion for the issuance of permits, and several states had either eliminated the requirement for a permit or were in the process of doing so.[38] Although efforts by gun rights advocates to pass a state reciprocity requirement relating to concealed carry permits have failed to gain congressional approval, thirty-five states currently recognize out-of-state permits and several issue permits to nonresidents.[39] Overlapping the movement to mandatory issuance of concealed carry permits is the "constitutional carry" movement, which seeks to eliminate any requirement of a permit.[40]

As a result of the 2010 midterm elections, the rise of the Tea Party, and the subsequent reapportionment of state legislative districts,[41] the balance of power in a number of state legislatures significantly shifted to conservatives opposed to firearms regulation and federal authority.[42] The magnitude of the shift can be seen in the effort by some state legislatures to pass legislation that nullifies all federal gun laws and criminalizes their enforcement.[43] Given the fact that reapportionment will not occur until 2020, it is unlikely that the power balance of state legislatures will change appreciably enough to favor firearms control legislation before then.[44] At

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[35] VIZZARD, *supra* note 7, at 145.

[36] *Id.* at 37.

[37] *See id.*

[38] Berlow, *supra* note 5. California, Hawaii, New York, New Jersey, Maryland, Massachusetts, Connecticut, Rhode Island, and Delaware retain discretionary permit laws. *See* NAT'L RIFLE ASSOC.-INST. FOR LEGISLATIVE ACTION, STATE LAWS, http://www.nraila.org/gun-laws/state-laws.aspx (last visited June 20, 2014), *archived at* http://perma.cc/7BW7-BWCF.

[39] Berlow, *supra* note 5.

[40] Jonathan Ellis, *12 States on Path to Guns with No Permits*, USA TODAY, Mar. 7, 2012, at 3A; Charles C.W. Cooke, *AR to Become 'Constitutional Carry' State*, NAT'L R. ONLINE (July 2, 2013, 12:19 PM), http://www.nationalreview.com/corner/352575/ar-become-constitutional-carry-state-charles-c-w-cooke#, *archived at* http://perma.cc/74TM-5QGH.

[41] Steven Shepard, *Democrats Still Paying the Price for 2010 Losses*, NAT'L J. (Jan. 21, 2014), http://www.nationaljournal.com/politics/democrats-still-paying-the-price-for-2010-losses-20140121, *archived at* http://perma.cc/WLG5-XRZX.

[42] *See* Sam Wang, *The Great Gerrymander of 2012*, N.Y. TIMES, Feb. 3, 2013, at SR1.

[43] Steve Chapman, *Nullifying Gun Laws*, CHI. TRIB., Sept. 18, 2013, at 23.

[44] *See* Bob Benenson, *In Remapping, No Guarantees*, CONGRESS.ORG (Mar. 7, 2011), https://ssl.congress.org/news/2011/03/11/in_remapping_no_guarantees, *archived at* http://perma.cc/6RFA-QYJT; Alex Roarty, *Where the Biggest Wave Hit*, NAT'L J., Nov. 6, 2010, at

the other end of the spectrum, a few states have enacted more restrictive legislation.[45] However, these initiatives were limited to additional restrictions on paramilitary firearms, limits on magazine capacity, and records checks for private buyers, all policies that already existed in some states. In Colorado, new laws mandating record checks for all gun buyers and limiting firearm magazines to fifteen rounds resulted in the recall of two members of the state legislature.[46] Although predicting changes in the political winds is a risky activity, it appears unlikely that the majority of states will institute laws significantly changing the direction of firearms policy.

C. THE COURTS

While Congress has taken no significant action since the passage of the Brady Law, the Supreme Court has taken monumental action. Although impact on day-to-day policy has thus far primarily affected only Washington, D.C. and Illinois, the potential extent of these two court decisions is far-reaching. In *District of Columbia v. Heller*, the Court invalidated the District of Columbia's virtual ban on handgun possession and held that the Second Amendment conferred an individual right to possess firearms.[47] In *McDonald v. Chicago*, the Court extended the potential restraint on legislation to the states by finding that it was a fundamental right and thereby incorporated the Second Amendment under the due process clause of the Fourteenth Amendment.[48]

The *McDonald* case may prove the more important decision for gun policy in the long run. Given the history of gun regulation, a highly restrictive federal statute always seemed an unlikely event. However, both Chicago and the District of Columbia had already demonstrated the capacity of local governments to move toward virtual prohibition of handguns, and the possibility of some states following suit does not seem beyond the realm of possibility.

In addition to blocking any future move toward handgun prohibition, these two decisions have virtually assured a continuing series of future legal actions to challenge existing controls at all levels, which have already

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[45] *See, e.g.*, Ian Lovett, *In California, New Package of Gun Laws but One Snag*, N.Y. TIMES, Oct. 12, 2013, at A11; *see also* Peter Applebome & Ray Rivera, *In Connecticut, Gun Curbs Had Difficult Path*, N.Y. TIMES, Apr. 6, 2013, at A1.

[46] Katie Glueck, *Colorado Lawmakers Recalled over Guns*, POLITICO (Sept. 10, 2013, 2:51 PM), http://www.politico.com/story/2013/09/colorado-recall-guns-referendum-96566.html#ixzz2kfDAGwUm, *archived at* http://perma.cc/ALD4-SBWL.

[47] District of Columbia v. Heller, 554 U.S. 570, 622, 635 (2008).

[48] McDonald v. City of Chicago, 130 S. Ct. 3020, 3050 (2010).

begun.[49] *Heller* and *McDonald* did not occur by accident. They were the result of a long, committed, and well-funded effort in pursuit of these goals by those who view gun rights as fundamental.[50] Although the outcome of future litigation remains uncertain, the institutional forces that precipitated these decisions will not evaporate any more than did advocates of racial equality after *Brown v. Board of Education*. Just as racial integration preceded a push for school busing and affirmative action, actions to further reduce existing gun controls will follow *Heller* and *McDonald*.

II. PUBLIC OPINION AND INTEREST GROUP SUPPORT

Although surveys reflected an increase in nationwide support for requiring record checks on private gun sales in the wake of the Sandy Hook shooting, the support quickly declined.[51] The long-term trend for over twenty years has been a decline in public support for more regulation.[52] In fact, the attention devoted to firearms regulation appears to have significantly increased firearms sales in the short run.[53]

An examination of book sales, letters to the editor, and blog commentaries all support the conclusion that gun control opponents are far more intensely and consistently engaged than gun control advocates. This is further supported historically by the preponderance of letters opposing gun control received by legislators.[54]

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[49] *See* Maura Dolan, *Concealed Gun Law Overturned*, SACRAMENTO BEE, Feb. 14, 2014, at A3; Adam Liptak, *Justices Refuse Case on New York Gun Law*, N.Y. TIMES, Apr. 16, 2013, at A13; Ann E. Marimow & Aaron C. Davis, *Md. Gun Law Gets Court's Backing*, WASH. POST., Mar. 22, 2013, at B01; Jessica Gresko, *DC Again Asks Judge to Uphold Gun Laws*, ASSOCIATED PRESS (Nov. 5, 2013, 5:25 PM), http://www.nbcwashington.com/news/local/DC-Again-Asks-Judge-to-Uphold-Gun-Laws-230704001.html, *archived at* http://perma.cc/R7VG-T7WY.

