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## The Online Gun Marketplace and The Dangerous Loophole In The National Instant Background Check System, 30 J. Marshall J. Info. Tech. & Privacy L. 757 (2014)

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## COMMENTS

# THE ONLINE GUN MARKETPLACE AND THE DANGEROUS LOOPHOLE IN THE NATIONAL INSTANT BACKGROUND CHECK SYSTEM

ANN DANIELS\*

### I. INTRODUCTION

“Smith & Wesson .40-caliber pistol for \$400.”<sup>1</sup> Benedict Ladera, a private gun seller and Seattle resident, posted a similar advertisement on [www.armslist.com](http://www.armslist.com) (Armslist).<sup>2</sup> Across the border in Canada, Demetry Smirnov visited the gun classifieds website, agreed to the disclaimer, and viewed Ladera’s post.<sup>3</sup> Smirnov contacted Ladera expressing his interest over the advertised pistol and traveled to Seattle to complete the transaction.<sup>4</sup> After the exchange, Smirnov drove to Chicago, Illinois where he met Jitka Vesely, a woman whom he had met online years earlier.<sup>5</sup> He shot and killed Vesely in a museum parking lot with the gun he had purchased through Armslist.<sup>6</sup> The administrator of Vesely’s estate and the Brady Center to Prevent Gun Violence brought a

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1. Michael Luo, *Seeking Gun or Selling One, Web is a Land of Few Rules*, N.Y. TIMES (Aug. 29, 2013, 10:52 AM), [http://www.nytimes.com/2013/04/17/us/seeking-gun-or-selling-one-web-is-a-land-of-few-rules.html?pagewanted=all&\\_r=1&](http://www.nytimes.com/2013/04/17/us/seeking-gun-or-selling-one-web-is-a-land-of-few-rules.html?pagewanted=all&_r=1&).

2. See *Vesely v. Armslist, LLC*, No. 13 CV 00607 (N.D. Ill. July 29, 2013) (order granting Defendant’s Motion to Dismiss).

3. *Id.*

4. Luo, *supra* note 1.

5. Defendant Armslist, LLC’s Memorandum of Law in Support of its Rule 12(B)(6) Motion to Dismiss Plaintiff’s Complaint at 2, *Vesely v. Armslist, LLC*, No. 13 CV 00607 (N.D. Ill. 2013) [hereinafter Defendant Armslist’s Memorandum].

6. Jacob Gershman, *Judge Dismisses Suit against Online Gun Marketplace*, WALL ST. J. (Aug. 29, 2013, 10:00 AM), <http://blogs.wsj.com/law/2013/08/02/judge-dismisses-suit-against-online-gun-marketplace/Law>.

wrongful death suit against Armslist, LLC in the United States District Court for the Northern District of Illinois in 2013.<sup>7</sup>

Radcliffe Haughton, a Wisconsin resident, responded to a similar advertisement from a private seller on Armslist and arranged to meet the seller in a McDonald's parking lot in 2012.<sup>8</sup> The private seller provided two prerequisites for the transaction: first, Haughton's driver's license to ensure that he was a Wisconsin resident and second, Haughton's legal ability to possess firearms.<sup>9</sup> Haughton produced his driver's license and verbally assured the seller that he was legally able to possess firearms.<sup>10</sup> The seller handed over the pistol and the transaction was complete.<sup>11</sup> Little did the seller know that Haughton had a restraining order entered against him by his wife, Zina Haughton, two days prior to the transaction.<sup>12</sup> Haughton's wife requested the restraining order after he had threatened to throw acid in her face and burn her and her family with gas.<sup>13</sup> After the transaction, Haughton killed his wife and two other women at her place of employment with the same pistol purchased off Armslist.<sup>14</sup>

"Got \$250 cash for a good handgun something reliable. Text ####-####." <sup>15</sup> Over in Colorado, Omar Roman-Martinez sought a firearm and posted a 9-millimeter handgun for sale on Armslist in 2013.<sup>16</sup> Roman-Martinez possesses two felony convictions for burglary and

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7. *Vesely v. Armslist, LLC*, No. 13 CV 00607 (N.D. Ill. July 29, 2013) (order granting Defendant's Motion to Dismiss). U.S. District Court Judge Charles Norgle, on July 29, 2013, granted Armslist's Motion to Dismiss for Failure to State a Claim on the grounds that the Plaintiffs cannot allege that Armslist owed a duty to Vesely. *Id.* The Judge further stated in his order that the conclusion that Armslist encourages its users to circumvent the law by enabling prospective purchasers to search for and find gun sellers in any state is meritless. *Id.* The Brady Center filed an appeal which is currently pending. *Id.*; Michael Cooper, Michael S. Schmidt, & Michael Luo, *Loopholes in Gun Laws Allow Buyers to Skirt Checks*, N.Y. TIMES (Apr. 10, 2013), <http://www.nytimes.com/2013/04/11/us/gun-law-loopholes-let-buyers-skirt-background-checks.html?pagewanted=all>.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. Erin Durkin, *Milwaukee Spa Shooter Radcliffe Haughton Was Not Legally Able to Purchase a Gun, but Got His Hands on a Semiautomatic Weapon through a Website Previously Eyed for Illegal Sales*, N.Y. DAILY NEWS (Oct. 23, 2012, 8:24 PM), <http://www.nydailynews.com/news/national/website-helps-milwaukee-spa-shooter-illegally-buy-gun-article-1.1190661>.

13. *Id.*

14. *Id.*

15. Luo, *supra* note 1.

16. *Id.*

motor vehicle theft along with a misdemeanor domestic violence conviction.<sup>17</sup> He ultimately decided not to buy a weapon, but claimed that the gun he was selling did not belong to him.<sup>18</sup>

The cases of Smirnov, Haughton, and Roman-Martinez are three examples currently in the news showcasing the easy and informal nature of acquiring a firearm online through a classified website, such as Armslist.<sup>19</sup> Under the Gun Control Act, the current federal legislation on firearms in the United States, these three men are barred from purchasing and possessing a firearm because each man falls into one of the prohibited categories of individuals identified in the Act.<sup>20</sup> First, Smirnov is a Canadian resident, not a United States citizen in order to lawfully possess a firearm in the United States.<sup>21</sup> Second, Haughton had a restraining order entered against him two days prior to his purchase of the .40 caliber semiautomatic pistol.<sup>22</sup> Haughton falls into the category that prohibits firearms to individuals with court-executed stalking or restraining orders.<sup>23</sup> Third, Roman-Martinez is convicted of two felonies and possesses a domestic violence misdemeanor.<sup>24</sup> These are two prohibited categories under the Gun Control Act.<sup>25</sup> From November 30, 1998 through May 31, 2014, the Federal Bureau of Investigation (FBI), through the Brady Handgun Violence Protection Act (Brady Act), has rejected 1,112,225 gun sales to potential buyers that are prohibited by law, such as convicted felons, illegal aliens, or fugitives.<sup>26</sup> However, all three men were able to find a loophole in the federal legislation to purchase a firearm with ease and without being subject to a background check: the online gun marketplace.

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17. *Id.*

18. *Id.*

19. ARMSLIST, <http://www.armslist.com> (last visited May 25, 2014); *see also* BUDS GUN SHOP, <http://www.budsgunshop.com> (last visited May 25, 2014).

