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ARTICLES

PLUGGING THE BULLET HOLES IN U.S. GUN LAW: AN AMMUNITION-BASED PROPOSAL FOR TIGHTENING GUN CONTROL

BRENDAN J. HEALEY*

INTRODUCTION

Ammunition control is the next frontier in U.S. gun control policy. As Scott D. Dailard noted only four years ago: “Since the birth of national firearms policy in 1934, Congress has neither adopted nor proposed any primary gun control strategy based on the regulation of ammunition.”¹ The situation has changed somewhat since Dailard’s pronouncement, at least in terms of gun control proposals,² but ammunition control remains a comparatively virgin legislative territory. Public attention and recent legislation have focused on armor-piercing and cop-killer bullets, but such laws operate at the margins and do not regulate the vast majority of ammunition.³ Though this type of legislation

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1. Scott D. Dailard, *The Role of Ammunition in a Balanced Program of Gun Control: A Critique of the Moynihan Bullet Bills*, 20 J. LEGIS. 19, 19 (1994).

2. See *infra* notes 36, 79-100 and accompanying text.

3. See *Armor Piercing Ammunition*, Pub. L. No. 99-408, 100 Stat. 920 (1986) (codified as amended at 18 U.S.C. §§ 922, 923 (1998)). See also *Comprehensive Crime Control Act of 1984*, Pub. L. No. 98-473, 98 Stat. 1837 (codified as amended at 18 U.S.C. § 929 (1994)) (providing for sentence enhancement for possession of armor-piercing ammunition in federal crime of violence or drug trafficking). *But see* GARY KLECK, POINT BLANK 82-83 (1991) [hereinafter KLECK, POINT BLANK] (“[A]t the time the law was voted on, there were no documented cases of a policeman being killed by such a[n] [armor piercing] bullet. Congressional committees could find only 18 cases over an

garners headlines, other types of ammunition control laws could be much more effective while assuming a lower profile on the U.S. political landscape.

The gaps in U.S. gun laws need to be filled because the United States has a high rate of firearm deaths, particularly in relation to other industrialized countries.⁴ In 1997, firearms were involved in 10,369 murders, 197,686 robberies, and 204,498 aggravated assaults.⁵ Nearly 35,000 Americans died as a direct result of gunfire, in 1995, whether by murder, suicide, or accident.⁶ In 1994, it was estimated that an additional 150,000 Americans were injured by firearms every year.⁷ In 1997, 972 youths under age 18 were killed by firearms.⁸

The federal government can and has reduced the danger to other aspects of American life. Through concerted, wide-ranging efforts the government has managed to slash mortality rates caused by cigarettes and automobiles, which, like guns, can be dangerous yet are widely used products of modern society.⁹ This Article does not recommend following the same strategies used in those campaigns, but these experiences show how to reduce fatalities without overly intruding on basic freedoms. The same can be done for guns, and the avenue to greater efficacy is ammunition control.

This Article explores ammunition control as an avenue

18-year period in which criminals were even found in possession of armor-piercing ammunition.”).

4. See H.R. Rep. No. 344, 103d Cong. 1985 (1993) (noting that, in 1990, handguns were involved in deaths of 22 people in Great Britain, 87 in Japan, and 68 in Canada and that comparable number in United States was 24,000).

5. See FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS FOR THE UNITED STATES 20, 31, 34 (1997) [hereinafter UNIFORM CRIME REPORTS].

6. See Violence Policy Center, *Firearm Facts* (visited Sept. 27, 1998) <http://www.vpc.org/fact_sht/firearm.htm>.

7. See ERIK LARSON, LETHAL PASSAGE: HOW THE TRAVELS OF A SINGLE HANDGUN EXPOSE THE ROOTS OF AMERICA'S GUN CRISIS 18 (1994) (estimating that 150,000 people incur nonfatal gunshot wounds annually).

8. See UNIFORM CRIME REPORTS, *supra* note 5, at 20.

9. Senator Moynihan analogizes the effort to make ammunition safer to that undertaken to make cars safer. As Moynihan notes, although manufacturers initially fought safety-oriented legislation, they now trumpet their cars' safety features in their advertising. 139 CONG. REC. S16931, S16932 (daily ed. Nov. 22, 1993) (statement of Sen. Moynihan). See also Daniel J. French, Note, *Biting the Bullet: Shifting the Paradigm from Law Enforcement to Edidemiology; A Public Health Approach to Firearm Violence in America*, 45 SYRACUSE L. REV. 1073, 1089-1100 (1995) (discussing similarities between auto and gun safety at length); Philip Weiss, *A Hoplophobe Among the Gunnies*, N.Y. TIMES MAG., Sept. 11, 1994, at 65 (“Arguably, the country is now at a turning point on the gun issue, one that recalls the period in the 60’s when two other private matters were transformed into public health issues: smoking and auto safety.”).

toward reducing gun violence in a culture that already is saturated with guns¹⁰—and nearly as saturated with gun control laws.¹¹ The centerpiece of this Article is a proposal to bring ammunition, not just handgun ammunition but all ammunition, under the aegis of the Brady Handgun Violence Prevention Act (“Brady”).¹² This proposal is designed not only to remedy some of the shortcomings in Brady but also to provide better control of firearms in general. Variations on this idea have been proposed by Senator John Kerry of Massachusetts, then Senator Howard Metzenbaum of Ohio, and Congressperson Joseph Kennedy of Massachusetts.¹³ These proposals, lost in the “sexier” aspects of gun control, however, have garnered little attention.¹⁴ This Article highlights, in a uniquely comprehensive manner, the advantages, and disadvantages, of adding ammunition to Brady.

In conjunction with adding ammunition to Brady’s purview, this Article proposes a larger program of control of ammunition dealers. This proposal includes a licensing requirement for ammunition dealers that would subject them to a stiff licensing fee. A proposal that may not be politically possible, but nonetheless bears consideration, particularly in light of recent local initiatives, is better point-of-sale recordkeeping. In the new licensing system, dealers would be asked to keep comprehensive

10. See Richard Hofstadter, *America as a Gun Culture*, in AMERICAN HERITAGE 21 (1970), quoted in FRANKLIN E. ZIMRING & GORDON HAWKINS, *THE CITIZEN’S GUIDE TO GUN CONTROL* 67-68 (1992) (stating that “[t]he United States is the only modern industrial urban nation that persists in maintaining a gun culture. It is the only industrial nation in which the possession of rifles, shotguns, and handguns is lawfully prevalent among large numbers of its population.”).

11. See *Preface* to ZIMRING & HAWKINS, *supra* note 10, at xi (noting that “Americans not only own a greater number and variety of firearms than citizens of any other modern state, . . . [t]he United States . . . has more firearms legislation than any other country in the world.”).

12. Brady Handgun Violence Prevention Act of 1993, Pub. L. No. 103-159, 107 Stat. 1536 (1993) (codified as amended at 18 U.S.C. § 922 (1994)).

13. Ammunition Safety Act of 1997, S. 553, 105th Cong. (Sen. Kerry’s proposal for adding bullets to Brady among other ammunition-related proposals); Ammunition Safety Act of 1997, H.R. 1349, 105th Cong. (Rep. Kennedy’s bill); Gun Violence Prevention Act of 1994, S. 1982, 103d Cong. (Sen. Metzenbaum’s bill); Ammunition Safety Act of 1995, S. 433, 104th Cong. (Sen. Kerry’s proposal for adding bullets to Brady); H.R. 1403, 104th Cong. (1995) (Rep. Kennedy’s proposal for adding bullets to Brady).

14. Three contemporaneous news stories reflect how little attention the ammunition provisions of Brady II received. See Mary Ann Akers, *Bradys Celebrate and Introduce New Handgun Bill*, U.P.I., Feb. 24, 1994 (introducing Brady II and mentioning ammunition only in context of arsenal licenses); Tom Diemer, *New Gun Bills Calls for Licensing; Metzenbaum Introduces New Measure*, CLEV. PLAIN DEALER, March 1, 1994, at 12A (discussing Brady II and mentioning only ban on non-sporting ammunition); Joanne Kenen, *Brady Seeks Tighter Gun Laws as Controls Begin*, REUTERS N. AM. WIRE, Feb. 28, 1994 (making no reference to ammunition in story on Brady II).

records of what ammunition they sell and to whom they sell it. This Article also proposes a ban on the sale of mail-order ammunition. Such a prohibition dovetails nicely with adding bullets to Brady because a background check requires an in-person transaction. Like the other aspects of this proposal, the elimination of mail-order sales reflects an attempt to control ammunition without overly infringing the rights of legitimate handgun users.¹⁵ None of these proposals are “magic bullets,” so to speak, but they could tighten some of the loopholes in gun control laws and help reduce incidents of handgun violence.

Section I of this Article begins with a discussion of the reasons why bullet control offers hope for effectively lowering gun violence—in essence, answering the question of why bullet control. Section II provides a brief overview of the history of gun control legislation and a brief survey of federal, state, and local gun control laws. A look at gun control and the Second Amendment helps put the Article’s focus on ammunition control in sharper perspective. Section III includes a survey of ammunition control, both the few laws that are on the books as well as proposed legislation. The heart of the Article, Section IV, covers the proposed ammunition control policy, beginning with the Brady Bill and the inclusion of handgun ammunition in Brady’s regulatory scheme. Next, two possibilities for more control of dealers are discussed: stricter licensing requirements for ammunition sellers and point-of-sale recordkeeping for bullets. Finally, Subsection C of Section IV discusses mail-order ammunition, and strategies for stopping the interstate sale of bullets.

In his book *Targeting Guns*, Gary Kleck has posited several principles that he believes effective weapons regulation should share. According to Kleck, future regulations should have the following attributes:

1. The controls should regulate long guns at least as strictly as handguns. Their political advantages notwithstanding, controls that restrict only handguns probably do more harm than good
2. The controls should be popular enough to be politically achievable and to not provoke massive disobedience and evasion
3. They must be obeyed by a nonnegligible fraction of the violence-

15. It is worth noting that any sweeping gun control legislation will change people’s buying habits in the short term as they try to get their purchases in under the wire. This sort of activity is endemic to gun control legislation. See, e.g., Richard Foster, *Buying Out Gun Shops to Beat the Ban*, ROANOKE TIMES & WORLD NEWS, Sept. 4, 1994, at B1 (noting run on assault weapons purchases in anticipation of passage of federal bill banning sales of such firearms). If the proposal outlined herein were to become law, there undoubtedly would be a short-term bump in ammunition sales.

prone population, not just by relatively nonviolent, noncriminal people.

4. They should not depend on the hopeless task of producing overall gun scarcity in a nation that already has over 230 million guns

5. They should avoid the jurisdictional "leakage" problem, whereby strict local controls on gun acquisition are evaded by going to less strict areas

6. They should address the private transfers of firearms that account for the overwhelming majority of gun acquisitions by violence-prone people

7. They should not be extremely expensive relative to their benefits.¹⁶

Kleck's list provides a useful and sensible starting point for assessing the prospects of proposed gun legislation, and the bullet control plan proposed herein has the potential to meet Kleck's criteria. The proposal's potential for success is attributable in part to some of the unique characteristics of ammunition, characteristics that make bullets particularly ripe fodder for future weapons control legislation.

I. WHY AMMUNITION CONTROL?

The historical tendency to give ammunition short shrift in gun legislation is particularly striking in light of the advantages to be gained from regulating bullets.¹⁷ As Senator Kerry has noted: "[R]egulating only weapons is naive."¹⁸ Keeping the focus on weapons and away from ammunition has been a misguided strategy for several reasons but generally because regulating ammunition offers the possibility for real change.