[50] VIZZARD, *supra* note 7, at 53–54, 64.

[51] *See* Rebecca Ballhaus, *Poll: Support for Tighter Gun Checks Ebbs*, WALL ST. J. (Dec. 13, 2013, 10:35 AM), http://blogs.wsj.com/washwire/2013/12/13/poll-support-for-tighter-gun-checks-softens/, *archived at* http://perma.cc/8JW6-2TNG.

[52] *See* Lydia Saad, *U.S. Remains Divided over Passing Stricter Gun Laws*, GALLUP (Oct. 25, 2013), http://www.gallup.com/poll/165563/remains-divided-passing-stricter-gun-laws.aspx, *archived at* http://perma.cc/APU5-8B85.

[53] *See* Bruce Kennedy, *Will 2013 Mark Record Gun Sales in US*?, MSN MONEY (July 19, 2013, 4:47 PM), http://money.msn.com/now/post--will-2013-mark-record-gun-sales-in-us, *archived at* http://perma.cc/9L5T-MJXA; Ben Rooney, *Ruger CEO: Gun Sales Returning to Normal Levels*, CNNMONEY (Aug. 1, 2013, 4:16 PM), http://money.cnn.com/2013/08/01/investing/sturm-ruger-gun-sales/, *archived at* http://perma.cc/WM8L-3E3F.

[54] Although accurate book sales figures are not publicly available, Amazon.com rankings provide a useful proxy. This author has followed the gun issue for over forty years in a number of major newspapers and on numerous blogs, interviewed a number of federal and state legislative staff members, and worked in the ATF's headquarters. The preponderance of opposition communication was apparent in all instances. *See also* Sam Stein & Paul

The decline in public support for gun control likely results from a variety of forces. First, public support for and trust in government has declined markedly since the 1960s.[55] Second, as Benjamin Barber has argued, all American political narratives are rights-based.[56] The existence of the Second Amendment and a persistent effort by opponents of gun control to shape the argument as one of individual rights has produced these results.

In addition, the gun rights advocacy infrastructure far exceeds the meager gun control advocacy infrastructure. Those opposing gun regulation have two distinct advantages. Gun enthusiasts can organize around specific institutions and events such as gun stores, gun shows, shooting ranges, and shooting activities. A thriving gun press activates and links supporters, and numerous organizations built around shooting and gun interests provide structure for organizing.[57] Moreover, gun control advocates lack any such specific organizational advantages and most do not rank gun control as their primary issue.[58]

However, the successes of gun control opponents may hold the seeds for their future problems. Subsequent to the highly publicized Trayvon Martin homicide, Florida experienced at least two more high-profile incidents of minor confrontations escalating to the shooting death of unarmed persons.[59] It remains to be seen how such incidents, involving

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Blumenthal, *The Gun Lobby: Why the NRA Is the Baddest Force in Politics*, HUFFINGTON POST (Dec 17, 2012, 6:39 PM), http://www.huffingtonpost.com/2012/12/17/gun-lobby-nra_n_2317885.html, *archived at* http://perma.cc/UV6K-NMA8; *How the NRA Relies More on Grassroots Mobilization Rather than Lobbying*, U.S. NEWS & WORLD REPORT TUMBLELOG (Dec. 18, 2012, 10:47 AM), http://usnews.tumblr.com/post/38229308383/how-the-nra-relies-more-on-grassroots-mobilization#.UyoLD86a-So, *archived at* http://perma.cc/5FT5-H82X.

[55] *See Trust in Government*, GALLUP, http://www.gallup.com/poll/5392/trust-government.aspx (last visited Sept. 14, 2014), *archived at* http://perma.cc/BRK7-WC2Q.

[56] *See* BENJAMIN BARBER, STRONG DEMOCRACY 14–16 (1984).

[57] *See* Walter Hickey, *How the NRA Became the Most Powerful Special Interest in Washington*, BUS. INSIDER (Dec. 18, 2012, 1:43 PM), http://www.businessinsider.com/nra-lobbying-money-national-rifle-association-washington-2012-12#ixzz2ppzW3JqN, *archived at* http://perma.cc/63UX-W2TW.

[58] *See* Jeffrey M. Jones, *In U.S., Fewer Mention Economic Issues as Top Problem*, GALLUP (Mar. 14, 2013), http://www.gallup.com/poll/161342/fewer-mention-economic-issues-top-problem.aspx, *archived at* http://perma.cc/Z926-77YQ; *Gun Control: Key Data Points from Pew Research*, PEW RESEARCH CTR. (July 27, 2013), http://www.pewresearch.org/key-data-points/gun-control-key-data-points-from-pew-research/, *archived at* http://perma.cc/LJC8-4G6S.

[59] *See* Alan Blinder, *Trial Brings New Scrutiny of Self-Defense Laws*, N.Y. TIMES, Feb. 7, 2014, at A11; Frances Robles, *Retired Police Captain Feared Attack Before Shooting in Theater, Officials Say*, N.Y. TIMES, Jan. 15, 2014, at A15.

apparently law-abiding citizens who are lawfully carrying concealed handguns, will shape future public opinion.

A. THE CRIME NARRATIVE

In addition to the structural and cultural impediments to sustaining support for gun control, the writings of John Lott, Gary Kleck, and others have generated a new narrative that has undercut the perceived association between guns and violent crime. The narrative began with Kleck's argument for the crime deterring effects of guns through defensive gun use (DGU).[60] Kleck, and later Kleck and Gertz, have argued that firearms are used as many as 2.5 million times per year to defend against crime.[61] They base their conclusions on random telephone surveys that ask about the defensive use of guns.[62] Alternatively, the Bureau of Justice Statistics' National Crime Victims Survey (NCVS) produces an estimate closer to 70,000.[63]

Both surveys were conducted by legitimate researchers, albeit using different methodology.[64] The surveys used by Kleck initially asked directly about gun use to thwart crimes,[65] while the NCVS questionnaire first asked if the respondent was the victim of a crime or attempted crime, followed by questions regarding what actions were taken to resist that crime.[66] Kleck argues that the very low reporting rate to the NCVS results from fear of admitting gun use to a government agency.[67] Yet when one examines the other responses to these high-rate surveys, serious questions arise. Thirty percent of the respondents report that they probably or almost certainly saved a life through gun use. This would translate into about 600,000 lives saved per year or 300 times the total reported murders in the United States. Likewise, the number of persons reported wounded by the respondents does not match possible reality.[68]

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[60] VIZZARD, *supra* note 7, at 15.