20. Luo, *supra* note 1; *see* 18 U.S.C. § 922(g)(5) (2014).

21. Luo, *supra* note 1.

22. Durkin, *supra* note 12.

23. Cooper, Schmidt, & Luo, *supra* note 7.

24. Luo, *supra* note 1.

25. *Id.*; *see* 18 U.S.C. § 922(g) (2013).

26. FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, *Denials: NICS Background Checks* 1, <http://www.fbi.gov/about-us/cjis/nics/reports/denials-020614.pdf> (last visited June 5, 2014) [hereinafter FBI, *Denials: NICS Background Checks*] (listing statistics of denials of background checks under NICS for each category of prohibited person from November 30, 1998 to May 31, 2014); *see also* *National Instant Criminal Background Check System*, FED. BUREAU OF INVESTIGATION, <http://www.fbi.gov/about-us/cjis/nics/nics> (last visited May 25, 2014) [hereinafter *National Instant Criminal Background Check System*].

The emergence of online gun marketplaces is a novel issue. Yet, the issues of gun legislation, gun violence, and Second Amendment rights pervade American society and burden legislators on federal and state levels. The most significant legal issue that arises from the existence of online gun marketplaces is how these websites fit into the current state of federal law on firearm background checks. Armslist is an Internet website that serves as an electronic bulletin board where individuals can post advertisements for the sale of their firearms and sporting gear.<sup>27</sup> There are approximately 170,000 listings for firearms on Armslist and private sellers encompass approximately ninety-five percent of these listings.<sup>28</sup> Private sellers who post advertisements for the sale of their firearms do not have to comply with federal background checks that are required of their federally-licensed counterparts.<sup>29</sup> Despite Armslist's efforts to provide a disclaimer to access their website, the website still functions as an unregulated bazaar.<sup>30</sup> The anonymity of the Internet permits the potential for unlicensed sellers to advertise their firearms and people who are legally barred from firearm ownership, such as convicted felons, to purchase them.<sup>31</sup>

Public safety is a compelling government interest, which is served by the current federal legislation on firearms. However, from 1968 to 2014, the United States and the challenges it faces have drastically evolved in all facets. Mass shootings at Columbine,<sup>32</sup> Virginia Tech,<sup>33</sup>

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27. Defendant Armslist's Memorandum, *supra* note 5, at 1.

28. Luo, *supra* note 1.

29. David H. Berstein & Bruce P. Keller, § 10.04 *Alcohol, Tobacco, and Firearms*, in *THE LAW OF ADVERTISING, MARKETING, AND PROMOTIONS* (2013).

30. Luo, *supra* note 1.

31. *Id.*

32. Aimee Kaloyares, Article, *Annie, Get Your Gun? An Analysis of Reactionary Gun Control Laws and Their Utter Failure to Protect Americans from Violent Gun Crimes*, 40 S. U. L. REV. 319, 333 (2013) ("In 2009, Dylan Klebold and Eric Harris shot thirteen people dead, twelve students and one teacher, at Columbine High School. Klebold and Harris were seventeen years old at the time of the shooting and acquired the guns illegally.").

33. Christine Hauser & Anahad O'Connor, *Virginia Tech Shooting Leaves 33 Dead*, N.Y. TIMES (Apr. 16 2007), <http://www.nytimes.com/2007/04/16/us/16cnd-shooting.html?pagewanted=all> ("Two separate attacks at Virginia Tech University in Blacksburg, Virginia took the lives of thirty-three people, many of them students."); Kaloyares, *supra* note 32. Kaloyares discusses Seung-Hui Cho, a senior at Virginia Tech University, was named the shooter in the massacre and was adjudicated mentally incompetent by the Virginia State Court. In response to the Virginia Tech University shooting, Congress moved to enact a reactionary amendment to improve the NICS to require heightened standards for mental health records to be part of the NICS system. The Amendment was ultimately deemed an unconstitutional infringement and failed strict scrutiny review. *Id.*

Newtown,<sup>34</sup> and the Naval Yard<sup>35</sup> have drawn American attention to gun violence and inflamed the debate between gun control advocates and opponents. This Comment proposes amendments to adopt new measures to meet the legislative intent of Congress while addressing emerging issues that impair policy goals. Technological advances, the ease of online transactions, and the prevalence of gun violence should prompt Congress to re-examine the current federal legislation in order to take a proactive step to address an emerging dangerous problem.

This Comment will address the arrival of the online gun marketplace and its effect on the current state of the law on background checks for firearms. Part II will provide the pertinent sections of the current federal legislation on firearms and explain in detail the National Instant Background Check System in the United States. It will show Congress' failed attempt to pass the Internet Gun Trafficking Act to address the issue of online gun marketplaces in 1999. It will identify and define the concept of Internet classified websites and the application of the Communications Decency Act (CDA). Part II will conclude with a discussion of Armslist and Congress' attempts for gun reform. Part III will identify and analyze the direct conflicts and issues presented between the existence of online gun marketplaces and the current federal legislation. It will analyze the emergence of secondary markets for firearms and their disparate effects on public safety. Next, Part III will demonstrate the immediate need for Congress to amend the Gun Control Act and the Brady Act to close the loophole for online gun marketplaces. It will propose a piece of legislation consisting of four practical and commonsense amendments to address the dangerous problems arising from the loose nature of online gun marketplaces. The current background check law needs to be expanded in order to apply universal background checks. Furthermore, the language of the legislation needs to recognize the Internet as an emerging marketplace for the manufacture, sale, and transfer of firearms. Part III will conclude by addressing the policy considerations of gun control advocates and opponents in order to

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34. James Barron, *Nation Reels after Gunman Massacres 20 Children at School in Connecticut*, N.Y. TIMES (Dec. 14, 2012), [http://www.nytimes.com/2012/12/15/nyregion/shooting-reported-at-connecticut-elementary-school.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2012/12/15/nyregion/shooting-reported-at-connecticut-elementary-school.html?pagewanted=all&_r=0) ("Adam Lanza shot dead twenty-eight people dead, twenty of those children, in and around Sandy Hook Elementary School in Newtown, Connecticut in 2012.").

35. Carol Morello, Peter Hermann, & Clarence Williams, *Authorities Identify Seven of the Twelve People Killed in Naval Yard Shooting*, WASH. POST (Sept. 16 2013), [http://articles.washingtonpost.com/2013-09-16/local/42092857\\_1\\_second-suspect-lanier-gray](http://articles.washingtonpost.com/2013-09-16/local/42092857_1_second-suspect-lanier-gray) ("Aaron Alexis shot dead twelve people and injured eight outside the Naval Yard in Washington, D.C. in 2013.").

understand the complexity of the issue and areas of compromise.