Senator Moynihan has said: "[L]ike nuclear waste, guns remain active for centuries. With minimum care, they do not deteriorate."¹⁹ Ammunition has a much shorter "shelf life."²⁰

16. GARY KLECK, *TARGETING GUNS: FIREARMS AND THEIR CONTROL* 385-86 (1997) [hereinafter *KLECK, TARGETING GUNS*].

17. See ROBERT SHERRILL, *THE SATURDAY NIGHT SPECIAL* 293 (1973) ("Actually it would be much more important to control ammunition than to control guns, if one wanted to affect crime rates, but most people can't see that."). See also French, *supra* note 9, at 1097-98 (enumerating advantages of bullet control as opposed to gun control).

18. 141 CONG. REC. S2826 (daily ed. Feb. 16, 1995) (statement of Sen. Kerry).

19. 141 CONG. REC. S369 (daily ed. Jan. 4, 1995) (statement of Sen. Moynihan).

20. See KLECK, *POINT BLANK*, *supra* note 3, at 415 (noting that "[t]he powder in gun ammunition eventually becomes unusable after 20 or more years, and can become unreliable much earlier").

Given that guns do not deteriorate, the other alternatives to reducing the supply that is already in public hands are to induce people to surrender their firearms or to confiscate the firearms. Confiscating guns would be practically impossible and nearly as difficult politically.²¹ Even if a million handguns were confiscated every year, there would still be a net gain of nearly three million per year, given the current rate of almost four million new handguns entering the market annually.²² Voluntary gun buybacks and the like offer a similarly low possibility of putting a dent in the number of guns in circulation. Voluntary gun returns and buybacks have garnered a great deal of attention but have only marginal efficacy.²³ There are more than 200 million guns in circulation,²⁴ and as Senator Moynihan has noted: "The weapons are there and they will not go away."²⁵

The focus therefore turns to ammunition for several reasons. First of all, a higher proportion of ammunition than of guns enters the market every year. Senator Moynihan estimates that there are 7.5 billion rounds of ammunition in private hands, about a four-year supply, indicating that roughly a quarter of this total is replenished every year.²⁶ The higher proportion of new ammunition use, as well as the differences in useful life, leads to the conclusion that a change in ammunition policy will have a more tangible and immediate effect than will new gun-related laws.²⁷ Also, bullets and or cartridges are often found at the scene

21. See, e.g., Don B. Kates, Jr., *Reflections on Gun Control and Holocausts* 10 (1994) (reviewing JAY SIMKIN ET AL., *LETHAL LAWS* (1994)) (unpublished manuscript, on file with author) (arguing that disarming citizens can lead to "extreme misuses of government power"). See also Andrew D. Herz, *Gun Crazy: Constitutional False Consciousness and Dereliction of Dialogic Responsibility*, 75 B.U. L. REV. 57, 89 n.126 (1995) ("Virtually no one in the gun control movement calls for confiscation.").

22. See KLECK, *TARGETING GUNS*, *supra* note 16, at 96-97 (including table on stock of existing guns that shows that 3,752,257 handguns were added in 1994 and that number of handguns per 1000 in population has climbed steadily to 325.2).

23. See William Allen, *Failure, Success in Gun Buybacks*, ST. LOUIS POST-DISPATCH, Feb. 19, 1995, at 10D (stating that "[g]un buyback programs make good publicity but do little to reduce gun crimes").

24. See LARSON, *supra* note 7, at 19 (noting ATF study indicating that, as of 1989, there were 66.7 million handguns and 200 million firearms in circulation in United States).

25. 139 CONG. REC. S14958 (daily ed. Nov. 3, 1993) (statement of Sen. Moynihan). See also ZIMRING & HAWKINS, *supra* note 10, at 95 ("[I]t is said that the number of firearms presently available in the United States is so great that the time to do anything about them has long since passed.").

26. See 139 CONG. REC. S612, S613 (daily ed. Jan. 21, 1993) (statement of Sen. Moynihan).

27. But see ZIMRING & HAWKINS, *supra* note 10, at 39-41, for the "new guns" hypothesis positing that newer guns are far more likely to be involved in crimes than are older guns.

of the crime, whereas guns usually are not, making ammunition an excellent source of forensic evidence, and one that can be used more advantageously than at present.²⁸ The impossibility of dealing with the massive amount of guns already in private hands, the possibility of affecting real change sooner, and the forensic potential of spent ammunition all point toward ammunition control as a viable and productive alternative to more gun control.

A few caveats should be noted before progressing into the proposals for bullet regulation. First, this scheme relates to federal laws, unless otherwise noted. Second, it refers to all ammunition, not just that for handguns. Although handguns cause a significant portion of human injuries and fatalities²⁹ and are involved in the majority of violent crimes,³⁰ regulating only handguns could cause people to substitute with long guns, which tend to be more destructive than handguns, when committing crimes.³¹

This Article also looks at reform through the lens of legislation, as opposed to court decisions, and specifically in terms of federal legislation.³² One of the main problems with this country's patchwork system of gun control laws is migration.³³ For

28. See, e.g., Robin Pogrebin, *Anatomy of a Murder Scene*, N.Y. TIMES MAG., Jan. 28, 1996, at 42 ("A deformed bullet—one that has been fired—is particularly valuable . . .").

29. See KLECK, TARGETING GUNS, *supra* note 16, at 25-26 (showing that in 1995 handguns were involved in 60.3% of murders and nonnegligent manslaughters involving guns).

30. See, e.g., UNIFORM CRIME REPORTS, *supra* note 5, at 18 (noting that handguns were used in 8,104 or 78% of 10,369 murders in which firearms were used); U.S. DEPARTMENT OF JUSTICE, CRIME DATA BRIEF (Apr. 1994) (showing that handguns were involved in 930,700 homicides, rapes, robberies, and assaults in 1992); NATIONAL COMMISSION ON THE CAUSE & PREVENTION OF VIOLENCE, FIREARMS AND VIOLENCE IN AMERICAN LIFE 49 (1969) (showing that handguns were involved in 76% of homicides, 86% of aggravated assaults, and 96% of robberies).

31. See KLECK, TARGETING GUNS, *supra* note 16, at 385 (noting that "controls that restrict only handguns probably do more harm than good").

32. Congress's ability to write legislation regarding gun, or by extension, ammunition control has come into question lately with the decision in *United States v. Lopez*, 514 U.S. 549 (1995), discussed in *infra* note 54 and accompanying text. Congress enacts such legislation under the power granted it by the Commerce Clause. U.S. CONST., art. I, § 8 ("Congress shall have the power to . . . regulate Commerce with foreign Nations, and among the several States . . ."). It is not expected that any of the federal legislation proposed in this Article would exceed the bounds of Congress's power under the Commerce Clause.

33. See LARSON, *supra* note 7, at 97-98 (noting that "Virginia's enthusiasm for firearms had turned the state into a massive shopping mall for gun traffickers from the North"); see also Philip J. Cook et al., *Regulating Gun Markets*, 86 J. CRIM. L. & CRIMINOLOGY 59, 66 (1995) ("One objective of federal gun control law is to insulate states so that stringent regulations on firearms commerce adopted in some states will not be undercut by greater

instance, guns flow from states like Virginia and Florida, where gun control is relatively lax, into strictly controlled jurisdictions like New York and Washington, D.C.³⁴ Writing local legislation in this field is like squeezing a water-filled balloon. The guns and ammunition simply flow in from elsewhere when the pressure becomes too tight in a particular area of the country.³⁵

Recently ammunition control has begun to receive attention, particularly at the federal and local levels. Nationally, Senator Moynihan and Congressperson Schumer are among the leaders who sponsor various types of ammunition control legislation.³⁶ Municipalities also have grown concerned with bullet control and have begun to pass such laws.³⁷ Legislators at various levels of government are trying to shore up the levee against the river of

availability of guns in other states."); Jon Kerr, *Ammunition Sales Registration Law Repealed*, WEST'S LEGAL NEWS, Dec. 4, 1995, at WLN 4132 (noting that San Gabriel Valley, California, repealed law requiring registration of bullet purchases because measure was "ineffective in fighting crime without similar statewide actions").

34. LARSON, *supra* note 7, at 104 (noting that 1992 Bureau of Alcohol, Tobacco and Firearms gun trace of New York weapons found 26% came from Virginia (prior to passage of more restrictive gun laws in Virginia) and 19% from Florida and noting also that so many guns travel up I-95 to Washington, Philadelphia, and New York that it is nicknamed the "Iron Road").

35. This Article will not deal with increased tort liability for ammunition manufacturers. Although this idea has merit and bears studying, it already has been dealt with in depth elsewhere. See Note, *Absolute Liability for Ammunition Manufacturers*, 108 HARV. L. REV. 1679 (1995) (proposing that ammunition manufacturers face absolute liability for injuries caused by their products); Wayne H. Wink, Jr., Note, *Biting the Bullet: Two Proposals to Stem the Tide of Gun Violence*, 10 ST. JOHN'S J. LEGAL COMMENT. 235 (1994) (addressing Moynihan taxation proposals and exploring strict liability for ammunition manufacturers and sellers).

36. Congressperson Schumer has sponsored, among other bills, the Children's Gun Violence Prevention Act of 1998, H.R. 4073, 105th Cong. (creating surveillance program for injuries to children from firearms); Law Enforcement Officers Protection Amendment Act of 1997, H.R. 1250, 105th Cong. (expanding definition of "armor piercing ammunition"); Firearms Safety and Violence Prevention Act of 1997, H.R. 788, 105th Cong. (broadly regulating "firearm products"); Gun Kingpin Penalty Act, H.R. 1264, 105th Cong. (1997) (making certain ammunition-related offenses predicate offenses under RICO); Saving Police Officers' Lives Act of 1995, H.R. 2386, 104th Cong. (regulating armor-piercing ammunition); Firearms Safety and Violence Prevention Act of 1995, H.R. 915, 104th Cong. (creating "Firearms Violence Information Clearinghouse"); Handgun Control and Violence Prevention Act of 1995, H.R. 1321, 104th Cong. (discussed *infra* notes 88-89 and accompanying text); Cop-Killer Bullet Ban Act of 1995, H.R. 444, 104th Cong. (regulating armor-piercing bullets); H.R. 915, 104th Cong. (1995) (proposing expansion of BATF powers regarding ammunition); Handgun Control and Violence Prevention Act of 1994, H.R. 4300, 103d Cong. (requiring federal license to deal in ammunition); H.R. 3720, 103d Cong. (1993) (increasing tax on ammunition). For Senator Moynihan's bills, see *infra* notes 96-100 and accompanying text.

37. See *infra* Part III.A and accompanying notes.

violence, and the legislative scheme of bullet control proposed in this Article reflects an effort to fill more of the gaps in the current gun control system.

II. AN OVERVIEW OF GUN CONTROL

A. *Brief History of Gun Control and the Second Amendment*

Gun control legislation predates the ratification of the Constitution.³⁸ The early laws often mandated gun ownership in an effort to ensure that men were well-armed when called up for militia duty.³⁹ Although states have had firearm-related laws since the Revolutionary era, it was not until the twentieth century that the federal government began to impose limits on gun ownership.⁴⁰ The first piece of major federal legislation came in 1934 with the National Firearms Act, which was directed toward “gangster-style” weapons.⁴¹ In 1938, Congress passed the Federal Firearms Act, which instituted limited licensing and recordkeeping requirements for gun dealers.⁴² The centerpiece of federal legislation is the Gun Control Act of 1968, passed in the wake of the assassinations of Martin Luther King, Jr. and Robert F. Kennedy.⁴³ It featured an attempt to control the trafficking of guns through interstate and importation channels, prohibited certain people from owning guns, and outlawed certain destructive devices.⁴⁴ Major pieces of gun control legislation passed since 1968 include the Firearm Owners’ Protection Act of 1986, also known as the McClure-Volkmer Act, which eased restrictions on interstate sales of rifles and shotguns to non-dealers and severely limited

38. See, e.g., ZIMRING & HAWKINS, *supra* note 10, at 122 (noting that gun legislation “began even before the American Revolution, when the Colony of Massachusetts prohibited the carrying of defensive arms in public places”).