[61] Gary Kleck & Mark Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun*, 86 J. CRIM. L. & CRIMINOLOGY 150, 164 (1995).

[62] *Id.* at 160.

[63] *See id.* at 153.

[64] For NCVS methodology, see *Data Collection: National Crime Victimization Survey (NCVS)*, BUREAU OF JUSTICE STATISTICS, http://www.bjs.gov/index.cfm?ty=dcdetail&iid=245#Methodology (last visited June 21, 2014), *archived at* http://perma.cc/YXQ8-WXTS. For the basic NCVS questionnaire, see *NCVS 2 Incident Report*, *available at* http://www.bjs.gov/content/pub/pdf/ncvs2_2012.pdf, *archived at* http://perma.cc/N2UW-FJ5U.

[65] *See* Kleck & Gertz, *supra* note 61, at 160–63.

[66] *See NCVS 2 Incident Report*, *supra* note 64.

[67] Gary Kleck & Mark Gertz, *Illegitimacy of One-Sided Speculation: Getting the Defensive Gun Use Estimate Down*, 87 J. CRIM. L. & CRIMINOLOGY 1446, 1446 (1997).

[68] *See* VIZZARD, *supra* note 7, at 15–19.

The likely answer is that a small number of respondents are exaggerating or lying. Since only 1% of respondents, in the high-rate studies, report DGU, only a small percentage of false positives will result in very high estimates.[69] Yet a critique of the methods and internal contradictions within the data offers a far less effective political argument than the claim that research proves guns prevent crimes.

Even more than the DGU argument, the writing of economist John Lott has had wide circulation. Lott's *More Guns, Less Crime*, now in its fourth edition, has been sold widely and is still routinely quoted by control opponents in letters, in blogs, and in editorials. Lott applied regression analysis to county level data and concluded that violent crime rates declined as the issuance of concealed carry licenses increased, which he attributes to deterrent effect.[70] Lott continues to depend primarily upon his original analysis, which utilized crime figures from the late 1980s and early 1990s.[71] A number of scholars have critiqued Lott's methodology, yet few members of the public have the background to evaluate econometric, quantitative models.[72]

However, a natural experiment exists as a result of differing laws in the four most populous states. California and New York have discretionary concealed permit issuance laws and low numbers of such permits.[73] Texas and Florida both mandate issuance to all applicants not prohibited from possessing firearms, such as felons and minors.[74] A comparison of violent crime and Part One crime rate changes in these states from the date of inception of the "shall issue" law to 2012 reveals that, in seven of the eight comparisons, the states with fewer permits have had greater decreases in

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[69] *See id*.

[70] *See* JOHN LOTT, MORE GUNS, LESS CRIME (2010) (utilizing regression analysis to argue that the issuance of concealed carry licenses have increased as violent crime rates have declined).

[71] *Id*. at 37–99. The time period for the data is significant, as this marked the beginning of a rapid nationwide drop in crime that continued through 2012.

[72] *See* Ian Ayres & John J. Donohue III, *Shooting Down the 'More Guns, Less Crime' Hypothesis*, 55 STAN. L. REV. 1193, 1202 (2003); William Alan Bartley & Mark A. Cohen, *The Effect of Concealed Weapons Laws: An Extreme Bound Analysis*, 36 ECON. INQUIRY 258, 258 (1998); Dan A. Black & Daniel S. Nagin, *Do Right-to-Carry Laws Deter Violent Crime?*, 27 J. LEGAL STUD. 209, 219 (1998); John J. Donohue III, *The Final Bullet in the Body of the More Guns, Less Crime Hypothesis*, 2 CRIMINOLOGY & PUB. POL'Y 397, 397–99 (2003); Mark Duggan, *More Guns, More Crime*, 5 J. POL. ECON. 1086, 1088 (2001); Steven D. Levitt, *Understanding Why Crime Fell in the 1990s: Four Factors That Explain the Decline and Six That Do Not*, 18 J. ECON. PERSP. 163, 175 (2004); Tomislav V. Kovandzic & Thomas B. Marvell, *Right-to-Carry Concealed Handguns and Violent Crime: Crime Control Through Gun Decontrol?*, 2 CRIMINOLOGY & PUB. POL'Y 363, 368–74 (2003).

[73] *See* NAT'L RIFLE ASSOC.-INST. FOR LEGISLATIVE ACTION, *supra* note 38.

[74] *Id.*

crime.[75] Given the extended period that permissive carry laws have been in effect in Florida and Texas, and the very large and diverse populations of all four states, these figures should raise questions for anyone looking at Lott's thesis. Nevertheless, Lott's work has been widely read and his thesis is routinely invoked, even by legislators.[76] And the undeniable fact is that violent crime rates, and crime rates in general, declined between 1992 and 2012 in spite of the ever-increasing number of firearms in American society.[77] Although this rough correlation does not constitute evidence that firearms reduce crime, it serves to undercut previous arguments that firearm availability constituted the primary driver of earlier increases in violent crime rates.

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[75] Calculation by author using FBI Uniform Crime Reports. Part One crimes as defined by the FBI are criminal homicide, forcible rape, robbery, aggravated assault, burglary, larceny/theft, motor vehicle theft, and arson. The author made the following comparisons between violent crime rates and Part One crime rates: From 1995 to 2011: California to New York to Texas; from 1987 to 2011, California to New York to Florida. FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, UCR DATA ONLINE, http://www.ucrdatatool.gov/index.cfm (last visited August 27, 2014) (For the 1995 to 2011 comparison, follow "Go to the table-building tool" hyperlink, then follow "All States and U.S. Total," then follow "One year of data." In Column A, query "California, New York, Texas." In Column B, query "violent property rates" and "property crime rates." In Column C, query "1995." For "violent crime rate," the values returned for California, New York and Texas should respectively be, when rounded to whole numbers, 966, 842, and 664. To compute Part I crimes for each state, add the "violent crime rate" to the "property crime rate." The values returned for California, New York, and Texas should respectively be, when rounded to whole numbers, 4,865, 4,560, and 5,684. Repeat this procedure for the year 2011 by switching the query in Column C to "2011." For "violent crime rate," the values returned for California, New York and Texas should respectively be, when rounded to whole numbers, 411, 398, 408. For Part I crimes, the values should respectively be 2,995, 2,311, and 3,880. To compute the decline from 1995 to 2011 for all states, for example, take the 1995 "violent crime rate" for California (966), subtract by the 2011 "violent crime rate" for California (411) and divide by the 1995 "violent crime rate" to get a 57% rate of decline. When repeating this calculation for New York and Texas, the decline rates for violent crimes are respectively 53% and 38%. When performing this calculation for "Part I" crimes, the decline rates for California, New York and Texas are respectively 38%, 49%, and 32%. Repeat the initial query for the 1987 to 2011 comparison for California, New York and Florida. When following these same steps, the calculations for the decline in "violent crime rates" are respectively 55%, 59%, and 49%. The calculations for the decline in "Part I crime rates" are respectively 54%, 61%, and 59%.