## II. BACKGROUND

“A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”<sup>36</sup> The Supreme Court of the United States, in *District of Columbia v. Heller*, held that the Second Amendment confers an individual right to keep and bear arms.<sup>37</sup> Two years later, in *McDonald v. City of Chicago*, the Court held that the interpretation of the Second Amendment in *Heller* was fully incorporated to the states through the Due Process Clause of the Fourteenth Amendment.<sup>38</sup> Gun crime and mass violence drive proposals for gun control laws and any successful law is followed by proposals for more control.<sup>39</sup> When a gun control law is adopted, the Second Amendment is curtailed in the interest of public safety.<sup>40</sup> *Heller* made clear that the right to self-defense is deeply rooted in United States history and tradition and a predominate reason for possessing arms.<sup>41</sup> However, gun possession is motivated by a variety of other reasons such as the ideological belief in the right to keep and bear arms, hunting, recreational enjoyment, and criminal intent.<sup>42</sup> Gun legislation polarizes society and is a source of great debate because it intrudes on this fundamental right.<sup>43</sup>

### A. THE CURRENT FEDERAL LAW ON FIREARMS

18 U.S.C. §§ 921-31 represent the current legislation on the manufacture, dissemination, and purchasing of firearms in the United States.<sup>44</sup> In 1968, Congress invoked its Commerce Clause authority to enact the Gun Control Act to regulate interstate transactions of

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36. U.S. CONST. amend. II.

37. *Dist. of Colum. v. Heller*, 554 U.S. 570, 595 (2008) (holding that the Second Amendment is interpreted as guaranteeing a right to keep and bear arms to individuals, not only the militia, for the purpose of self-defense within the home).

38. *McDonald v. City of Chi.*, 130 S. Ct. 3020, 3041 (2010) (holding that the Second Amendment is incorporated against the states through the Fourteenth Amendment and the *District of Columbia v. Heller* interpretation applies to this holding).

39. James B. Jacobs & David Kairys, *Debate: Can Handguns Be Effectively Regulated?*, 156 U. PA. L. REV. PENNUNBRA 188, 190 (2007).

40. Kaloyares, *supra* note 32.

41. *McDonald*, 130 S. Ct. at 3036.

42. Jacobs & Kairys, *supra* note 39.

43. *Id.* at 194.

44. 18 U.S.C. §§ 921-31 (2014) (all sections of the current law on the federal regulatory scheme for firearms).

firearms.<sup>45</sup> The Gun Control Act defines firearms as:

(A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device; Such term does not include an antique firearm.<sup>46</sup>

Section 922(g) of the Gun Control Act prevents the sale of firearms to anyone under the ten identified categories:

(1) a convicted felon; (2) an individual convicted of a crime punishable by one year or more in prison; (3) a fugitive from justice; (4) an individual who is adjudicated mentally ill or committed to a mental institution; (5) a controlled substance abuser; (6) an alien; (7) an individual who has renounced U.S. citizenship; (8) an individual who has committed a domestic violence misdemeanor; (9) an individual who has a dishonorable discharge from the military; and (10) an individual who has a stalking order.<sup>47</sup>

The legislative purpose behind the federal gun legislation is to curb crime by keeping firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency.<sup>48</sup> Through its fact-finding power, Congress recognized that crimes involving guns is a pervasive and nationwide problem in the United States.<sup>49</sup> Furthermore, the interstate movement of guns exacerbates crime at the local level.<sup>50</sup> Congress determined that the ease with which firearms could be obtained contributed significantly to the prevalence of lawlessness and violent crime in the United States.<sup>51</sup>

The Brady Act of 1993, an amendment to the Gun Control Act, mandates background checks of individuals prior to any gun sale from

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45. § 922 (the current law on the federal regulatory scheme for firearms and listing the amendments made to the section).

46. § 921(a)(3); *see also* U.S. DEP'T OF JUSTICE, BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES, *Firearms Tracing Guide: Tracing Firearms to Reduce Violent Crime* 4 (2012), available at <https://www.atf.gov/files/publications/download/p/atf-p-3312-13.pdf>.

47. Kaloyares, *supra* note 32.

48. *Huddleston v. United States*, 415 U.S. 814, 824 (1974) (holding that the language, structure, and legislative history of the Gun Control Act supported a finding that a sale or other disposition of a firearm in a pawnshop was covered by the Act).

49. § 922(q)(1)-(2).

50. *Id.*

51. *Huddleston*, 415 U.S. at 824; *see also* Omnibus Crime Control and Safe Streets Act of 1968, S. Rep. No. 1097, 90th Cong., 2d Sess., 108 (1968).



any federal firearm licensee (FFL) to any individual.<sup>52</sup> The law only applies to what it defines as “dealers”<sup>53</sup> and does not regulate the activities of private or occasional sellers of firearms.<sup>54</sup> As an enforcement mechanism of the public safety goals, Congress required the Attorney General to establish the National Instant Criminal Background Check System (NICS).<sup>55</sup> Responsibility is placed upon firearm merchants and manufacturers to comply with the NICS.<sup>56</sup> Under the NICS, a gun purchaser must wait three days for a background check to clear before the gun purchase from a FFL is finalized.<sup>57</sup> The FFL must complete a Bureau of Alcohol, Tobacco, Firearm and Explosives (ATF) Form 4473.<sup>58</sup> ATF Form 4473 is an application that seeks a variety of information from the potential buyer.<sup>59</sup> It contains basic questions such as name, address, social security number, and birthdate.<sup>60</sup> In addition, it contains specific questions related to each prohibited category in Section 922(g) of the Gun Control Act.<sup>61</sup> For example some of the questions are: (1) have you ever been convicted of a felony?; (2) are you an alien illegally in the United States?; and (3) are you subject to a court restraining order?<sup>62</sup> After the FFL completes ATF Form 4473, the FFL must contact the NICS section of the FBI via the toll-free number or via the Internet E-Check System to request a background check with descriptive information provided on the form.<sup>63</sup>

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52. Kaloyares, *supra* note 32.

53. § 921(a)(11). This Section defines the term “dealer” as “(A) any person engaged in the business of selling firearms at wholesale or retail, (B) any person engaged in the business of repairing firearms or of making or fitting special barrels, stocks, or trigger mechanisms to firearms, or (C) any person who is a pawnbroker.” *Id.* The term ‘licensed dealer’ means “any dealer who is licensed under the provisions of this chapter.” *Id.*

54. Kaloyares, *supra* note 32.

55. *The Fix Gun Checks Act: Better State and Federal Compliance, Smarter Enforcement: Hearing Before the Subcomm. on Crime and Terrorism of the Sen. Comm. on the Judiciary*, 112th Cong. (2011), available at <http://www.hsdl.org/?view&did=693922> [hereinafter *Fix Gun Checks Act hearing*] (testimony of David Cuthbertson, Assistant Director of the FBI Criminal Justice Information Services Division).

56. Kaloyares, *supra* note 32.

57. *Id.*

58. FEDERAL BUREAU OF INVESTIGATION, *National Instant Criminal Background Check Systems*, *supra* note 26.

59. *Form 4473*, BUREAU OF ALCOHOL, TOBACCO, FIREARMS, & EXPLOSIVES, U.S. DEPT OF JUSTICE, available at <http://www.atf.gov/files/forms/download/atf-f-4473-1.pdf> (last visited May 25, 2014).