39. See, e.g., Act of Apr. 4, 1786, ch. 25, 1786 N.Y. LAWS 220 (mandating that “every able bodied male person . . . shall within three months thereafter provide himself at his own expence with a good Musket or Firelock, a sufficient bayonet and belt, a pouch with a box therein to contain not less than twenty-four cartridges . . .”).

40. See ZIMRING & HAWKINS, *supra* note 10, at 131 (noting that although there was substantial state and local legislation from 1880 to 1915, “there was no pressure generated to federalize the issue of firearms control until well into the twentieth century”).

41. National Firearms Act, Pub. L. No. 73-474, 48 Stat. 1236 (1934). However, the National Firearms Act was not Congress’ first action regarding gun control. In 1927, Congress banned the transmission of firearms through the mail. See 44 Stat. at 1059.

42. Federal Firearms Act, Pub. L. No. 75-785, 52 Stat. 1250 (1938).

43. Gun Control Act of 1968, Pub. L. No. 90-351, 82 Stat. 226 (codified as amended at 18 U.S.C. §§ 921-28 (1994)) (increasing licensing requirements and regulating “Saturday Night Specials” and covering other areas of gun control).

44. *Id.*

recordkeeping requirements for dealers;⁴⁵ the Undetectable Firearms Act of 1988, which made it illegal to make and transfer firearms not detectable in metal detectors;⁴⁶ the Crime Control Act of 1990, which included among other things, gun-free school zones;⁴⁷ and the Brady Handgun Violence Prevention Act of 1993, which implemented a background check, to be completed within five days, for those desiring to purchase handguns.⁴⁸ The so-called "Brady II," which would require people to get licenses for their guns as they do for their cars, has been proposed but has not been passed.⁴⁹

Although the Second Amendment assures that "the right of the people to keep and bear Arms, shall not be infringed," no one has ever succeeded in mounting a serious Second Amendment judicial challenge to federal gun control laws. The Supreme Court has dealt directly with the Second Amendment only four times, once in the 20th century.⁵⁰ The main Supreme Court case is *United States v. Miller*,⁵¹ in which the National Firearms Act of 1934 survived a Second Amendment challenge. Various other cases have reached the circuit court level, but the Supreme Court fairly regularly denies certiorari in Second Amendment cases.⁵² In the end, the Second Amendment is one of the most seldom-litigated amendments in the Bill of Rights.

45. Firearm Owners' Protection Act, Pub. L. No. 99-308, 100 Stat. 449 (1986) (codified as amended at 18 U.S.C. §§ 921-29 (1994)) (limiting, also, number of machine guns that can be held in private hands at then-existing stock).

46. Undetectable Firearms Act of 1988, Pub. L. No. 100-649, 102 Stat. 3816 (codified as amended at 18 U.S.C. § 922(p) (1994)) (outlawing firearms capable of passing through walk-through metal detectors or airport x-ray machines without being detected).

47. Crime Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789 (codified as amended at 18 U.S.C. § 922(q) (1994)).

48. Brady Handgun Violence Prevention Act of 1993, Pub. L. No. 103-159, 107 Stat. 1536 (codified as amended at 18 U.S.C. § 922(q)-(t) (1994)). See also Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (banning large-capacity feeding devices); 18 U.S.C. § 922(d) (West Supp. 1998) (preventing sale of firearms to persons who have been convicted of crimes involving domestic violence).

49. Gun Violence Prevention Act of 1994, S. 1882, 103d Cong., H.R. 3932, 103d Cong. (1994).

50. See ZIMRING & HAWKINS, *supra* note 10, at 145. These cases include: *United States v. Cruikshank*, 92 U.S. 542 (1875); *Presser v. Illinois*, 116 U.S. 252 (1886); *Robertson v. Baldwin*, 165 U.S. 275 (1897).

51. 307 U.S. 174, 178 (1939) ("In the absence of any evidence tending to show that possession or use of a 'shotgun having a barrel of less than eighteen inches in length' at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument.").

52. For a discussion of various Second Amendment cases in circuit courts, see Herz, *supra* note 21, at 73-74 n.57, 77 n.74.

In fact, the most recent threat to the edifice of federal gun control laws has come not via the Second Amendment but instead through litigation based on the Commerce Clause and the Tenth Amendment.⁵³ In *United States v. Lopez*, the Supreme Court held the federal Gun-Free School Zones Act unconstitutional, finding it beyond the powers delegated to Congress under the Commerce Clause.⁵⁴ In *Printz v. United States*, the Court held that the interim obligations imposed by the Brady Bill on local law enforcement officers to carry out background checks of gun purchasers were in violation of the Tenth Amendment.⁵⁵ Although the reach of these decisions remains unclear, Commerce Clause and Tenth Amendment concerns must be dealt with whenever federal gun control legislation is proposed.

B. *The Gun Control System*

It is almost oxymoronic to talk about a gun control “system” because the hodgepodge of laws that has accreted over time and across jurisdictions has little systematic consistency.⁵⁶ Nonetheless, to the extent generalizations can be drawn, Zimring and Hawkins characterize the majority of U.S. gun laws as “place and manner restrictions,” laws that reflect an attempt to separate legitimate uses from nonlegitimate uses.⁵⁷

1. *Federal*

The heart of the federal gun control system is 18 U.S.C. Sections 921-30.⁵⁸ Given the variety of federal gun control laws, a somewhat curious omission is the lack of a federal licensing system for gun owners or a registration system for the guns themselves.⁵⁹ Many other countries require a license to own a gun,⁶⁰ but in the United States, the job of licensing people to own,

53. U.S. CONST. art. I, § 8 (according Congress the power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”); U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

54. *United States v. Lopez*, 514 U.S. 549, 565-66 (1995).

55. *Printz v. United States*, 117 S. Ct. 2365, 2383-84 (1997).

56. See, e.g., *Preface to ZIMRING & HAWKINS, supra* note 10, at xi (noting that “it is generally acknowledged that the more than 20,000 federal, state, and local gun laws have largely failed to achieve gun control”).

57. ZIMRING & HAWKINS, *supra* note 10, at 113.

58. 18 U.S.C. §§ 921-30 (West Supp. 1998) (covering such firearm topics as licensing, assault, weapons, and transportation among others).

59. The lack of a national licensing system may change. Handgun Control Inc.’s proposal for Brady II includes a provision “requiring the licensing of handgun owners and the registration of all handgun transfers.” *The Gun Violence Prevention Act—Brady II Questions and Answers* (visited Nov. 1, 1998) <<http://www.handguncontrol.org/gunlaw/BI/b1b12qa.htm>>.

60. See ZIMRING & HAWKINS, *supra* note 10, at 7 (reporting that 29

or even carry, guns falls to the states.⁶¹

2. State

The bulk of state laws on gun control deal with licensing and hunting regulations. There are two broad categories of licenses—permits to own a gun or to carry a concealed weapon.⁶² Licensing regulations follow two general formats, permissive and restrictive. Under a permissive system, the assumption is that the license will be granted and cause must be shown for denial, whereas under a restrictive system the presumption is against granting a license and good cause must be shown for its issuance.⁶³ Only two states, Massachusetts and New York, have restrictive systems—although the District of Columbia has stringent gun control regulations—boasting two of the strictest gun control laws at the state level in the Bartley-Fox Amendment and the Sullivan Law, respectively.⁶⁴ One of the primary trends in gun control is a general easing of state restrictions in jurisdictions across the country.⁶⁵

3. Local

Just as states are limited by preemption restrictions, so too are municipalities. Limits on local laws come from state preemption statutes, many of which were drawn specifically to prevent municipalities from passing gun control laws.⁶⁶ Ironically,

European countries require a license to own or carry, or both).

61. See Paul Dean, *Permission to Pack; More than a Million Americans are Ready to Deal Lethal Force. And They're Licensed To Do It. Handgun Permits are Getting Easier to Come by—Even in L.A.*, L.A. TIMES, Jan. 4, 1996, at E1 (noting that more than half of all states license citizens to carry concealed weapons).

62. See 18 U.S.C. § 923 (West Supp. 1998) (providing for licensing of firearms importers, manufacturers, and dealers but not for licensing of owners except for collectors); see also KLECK, POINT BLANK, *supra* note 3, at 353-58 (discussing state licensing systems).

63. See KLECK, POINT BLANK, *supra* note 3, at 353-58 (discussing permissive and restrictive licensing systems); ZIMRING & HAWKINS, *supra* note 10, at 125 (noting that 48 states have permissive systems and that only New York and Massachusetts have restrictive systems).

64. For Massachusetts gun laws see MASS. GEN. LAWS ANN. ch. 140, §§ 121-31(c) (West 1995). Sullivan Law, ch. 195, 1911 N.Y. LAWS 442. See also D.C. CODE ANN. § 6-2312 (1981) (prohibiting registration of pistols not already registered by Sept. 24, 1976); D.C. CODE ANN. § 6-2351 (prohibiting sale of handguns).

65. States are rolling back restrictions on carrying concealed weapons, and several states have made it much easier to carry. See Sam Howe Verhovek, *Ideas & Trends: Why Not Unconcealed Guns*, N.Y. TIMES, Sept. 3, 1995, § 4, at 1 (noting that in two years prior to that date nine states had passed laws easing carry restrictions).

66. See Holly Yeager, *Gun Laws are a Moving Target*, ALBANY TIMES UNION, Oct. 26, 1997, at A1 (noting that “42 states have adopted some type of preemption law on guns”); see also *After the School Shootings: States Given*

these preemption laws may push cities to enact more ammunition-related ordinances in the future because the cities are prohibited from passing laws that regulate guns.⁶⁷

III. AMMUNITION CONTROL

A. Current

Although federal legislation takes relatively little notice of ammunition, bullets were singled out in the Law Enforcement Officers' Protection Act in 1986.⁶⁸ That act banned the manufacture, importation, and sale of armor-piercing ammunition.⁶⁹ The Violent Crime Control and Law Enforcement Act of 1994 included a few provisions geared toward ammunition control.⁷⁰ The Act banned large capacity ammunition-feeding devices and outlawed the sale of handgun ammunition to minors.⁷¹ The Antiterrorism and Effective Death Penalty Act of 1996 included a provision geared toward assessing and reducing the threat to law enforcement personnel from the criminal use of ammunition.⁷² None of these laws, however, provide for any sort of

"Back to School" Grades on Laws Protecting Kids from Guns (visited Nov. 12, 1998) <<http://www.handguncontrol.org.press/september4-98.htm>> (including state-by-state preemption listings). See, e.g., DEL. CODE ANN. § 835 (1994) (banning amendments of municipal charters to "[p]rohibit, restrict or license ownership, transfer, possession or transportation of firearms or components of firearms or ammunition . . ."); LA. REV. STAT. ANN. § 40:1796 (West 1995) (prohibiting firearm or ammunition ordinances "more restrictive than state law"). Some localities have legislated along what could be considered the outer margins of the gun control debate. In 1981, Morton Grove, Illinois, banned handguns within the village limits, one of the factors motivating state legislatures to push for preemption laws, and in 1982, partly in response to the Morton Grove ordinance, Kennesaw, Georgia, passed a law requiring every able-bodied male to own a gun. See Marlon Manuel, *Gingrich Territory*, ATLANTA CONST., Nov. 15, 1998, at 1H (noting that mandatory gun ownership law remains on the books but has not been enforced); Associated Press, *Small Town's Mandatory Gun Ownership Law Repealed*, July 8, 1994 (noting that a similar mandatory gun-ownership law passed in Franklinton, Pa., was repealed after 12 years).

67. See, e.g., Adam Pertman, *In California, Bullet-Control Rules Take Hold*, BOSTON GLOBE, May 30, 1995, at 11 (noting that California jurisdictions are preempted from legislating against guns but that state attorney general has held that municipalities can pass ammunition statutes).

68. Armor Piercing Ammunition, Pub. L. No. 99-408, 100 Stat. 920 (1986).

69. *Id.*

70. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (limiting high-capacity feeding devices to 10 rounds of ammunition).