[76] *See* Alex Seitz-Wald, *Why Is the Media Rehabilitating John Lott?*, SALON.COM (Dec. 21, 2012, 7:57 AM), http://www.salon.com/2012/12/21/why_is_the_media_rehabilitating_john_lott/, *archived at* http://perma.cc/8LB7-BA3S; Sean Sullivan, *GOP Rep. Gohmert: More Access to Guns Could Avert Mass Shootings*, WASH. POST. (Dec. 16, 2012, 11:47 AM), http://www.washingtonpost.com/blogs/the-fix/wp/2012/12/16/gop-rep-gohmert-more-access-to-guns-could-avert-mass-shootings/, *archived at* http://perma.cc/H7J8-VHE7.

[77] Both the Uniform Crime Report and the National Crime Victim Survey support the conclusion that crime dropped significantly between the early 1990s and 2012.

III. POLICY

A. LIMITED POLICY OPTIONS

Future policy options are constrained by politics, law, and facts on the ground. In *Heller*, the Court made it clear that prohibitions on possession by some classes of persons are constitutional.[78] Thus, laws restricting felons, minors, and those who are adjudicated mentally ill seem unlikely to be in danger. Likewise, any attempt at prohibition or quasi-prohibition of firearms not currently prohibited would appear to fail the constitutional standard.[79] Thus, future fights will likely focus on concealed and open carry laws, licensing, and registration. In addition, the courts will almost assuredly have to face the issue of restrictions on military-style firearms. Assuming the courts do not overturn current restrictions on machine guns and destructive devices, a fairly safe assumption, the fight will focus on permit systems and semiautomatic, military-style rifles, often referred to as assault weapons.

Even within the confines of what is allowed under the current interpretation of the Second Amendment, efforts at any additional federal regulation face several hurdles. The first is the current strength of conservative political forces and the opposition to gun control among members of the Republican Party and other conservatives.[80] The power of such opposition is intensified by the bicameral nature of Congress and the Republican structural advantage at the state and federal level, resulting from 2010 redistricting and a lack of active public support for gun control.[81]

In addition to limits set by the Second Amendment, the Tenth Amendment also constitutes a constraint on federal options. In *Printz v. United States*, the Court ruled that the Tenth Amendment barred the federal government from requiring state and local law enforcement to conduct record checks of gun buyers.[82] Previously, the Court had ruled in *United States v. Lopez* that Congress had exceeded its Commerce Clause powers by restricting guns on or near school grounds.[83] Although these decisions do not apply exclusively to firearms controls, they do set limits on

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[78] District of Columbia v. Heller, 554 U.S. 570, 626–28 (2008).

[79] Although *Heller* left numerous questions as to the exact nature of the constitutional standard, the decision made clear that prohibition of commonly possessed firearms did not meet that standard. *Id.* at 624–25.

[80] *See* PEW RESEARCH CTR., *supra* note 58.

[81] Even when a majority supports a specific control, activity and intensity favor the opposition.

[82] Printz v. United States, 521 U.S. 898, 933–34 (1997).

[83] United States v. Lopez, 514 U.S. 549, 552 (1995).

congressional authority to devise regulation strategies that mandate any state or local action.

Finally, the sheer size of the gun-owning population and its wide distribution throughout the populace presents significant problems in crafting any uniform national regulation. Although it is impossible to exactly calculate the number of firearms in the country, the number likely exceeds 300 million.[84] Although existing barriers seem to preclude policy change, eventually all public policy is subject to change. A hundred years of Jim Crow laws and "separate but equal" jurisprudence imploded in the second half of the twentieth century. The New Deal coalition and the expansion of the welfare state looked inevitable in 1964, but not in 1968. In the case of gun control, demographics seem to portend the potential for future change. Notwithstanding the surge in gun sales that occurred in reaction to proposed changes in federal law following the Sandy Hook shooting, the long-term trend in gun ownership and in hunting is downward.[85] In an ever more urbanized nation, in which fewer young people develop interest in and attachment to guns and shooting sports, the political balance will inevitably shift over time. This trend will likely be amplified by the increasing electoral influence of women and minorities, who reflect less special interest support for gun rights and generally support more liberal candidates.[86]

B. OBJECTIVES FOR FUTURE POLICY

Rational policy formulation argues for useful and attainable goals. Too often, advocates have pursued regulation for its own sake. Three potential goals stand out as having these useful and attainable characteristics:

(1) Reduce gun possession and carrying by high-risk individuals.

(2) Reduce access to firearms by prohibited persons.

(3) Utilize firearms laws to incapacitate violent, career offenders.

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[84] William J. Vizzard, *Firearms Industry*, *in* GUNS IN AMERICAN SOCIETY: AN ENCYCLOPEDIA OF HISTORY, POLITICS, CULTURE AND LAW 290 (Gregg Lee Carter ed., 2nd ed. 2013).

[85] *Id*. at 289–90.

[86] *See* Ronald Brownstein, *Stark Divide Between Blacks, Whites on Gun Control and Health Care*, NAT'L J. (Sept. 26, 2013), http://www.nationaljournal.com/congressional-connection/coverage/stark-divide-between-blacks-whites-on-gun-control-and-health-care-20130926, *archived at* http://perma.cc/FS5B-BQN7; Taegan Goddard, *Why New Gun Controls Are Inevitable*, THE WEEK (Jan 15 2013, 9:17 AM), http://theweek.com/article/index/238772/why-new-gun-controls-are-inevitable, *archived at* http://perma.cc/9V3P-PCUX.

Access to firearms facilitates robbery, serious assault, and homicide. An examination of the circumstances of stranger homicides reveals a common pattern of young males, often under twenty-one years of age or with prior felony convictions, acting with little to no prior planning in response to challenge or conflict.[87] Routine activity theory postulates crime occurs when a motivated offender encounters an available victim in the absence of a capable guardian.[88] An offender must be capable as well as motivated. Reducing the immediate availability of a firearm by making acquisition more difficult and possession more risky directly attacks that capability.