60. *Id.*

61. *Id.*

62. *Id.*

63. FEDERAL BUREAU OF INVESTIGATION, *National Instant Criminal Background Check Systems*, *supra* note 26.

When a NICS check is conducted, the individual's name and descriptive information is searched against information maintained in three databases managed by the FBI Criminal Justice Information Services Division.<sup>64</sup> The three databases are the Interstate Identification Index (III), the National Crime Information Center (NCIC), and the NICS Index.<sup>65</sup> The III is a computerized index of criminal justice information from the FBI that identifies individuals who have been arrested for felonies or serious misdemeanors under state or federal law.<sup>66</sup> The NCIC is also a computerized national index maintained and utilized as a resource to apprehend fugitives, locate stolen property, and find missing persons.<sup>67</sup> In addition, the NCIC conducts other criminal searches to determine whether the potential purchaser is a sexual offender,<sup>68</sup> is on supervised release,<sup>69</sup> and is in the Suspected Terrorist File.<sup>70</sup> The NICS Index provides information on individuals identified in federal, state, and local records as being prohibited from possessing a firearm by one or more of the ten categories in Section 922(g) of the Gun Control Act.<sup>71</sup> Furthermore, if the potential purchaser claims non-U.S. citizenship, NICS works with the Department of Homeland Security Immigration and Custom Enforcement to determine if it can proceed.<sup>72</sup> Local, state, and federal agencies as well as mental health institutions, psychiatrists, and police departments voluntarily contribute information and request placement of individuals into the NICS Index.<sup>73</sup>

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64. *Fix Gun Checks Act hearing*, *supra* note 55.

65. *Id.*

66. Elaine Vullmahn, Comment, *Firearm Transaction Disclosure in the Digital Age: Should the Government Know What is in your Home?*, 27 J. MARSHALL J. COMPUTER & INFO. L. 497, 503 (2010).

67. *Id.*; see also *National Crime Information Center*, FED. BUREAU OF INVESTIGATION, [http://www.fbi.gov/about-us/cjis/ncic/ncic\\_files](http://www.fbi.gov/about-us/cjis/ncic/ncic_files) (last visited May 25, 2014).

68. National Sex Offender Registry File: records on individuals who are required to register in a jurisdiction's sex offender registry. *National Crime Information Center*, *supra* note 67.

69. Supervised Release File: records on individuals on probation, parole, or supervised release or released on their own recognizance or during pre-trial sentencing. *Id.*

70. Known or Appropriately Suspected Terrorist File: records on known or appropriately suspected terrorists in accordance with HSPD-6. *Id.*; Vullmahn, *supra* note 66, at 504.

71. *Fix Gun Checks Act hearing*, *supra* note 55.

72. *Id.*

73. *The National Instant Background Check System Index Brochure* FED. BUREAU OF INVESTIGATION, <http://www.fbi.gov/about-us/cjis/nics/general-information/nics-index> (last visited May 25, 2014).

Once the background check is completed, the system can produce three responses: (1) proceed; (2) deny; or (3) delay.<sup>74</sup> When the system indicates “proceed,” the FFL can complete the sale because the system concluded that the transfer would be lawful.<sup>75</sup> The FFL must sign and add the NICS transaction number to the ATF Form 4473.<sup>76</sup> The FFL must keep a paper copy of the Form for at least twenty years and the e-form must be kept for at least five years.<sup>77</sup> Alternatively, if the system indicates a denial, the FFL is prohibited from conducting the sales transaction.<sup>78</sup> A “deny” response occurs when at least one system match indicates that the prospective purchaser is not legally able to possess a firearm.<sup>79</sup> If the system produces a “delay” response, there is a potentially prohibitive criterion in existence in regards to the potential buyer and more information is required to make the final determination.<sup>80</sup>

## B. SECONDARY MARKET FOR FIREARMS

The acquisition of firearms is divided into two markets: primary and secondary.<sup>81</sup> The Gun Control Act and the Brady Act regulate the primary market: retail transfers of firearms between FFLs and individual buyers.<sup>82</sup> The secondary market involves transactions of unlicensed sellers that are not subject to regulatory oversight.<sup>83</sup> Primary and secondary markets intersect in special venues.<sup>84</sup> Gun shows are an example of a venue that provides for a large number of secondary market sales by non-licensed dealers; they occur over a two-day period where vendors, licensed dealers, promoters, and collectors come together to engage in firearm transactions.<sup>85</sup> The most significant policy consideration arising from the existence of gun shows is whether the gun show

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74. Vullmahn, *supra* note 66, at 505.

75. *Id.*

76. *Id.* at 506.

77. *Id.*

78. *Id.* at 505.

79. *Id.*

80. *Fact Sheet: National Instant Background Check System*, FED. BUREAU OF INVESTIGATION, <http://www.fbi.gov/about-us/cjis/nics/general-information/fact-sheet> (last visited May 25, 2014).

81. Anthony A. Braga & David M. Kennedy, *Feature: Gun Control in America: Gunshows and the Illegal Diversion of Firearms*, 6 GEO. PUB. POL'Y REV. 7, 7 (2000).

82. PHILIP J. COOK & JENS LUDWIG, NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, GUNS IN AMERICA: NATIONAL SURVEY ON PRIVATE OWNERSHIP AND USE OF FIREARMS 5 (1997), available at <https://www.ncjrs.gov/pdffiles/165476.pdf>.

83. *Id.*

84. Braga & Kennedy, *supra* note 81.

85. *Id.* at 10.

problem is driven by felons and juveniles from illegally acquiring firearms at these shows without being subject to a background check.<sup>86</sup> An emerging secondary market for firearms is the online gun marketplace where ninety-four percent of the advertisements on Armslist were posted by private parties.<sup>87</sup>

In 1999, Senator Charles Schumer and Representative Robert Rush introduced two companion bills entitled The Internet Gun Trafficking Act in order to confront this emerging secondary market.<sup>88</sup> These bills were proposed to be an amendment to Section 922 of the Gun Control Act.<sup>89</sup> The bills would create a new regulatory framework to ban anyone other than a FFL from conducting Internet firearm transfers.<sup>90</sup> “It shall be unlawful for any person who is not licensed under Section 923 of the Gun Control Act to transfer a firearm pursuant to a posting or listing of the firearm for sale or exchange on an Internet website . . . to any person other than the operator of the website.”<sup>91</sup> However, the bills met partisan opposition and left the nation without any such new regulations to address the issue.<sup>92</sup>

### C. INTERNET CLASSIFIEDS, THE COMMUNICATIONS DECENCY ACT, AND ARMSLIST

The Internet, as a marketplace, has largely been a benefit for consumers and retailers.<sup>93</sup> A growing number of Internet companies have created online classified advertisements, a business dominated by newspapers for more than a century.<sup>94</sup> Internet classified websites have become popular with the emergence of websites such as Craigslist.<sup>95</sup> The CDA of 1996 imposed regulations on Internet website operators

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86. *Id.* at 8.

87. Luo, *supra* note 1.

88. LAW OF THE INTERNET § 7.03 (2012).

89. *See generally* The Internet Gun Trafficking Act of 1999, S 637, 106th Cong. (1999).

90. *Id.*

91. *Id.*

92. LAW OF THE INTERNET, *supra* note 88.

93. *Id.*

94. Sam Diaz, *On the Internet, A Tangled Web of Classified Ads*, WASH. POST (Aug. 31 2007), <http://www.washingtonpost.com/wpdyn/content/article/2007/08/30/AR2007083002046.html?hpid=sec-tech>.