71. *Id.*

72. Antiterrorist and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (including mandate for study of what type of ammunition is used to kill or injure officers and general study of quantities of ammunition sold and common uses for such ammunition).

broad-based regulation of ammunition.

Some of the more interesting ammunition control measures have been initiated at the local level. Some states have chosen to ban armor-piercing bullets,⁷³ but ammunition control has filtered down to even more local levels of government. Pasadena, California gained attention in the spring of 1995 when it became, presumably, the first city in the nation to pass an ammunition control ordinance that regulates dealers.⁷⁴ The law has since been repealed, but under Pasadena's ordinance, dealers were required to keep records of ammunition sales, which included a purchaser's age, identification, brand of ammunition, and amount purchased, among other information.⁷⁵ Despite the demise of Pasadena's law, several cities, including Los Angeles, which also requires a buyer's right thumb print, have passed ammunition sales ordinances.⁷⁶ Cities also have implemented laws banning sales of ammunition around holidays when residents are likely to shoot guns in the air. Los Angeles, for instance, does not allow ammunition sales prior to and on New Year's Day and the Fourth of July.⁷⁷ The District of Columbia bans sales of ammunition to people who do not have a valid license for the same caliber firearm and also prohibits the manufacture of ammunition within the district.⁷⁸

73. See, e.g., 720 ILL. COMP. STAT. 5/24-2.1 (West 1996) (making it unlawful to manufacture, sell, purchase, possess, or carry a metal-piercing bullet); N.H. REV. STAT. ANN. § 159.18 (1994) (banning use of Teflon-coated, armor-piercing, and exploding bullets and cartridges); S.C. CODE ANN. § 16-23-520 (Law Co-op. 1993) (outlawing use, transportation, manufacture, possession, purchase, or sale of Teflon-coated bullets).

74. See Pertman, *supra* note 67, at 11.

75. PASADENA, CAL., ORDINANCE 6625 (Mar. 6, 1995), An Ordinance of the City of Pasadena Amending Title 9 to add Chapter 9.86 to the Pasadena Municipal Code, Pertaining to the Registration of Ammunition Sales (on file with author). The law was repealed in the summer of 1997. See Richard Winton & Nicholas Riccardi, *Pasadena Repeals Ammunition Law, Rejected Alternative*, L.A. TIMES, Aug. 19, 1997, at B1.

76. LOS ANGELES, CAL., CODE ch. V, art. IV, § 55.11 (1998) (discussing recordkeeping requirements for ammunition vendors); see also *Ammo Law*, CITY NEWS SERVICE, Aug. 19, 1997 (noting that "[s]everal Southern California cities" passed statutes similar to Pasadena's).

77. LOS ANGELES, CAL., CODE ch. V, art. IV, § 55.09 (1990) (banning sales seven days prior to and on New Year's Day and Fourth of July).

78. See D.C. CODE ANN. § 6-2361 (1981 & 1995) ("No person shall purchase ammunition in the District of Columbia: unless . . . (3) He is the holder of the valid registration certificate for a firearm of the same gauge or caliber as the ammunition he possesses; except that no such person shall possess restricted pistol bullets"); D.C. CODE ANN. § 6-2341 (banning manufacture of ammunition in District of Columbia); D.C. CODE ANN. § 6-2347 (prohibiting display of ammunition in store windows and mandating that ammunition be kept in locked container).

B. Proposed

Several provocative bills concerning ammunition control have been proposed in the last few years. As noted above, some proposals have involved adding ammunition regulations to Brady. The most comprehensive of these bills, the Gun Violence Prevention Act of 1994, also known as "Brady II," covers a number of issues in handgun and ammunition control, including many similar to the proposals outlined in this Article.⁷⁹ Brady II was introduced in 1994 as soon as Brady itself became operative.⁸⁰ Among the ideas included in Brady II are: an arsenal limit of 1,000 rounds per person, prohibition of ammunition sales to juveniles, requirement of ammunition dealer licenses, heightened license fees, expanded definition of banned non-sporting ammunition, and the addition of ammunition to Brady.⁸¹ Congressperson Schumer's House version of the bill also included a 50-percent tax on handgun ammunition and a 30-percent tax on ammunition other than handgun ammunition.⁸² Despite the potentially groundbreaking nature of the ammunition-related proposals of Brady II, even its Senate sponsor soft-pedaled the bullet provisions. In his introduction of Brady II, Senator Metzenbaum concentrated on the firearm-related aspects of the bill rather than on what would have been the most comprehensive system of ammunition control ever passed.⁸³

The 104th Congress featured a particularly high number of ammunition-related proposals, including the two in connection with Brady. Senator John Kerry of Massachusetts and Representative Joseph Kennedy of Massachusetts proposed the Ammunition Safety Act of 1995 in their respective houses.⁸⁴ Among the act's several ammunition-related proposals was one to make the Brady Act applicable to the transfer of ammunition.⁸⁵ The act also included provisions to ban mail-order sales, double

79. Gun Violence Prevention Act of 1994, S. 1882, 103d Cong., H.R. 3932, 103d Cong. (1994).

80. See 140 CONG. REC. S2172 (daily ed. March 1, 1994) (statement of Sen. Metzenbaum) ("I am proud to [announce the Gun Violence Prevention Act of 1994] at this very historic time that the Brady bill becomes the law of the land.").

81. See Gun Violence Prevention Act of 1994, S. 1882, 103d Cong., H.R. 3932, 103d Cong.

82. See Gun Violence Prevention Act of 1994, H.R. 3932, 103d Cong.

83. See 140 CONG. REC. S2172, S2173 (daily ed. March 1, 1994) (statement of Sen. Metzenbaum). Senator Metzenbaum's only argument for ammunition restriction was statement that arsenal limits "would prevent people like David Koresh from acquiring large arsenals without the knowledge of law enforcement." *Id.*

84. Ammunition Safety Act of 1995, S. 433, 104th Cong., H.R. 1403, 104th Cong. (1995) (prohibiting sale of ammunition in interstate commerce except by licensed importers, manufacturers or dealers).

85. *Id.*

penalties for sales to juveniles, broaden the definition of armor-piercing bullets, and institute ammunition dealer licensing.⁸⁶ Senator Kerry provided more justification for his bullet plan than Senator Metzenbaum had done in his earlier bill. As Senator Kerry noted:

[N]o gun works without a bullet. Yet for no good reason, Congress in the early 1980's repealed laws that regulate ammunition. And while a background check is required to stop felons from purchasing guns, no such background check is required to stop them from buying ammunition for the guns they may already have.⁸⁷

Ultimately, neither bill made it out of committee, but the Kerry/Kennedy bills had the potential, like Brady II, to become the most sweeping bullet-control legislation in history.

The Kerry/Kennedy proposals were not the only major pieces of ammunition-related legislation introduced in the 104th Congress. Congressperson Schumer introduced a bill that would subject ammunition dealers and collectors to the same requirements faced by firearms licensees.⁸⁸ In his bill, Schumer also proposed a prohibition of the sale of ammunition in interstate commerce and an addition to the definition of armor-piercing ammunition for the hollow point bullets that explode on impact.⁸⁹ Several other bills also touched on ammunition,⁹⁰ giving the 104th Congress a wealth of creative, although ultimately mostly fruitless, bullet-related initiatives.

The 105th Congress has also been active in terms of ammunition-related legislation. In addition to Congressperson Schumer and Senator Moynihan's various proposals,⁹¹ bills have been introduced regarding large-capacity feeding devices,⁹²

86. *Id.*

87. 141 CONG. REC. S2826 (daily ed. Feb. 16, 1995) (statement of Sen. Kerry).

88. See Handgun Control and Violence Prevention Act of 1995, H.R. 1321, 104th Cong. Congressperson Schumer had introduced the same bill in the previous Congress. See H.R. 4300, 103d Cong. (1994). For other ammunition-related bills proposed by Congressperson Schumer in the 104th Congress, see *supra* note 36.

89. Handgun Control and Violence Prevention Act of 1995, H.R. 1321, 104th Cong.

90. See H.R. 915, 104th Cong. (1995) (proposing expansion of BATF oversight of manufacture, distribution, and sale of ammunition); see also Moynihan bills in the 104th Congress, *infra* note 96. But see H.R. 919, 104th Cong. (1995) (urging repeal of Violent Crime Control and Law Enforcement Act of 1994).

91. For bills introduced by Congressperson Schumer in the 105th Congress, see *supra* note 36. For bills introduced by Senator Moynihan in the 105th Congress, see *infra* note 96.

92. See S. 1887, 105th Cong., H.R. 3646, 105th Cong. (1998) (prohibiting the import of large-capacity ammunition feeding devices).

Internet and mail-order sales of ammunition,⁹³ and sales of plastic bullets.⁹⁴ In addition, Senator Kerry and Representative Kennedy again introduced bills proposing the addition of bullets to Brady.⁹⁵

Over the years, Senator Moynihan has been the most consistent sponsor of ammunition control legislation.⁹⁶ Senator

93. See H.R. 4114, 105th Cong. (1998) (banning Internet and mail-order sale of ammunition to individuals without license to deal in firearms and requiring dealers to record sales of more than 1,000 rounds to any one person).

94. See Northern Ireland Peace Act, H.R. 1075, 105th Cong. (1997) (limiting sale of plastic bullets to United Kingdom).

95. See Ammunition Safety Act of 1997, S. 553, 105th Cong., H.R. 1349, 105th Cong. (proposing to add bullets to Brady).

96. See Destructive Ammunition Prohibition Act of 1997, S. 132, 105th Cong. (prohibiting certain ammunition); Law Enforcement Officers Protection Amendment Act of 1997, S. 112, 105th Cong. (regulating armor-piercing bullets); Real Cost of Handgun Ammunition Act of 1997, S. 137, 105th Cong. (placing 1,000 percent tax on all 9 millimeter, .25 caliber, and .32 caliber ammunition); Violent Crime Reduction Act of 1997, S. 136, 105th Cong. (prohibiting manufacture, transfer, or importation of .25 caliber, .32 caliber, and 9 millimeter ammunition); Violent Crime Control Act of 1997, S. 135, 105th Cong. (creating Bullet Death and Injury Control Program within Centers for Disease Control); Handgun Ammunition Control Act of 1997, S. 134, 105th Cong. (directing Secretary of Treasury to request National Academy of Sciences to study different types of ammunition); Real Cost of Destructive Ammunition Act, S. 133, 105th Cong. (1997) (increasing tax on ammunition); Law Enforcement Officers Protection Amendment Act of 1996, S. 2163, 104th Cong. (regulating armor-piercing ammunition); Violent Crime Reduction Act of 1995, S. 118, 104th Cong. (prohibiting importation and manufacturing of .25 caliber, .32 caliber, and 9 millimeter ammunition); Destructive Ammunition Prohibition Act of 1995, S. 122, 104th Cong. (prohibiting "destructive ammunition"); Handgun Ammunition Control Act of 1995, S. 20, 104th Cong. (increasing recordkeeping requirements and licensing fees for ammunition dealers); Real Cost of Destructive Ammunition Act, S. 124, 104th Cong. (1995) (amending Internal Revenue Code to provide 10,000% tax on certain bullets, an occupational tax of \$10,000 a year on ammunition importers as well as registration requirements); Violent Crime Control Act of 1995, S. 120, 104th Cong. (proposing establishment of "Bullet Death and Injury Control Program" in Centers for Disease Control); Real Cost of Handgun Ammunition Act of 1995, S. 119, 104th Cong. (proposing 1000% tax on 9 millimeter, .25 caliber, and .32 caliber bullets); Violent Crime Prevention Act, S. 178, 103d Cong. (1993) (prohibiting manufacture, transfer, or importation of .25 caliber, .32 caliber, and 9 millimeter ammunition); Real Cost of Ammunition Act, S. 179, 103d Cong. (1993) (placing 1000% tax on .25 caliber, .32 caliber, and 9 millimeter ammunition); S. 109, 103d Cong. (1993) (requiring that manufacturers and importers keep records of disposition of ammunition); S. 108, 103d Cong. (1993) (prohibiting importation of large-capacity feeding devices and semi-automatic weapons); Violent Crime Control Act of 1993, S. 32, 103d Cong. (1993) (increasing tax on .25 caliber, .32 caliber, and 9 millimeter bullets to 1000% and creating a Bullet Death and Injury Control Program within the National Centers for Disease Control); S. 51, 102d Cong. (1991) (prohibiting manufacture, transfer, or importation of .25 caliber, .32 caliber, and 9 millimeter bullets); S. 789, 102d Cong. (1991) (banning large-capacity feeding devices); S. 2048, 102d Cong. (1991) (requiring ammunition disposition records).