The available evidence overwhelmingly supports the conclusion that prohibited persons acquire guns most often from acquaintances or the secondary market.[89] Offenders and traffickers have a continuing need to replenish their supply of firearms from the primary market.[90] Policy should focus on increasing risk for transfer of firearms to prohibited persons, stemming the flow of new firearms from the primary or legal market to the secondary or unlicensed market, and reducing or eliminating trafficking in this secondary market. Unlicensed traffickers lack both the motivation and capacity to determine the eligibility of a purchaser to lawfully receive the firearm and typically sell to all potential buyers.[91]

Although regulating the secondary market primarily faces opposition from conservatives and the gun lobby, the third objective generates opposition from liberals. Because the U.S. criminal justice system has overutilized incarceration as a response to crime, any proposal advancing the use of incarceration as a crime prevention mechanism faces immediate suspicion and opposition from liberals, particularly criminologists.[92] While

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[87] The author has observed homicide events for fifty years. They routinely result from a perceived slight or challenge that escalates, or from gang members detecting a violation of their turf. *See also* RICHARD T. WRIGHT & SCOTT H. DECKER, ARMED ROBBERS IN ACTION (1997). The authors' interviews of armed robbers document the tendency for spontaneous, risky behavior that is facilitated by the presence of a firearm. For characteristics of homicide events, see Evelyn M. Kuhn, et al., *Victim and Perpetrator Characteristics for Firearm-Related Homicides of Youth During 1991–1997*, *in* THE VARIETIES OF HOMICIDE AND ITS RESEARCH: PROCEEDINGS OF THE 1999 MEETING OF THE HOMICIDE RESEARCH WORKING GROUP 111, 111 (Paul H. Blackman et al., eds.), *available at* http://umaine.edu/socialwork/files/2014/02/femicide.pdf, *archived at* http://perma.cc/K7CA-7N93.

[88] *See* Nicholas Branic, *Routine Activities Theory*, ENCYCLOPEDIA CRIME & PUNISHMENT (forthcoming 2014).

[89] *See* VIZZARD, *supra* note 7, at 29–31.

[90] Phillip J. Cook, et al., *Regulating Gun Markets*, 86 J. CRIM. L. & CRIMINOLOGY 59, 63–64, 68–71 (1995). *See also* William J. Vizzard, *A Systematic Approach to Controlling Firearms Markets*, 11 J. ON FIREARMS & PUB. POL'Y 177, 179 (1999).

[91] *See* VIZZARD, *supra* note 7, at 29–31.

[92] *See* NAT'L POLICY COMM., THE USE OF INCARCERATION IN THE UNITED STATES: A

these constitute valid concerns, they should not automatically preclude consideration of targeted use of incarceration. Available research, as well as my own experience, support the conclusion that a subset of about 20% of active offenders routinely possesses and uses firearms.[93] The same research seems to support the conclusion that this group commits all crime at a rate higher than the average incarcerated offender and commits about half of all violent crime.[94] Effective enforcement of the prohibition against felons possessing firearms offers a useful mechanism for targeting this subset of offenders.[95]

C. OPTIONS

If political dynamics change adequately to open the policy window, policy entrepreneurs should focus on pursuing the forgoing goals while minimizing the burden these policies place on legitimate gun owners and licensed dealers. Because over 100 million citizens possess firearms and because most firearms dealers are small businesses, policies should be easily understood and easily followed. Any policy that demonizes gun owners, or any policy advocacy that does so, will generate massive resistance.

Effective policy faces multiple hurdles. First, it must become legislation. This means advocates must craft the policy to appeal to a coalition large enough to constitute a majority in the electorate. Second, it must not alienate a powerful minority, creating opposition that would thwart its passage and implementation. Finally, it must be successfully implemented. As Pressman and Wildavsky clearly demonstrated in their seminal work on policy implementation, simply instituting a public policy does not assure the desired result.[96] Although successful implementation depends on executive branch functionaries, legislators can produce policy

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POLICY PAPER PRESENTED BY THE NATIONAL POLICY COMMITTEE TO THE AMERICAN SOCIETY OF CRIMINOLOGY (Feb. 2001), *available at* http://www.asc41.com/policies/policypaper1.html, *archived at* http://perma.cc/8HC8-WTAK; *Understanding the Incarceration Binge: Author, Robert Perkinson Candidly Discusses Punishment in America*, ACJS NOW (ACJS, Greenbelt, MD), Aug. 2011, at 8–9; HARVARD UNIV. INST. OF POLITICS MASS INCARCERATION POLICY GROUP, COMMUNICATION OF COLLATERAL CONSEQUENCES: A STRATEGIC OUTREACH PLAN FOR THE NATIONAL INVENTORY OF THE COLLATERAL CONSEQUENCES OF CONVICTION, (May 2013), *available at* http://www.iop.harvard.edu/sites/default/files_new/research-policy-papers/Mass%20Incarceration%20Policy%20Paper.pdf, *archived at* http://perma.cc/ASM-7HNA.

[93] *See* JAMES D. WRIGHT & PETER H. ROSSI, ARMED AND CONSIDERED DANGEROUS 13 (1997).

[94] *See id*. at 13, 75.

[95] This will be discussed in more detail *infra* at Part III.C.

[96] JEFFREY L. PRESSMAN & AARON WILDAVSKY, IMPLEMENTATION (1973).

that either lays the groundwork for implementation or virtually assures that implementation will fail. To be successful, the policy should focus on clear objectives, account for the implementation environment, maximize incentives for compliance, and allow for adaptive change as operators gain experience. Unfortunately, crafting policy that will pass a legislature may require none of these.

Several modest, but workable, options exist at the federal level. Congress could revoke 18 U.S.C. 922(t)(2)(C), the existing prohibition on retaining information on criminal record checks for gun sales; the restriction in 18 U.S.C. 926(a) on the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) retaining firearms purchaser information, and 18 U.S.C. 923(g)(3)(B), the restriction on sharing firearms trace information with state and local police. The firearms lobby would characterize this as a national registration system; however, it falls far short of that.[97] It would eliminate the need for the arcane system of tracing firearms that now exists.[98] It would also allow ATF to institute a regulation requiring all licensees to report transfers to other licensees. This would eliminate the potential for licensed dealers to order guns, fail to enter them in their required log, and then sell them under the counter with no records and record checks of the owners. Currently, ATF inspectors have no means of determining if the dealer has listed all firearms received.

In addition, Congress could reinstate a felony statute for willful falsification of dealer records. FOPA reduced this offense to a misdemeanor, even when the dealer fails to record large numbers of guns or intentionally falsifies his records.[99] This change virtually assured that U.S. Attorneys would not charge this offense.[100] Although the majority of licensed firearms dealers comply with the law, detecting and prosecuting those who do not presents a significant enforcement problem.[101]

FOPA also defined "engaging in the firearms business" as requiring livelihood and profit.[102] The nature of this current definition, which allows traffickers to claim the status of hobbyists and collectors, creates ambiguity

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[97] True registration, as required by the NFA, criminalizes possession of a firearm not registered to the possessor and subjects such firearms to seizure.