95. Shahrzad T. Radbod, *Craigslist-A Case for Criminal Liability for Online Service Providers?*, 25 BERKELEY TECH. L.J. 597, 597 (2010) (noting that Craigslist, launched in 1995, is a website that provides a platform for users to post classified advertisements within categories and subcategories).

and the Act defines different forms of Internet websites.<sup>96</sup> The Act split Internet websites into two categories: Internet Service Providers (ISP) and Information Content Providers (ICP).<sup>97</sup> An ISP is a website that posts content generated by the website's users. Furthermore, ISPs have no participation or influence in creating the content posted on their websites.<sup>98</sup> Section 230 of the CDA states that, "no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."<sup>99</sup> Moreover, Section 230 of the CDA provides federal immunity to any cause of action that would make ISPs liable for information originating with a third-party user of the service.<sup>100</sup> Alternatively, an ICP is a person or entity responsible in whole or in part, for creating or developing information provided through the Internet or another interactive computer service.<sup>101</sup>

Armslist is a classified website that serves as a platform for sellers and purchasers to engage in firearm transfer transactions.<sup>102</sup> It was created by Jonathon Gibbon and Brian Mancini, friends who attended the United States Air Force Academy and the University of Pittsburgh.<sup>103</sup> The creators' intent was to "create a place for law-abiding gun owners to buy and sell online without all the hassles of auctions and shipping."<sup>104</sup> In addition, they stated the idea arose when Craigslist banned gun advertisements on its website.<sup>105</sup> Armslist asserts on its website that they provide a simple and easy to use marketplace.<sup>106</sup>

For the purposes of the CDA, Armslist claims that it is an ISP because it provides an interactive website which enables the public to access information by way of the Internet.<sup>107</sup> Armslist protects itself legally through a disclaimer that appears before one can access the website

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96. Ashley Ingher, Note, *Cyber Crime Control: Will Websites ever be held Accountable for the Legal Activities They Profit From*, 18 CARDOZO J.L. & GENDER 423, 425-26 (2012).

97. *Id.* at 425.

98. *Id.*

99. *Id.* at 427.

100. *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998) (holding that America Online, Inc. was an interactive computer service and should not be held responsible for the defamatory statements posted by its users).

101. 47 U.S.C. § 230(f)(3) (2014); *see also* Defendant Armslist's Memorandum, *supra* note 5, at 7.

102. Defendant Armslist's Memorandum, *supra* note 5, at 1.

103. Luo, *supra* note 1.

104. *Id.*

105. *Id.*

106. ARMSLIST, *supra* note 19.

107. Defendant Armslist's Memorandum, *supra* note 5.

where they assert their non-involvement in the user content.<sup>108</sup> After agreeing to the disclaimer, a visitor must select a location from where the advertisement will originate.<sup>109</sup> Next, the visitor can expand or limit their search by categories such as “Firearms,” and “Firearm Accessories,” and subcategories such as “Handguns,” “NFA Firearms,” and “Rifles.”<sup>110</sup> Once the visitor chooses the desired category, then he can view advertisements posted by other site-users and communicate directly with the individual through whatever means that person has chosen for communication.<sup>111</sup> Armslist claims that the individuals who post advertisements on its website are third-party ICPs under the CDA; thus, Armslist cannot be held responsible for their content.<sup>112</sup>

#### D. THE FUTURE OF GUN CONTROL REFORM

The 112th Congress set gun law reform as one of the primary issues to address in 2013.<sup>113</sup> Congress sought to consider tighter rules on firearms such as increasing penalties for those who purchase guns for criminals.<sup>114</sup> In 2013, President Obama prompted Congress to design a universal background check system for gun sales and strengthen the system to prevent transfers to criminals who cannot pass background checks.<sup>115</sup> Congress heeded this request and the 113th Congress introduced The Fix Gun Checks Act.<sup>116</sup> The bill, eventually rejected by the Senate, proposed to ban a list of specific semi-automatic weapons and magazines that hold more than ten rounds.<sup>117</sup> The most significant proposal was amending the Brady Act and expanding the current NICS background check system to encompass universal background checks. The gun control reform met partisan opposition and quickly failed

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108. *Terms of Use*, ARMSLIST, <http://www.armslist.com/info/terms> (last visited May 25, 2014).

109. *See generally* ARMSLIST, *supra* note 19.

110. *Id.*

111. *Id.*

112. Defendant Armslist’s Memorandum, *supra* note 5.

113. *Congress Returns to Try to Reach Final Deals on Major Issues of Immigration, Gun Control*, FOX NEWS (Apr. 8, 2013), <http://www.foxnews.com/politics/2013/04/08/congress-returns-to-try-to-reach-final-deals-on-major-issues-immigration-gun>.

114. Jennifer Steinhauer, *Congress to Consider Tighter Rules on Firearms*, N.Y. TIMES (Feb. 23, 2013), [http://www.nytimes.com/2013/02/24/us/politics/congress-to-consider-tighter-rules-on-guns.html?\\_r=0](http://www.nytimes.com/2013/02/24/us/politics/congress-to-consider-tighter-rules-on-guns.html?_r=0).

115. *Id.*

116. *See generally* The Fix Gun Checks Act of 2013, S. 649, 113th Cong. (2013).

117. *Id.*

Congressional muster.<sup>118</sup>

Gun control advocates seek to re-charge efforts to get gun reform back on Congressional radar in 2014.<sup>119</sup> Michael Bloomberg, former New York City mayor and fervent gun-control advocate, launched a campaign against online gun sales through the group called Mayors against Illegal Guns in December 2013.<sup>120</sup> This coalition has recently called on Congress to pass legislation to regulate the private sale of guns.<sup>121</sup> In addition, the emergence of “smart guns,” a new technological advancement in the firearms industry, has recently sparked the attention of congressmen.<sup>122</sup> “Smart” guns are personalized guns that activate only when in the close proximity or the hands of the lawful owner or authorized user.<sup>123</sup> Congress faces the issue of new technological advances in the firearms market in 2014 and beyond.

### III. ANALYSIS

The Gun Control Act is outdated. A great deal has changed from 1968 until present-day 2014. The current law must be amended to address the demands of a technologically evolving society and reflect the new wave of uncertainties arising from the prevalence of gun violence in the United States. Practical and common sense reform, bridging the sentiments of the polarized country, is necessary to modernize the current legislation in the twenty-first century. The federal government has a compelling interest in protecting public safety and the lives of its citizens.<sup>124</sup> That interest is balanced against the rights enumerated in the Bill of Rights, particularly the Second Amendment.<sup>125</sup> The immediate need for gun reform is fueled by the dangerous loopholes present in the current legislation that create avenues for statutory prohibited persons to acquire guns lawfully by skirting background checks through the

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118. Steinhauer, *supra* note 114.

119. Trymaine Lee, *Advocates to Recharge Gun Reform Efforts for 2014*, MSNBC (Aug 9, 2013), <http://www.msnbc.com/msnbc/advocates-recharge-gun-reform-efforts>.

120. *Bloomberg Gun Group Calls for Crackdown on Online Gun Sales Loophole*, CBS NEWS (Dec. 12, 2013), <http://http://newyork.cbslocal.com/2013/12/12/bloomberg-gun-group-calls-for-crackdown-on-online-gun-sales-loophole>; *see generally* MAYORS AGAINST ILLEGAL GUNS, <http://www.mayorsagainstillegalguns.org/html/home/> (last visited Feb. 24, 2014).