Moynihan has provided a variety of intriguing proposals, primarily focusing on taxing and banning of certain bullets, but there are weaknesses in Senator Moynihan's bills. First, a confiscatory tax of the extreme nature Senator Moynihan advocates might run into a Constitutional challenge as a taking under the Fifth Amendment.⁹⁷ In addition there is an argument that Senator Moynihan has, in singling out 9 millimeter, .25 caliber, and .32 caliber ammunition, taken aim at the wrong targets.⁹⁸ Over the years, though, there have been a number of useful ideas embedded in Senator Moynihan's flurry of bills. One of the most interesting, if not the most high profile, is Senator Moynihan's proposal for a center devoted to the study of bullet-induced injuries, a research group that would provide hard data that could be used to write better bullet-based legislation in the future.⁹⁹ Senator Moynihan also deserves credit for publicizing the bullet control issue.¹⁰⁰ Year after year, Senator Moynihan hammers home the message of focusing on ammunition control, and his inventive proposals provide a good stepping-off point for further ideas in the field.

IV. AN AMMUNITION CONTROL PROPOSAL

A. *Adding Bullets to Brady*

This Article does not focus on taking people's guns or ammunition away from them or on banning certain types of ammunition. The proposals herein are predicated on keeping potentially dangerous people from acquiring bullets and on creating greater accountability for wrongful use of bullets (and, by extension, guns), while respecting the rights of gun owners to continue to own and use their weapons. Granted, most of the proposals herein would ignite a firestorm of protest from the pro-gun lobby, but none of the proposals detract from the law-abiding

97. See Wink, *supra* note 35, at 246-51 (discussing the possibility that Moynihan's tax plan could be considered a taking, and noting that it possibly could, but probably would not, be considered a compensable taking).

98. See Dailard, *supra* note 1, at 27, 28 (noting that .25 and .32 calibers "are demonstrably less dangerous, and less 'lethal,' than most other calibers in the spectrum of modern handgun ammunition," and that 9 millimeter cartridges typically fall into "the middle of the ballistic range for handgun rounds").

99. See Violent Crime Control Act of 1997, S. 135, 105th Cong. (creating Bullet Death and Injury Control Program within Centers for Disease Control); Violent Crime Control Act of 1995, S. 120, 104th Cong.

100. This is no small feat and deserves credit because it is often done in the face of virulent opposition. As Larson notes, "[w]here the NRA has been most influential, however—and where its influence has been least acknowledged or appreciated—is in defining the vocabulary of the firearms debate and thus, in a sense, winning the debate before it even began." LARSON, *supra* note 7, at 185. Senator Moynihan has helped push the debate back to bullet control.

gun owner's ability to possess or purchase ammunition.

Keeping ammunition out of the wrong hands is a difficult task, but a system already exists, that, with relative ease, could be used in the effort—the Brady Handgun Violence Prevention Act, which passed in 1993 and went into effect in early 1994.¹⁰¹ The linchpin of Brady's enforcement system is a background check of prospective handgun purchasers.¹⁰² When Brady was passed, the Chief Law Enforcement Officer (CLEO) in each jurisdiction was required to perform the checks until a national instant background check system, which would be used by handgun dealers, was implemented on November 30, 1998.¹⁰³ In *Printz v. United States*, the Supreme Court declared this interim use of CLEOs unconstitutional.¹⁰⁴ It bears noting that CLEOs could still carry out Brady background checks, but under *Printz* their participation was no longer mandated by the federal government. Under the interim system, licensed handgun dealers completed a form with information from prospective handgun purchasers and then forwarded the form to the CLEO.¹⁰⁵ The CLEO then had five days in which to complete a background check and was asked to do a reasonable search that covered seven categories of information, ranging from felony indictments to alien status to drug addiction.¹⁰⁶ This five-day period commonly was mistaken for a "cooling off" period. Although it sometimes functioned as such, it was merely a window of time in which to complete a reasonable background search. For instance, if the search was completed in one day, the handgun purchaser need not wait the entire five-day period.¹⁰⁷

As of November 30, 1998, when the on-line system of Brady records became operational, there were three major changes in the implementation of Brady checks.¹⁰⁸ First, the on-line system allows licensed dealers to do an instantaneous background check, thereby removing CLEOs from the process and eliminating the

101. Brady Handgun Violation Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993) (codified as amended at 18 U.S.C. § 922(q)-(t) (1994)).

102. *Id.* § 922(s)(1)(C)(ii).

103. Brady Handgun Violation Prevention Act, Pub. L. No. 103-159, at § 103(b) (specifying time table of national instant criminal background check system no later than 60 months after the enactment of Act).

104. *Printz v. United States*, 117 S. Ct. 2365, 2383-84 (1997).

105. 18 U.S.C. § 922(s)(1)(A) (West Supp. 1998).

106. *Id.* § 922(s)(1)(A)(ii)(I) & (s)(3)(B)(i)-(vii).

107. *Id.* § 922(s)(1)(A)(ii)(II). It is worth noting, as well, that Senator Dick Durbin of Illinois, as well as several other Senators, and Congressperson Schumer introduced bills in their respective houses before the sunset of the Brady waiting period in an effort to establish a minimum three-day waiting period. See Brady Waiting Period Extension Act of 1998, S. 2324, 105th Cong., H.R. 4233, 105th Cong. (proposing minimum of 72-hour waiting period before purchase of handgun is permitted).

108. Pub. L. No. 103-159, § 103.

taint of unconstitutionality from Brady.¹⁰⁹ In addition, there is no longer any waiting period unless the background check cannot be completed instantaneously.¹¹⁰ Finally, Brady checks will be performed on purchasers of all firearms, not just handguns.¹¹¹ Many states also have Brady-type background checks and/or waiting periods.¹¹² If ammunition is added to Brady, these states

109. 18 U.S.C. § 922(t) (West Supp. 1998).

110. *Id.*

111. See 18 U.S.C. § 922(t)(1) (West Supp. 1998).

112. See Handgun Control, Inc., *What Will Happen in my State when the Brady Law Waiting Period Expires?* <<http://www.handguncontrol.org/gunlaw/B3/bradybackground.htm>> (noting that nine states require background checks on all firearm purchasers, 18 states require background checks on handgun purchasers, and 23 states follow only federal law). For individual state and territory statutes regarding gun purchases, see CAL. PENAL CODE § 12071(b)(3)(A) (West 1992) (10-day waiting period); COLO. REV. STAT. § 12-26.5-104 (1996) (statewide instant criminal background check within 24 hours); CONN. GEN. STAT. §§ 29-33, 29-37a (1990) (two-week waiting period for handguns, no waiting period for holders of valid state permits to carry, and two weeks for other guns); DEL. CODE ANN. tit. 11, § 1448A (1995) (instant background check); D.C. CODE ANN. § 22-3208 (1981) (48-hour waiting period); FLA. STAT. ch. 790.065(2)(c)2 (1992) (background-check within 24 hours); GUAM CODE ANN., tit. 10, §§ 60106, 60108 (1993) (background check required for "identification card," which is required for gun ownership); HAW. REV. STAT., tit. 10, § 134-2 (West Supp. 1998) (requiring permits to acquire firearms and mandating waiting period of at least 14 days for first-time purchasers); IDAHO CODE, ch. 33, § 19-5408-5409 (1948-1997) (instant background check with three-day window to acquire information); 720 ILL. COMP. STAT. 5/24-3(g) (West 1993) (mandating at least 72-hour waiting period for concealed weapons and at least 24 hours for other guns); IND. CODE § 35-47-2-8 (1998) (at least seven working days for handguns, except for those with a qualified or unlimited handgun-carrying license); IOWA CODE § 724.15 (1993) (annual permit for handguns); MD. CODE ANN. art. 27, § 442(c) (1996) (waiting period of at least seven days for handgun); MASS. GEN. LAWS, ch. 140, § 129B (1991) (requiring firearm identification card); MICH. COMP. LAWS § 28.422 (1994) (requiring license to purchase); MINN. STAT. § 62A.7132(4) (1987) (seven-day waiting period for pistols and semiautomatic military-style assault weapons); MO. REV. STAT. § 571.090.3 (1995) (waiting period for permit to carry concealed weapons not to exceed seven days); NEB. REV. STAT. § 69-2418 (1991) (instant check); N.J. STAT. ANN. § 2C:58-3(f) (West 1995) (application for permit to purchase handgun granted within 30 days for residents and 45 days for nonresidents); OR. REV. STAT. § 166.420 (1990) (waiting period of up to 15 days for purchase of handguns); TENN. CODE ANN. § 39-17-1316(b)(1) (1997) (15-day waiting period for sale of pistol or sidearm); UTAH CODE ANN. § 76-10-526 (1995) (instant criminal background check); WISC. STAT. ANN. § 175.35(2)(d) (West 1998) (48-hour waiting period for handgun purchasers). These states and territories do not have provisions for background checks or waiting periods and follow federal law in this regard: Alabama, Alaska, Arizona, Arkansas, Georgia, Kansas, Kentucky, Louisiana, Maine, Marianas Islands, Mississippi, Montana, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Puerto Rico, Rhode Island, South Carolina, South Dakota, Texas, Vermont, Washington, West Virginia, and Wyoming. See Bureau of Alcohol, Tobacco, and Firearms, State Laws and Published Ordinances—Firearms at 35-36 (visited October 27,

will have the option of adding background checks under state law as well.

“The purpose of [Brady] is to prevent convicted felons and other persons who are barred by law from purchasing guns from licensed gun dealers, manufacturers or importers.”¹¹³ Brady is far from perfect,¹¹⁴ however, and adding ammunition to its purview would help to mend some of its more serious weaknesses and allow it better to fulfill its mandate. Perhaps the biggest weakness in Brady is the ease with which it can be circumvented—not only by people who lie on their applications, but also by people who avoid the system entirely¹¹⁵—and the dangers these circumventions present.¹¹⁶ For instance, Brady has negligible effect on those who already own guns,¹¹⁷ those who purchase their guns using a straw man,¹¹⁸ those who steal guns,¹¹⁹ and those who purchase guns on the secondary market.¹²⁰ All of those people, however, still will

1998) <<http://www.atf.treas.gov/pub/statelaws.htm>>. In four of these states—Georgia, Mississippi, North Dakota, Pennsylvania, and South Dakota—the five-day waiting period does not apply to persons holding valid permits/licenses to carry issued within five years of the purchase. *Id.* No state appears to require a background check or waiting period for the purchasers of ammunition.

113. Brady Handgun Violation Prevention Act, H.R. Rep. No. 344, 103d Cong. (1993).

114. See 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 101, 112 (1995) (discussing various weaknesses of, and loopholes in, Brady).

115. See *id.* at 113-19 (discussing ways in which dangerous people can acquire handguns on the secondary market).

116. See JEFFREY A. ROTH, U.S. DEP’T OF JUSTICE, FIREARMS AND VIOLENCE 3 (Feb. 1994) (noting that “illegal or unregulated transactions are the primary sources of guns used in violence. For example, only 29 percent of 113 guns used in felonies committed in Boston during 1975 and 1976 were bought directly from federally licensed dealers”—and that long predates the passage of Brady).