[98] *See* Melissa Block, *The Low-Tech Way Guns Get Traced*, NPR (May 20, 2013, 5:11 PM), http://www.npr.org/2013/05/20/185530763/the-low-tech-way-guns-get-traced, *archived at* http://perma.cc/Y2AH-9J93.

[99] 18 U.S.C. § 924(a) (2012).

[100] U.S. Attorneys seldom file misdemeanor cases, particularly if the cases involve complex violations.

[101] *See* WILLIAM J. VIZZARD, IN THE CROSS FIRE: A POLITICAL HISTORY OF THE BUREAU OF ALCOHOL, TOBACCO AND FIREARMS 40–42 (1997).

[102] 18 U.S.C. § 921(a)(21)–(22) (2012).

for enforcers and citizens alike, and frustrates prosecution of illegal traffickers. A bright line would benefit both persons trying to comply with the law and those who enforce it. The obvious remedy for this is to set a number of sales or offers for sale—for example, six per year—that trigger the need for a license. This would impose a burden on unlicensed individuals who make a regular habit of buying and selling guns at gun shows, but that would be the point.

Currently, the law restricts dealers' licenses to those intending to engage in the business. Fees are $200 for initial application and $30 per year for renewal.[103] ATF must determine through the totality of circumstances if the applicant really intends to engage in the business. Thus, an individual can be denied a license or subsequent license renewal based on the failure to keep regular business hours at a commercial premise.[104] If ATF fails to renew the license and the individual continues engaging in gun sales, the agency is placed in the position of charging someone for dealing without a license after having denied renewal or issuance of the license. Although such a prosecution may be legally sound under current law, it seems contradictory to the layman and has been the source of conflict between ATF and gun rights advocates.[105] To remove the ambiguity, Congress could eliminate the intent-to-engage requirement and raise the fee to a level that would support the cost of issuing licenses and conducting yearly inspections. The only rational justification for limiting dealer licenses to those actively selling firearms is to reduce the total number of dealers, thus reducing the burden that additional dealers place on effective regulation and enforcement. If the dealer fees offset the cost of enforcement, and the applicant otherwise qualifies, this problem ceases to exist. Higher fees would reduce the number of inactive dealers and those remaining would offset the cost of overseeing them with their fees.

Requiring private sellers to transfer firearms through licensed dealers, thus subjecting the purchaser to Brady checks, offers significant potential for restricting the indiscriminate sale of firearms to strangers at gun shows and via newspaper or internet ads. The highly public nature of these two mediums allows for broad enforcement at minimum cost and with minimum government intrusion into private behavior. This requirement would likely prove far less effective in controlling occasional sales or transfers between familiars. Since 1991, California has required the

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[103] 18 U.S.C. § 923(a)(3)(B) (2012).

[104] William J. Vizzard, *The Gun Control Act of 1968*, 18 ST. LOUIS U. PUB. L. REV. 79, 90–91 (1999).

[105] *See* VIZZARD, *supra* note 7, at 123–24.

transferor of any firearm to do so through a licensed dealer.[106] However, California has devoted few if any resources to informing the public of the law or enforcing the law, and few residents have complied with the requirement.[107] Jacobs and Potter addressed the problems associated with enforcing such a requirement in their 1995 critique of Cook, et al.'s analysis of primary and secondary markets.[108] This focus on the mechanics of implementation, so often absent from policy analysis, raises valid issues. Establishing an illegal transfer after the fact presents significant investigative and legal difficulties.[109] However, Jacobs and Potter did not address the utility of such a requirement in constraining sales by unlicensed dealers. Failure to follow the records check process constitutes a separate violation from the unlicensed dealing. Undercover purchases would generate almost insurmountable evidence of a violation. Thus, even without a revision of the definition of engaging in the business, an effective mechanism would exist to address unlicensed and indiscriminate trafficking in firearms, curtail advertisements for sales to strangers, and prevent indiscriminate sales at gun shows.

Although a requirement to conduct a record check for all private transfers by routing them through licensed dealers would have limited impact on casual sales between acquaintances or the use of straw purchasers, it would constrain a currently unregulated secondary market that flourishes around gun shows, and progressively the Internet. Jacobs has appropriately pointed out the fallacy of trying to control only sales at gun shows, arguing that sellers wishing to avoid the record check requirement could agree to sell at the gun show and consummate the sale later.[110] This argument reflects some lack of experience with gun shows. Based on this author's extensive experience attending gun shows, it seems likely that many unlicensed sellers sell far too many guns to efficiently arrange sales for later dates. However, some number would do so. Requiring all transfers, or all transfers other than those to close relatives and

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[106] CAL. PENAL CODE § 28050 (West 2012).

[107] Reported sales by dealers outnumber those originating with non-licensed individuals eight to one; data for 2011–2013 provided to author by California Department of Justice, Bureau of Firearms (Jan. 31, 2014).

[108] *See generally* 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 (1995) (critiquing Cook et al.'s analysis).

[109] *Id*. at 110–12; *see also* VIZZARD, *supra* note 7, at 158–64. The only parties with direct knowledge of venue and circumstances of the event have rights against self-incrimination. Absent registration or a requirement to report loss or theft, the transferor can claim either of these or transfer to an unidentified third party who was not a prohibited person.

[110] *See* JACOBS, *supra* note 31, at 130–32, 134–36.

temporary transfers for hunting or competition, to go through record checks, would make selling to strangers far more vulnerable to enforcement action. Jacobs further makes the point that sales between individuals are difficult to detect and to prosecute absent some system of required registration; he is correct on both counts.[111] However, Jacobs overlooked the deterrent effect on repeat sellers.

While law enforcement lacks a mechanism, absent compulsory registration, for determining that a gun transferred without the proper process as well as means of proving the facts of the transfer, repeat sellers are vulnerable to purchases by informants and undercover law enforcement officers. Unlike drug dealers, gun sellers must constantly seek new customers. Although some customers will make repeated purchases if guns are confiscated, lost, stolen, or discarded, guns do not wear out readily. By dealing with new customers, traffickers put themselves at far greater risk than dealing with a fixed customer base. In addition, guns are difficult to hide and discard on short notice, making evidence easier to seize. Any effort to sell via newspaper or Internet ads without proper transfer puts even the occasional seller at risk. Thus, Jacobs's conclusion—that the requirement for all sales to be conducted through a dealer is unenforceable—applies only to occasional sales, not to volume trafficking.