121. MAYORS AGAINST ILLEGAL GUNS, *supra* note 120.

122. *‘Smart’ Gun Control? Dem Bill Would Require All New Guns Be ‘Personalized’*, FOX NEWS (Feb. 20, 2014), <http://www.foxnews.com/politics/2014/02/20/dem-bill-would-require-all-new-guns-be-personalized/>.

123. *Id.*

124. *Dist. of Colum. v. Heller*, 554 U.S. 570, 687 (2008).

125. *Id.* at 683.

online gun marketplace.<sup>126</sup>

This section will propose a solution to the problems by drafting four amendments to the current federal gun legislation. It will examine the issues presented by the loopholes in the current state of the law and the online gun marketplace compliance with the CDA. The re-interpretation of the Second Amendment, through *Heller*<sup>127</sup> and *McDonald*,<sup>128</sup> established that the individual right to keep and bear arms is a fundamental right guaranteed to American citizens.<sup>129</sup> Thus, Congress cannot enact a complete ban on handguns in the United States.<sup>130</sup> This Comment does not propose a prohibition either on guns or on the online gun marketplace. Alternatively, these amendments will reflect the current issues, acknowledge policy considerations, and balance Second Amendment interests in order to find practical solutions to achieve the intent of Congress to protect the American public from dangerous persons acquiring firearms.

The interest in gun reform tends to elevate after a violent tragedy hits the news. It is natural to immediately attempt to respond to that tragedy and to prevent the threat of future injury.<sup>131</sup> Yet, it is imperative for Congress not to wait for another Columbine,<sup>132</sup> Virginia Tech,<sup>133</sup> or Newtown<sup>134</sup> to act to amend the current legislation on firearms. The effectiveness of primary market gun regulations, such as the Gun Control Act and the Brady Act, are undermined by the large volume of unregulated secondary market sales.<sup>135</sup> The need for gun reform to close in on the secondary market and fix the current loopholes is necessary as a preventative measure to reduce acquisition of firearms by those who are legally barred from doing so and protect the rights of individuals who can lawfully acquire firearms. Without these amendments, the secondary market for guns will flourish in the United States and the current legislation will soon become obsolete.

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126. Cooper, Schmidt, & Luo, *supra* note 7.

127. *Heller*, 554 U.S. at 570.

128. *McDonald v. City of Chi.*, 130 S. Ct. 3020, 3020 (2010).

129. Michael J. Habib, Note, *The Future of Gun Control Laws Post-McDonald and Heller and the Death of One-Gun-Per-Month Legislation*, 44 CONN. L. REV. 1339, 1351 (2012).

130. *Id.*

131. Kaloyares, *supra* note 32, at 364.

132. *Id.* at 333.

133. Hauser & O'Connor, *supra* note 33.

134. Barron, *supra* note 34.

135. Braga & Kennedy, *supra* note 81, at 19.



## A. THE OUTDATED GUN CONTROL ACT AND ITS DANGEROUS LOOPHOLES

## 1. Times, They are Changing

In 1968, Congress established a regulatory framework to meet the government interest in preventing dangerous individuals from attaining firearms while interfering as little as possible with the law-abiding citizens.<sup>136</sup> The legislation, although not perfect, addressed many of the questions that plagued the country in the mid-twentieth century. The assassination of President John F. Kennedy, Robert Kennedy, and Martin Luther King, Jr., prompted Congress to act on this gun legislation.<sup>137</sup> Twenty-five years later, Congress amended the Gun Control Act with the Brady Act in response to the attempted assassination of President Ronald Reagan and the intensification of gun violence.<sup>138</sup> The United States experienced the peak of gun homicide and violence in 1993.<sup>139</sup> This amounted to seven gun homicides per 100,000 people.<sup>140</sup> Therefore, in brief, Congress successfully acted on gun reform legislation in order to meet the demands and issues presented in the two time-periods. These actions constricted the ability of individuals to acquire handguns in order to meet the policy goal of curbing gun violence.<sup>141</sup> In 1994, Congress passed the Assault Weapon Ban<sup>142</sup> to prohibit the manufacture and sale of eighteen specific firearms designated as “assault weapons” for use by private citizens.<sup>143</sup> However, Congress let the law expire after its ten-year expiration date in 2004 because it did not

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136. *Huddleston v. United States*, 415 U.S. 814, 824 (1974) (holding that the language, structure, and legislative history of the Gun Control Act supported a finding that a sale or other disposition of a firearm in a pawnshop was covered by the Act); *United States v. Weatherford*, 471 F.2d 47, 51 (7th Cir. 1972) (affirming the defendants conviction of violating 18 U.S.C. § 922(g) by transporting firearms or ammunition in interstate commerce by persons who have been convicted of a crime punishable by imprisonment for a term exceeding one year).

137. Vullmahn, *supra* note 66, at 501.

138. *Id.*

139. Bill Chappell, *Rate of U.S. Gun Violence has Fallen Since 1993, Study Says*, NPR (May 7, 2013 5:06 PM), <http://www.npr.org/blogs/thetwo-way/2013/05/07/181998015/rate-of-u-s-gun-violence-has-fallen-since-1993-study-says>.

140. *Id.*

141. Vullmahn, *supra* note 66, at 502.

142. 18 U.S.C. § 922(v)-(w) (1994). Act effective 9/13/94 and repealed 9/13/2004 which appears as 18 U.S.C. § 921(v)-(w), which reads: “(v) (1) It shall be unlawful for a person to manufacture, transfer, or possess a semiautomatic assault weapon.” *Id.*

143. Brad Plumer, *Everything You Need to Know about the Assault Weapons Ban in One Post*, WASH. POST (Dec. 17, 2012), <http://www.washingtonpost.com/blogs/wonkblog/wp/2012/12/17/everything-you-need-to-know-about-banning-assault-weapons-in-one-post/>.

produce a significant impact on reducing gun violence in the ten years of its existence.<sup>144</sup>

The twenty-first century ushered in a new era of technological advancements, violence, and national security concerns. From 1993 to 2009, the United States experienced seventeen gun massacres, with the most casualties experienced at Columbine and Virginia Tech.<sup>145</sup> Yet, just during the Obama Administration, from 2009 to 2013, the United States has experienced twenty mass-shootings, where at least five people had been killed.<sup>146</sup> After each event, Americans hope that such events will not be repeated and that Congress will act.<sup>147</sup> After each event, gun control advocates push for reform and the debate pervades national news. The shooters in Columbine, Virginia Tech, and Aurora<sup>148</sup> all represent individuals who were legally barred by the Gun Control Act and the Brady Act from acquiring firearms due to their age, mental incompetency, or criminal background.<sup>149</sup> The examples of Smirnov, Houghton, and Roman-Martinez illustrate the dangers of how legally barred individuals can acquire firearms with ease through the emerging online gun marketplace.

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144. *Id.*

145. *Deadliest U.S. Mass Shooting*, L.A. TIMES (June 7, 2013), <http://timelines.latimes.com/deadliest-shooting-rampages/> (providing a timeline of deadliest mass shootings in the United States from 1984-2013).