117. A 1989 study indicated that there were more than 66 million handguns in private hands. See LARSON, *supra* note 7, at 19.

118. See *id.* at 88 (“Straw-man purchases, in which a qualified buyer buys a handgun for an unqualified person, are the primary means by which America’s bad guys acquire their weapons, and one the Bureau of Alcohol, Tobacco and Firearms cannot hope to put an end to . . .”).

119. This is not a insignificant number. According to the 1994 Crime Data Brief, there was an average of 180,500 incidents of handgun theft per year from 1987 to 1992. U.S. DEPARTMENT OF JUSTICE, CRIME DATA BRIEF (Apr. 1994); see also KLECK, TARGETING GUNS, *supra* note 16, at 91 (“Thefts are significant to the control of guns because they are probably the primary way that guns are transferred from the less criminal segments of the population to the more criminal segments.”).

120. See Cook et al., *supra* note 33, at 69 (estimating 50-50 split between sales of new and used guns and 60-40 split between primary and secondary markets). It should be noted, too, that in gun sales, “secondary market” does not necessarily mean black market. *Id.* at 70-72. The secondary market

need ammunition for their guns, and this is where adding ammunition to Brady's scheme will help remedy some of the problems in the regulatory sieve of Brady.

Proponents of Brady point out that 41,000 prospective handgun purchasers were denied in the first year after the bill became effective in 1994,¹²¹ but there were 66.7 million handguns in private hands in 1989.¹²² Undoubtedly, many of those guns were already in the "wrong" hands, and those gun owners would not necessarily ever have to go through a Brady background check. Sometimes the "wrong" hands are the hands of children.¹²³ A stepped-up Brady may help deter some children who acquire firearms from also acquiring new ammunition. It can also deter people who intend to use the guns they already own for criminal means but who might be running low on ammunition. The prospect of a Brady background check might deter these potential wrongdoers from purchasing ammunition.

The same is true of gun purchasers who use a "straw man." While it may be relatively easy to convince someone with a "clean" record to make a gun purchase, it may be more difficult to find someone willing to make repeated ammunition purchases or to do so on short notice when the bullets are in short supply. In essence, this proposal takes a Brady net designed to strain out "wrong" firearm users and gives that net a finer mesh, which will catch some of the criminal fish who might otherwise have slipped through the regulatory net.¹²⁴

Because guns are so durable, many people have what amounts to a lifetime immunization from Brady checks.¹²⁵ People who otherwise would have slipped under Brady's radar may be detected when they buy ammunition for their guns. Even the people with Brady "immunization"—those who own guns already or have stolen them or bought them on the black market—likely

includes purchases from unlicensed sellers, which could include black market sales but could also include guns bought at a gun show, through an advertisement in the newspaper, or through any other legitimate but unlicensed seller. *Id.* at 68-70.

121. BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, ONE-YEAR PROGRESS REPORT: BRADY HANDGUN VIOLENCE PREVENTION ACT 9 (Feb. 28, 1995).

122. See LARSON, *supra* note 7, at 19.

123. See Cook et al., *supra* note 33, at 61-62 (citing to Harris poll in which more than half of the respondents in sample of children in grades seven through 12 said they could get a handgun if they wanted one).

124. These people can lie on their applications for ammunition, just as many people likely do now on applications for handguns, but the greater frequency with which they will be forced to do so will provide more opportunities to catch them.

125. See H.R. Rep. No. 344, 103d Cong. 1984, 2001 (1993) (Additional views of Rep. Ramstad) ("As we all know, the vast majority of violent crime in America is committed with illegal guns, which will in no way be impacted by the modified Brady Bill.").

will need to buy ammunition for their guns at some time. According to Senator Kerry: "Felons who want to kill will always find guns, but have to come out of the woodwork to purchase ammunition."¹²⁶ Including ammunition under Brady will prevent them from doing so. Having to pass Brady requirements every time they purchase ammunition will be another hurdle for those who may have acquired their weapons illegally. Of course, these people may already own ammunition, but it is unlikely they have a lifetime supply. They may also purchase ammunition on the black market.

Background checks, as well as point-of-sale recordkeeping, could lead to a rise in black-market trading in ammunition.¹²⁷ If regulations change, an increasing number of buyers will be desperate to purchase ammunition without going through legal channels. This is a natural byproduct of nearly any plan that attempts to control firearms or ammunition. Except to the extent possible under the limits in bulk sales outlined below, it is almost impossible to eliminate such black-market activity.

Although lawless activity is a negative byproduct of a regulatory scheme, authors Cook, Molliconi, and Cole point out that loopholes do not have to be fatal to a regulatory plan. As they write in reference to gun control:

[D]espite these loopholes, the regulations do make a difference. Tougher restrictions in the primary market raise prices in the secondary market. While such restrictions do not entirely prevent youths and criminals from obtaining guns, higher prices will deter some sales. Just as it is not necessary to plug every hole in the dam to hold water, so it is not necessary to directly regulate each transaction to reduce the availability of guns to dangerous people.¹²⁸

The same is true of ammunition. The rising tide of prices across the board might put some ammunition buyers out of the market and provide a secondary deterrent effect in addition to the regulations.

The key barrier to buildup of black-market inventories is the institution of monthly limits on ammunition purchases. If there are no limits, one person with a clean record could purchase massive amounts of ammunition either as a straw man or as an enterprising black-market retailer.¹²⁹ Once this ammunition is out

126. 141 CONG. REC. S2826 (daily ed. Feb. 16, 1995) (statement of Sen. Kerry).

127. See Cook et al., *supra* note 33, at 71-72 ("While buyers prefer the primary market, the secondary market will look increasingly attractive as the regulations governing the primary market become more restrictive.").

128. *Id.* at 72.

129. Virginia, which had developed a reputation as a gun supermarket, has developed similar limits on handgun purchases. See 1993 Va. Acts ch. 486 § 1 (codified at VA. CODE ANN. § 18.2-308.2:2(Q) (Michie 1994)) (limiting

of the hands of licensed dealers, it is beyond Brady's reach. Therefore, limits on purchases will limit the growth of secondary ammunition supermarkets. This concept was included in Brady II, in which the recommended arsenal limit was 1,000 rounds per person,¹³⁰ but the proposal herein differs somewhat from Brady II. Rather than limiting the amount of ammunition a person could own, it would limit the amount a person could buy in a given time period. Monitoring how much ammunition a person owns would be practically difficult and politically impossible. Monthly purchase limits would be far less intrusive and more easily monitored.

One exemption both from the recommended ammunition limits might involve people who purchase ammunition for sporting purposes. Target shooters could easily exceed a monthly limit on cartridges. For instance, collegiate rifle teams and other sport shooters might be exempted from the limit if they have some sort of credential that identifies them as sport shooters who use a great deal of ammunition. People who go to shooting ranges and buy packages of ammunition that they expend on-site also might be exempted from Brady background checks and purchase limits. The concern behind Brady is dangerous ammunition in the wrong hands on the street. As long as target shooters do not take the ammunition with them when they leave, there is probably no need to subject them to purchase limits on ammunition bought at the range.

Adding ammunition to Brady will not solve all of the problems with the law, but it will mitigate some of them—and it will do so at a relatively low cost. Theoretically, the background check will involve as much time and difficulty as the check on the Visa the purchaser uses for her guns or ammunition. Asking dealers to take the small additional step of doing background checks on ammunition buyers will not prove onerous. Also, gun-owners' concerns about overly intrusive law enforcement officers would be assuaged by taking CLEOs out of the loop.

Once the system is up and running, it makes sense to map handgun ammunition onto the Brady system of gun control.¹³¹ Doing so will require modification of the system, however. The background check will involve a telephone call or computer hookup by the federal firearms licensee (i.e. the gun dealer) to the FBI's

purchasers to one handgun per month).

130. Gun Violence Prevention Act of 1994, S. 1882, 103d Cong., H.R. 3932, 103d Cong. (1994).

131. Ammunition is not the only destructive product that has been targeted for inclusion in Brady-type background checks. See Bombing Prevention Act, H.R. 43, 104th Cong. (1995) (proposing use of Brady instant background check system for people seeking licenses or permits for explosives).

National Instant Criminal Background Check System.¹³² An operator will take the call and run the check, which will last from 30 seconds to two minutes.¹³³ The FBI had been planning to charge roughly \$14 per check in order to cover its costs in running the system, but was prohibited from doing so under the Omnibus Appropriations Act for fiscal year 1999, which provided additional money to the FBI for background checks and mandated that the FBI could not charge firearms purchasers a fee for such checks.¹³⁴ Background checks can also be done through states that serve as a so-called "Point of Contact," and the state will access the FBI database electronically, presumably bypassing the operator, 24 hours a day and free of charge to the states.¹³⁵ In those states, the gun dealer will call the state, rather than the FBI.¹³⁶ States may elect to charge gun dealers for this service.¹³⁷

There is a significant cost to the FBI in providing background checks for firearm purchasers.¹³⁸ In light of this expense, the addition of bullets to Brady should probably be delayed until a more automated system—one more like a credit card validation system—becomes operational. The FBI anticipates adding toll-free, electronic dial-up access to the background check system soon.¹³⁹ At that time, the additional expense of doing automated background checks on ammunition purchasers would likely be marginal.

Implementation of the proposal outlined herein would require little modification of the Brady Bill itself. Sections of the law that use the term "firearm" could be modified to say "firearm or ammunition." In order to make the change effective, however, a

132. See National Instant Criminal Background Check System Regulation, 63 Fed. Reg. 58,303, 53,308 (1998) (to be codified at 28 C.F.R. pt. 25.6).

133. See Notes, *HERALD-SUN*, Sept. 27, 1998, at D11.

134. National Instant Criminal Background Check System User Fee Regulation, 63 Fed. Reg. 43,893, 43,894 (1998) (to be codified at 28 C.F.R. pt. 25) (proposed Aug. 17, 1998). National Instant Criminal Background Check System Regulation, 63 Fed. Reg. 58,303, 58,303 (1998) (noting that everyone who commented on user fee during comment period opposed such a fee).

135. National Instant Criminal Background Check System Regulation, 63 Fed. Reg. 58,303, 58,309 (1998) (to be codified at 28 C.F.R. pt. 25.6(d)-(i)).

136. 28 C.F.R. pt. 25.6(d) (1998).

137. National Instant Criminal Background Check System User Fee Regulation, 63 Fed. Reg. 43,893, 43,894 (1998) (proposed Aug. 17, 1998).

138. See Violence Policy Center, *Paper Tiger? Will the Brady Law Work After Instant Check?* (visited Nov. 17, 1998) <<http://www.vpc.org/studies/bradintr.htm>> (noting that Justice Department estimated in August of 1998 that instant check system would cost \$91.6 million for 1999 fiscal year).

139. See National Instant Criminal Background Check System Regulation, 63 Fed. Reg. 58,303, 58,308-09 (1998) (to be codified at 28 C.F.R. pt. 25.6(b)) ("[T]oll-free electronic dial-up access to the NICS will be provided to FFLs after the beginning of the NICS operation. FFLs with electronic dial-up access will be able to contact the NICS 24 hours each day, excluding scheduled and unscheduled downtime.").

gaping loophole in Brady will need to be closed for ammunition purchasers. Under Brady, people who have a valid permit to possess or acquire a firearm issued in the last five years by the state in which the transfer is to take place are exempted from undergoing a background check.¹⁴⁰ The ATF has further widened this loophole by concluding that “a permit to ‘possess’ a firearm includes a permit to carry concealed weapons.”¹⁴¹ Defining “possess” in a way that encompasses “carry” permits would limit Brady checks in 29 states.¹⁴² In order for background checks on ammunition purchasers to be effective, they should be performed on all ammunition purchasers regardless of any firearms permits the buyer may have.