D. REGISTRATION AND LICENSING

Enforcing controls on the secondary market and policing individual transfers to prohibited persons would prove far easier if the United States had a comprehensive system of licensing and registration for firearms owners and firearms. In effect, a license would provide a pre-clearance of the purchaser. The current problem of following up ambiguous dispositions to arrests and mental commitments before a firearm sale can be approved would cease, as this action could occur before the issuance of a license. Such a system would undercut any defense that the transferor of a firearm did not realize the recipient's status or the need to conduct the transfer through a licensed dealer. Even straw purchasers who buy guns for prohibited persons using their own identification would have to obtain a permit. Requiring a minimum of training, some sort of competency examination, and positive identification to obtain a permit would likely deter many straw purchasers, who can now simply fill out a simple form and show a driver's license.[112]

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[111] *See id*. at 131, 135–36.

[112] These are the typical minimum requirements proposed by advocates of firearms licensing. *See* S. 1878, 103d Cong. (1994).

Unfortunately, any permit and licensing system faces numerous practical, political, and legal hurdles. The sheer size of the existing firearms inventory and the number of gun owners constitute two of the greatest hurdles. Although the exact number of firearms cannot be determined, the best estimate is somewhere over 300 million and growing.[113] The number of gun owners proves equally ambiguous, but may well approach 100 million.[114] Any effort to register this many firearms in the possession of so many individuals presents a formidable task both practically and politically. Other than the Internal Revenue Service and the Social Security Administration, the federal government lacks any agency with the infrastructure and experience to handle such a task, but this function does not fit with the existing role or culture of either agency. In addition, both agencies seem stretched to their limit with their current functions. The task could be simplified if the states took on the primary responsibility and the federal government provided a central repository of information. State motor vehicle departments have both the type of experience and infrastructure that would be required, although not the resources.

The federal government has succeeded in convincing state legislatures to insert uniform standards into state law in areas such as auto safety, drinking age, environmental regulation, and educational testing. However, recent state resistance to support for universal health care and the establishment of state exchanges demonstrates a very different political environment than that of past years. Given the pattern of actions in many states on concealed carry and efforts by some states to block enforcement of existing federal firearms laws, cooperation seems highly unlikely in a majority of states. Any federal effort to mandate state action would face a constitutional challenge invoking the *Printz* precedent.

An alternative, advanced in the Gun Violence Prevention Act of 1994, would impose registration more gradually by registering firearms only at the time of transfer.[115] This approach would leave millions of unregistered firearms to migrate into the secondary, illegal market and eliminate the

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[113] Vizzard, *supra* note 84, at 290.

[114] Survey data shows that the percentage of respondents stating that they personally own guns varied between 27% and 34% over the past ten years. Using the median of 30.5% multiplied by the population of the United States, the number of gun owners "approaches" 100 million. *See Gun Ownership Trends and Demographics*, PEW RESEARCH CENTER FOR THE PEOPLE & THE PRESS (March 12, 2013), http://www.people-press.org/2013/03/12/section-3-gun-ownership-trends-and-demographics, *archived at* http://perma.cc/5CPG-99CA.

[115] S. 1878, 103d Cong. (1994).

primary benefit of registration.[116] An effective registration system allows police officers to make an instant determination of the legal status of the firearm, just as licensing allows instant determination of the legal status of the possessor. A hybrid system like that advanced in the Gun Violence Prevention Act undercuts the very justification for either system.

Given the practical, political, and legal barriers that currently exist, there seems little likelihood of Congress approving any uniform national system of either firearm registration or firearm owner licensing. The same conclusion appears probable for the majority of state legislatures.

E. FOCUS ON FELONS

A strategy that has received little attention is to focus on using firearms laws to incapacitate the highest risk offenders. As previously cited, research indicates that a subset of active offenders account for over half the criminal impact.[117] This same group self-reported routinely possessing and carrying firearms.[118] This behavior renders this group vulnerable to the use of firearms statutes. By definition, most are prohibited persons as a result of felony convictions. Many are subject to parole and probation searches. Police agencies often target this same group for focus and attention by career offender units.[119] Yet police efforts often focus on apprehending members of this group during crimes such as burglary or robbery. In practice, this strategy faces three hurdles. First, even active offenders engage in criminal conduct for very short periods of time, necessitating extended covert surveillance by law enforcement. Second, offenders are at their highest level of alertness immediately before, during, and after committing offenses, making surveillance most difficult. Third, apprehension before an offense occurs likely precludes prosecution, while apprehension during or after creates high risk for police and public.[120] Yet to allow an offense to take place puts police at great risk of public condemnation.

In this author's experience, police officers have historically often felt the need to apprehend offenders during or immediately after a primary

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[116] For a detailed discussion of problems associated with this approach, see JACOBS, *supra* note 31, at 137–52.

[117] WRIGHT & ROSSI, *supra* note 93, at 75.

[118] *Id.* at 13.

[119] SUSAN E. MARTIN & LAWRENCE W. SHERMAN, POLICE FOUND., U.S. DEP'T OF JUSTICE, CATCHING CAREER CRIMINALS 11 (July 1986), *available at* http://www.policefoundation.org/content/catching-career-criminals-0, *archived at* http://perma.cc/4S7D-A3RP.

[120] Thirty years of law enforcement experience and fifty years of following criminal behavior have convinced the author that arresting a suspect during an offense generates a fight or flight response likely to precipitate violent behavior or risky flight.

offense has occurred to assure evidence necessary to prosecute the offender. Apprehending an offender with a firearm at a less risky time has less appeal to these officers, because the possession of firearms by felons has been viewed as a less serious "status offense." Such offenses have historically often received less investigative and prosecutorial attention because the law treats them as less serious offenses. Sentencing serves as a proxy for importance in the world of criminal law.

Operationally, prosecution of serious offenders for firearm possession offers a number of advantages. The primary witnesses usually consist of law enforcement officers, who are likely to be more effective witnesses than the typical victim, and who are more likely to appear in court. A possession charge offers few defensive strategies when the gun is on the person.[121] Although discovery in a home or car resulting from a parole/probation search or search warrant requires more investigation to substantiate intent and capacity to possess, suppression of evidence proves difficult in such scenarios.[122]

Ironically, during two decades in which sentences for a variety of crime, particularly those involving narcotics and sexual assaults, were widely increased, legislatures have largely ignored firearm possession offenses. Congress did, however, institute mandatory sentences for felons in possession who had three prior violent crimes or serious drug offenses.[123] Only California included felon in possession in its career offender law.[124] Elevation of the sentencing potential for felons possessing firearms would have to overcome the current reaction over sentencing of minor drug offenders and other mandatory sentencing that has expanded prison populations and has generated negative reaction from scholars, the legal profession and, most recently, the public. The most visible example of the reaction to this overreach is evident in the successful passage of Proposition 36, which greatly reduced the number of offenses constituting a third strike under California law. [125]

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[121] The primary defense available is to suppress the search. However, *Terry* stops specifically allow checking for weapons. Thus the discovery of a firearm offers a difficult set of facts for the defense.