146. *Mass Shootings during the Obama Administration*, ABC NEWS (Sept. 17, 2013), <http://abclocal.go.com/ktrk/story?section=news/politics&id=9251186> (Mass shootings in 2009: Binghamton, N.Y. Immigration Center (thirteen killed); Fort Hood, TX. (thirteen killed); Mass shootings in 2010: Carthage, N.C. Nursing Home (eight killed); Manchester, CT., Beer Distributor (eight killed); Mass shootings in 2011: Tuscon, AZ., Rep. Gabby Giffords Event (six killed); Carson City, N.J., IHOP (five killed); Seal Beach, CA., Seal Beach Salon (eight killed); Mass shootings in 2012: Norcross, GA., Su Jung Health Sauna (five killed); Oakland, CA. Okios University (seven killed); Seattle, WA., Coffee House (five killed); Aurora, CO., Movie Theatre (twelve killed); Oak Creek, WI., Sikh Temple (six killed); Minneapolis, MN., Signage Company (five killed); Newton, CT., Sandy Hook Elementary (twenty-six killed); Mass shootings in 2013: Mohawk Valley, N.Y. (five killed); Federal Way, WA., Pinewood Apts. (five killed); Santa Monica, CA., Rampage (six killed); Hialeah, FL., Hialeah Apts. (seven killed); Washington D.C., Naval Yard (thirteen killed)).

147. Kaloyares, *supra* note 32, at 363.

148. Scott Neuman, *A Year after Aurora Shooting, Alleged Shooter's Case Drags On*, NPR (July 20, 2013 12:33 PM), <http://www.npr.org/blogs/thetwo-way/2013/07/20/203948155/a-year-after-aurora-shooting-alleged-shooters-case-drags-on>.

"Alleged shooter James Holmes opened fired on people who were at the midnight showing of the Batman film *The Dark Knight Rises* in Aurora, Colorado killing twelve people and injuring seventy on July 20, 2012." *Id.*

149. Kaloyares, *supra* note 32, at 363.

Furthermore, access to and use of the Internet has exponentially grown since its commercial debut by 1992.<sup>150</sup> When Congress passed the Brady Act in 1993, the Internet was still in its infancy. From 2000-2012, Internet users world-wide have grown from 360,985,492 to 2,405,518,376.<sup>151</sup> This is a 566.4% growth.<sup>152</sup> In North America, there are approximately 273,785,413 Internet users, which amount to 78.6% of the population.<sup>153</sup> The Internet has revolutionized the computer and communications world and set the stage for this unprecedented integration of capabilities.<sup>154</sup> Communication, transactions, and commerce have all become easier through the Internet. The development of Internet classified websites, like Craigslist, allows individuals to engage in private transactions for anything from electronics, furniture, and employment.<sup>155</sup> The growing trend of trading goods and services through the Internet led to the exchange of firearms and ammunition through online gun marketplaces.

The current federal legislation on firearms still reflects the demands and concerns of an American society in 1968. Since 1994, many proposed bills have come across Congress' slate to reform the current gun legislation; however, none have passed muster. They have been met by opposition by both political parties and the heavy influence of the National Rifle Association (NRA).<sup>156</sup> The NRA expresses fears that any new gun control legislation would be used to limit the gun rights of law-abiding citizens.<sup>157</sup> It is necessary to create amendments to the current federal law on firearms by heeding to the interests of both sides of the issue. Congress must re-examine the language of the legislation to evaluate the relevancy of the current provisions and the need for additional amendments to take the statute out of the twentieth century.

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150. *Internet Timeline*, COMPUTER HISTORY MUSEUM, [http://www.computerhistory.org/internet\\_history/internet\\_history\\_90s.html](http://www.computerhistory.org/internet_history/internet_history_90s.html) (last visited May 25, 2014).

151. *Internet Growth Statistics*, INTERNET WORLD STATS, <http://www.internetworldstats.com/emarketing.htm> (last visited May 25, 2014).

152. *Id.*

153. *Id.*

154. Barry M. Leiner, et al., *Brief History of the Internet*, INTERNET SOC'Y, <http://www.internetsociety.org/internet/what-internet/history-internet/brief-history-internet> (last visited May 25, 2014).

155. *See generally* CRAIGSLIST, <http://www.craigslist.com> (last visited May 25, 2014).

156. *About NRA-ILA Brochure*, NRA-ILA, <http://www.nraila.org/about-nra-ila.aspx> (last visited May 25, 2014) (outlining the policy platforms and purpose of the Institute of Legislative Action for the National Rifle Association).

157. *'Smart' Gun Control?*, *supra* note 122.

## 2. Skirting the Law through Loopholes

The emergence of the online gun marketplace has created a new set of questions and problems for the outdated Gun Control Act. The transactions available on Armslist present three issues for the current federal legislation on firearms: (1) individuals who are prevented from attaining firearms under 18 U.S.C. § 922(g)<sup>158</sup> are legally able to acquire them from an online gun marketplace; (2) private and occasional sellers of firearms are not required to conduct the Brady Act NICS background checks for buyers; and (3) individuals who are buying firearms from private sellers from the online gun marketplaces are not stopped from presenting false identification and deception in connection with the purchase. In effect, Armslist and similar online gun marketplaces create an unregulated avenue for illegal activity. Although Armslist classifies itself as an ISP, inferring no liability for the actions of users on its website, it is providing access for individuals to transact with products that are inherently dangerous. Online gun marketplaces should not be able to hide behind their legal disclaimers but should take steps to ensure that blatantly illegal acts are not being committed through their network. The reality of these issues is demonstrated through the cases of Smirnov, Haughton, and Roman-Martinez. Individuals around the country, even outside the United States, are discovering the easy and accessible nature of the online gun marketplace whether it is for lawful or unlawful purchases.

First, the online gun marketplace contradicts Section 922(g) of the Gun Control Act.<sup>159</sup> This section prohibits the possession and sale of firearms to ten classes of individuals.<sup>160</sup> These prohibited classes are deprived of their Second Amendment right due to an overwhelming public interest in limiting possession of firearms to law-abiding and responsible individuals.<sup>161</sup> Before accessing Armslist, an individual is required to read through a legal disclaimer and accept the terms and conditions.<sup>162</sup> One of the disclaimer's terms is that one must "always comply with local, state, federal, and international law . . . Armslist

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158. 18 U.S.C. § 922(g) (2014).

159. *Id.*

160. *Id.*

161. *Barker v. United States*, 579 F.2d 1219, 1226 (1978) (affirming the defendant's conviction of receipt of a firearm by a convicted felon which had been transported through interstate commerce in violation of 18 U.S.C. § 922(h) and denying motion to vacate sentence).

162. *Terms of Use*, *supra* note 108.

does not become involved in transactions between parties.”<sup>163</sup> Armslist is an ISP under the CDA and ensures that it is not liable for the content generated by its users and the consequences of the transactions by its users.<sup>164</sup> This disclaimer term acts as a self-enforcing regulation, but the website is not regulated by the current federal legislation on firearms.