There are other practical problems with bringing bullets to Brady. For one, it is relatively easy to make bullets, and gun owners can circumvent regulations by doing so.¹⁴³ Using a reloading machine, a gun owner can put together hundreds, if not thousands, of live cartridges in a day.¹⁴⁴ Reloading machines are relatively cheap and are becoming increasingly sophisticated.¹⁴⁵ Reloading machines do not leave a bullet regulation system completely hamstrung, though. Although reloading machines allow gun owners to reuse cartridges, the other parts of a live round are more difficult to fabricate. Making smokeless powder is particularly difficult for the home craftsman.¹⁴⁶

140. See 18 U.S.C. § 922(t)(3)(A) (West Supp. 1998).

141. See Implementaion of Public Law 103-159, Relating to the Permanent Provisions of the Brady Handgun Violence Prevention Act, 63 Fed. Reg. 58,272, 58,275 (1998) (to be codified at 27 C.F.R. pt. 178, 179).

142. See Violence Policy Center, *Why a Concealed Carry License Should not Substitute for the Brady Background Check* (visited Nov. 17, 1998) <http://www.vpc.org/fact_sht/ccbrady.htm>.

143. See KLECK, TARGETING GUNS, *supra* note 16, at 374 (noting that “ammunition is even easier to manufacture at home than guns. This is not even a hypothetical eventuality, since millions of guns owners already handload their own ammunition at home, and these owners alone could easily meet the very limited national need for workable cartridges for either criminal or defensive purposes.”).

144. See, e.g., Bob Forker, *Reloading for the Varminter: Addressing the Special Needs of the High-Volume Varmint Shooter*, GUNS & AMMO, Nov. 1996, at 90, 91 (noting in review of Dillon 550B reloading press that it is possible to load up to 500 rounds per hour).

145. See John Lachuk, *High-Tech Handloading*, 1996 ANNUAL GUNS & AMMO 1996, at 106.

A full-fledged reloading revolution is upon us, fueled by sophisticated computer programs that allow any one with a common desktop personal computer to have at his fingertips all of the ballistic calculating power that was once shared only by major ammo makers. State-of-the-art automatic metallic cartridge reloading machines are priced so low [about \$400 for a mid-range model] they can be amortized in a year or so of enthusiastic shooting.

Id.

146. See B. Bruce-Briggs, *The Great American Gun War*, in PUB. INTEREST

In any of the proposed ammunition-related legislation discussed herein the drafters simply will need to recognize that a potential loophole exists for the people who buy the constituent parts of ammunition rather than the bullets themselves. One way to make sure this loophole stays closed is to maintain the definition of ammunition now under federal law—a definition that encompasses the components of a live cartridge.¹⁴⁷ This definition might be too broad and considered overly intrusive, but remains a viable option if it turns out that the proposals made herein are hamstrung by home ammunition makers. The ease with which ammunition can be made at home is a drawback in almost any scheme of bullet regulation. Homemade bullets are an endemic problem in ammunition control that is almost impossible to eliminate.

Because Congress's power to pass Brady was based on the Commerce Clause and Congress's ability to regulate interstate commerce, Brady might not apply to intrastate firearm sales. This jurisdictional limitation could also apply to intrastate ammunition sales. Currently, this is not a major limitation because most people buy bullets that have moved in interstate commerce.¹⁴⁸ Those ammunition dealers determined to get around Brady, however, could bypass the regulations by manufacturing and selling bullets in-state. They could set up what essentially would be "bullet boutiques," akin to beer microbreweries. Sales of locally produced bullets might not require a background check, although the federal government could argue, and correctly so, that under the historically expansive reading of the Commerce Clause such transactions nonetheless "affect" interstate commerce.¹⁴⁹

Finally, there is a political dimension to Brady. The bill experienced a torturous history before it passed. It was proposed in three separate sessions of Congress before finally passing on the fourth try in 1993.¹⁵⁰ Brady has remained controversial since its

45, 82 (1976) (noting however that black powder is relatively easy to make).

147. See 18 U.S.C. § 921(a)(17)(A) (West Supp. 1998) (defining ammunition as "cartridge cases, primers, bullets, or propellant power designed for use in any firearm").

148. In 1993, Senator Moynihan estimated that large-quantity manufacturing of ammunition was concentrated in about a half dozen firms. 139 CONG. REC. S16,931, S16,932 (daily ed. Nov. 22, 1993) (statement of Sen. Moynihan).

149. See, e.g., *Wickard v. Filburn*, 317 U.S. 111, 127-28 (1942) (holding that farmer's small wheat crop grown primarily for personal use affected interstate commerce).

150. The three failed attempts to pass Brady occurred in 1987, 1989, and 1991. See H.R. 975, 100th Cong. (1987), S. 466, 100th Cong. (1987); H.R. 467, 101st Cong. (1989), S. 1236, 101st Cong. (1989); S. 257, 102d Cong. (1991), H.R. 7, 102d Cong. (1991). Brady was finally passed six years after the first attempt. See Pub. L. No. 103-159, 107 Stat. 1536 (1993) (codified as amended at 18 U.S.C. § 922(q)-(t) (1994)).

passage, as shown by the almost immediate court challenges to its validity.¹⁵¹ The basis for the court challenges—mandated CLEO participation as a violation of federalism—is avoided by waiting to implement changes until the national background check system is in place. However, public opinion against Brady will remain an ongoing hurdle. The naysayers will have to be convinced that Brady is here to stay, and that it may as well be given the opportunity to fulfill its promise by denying the “bad guys” access to ammunition.

B. Ammunition Sales Controls

As the discussion in Part III, Subsection A of this Article regarding the growth of local sales laws indicates, ammunition sales controls are a trend in ammunition control. Of course, this would be less true were it not for the Firearm Owners' Protection Act.¹⁵² Under the Gun Control Act of 1968 there were some recordkeeping requirements for ammunition sellers.¹⁵³ The Firearm Owners' Protection Act swept away those controls.¹⁵⁴ A few municipalities have stepped into the breach,¹⁵⁵ but there are limits on what they can do because of the leakage problem—making the restrictions too tight and having people buy their ammunition elsewhere.¹⁵⁶ For instance, Los Angeles's law can be

151. For circuit court cases, see *Mack v. United States*, 66 F.3d 1025, 1033 (9th Cir. 1995) (determining that Brady is constitutional), *cert. granted*, 116 S. Ct. 2511 (1996); *Frank v. United States*, 78 F.3d 815, 827 (2d Cir. 1996) (upholding constitutionality of Brady); *Koog v. United States*, 79 F.3d 452, 458 (5th Cir. 1996) (holding that Brady violated Tenth Amendment). For district court cases regarding Brady, see *Romero v. United States*, 883 F. Supp. 1076, 1089 (W.D. La. 1995) (finding Brady requirements of CLEOs unconstitutional); *Frank v. United States*, 860 F. Supp. 1030, 1044 (D. Vt. 1994) (holding Brady unconstitutional); *Mack v. United States* 856 F. Supp. 1372, 1383 (D. Ariz. 1994) (holding Brady unconstitutional); *McGee v. United States*, 863 F. Supp. 321, 327 (S.D. Miss. 1994) (holding Brady unconstitutional); *Printz v. United States*, 854 F. Supp. 1503, 1513 (D. Mont. 1994) (holding that “the ascertainment/background check provision of the Act exceeds the powers delegated to Congress and violates the Tenth Amendment”); *Koog v. United States*, 852 F. Supp. 1376, 1388 (W.D. Tex. 1994) (finding interim provisions not unconstitutional).

152. Firearm Owners' Protection Act, Pub. L. No. 99-308, 100 Stat. 449 (1986) (codified as amended at 18 U.S.C. §§ 921-29 (1994)).

153. Gun Control Act of 1968, Pub. L. No. 90-357, 82 Stat. 226 (codified as amended at 18 U.S.C. §§ 921-28 (1995)) (requiring dealers to record ammunition buyer's name, age, and place of residence).

154. Firearm Owners' Protection Act, Pub. L. No. 99-308, 100 Stat. 449 (1986) (codified as amended at 18 U.S.C. §§ 921-29 (1994)) (limiting recordkeeping requirements to armor-piercing bullets).

155. *E.g.*, LOS ANGELES, CAL., CODE, ch. V, art. IV, § 55.11 (1998) (discussing recordkeeping requirements for ammunition vendors); *see also Ammo Law*, CITY NEWS SERVICE, Aug. 19, 1997.

156. *See supra* note 34 and accompanying text.

easily avoided by simply going to any one of dozens of nearby towns and purchasing ammunition where recordkeeping requirements are minimal or nonexistent. There is a better way—one once again based on a federally mandated system of recordkeeping.

The proposed system of ammunition sales controls divides into two components—enhanced recordkeeping at the point of sale and licensing of ammunition dealers coupled with significant licensing fees. A caveat to this proposal should be noted at the outset. Improved recordkeeping faces probably the highest political hurdles of any of the proposals in this Article. Many gun owners fear that recordkeeping is a predicate for confiscation.¹⁵⁷ If the government knows who owns what, the thinking goes, it will be able to round up all the firearms in the future.¹⁵⁸ It is a hollow argument that the proposal in this Article involves only ammunition and not weapons because a government truly dedicated to confiscating weapons could get a good idea of who owned what firearms by viewing records of ammunition sales. Improved recordkeeping may not be politically feasible at this time, but it nonetheless merits consideration and there are ways to mitigate the confiscation concerns of gun owners.

Ammunition recordkeeping would spawn a number of benefits. Unlike guns, which frequently are not found at the crime scene, bullets and cartridges often are found.¹⁵⁹ They provide a tangible link to the wrongdoer, and this link can be strengthened. Improved point-of-purchase recordkeeping can help in this respect. Although the records probably would not be complete enough to track bullets directly to their source, they would provide a good starting point for law enforcement officers in their investigations.

Recordkeeping systems are fairly standard and relatively simple. Senator Moynihan would require information on “importation, production, shipment, sale, or other disposition of ammunition” including “amounts, calibers, and types of ammunition that were disposed of.”¹⁶⁰ Los Angeles requires a right

157. See OSHA GRAY DAVIDSON, UNDER FIRE: THE NRA AND THE BATTLE FOR GUN CONTROL 149-52 (1993) (characterizing NRA's leitmotif of opposition to legislation as “Armageddon Appeal”).

158. See LARSON, *supra* note 7, at 185 (quoting NRA “Member Guide” as saying: “Any type of licensing and computer registration scheme aimed at law-abiding citizens is a direct violation of Second Amendment rights, serves no law enforcement purpose, and ultimately could result in the prohibition and/or confiscation of legally owned firearms.”).

159. Some shooters apparently are concerned about the possibility of leaving cartridges at the scene of a crime. “Caseless” Bullets Could Eliminate Evidence, CLEV. PLAIN DEALER, Aug. 9, 1993, at 2c. They have equipped their guns with plastic bags to catch the cartridges as they are ejected. It also bears noting that revolvers do not eject cartridges.

160. S. 109, 103d Cong. (1993); see also Violent Crime Control Act of 1997, S.

thumb print and six different types of information: date of sale; purchaser's name, address, and date of birth; purchaser's driver's license number or other identification and state where license issued; brand, type, and amount of ammunition purchased; and the purchaser's signature, and the name of the sales person.¹⁶¹ The main objective is simply to get some type of information that will be useful not only for criminal investigative purposes but also for aiding research on ammunition buying patterns and the like.

Recordkeeping also fills an important role in the context of the proposals forwarded in this Article. Many of the proposals are predicated on the idea of keeping ammunition out of the "wrong" hands. Sometimes, though, ammunition does fall into the "wrong" hands or is misused by otherwise law-abiding people. In those cases, sales records will be a first step toward apprehending those people. The focus then shifts from "wrong" people to "wrong" uses—an important move because anyone can use ammunition for bad reasons. Again, though, the idea is never to punish or limit ammunition ownership per se but rather to keep ammunition out of the wrong hands and then, failing that, to use spent ammunition as a forensic device to aid in tracking down people who use their firearms for violent purposes.