[122] *See* William J. Vizzard, *Reexamining the Importance of Firearm Investigations*, 68 FBI LAW ENFORCEMENT BULL. 1, 1–6 (May 1999).

[123] 18 U.S.C. § 924(e)(1) (2012).

[124] California's Three Strikes Law originally included all felonies as a third strike. However, Proposition 36, passed by the voters in 2012, redefined the law and eliminated felon in possession offenses as a third strike in the process. CAL. PEN. CODE § 667 (Deering, LEXIS through 2014 Sess.).

[125] *See* PROPOSITION 36, *available at* http://vig.cdn.sos.ca.gov/2012/general/pdf/36-title-summ-analysis.pdf, *archived at* http://perma.cc/8DGB-HCQS; Tracey Kaplan, *Three-Strikers' Families Hope for Early Release*, SAN JOSE MERCURY NEWS, Nov. 8, 2012, at A13.

Longer sentencing of repeat felons with firearms differs from California's three strikes mandatory twenty-five years to life sentence for any felony[126] or the disproportionate federal sentences for crack cocaine.[127] Both of these grew out of moral panics that generated political responses. Unlike the crack cocaine sentences, this approach would not apply to young persons with little or no criminal history. Unlike the original California approach, it would not target low risk, chronic offenders. Active offenders, who make a practice of carrying firearms, constitute a very high-risk population. Choosing to attain a firearm illegally constitutes a conscious, planned offense. Even the decision to carry a firearm often involves more opportunity for thoughtful reflection than the decision to use the firearm. The combination of persons with a predilection for violence and firearms is very dangerous.

Although increasing the likelihood of incarceration for firearms possession by persons with prior violent felony convictions would not face the entrenched opposition of conservatives and the gun lobby, it will likely face opposition from some liberals and scholars who will see it as just another effort to utilize incarceration as the sole response to crime. Reducing this opposition would require convincing elites, particularly attorneys and social scientists, that this is a limited effort directed only at those offenders who pose the greatest risk and are the least amenable to rehabilitation and not a new push for massive incarceration.

F. POLICY CHANGES UNLIKELY

Long-term demographic trends do seem to foretell a slow decline in American gun culture, with both hunting and gun ownership reflecting this trend.[128] Although this would seem to imply an improving environment for additional gun control, significant policy change in the area of gun regulation seems unlikely in the foreseeable future. The current state of national politics constitutes the greatest immediate bar to legislation. Beyond that, the entrenched power of gun control opponents, combined

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[126] *See* PEN. § 667.

[127] Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, Attorney General Holder Urges Changes in Federal Sentencing Guidelines to Reserve Harshest Penalties for Most Serious Drug Traffickers, DEP'T OF JUSTICE (Mar. 13, 2014), *available at* http://www.justice.gov/opa/pr/2014/March/14-ag-263.html, *archived at* http://perma.cc/AAY7-7X4E.

[128] *See* Sabrina Tavernise & Robert Gebeloff, *Share of Homes with Guns Shows 4-Decade Decline*, N.Y. TIMES, Mar. 10, 2013, at A1. U.S. Fish and Wildlife data on hunting licenses reflect that they peaked in 1982 at nearly 16.8 million and have declined to about 14.6 million in 2013. *See* U.S. FISH & WILDLIFE SERVICE HISTORICAL HUNTING LICENSE DATA, *available at* http://wsfrprograms.fws.gov/Subpages/LicenseInfo/Hunting.htm, *archived at* http://perma.cc/3BMQ-4M3V.

with the practical problems of designing a workable regulatory policy that can be implemented for such a large gun-owning population with over 300 million guns, constitute long-term barriers that will not dissolve readily, even if the political environment becomes less acrimonious and more cooperative.

In the near and intermediate term, decentralized efforts directed at reducing gun carrying and violent behavior among at-risk populations seem to offer the most potential for reducing gun violence. Two important facts regarding homicide should inform policy: many homicides are spontaneous actions facilitated by the presence of firearms, and second, these homicides are concentrated culturally and geographically.[129] As Malcolm Gladwell has so convincingly argued, social change does not follow a linear trajectory, but spreads like an epidemic.[130] Changing a few critical actors holds the key to initiating the spread of a social norm and social behavior. Interventions that change norms relating to gun carrying and acceptance of violence as normal behavior among high-risk populations offer significant potential for reducing death and serious injury from firearms. Ceasefire projects would seem to offer more near-term hope for reducing violence than does the frustrated pursuit of new national gun laws.[131]

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[129] *See* CHERYL L. MAXSON ET AL., NAT'L CRIM. JUSTICE REFERENCE SERV., ADOLESCENT HOMICIDES IN LOS ANGELES: ARE THEY DIFFERENT FROM OTHER HOMICIDES? (DRAFT) (2002), *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/193811.pdf, *archived at* http://perma.cc/92KL-BKWJ?type=pdf; BRIAN WIERSEMA, NAT'L CRIM. JUSTICE REFERENCE SERV., COMMUNITY STRUCTURE AND PATTERNS IN CRIMINAL HOMICIDE: EXPLORING THE WEEKEND EFFECT (Jan. 1996), *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/187353.pdf, *archived at* http://perma.cc/23MD-LCQR?type=pdf; FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, CRIME IN THE UNITED STATES 2012, http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/offenses-known-to-law-enforcement/expanded-homicide (last visited June 30, 2014), *archived at* http://perma.cc/G9NL-5WV7?type=source.

[130] MALCOLM GLADWELL, TIPPING POINT (2000).

[131] WESLEY G. SKOGAN & SUSAN M. HARTNETT, EVALUATION OF CEASE FIRE-CHICAGO (2009). It should be noted that, as would be expected if the Chicago project has in fact continued to change behavior, the Chicago homicide rate dropped approximately 20% in 2013. *See* Maudlyne Ihejirika, *Shooting Incidents Among Youth in Chicago down 40 Percent: City Analysis*, CHI. SUN-TIMES, (Jan. 27, 2014, 10:32 PM), http://www.suntimes.com/25216021-761/shooting-incidents-among-youth-in-chicago-down-40-percent-city-analysis.html#.U_4_1VY0c6I. Likewise Oakland, California, implemented Cease Fire and experienced a significant homicide drop. *See* Lee Romney, *Bright Spots for Oakland Police*, L.A. TIMES, Jan. 27, 2014, at AA1; Harry Harris, *Oakland Sees Biggest Drop in Homicides Since 2004*, SAN JOSE MERCURY NEWS, Jan. 1, 2014, http://www.mercurynews.com/california/ci_24823295/oakland-city-sees-biggest-drop-homicides-since-2004, *archived at* http://perma.cc/F7VT-Z5XQ.