The Bureau of Alcohol, Tobacco and Firearms would not have to serve as the central repository for information but would have access to dealer-maintained records on demand. Keeping ATF at "arm's length" from bullet purchase records, might make the system more acceptable to gun owners. The Brady Bill's mandate that CLEOs destroy records pertaining to their background search within twenty days is, in many ways, a response to this fear.¹⁶² The theory is that if the CLEOs destroy the records they cannot be used later by the ATF when it rounds up all the guns. A similar fear would exist with recordkeeping regarding ammunition. Such fear on the part of gun owners, whether justified or not, can never be eliminated, but perhaps it can be lessened. As noted above, records pertaining to ammunition sales are most useful when used to apprehend criminals. These are the "bad guys" the NRA has professed an interest in regulating.¹⁶³ Perhaps the best way to assuage the NRA's fears is to mandate strict decentralization of the records. Ammunition sales records would be kept only by

135, 105th Cong. (placing recordkeeping requirements on manufacturers and importers of ammunition); Handgun Ammunition Control Act of 1995, S. 20, 104th Cong.

161. LOS ANGELES, CAL., CODE ch. V, art. IV, § 55.11 (1998).

162. See 18 U.S.C. § 922(s)(6)(B)(i) (West Supp. 1998).

163. See DAVIDSON, *supra* note 157, at 59-60 (discussing NRA's belief that "Gun Control Isn't Crime Control" and noting "its solution to crime was as simple (or simplistic) as that of its opponents' [sic]: Toss anyone who criminally misuses a gun into jail and throw away the key").

dealers, rather than in a central repository, and could be accessed for use only in an active criminal investigation. The system would, in essence, build in inefficiencies that would ease gun owners' concerns while still giving law enforcement officers a tool with which to do their jobs.

The establishment of greater control over who can sell ammunition and how dealers can do so should be done in conjunction with the merger of ammunition onto Brady mandates.¹⁶⁴ Given the easing of restrictions in the Firearm Owners' Protection Act, the fee and licensing structure for ammunition dealers could be tightened considerably.¹⁶⁵ Authors Jacobs and Potter have described the licensing system for firearms dealers as "all smoke and mirrors,"¹⁶⁶ and the licensing system for ammunition dealers is, at this time, nonexistent.

Ammunition manufacturers and importers pay nominal fees—ten dollars and fifty dollars per year respectively—but dealers have no fee or licensing requirement.¹⁶⁷ The initial move then is to bring ammunition dealers back under the regulatory umbrella. Then the question turns to setting the licensing fee for dealers. The current system for firearms, which provides for dealers to pay a fee of \$200 for three years, sets too low a barrier to entry.¹⁶⁸ Senator Moynihan has proposed an occupational tax of \$10,000 a year on importers, manufacturers, and dealers of handgun ammunition.¹⁶⁹ This is perhaps a bit steep, but the licensing fee certainly can be increased over the current level for firearms dealers. An annual fee of \$1000 for importers, manufacturers, and dealers would be a good starting point and might help weed out the fly-by-night operators.¹⁷⁰

164. Buying bullets has become almost comically commonplace. Recently, a Baltimore Burger King offered customers a coupon "Good for one free box of ammo with gun purchase or 10 percent off." *Bullets and Burgers at Baltimore Restaurant*, S.F. CHRON., Apr. 6, 1996, at A3.

165. Firearm Owners' Protection Act, Pub. L. No. 99-308, 100 Stat. 449-61 (codified as amended at 18 U.S.C. §§ 921-29 (1986)).

166. Jacobs & Potter, *supra* note 114, at 113; *see also*, Violence Policy Center, *Paper Tiger? Will the Brady Law Work After Instant Check?* (visited Nov. 17, 1998) <<http://www.vpc.org/studies/bradintr.htm>> (statement of gun-control advocates questioning efficacy of Brady particularly Instant Check provisions).

167. *See* 18 U.S.C. § 923(a)(1)-(3) (West Supp. 1998) ("No person shall engage in the business of importing[,] manufacturing[,] dealing in firearms, or importing or manufacturing ammunition, until he has filed an application with and received a license to do so from the Secretary."). Ammunition dealing is a notable exclusion from this section.

168. *Id.*

169. *See* Real Cost of Destructive Ammunition Act, S. 124, 104th Cong. (1995).

170. One of the provisions in Brady II is a \$1000 annual fee for ammunition dealers. *See* Gun Violence Prevention Act of 1994, S. 1882, 103d Cong., H.R. 3932, 103d Cong. (1994).

Instituting licensing, along with a set of stiff fees, will prevent people from becoming dealers in order to circumvent any ban on mail-order sales to non-dealers. It also will increase accountability by giving dealers a greater financial incentive to keep their licenses. Accountability is particularly important because dealers will have new and crucial responsibilities under the scheme outlined herein. They would play a key role in implementing Brady checks on ammunition buyers and in taking point-of-sale information for other purposes. Making their licenses more valuable, by making dealers pay more for them, would make the threat of rescinding those licenses valid.

A logical outgrowth of these proposals appears to be bullet registration. After all, if one goes to the trouble of requiring dealers to keep better records of bullet buyers, it should be easy to go one extra step and provide some registration of the bullets sold. This Article, however, does not advocate instituting some type of registration scheme for bullets. Bullet registration would further many of the goals, greater accountability, better tracking, and the like, outlined above, but there are immense practical difficulties. There would be two possible means of registration—imprinting each bullet, or series of bullets, with a serial number or putting some sort of chemical taggant in the gunpowder. Neither method is feasible,¹⁷¹ but taggants are particularly impractical. It is difficult enough to place taggants in large patches of commercial explosives, let alone in the minute quantities of gunpowder in a single cartridge.¹⁷² Also, a knowledgeable gun owner can manufacture her own gunpowder at home, and thereby bypass any taggant system.¹⁷³ A serial number system is better, but again one is dealing with imprinting something of very small size in very vast numbers.¹⁷⁴ The several billion bullets already in existence

171. See JOHN KAPLAN, *Foreword to FIREARMS AND VIOLENCE: ISSUES IN PUBLIC POLICY, XXIX-XXX* (Don B. Kates, Jr. ed., 1984) (“Of course it would be helpful in tracking down criminals to have a registry of the bullets fired by each gun The problem is that any method of registering guns by the particular markings on the bullets they fire would be hopelessly impractical.”).

172. See Reynold N. Hoover, *Learning From Oklahoma City: Federal and State Explosive Laws in the United States*, 5 KAN. J.L. & PUB. POL’Y 35, 48-51 (1995) (discussing development of and questions regarding taggants).

173. See KLECK, *POINT BLANK*, *supra* note 3, at 415 (noting that it is easier to make gunpowder at home than to brew “moonshine”).

174. Compare Paul Rosenberg, Editorial, *Stop Talking Gun Control and Start Discussing Bullet Control*, CHAPEL HILL HERALD, Nov. 8, 1994, at 4 (“Every bullet sold to law enforcement, the military and civilian dealers would bear a registered serial number.”) with Mark Penman, Letter, *Bullet Numbering Proposal, Absurd, Illogical*, CHAPEL HILL HERALD, Nov. 18, 1994, at 4 (noting that “[t]he expense [of numbering bullets] would be astronomical. Most bullets are currently bulk-produced in case lots measured in the tens of thousands” and further noting that “[b]ullets travel real fast, get very hot and stop quite suddenly. . . . The probability of a tiny serial number surviving

would escape serialization, and reloading machines allow people to make their own live ammunition, further confusing a registration system. As one observer has noted, registering bullets would be like registering pennies.¹⁷⁵ Even if registration were logistically practical and technologically possible, legislating such a system into existence would be a politically impossible mission. Bullet registration runs into the same difficulties facing a point-of-sale recordkeeping system.¹⁷⁶

C. Elimination of Mail-Order Sales

A ban on mail-order sales is an essential predicate to bringing ammunition under Brady's regulatory scheme. Because it would be impossible to carry out background checks otherwise, it is necessary to reinstate the ban on mail-order interstate ammunition sales to non-dealers.¹⁷⁷ Mail-order ammunition sales previously were banned under the Gun Control Act of 1968.¹⁷⁸ However, in 1986, the Firearm Owners' Protection Act dropped the ban on mail-order interstate sales to non-dealers.¹⁷⁹ Because ammunition can be ordered through the mail, a cornucopia of munitions is just a phone call away.¹⁸⁰ Since 1968, mail-order firearm sales directly to consumers have been banned,¹⁸¹ and now

deformation is infinitesimal").

175. Interview with P.J. Hubert, a gun owner, New York, N.Y. (Mar. 20, 1996). *But see* French, *supra* note 9, at 1098-1100 (arguing merits of serial-number system for bullets).

176. *See* Jeanie Borba, *NRA Pushes Message in Fresno*, FRESNO BEE, Nov. 14, 1995, at B2 (noting NRA's opposition to gun registration).

177. LARSON, *supra* note 7, at 212 (discussing McClure-Volkmer's repeal of Gun Control Act's ban on mail-order sales of ammunition to consumers).

178. Pub. L. No. 90-351, 82 Stat. 226 (1968).

179. Pub. L. No. 99-308, 100 Stat. 449-61 (1986) (codified as amended at 18 U.S.C. § 921-29 (1996)).

180. *See, e.g.*, THE SPORTSMAN'S GUIDE: GARY OLEN'S HAND-PICKED, FIELD TESTED OUTDOOR GEAR AT . . . RIDICULOUSLY LOW PRICES (1996). The interested purchaser can buy 5000 rounds of .22 caliber ammunition from The Sportsman's Guide ("The 'Fun-to-Read' CatalogJ") for \$99.99 or \$.02 a round. *Id.* at 64. Customers can buy ammunition if they fulfill the following requirement:

- Cannot be sold to minors, convicted felons or those chemically dependent. You MUST be 21 and have no legal disabilities to order.
- Mail Orders: sign legal notice on order form. Phone Orders: review legal notice on order form and provide verbal confirmation at time of ordering.
- Adult signature is required upon delivery.

Id. at 36. The order form includes a disclaimer and blanks for signature and birth date but requires no other independent verification of the information included. The catalogue also features a variety of "military surplus" ammunition and sells full metal jacket, full metal jacket boattail, jacketed hollow point, and soft point cartridges. *Id.* at 64-65.

181. *See* 18 U.S.C. § 922(a)(1) (West Supp. 1998); *see also* LARSON, *supra* note 7, at 212 (noting that although interstate firearms sales have been banned, regulations have been loosened).

is the time to follow suit with ammunition.

The justification for banning mail-order sales is simple—without such a ban there is no way to control who purchases ammunition. The documentation requirements are minimal, and there is no way to check that even these few requirements are met without the purchaser having a face-to-face meeting with a licensed firearms dealer. Unless mail-order sales come to a halt, children and felons will be able to amass mini-arsenals as easily as they do their Christmas shopping, and adding bullets to Brady would be a pointless endeavor.¹⁸²

CONCLUSION

This plan will not cure the ills of violence in the United States. No plan will, but this is more than an “if-it-saves-one-life-it’s-worth-it” type of plan. It will shore up some of the leaks in the dike, and at relatively low cost, either to the government or to gun owners. It preserves gun owners’ rights to keep and bear arms while furthering the public’s goal of making sure that those guns are kept in the right hands and that guns are not wrongfully used. It also attempts to fill in gaps in preexisting laws such as Brady. Although it probably will not achieve the ground-breaking change of such federal campaigns as those against cigarettes and for auto safety, it is a critical step in the right direction and one that moves the debate into largely unmarked territory—legislative land that is ripe for discovery.

182. See LARSON, *supra* note 7, at 167-68 (discussing his investigation of mail-order ads in *American Handgunner* and how he sent away for pamphlet on “world’s deadliest handgun ammunition” and directions on how to make exploding bullets).