Armslist provides an open door for prohibited individuals to purchase and sell firearms through contacts formed on the website. These communications and the final exchange are unregulated. It is impossible in most cases to identify the individuals who buy and sell firearms through the online gun marketplace because of the anonymous nature of the websites. The anonymity of the website makes identifying the people who buy and sell guns on these online forums impossible in most cases.<sup>165</sup> Armslist provides potential buyers a platform for contacting sellers directly through the website, without making their contact information public.<sup>166</sup> In some cases, people include telephone numbers in their advertisements.<sup>167</sup> There are two types of sellers on Armslist: verified FFLs and private, unlicensed sellers.<sup>168</sup> The FFLs contain language in their advertisement that warn the potential purchaser that they will be subject to a NICS background check, provide proper identification, and partake in a waiting period before the transaction can occur.<sup>169</sup> These verified FFLs conduct the federally mandated steps in the transaction of the firearms in compliance with federal law. On the other hand, a majority of the advertisements are created by anonymous private sellers. As in the illustrative cases, Smirnov and Haughton, both prohibited by 18 U.S.C. § 922(g)<sup>170</sup> from possessing a firearm, did in fact acquire a firearm from the website. Here, the persons who sold the firearms to the legally barred individuals have no meaningful enforceable responsibility.<sup>171</sup>

Second, the non-regulation of private sales and the secondary market is aggravated by the online gun marketplace. Since the Gun Control Act and the NICS background checks only apply to FFLs, private and occasional sellers of firearms are not subject to federal regulation. As a consequence, the private seller is not required by law to fill out the ATF

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163. *Id.*

164. Defendant Armslist’s Memorandum, *supra* note 5, at 6.

165. Luo, *supra* note 1.

166. *Id.*

167. *Id.*

168. *See generally* ARMSLIST, *supra* note 19.

169. *See generally id.*

170. 18 U.S.C. § 922(g) (2014).

171. Jacobs & Kairys, *supra* note 39, at 197.

Form 4473 nor request a background check from the FBI on its potential buyer. Nor does the private seller have to request proper identification from the potential buyer. These private sales of firearms between unlicensed sellers and buyers form the secondary market. In a National Institute of Justice study on gun ownership in America, sixty percent of gun acquisitions involved an FFL and hence involved an NICS background check.<sup>172</sup> However, the remaining acquisitions, which measure about two million per year, were off-the-book transfers by private individuals in the secondary market.<sup>173</sup> A majority of the individuals who post advertisements for their firearms do not possess a federal license. The unlicensed sellers may have lawful intentions behind their advertisements; yet, as illustrated by the cases of Smirnov, Houghton, and Roman-Martinez, there is an abuse of the website for illegal activity.

Without regulation, individuals who are legally barred from possessing firearms have an easy opportunity to sell their firearms to contacts made through the website. For example, Roman-Martinez posted an advertisement for a 9-millimeter handgun on Armslist.<sup>174</sup> In reality, Roman-Martinez is prohibited under 18 U.S.C. § 922(g)(1)<sup>175</sup> and 18 U.S.C. § 922 (g)(9)<sup>176</sup> from possessing, selling, or purchasing a firearm. Yet, through Armslist, Roman-Martinez was not prohibited from posting this advertisement and potentially selling the gun to an interested individual. Roman-Martinez, for the purposes of the website, was a private seller not subject to federal regulation. The identity or criminal background of Roman-Martinez, and many like him, are not taken into consideration in the transactions occurring in the online gun marketplace.

In addition, the secondary market is manifested in gun shows, straw purchasers, and mail order.<sup>177</sup> The purchases through these mediums are made through non-licensed dealers who are exempted from the regulations that apply to FFLs.<sup>178</sup> Firearm transfers by FFLs at gun shows are regulated; while, private transfers are not regulated.<sup>179</sup>

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172. Cook & Ludwig, *supra* note 82, at 6 (examining current trends in gun ownership, acquisition, and cost-benefit analysis of uses in the United States).

173. *Id.* at 5.

174. Luo, *supra* note 1.

175. 18 U.S.C. § 922(g)(1) (2014) (prohibiting the possession, transportation, or receipt of a firearm or ammunition by a convicted felon).

176. *Id.* at § 922(g)(9) (prohibiting the possession, transportation, or receipt of a firearm or ammunition by an individual convicted of a domestic violence misdemeanor).

177. Jacobs & Kairys, *supra* note 39, at 197.

178. Braga & Kennedy, *supra* note 81, at 10.

179. *Id.* at 8.

This is similar to the online gun marketplace. As previously noted, Armslist advertisements contain posts from FFLs and private sellers. FFLs must comply with the obligations that accompany their federal license;<sup>180</sup> yet, private sellers do not engage in the business of selling firearms as defined by Section 921 of the Gun Control Act<sup>181</sup> and thus they are left unregulated. Since private sellers are not required to inspect a buyer's identification card or conduct the NICS background check, they may never know if the person to whom they are transferring the firearm is a prohibited person.

The dangerous nature of unregulated firearm sales through the secondary market is simply manifested in the nature of firearm possession. Firearm purchases are unlike other regulated products like narcotics. Unlike narcotics, which users need to replace their supply constantly, individuals do not need to replace their guns often.<sup>182</sup> In the criminal context, a single gun could last for years, even for an entire criminal career.<sup>183</sup> Thus, each firearm transaction matters and the loopholes to acquire these firearms cannot be disregarded. Congress must consider amending the current Brady Act to adopt a universal background check that will encompass both federally-licensed sales and private sales of firearms. The re-definition of the background check system will not only provide meaningful solutions for the problems demonstrated by online gun marketplaces but also close in the entire secondary market.

Third, the online gun marketplace magnifies the opportunity for individuals to use deception and present false identification to acquire firearms. Although private sellers of firearms are not subject to federal regulation when it comes to the proper ATF Form 4473 and NICS background checks, non-licensed persons are prohibited from knowingly transferring a firearm to a felon or other prohibited person, knowingly transferring a firearm to a person who resides in another state, and acquiring firearms from out-of-state dealers.<sup>184</sup> The initial anonymity of the online gun marketplaces may make it impossible for the seller to know or have reason to know that the individual seeking their firearm is a prohibited individual. Yet, the transaction is not complete until the seller and the potential buyer meet in person. The seller and the buyer set the terms of the exchange. This leaves two dangerous possibilities: the buyer has an incentive to use false identification in acquisition of

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180. *Id.*

181. 18 U.S.C. § 921(a)(11) (2014) (definitions for 18 U.S.C. §921 et seq. include "person," "interstate or foreign commerce," "firearm," "dealer," "destructive device," etc.).

182. Jacobs & Kairys, *supra* note 39, at 203.

183. *Id.*

184. Braga & Kennedy, *supra* note 81, at 7.

the firearm or the private seller fails to request proper identification. There is no enforcement of this other than the private individual's choice to comply with federal and state law at the time of the transfer.

Some sellers may ask for proper state identification before transferring the firearm. For example, in the Radcliffe Haughton case, the private seller simply asked Haughton whether he was legally able to possess a firearm and asked for his Wisconsin driver's license. In this case, Haughton was clearly not permitted to possess a firearm because he fell under the prohibited category of 18 U.S.C. § 922(g)(8)(B).<sup>185</sup> Yet, the seller could not possibly know this from glancing at a driver's license.<sup>186</sup> However, Haughton did deliberately deceive the seller when he stated that he was lawfully able to possess a firearm. The deception worked, and the transaction was complete. In another example, the Dmitry Smirnov case, the private seller in Seattle, Washington knew that Smirnov was not only an out-of-state resident, but a Canadian resident.<sup>187</sup> He even increased the price by \$200 because of this fact.<sup>188</sup> Yet, the private seller still sold the gun to Smirnov in violation of this provision of the law. The lack of enforcement mechanism of this provision leads individuals to use false information and deception to acquire a firearm. The online gun marketplace provides an avenue for individuals to skirt the laws. Congress must address this issue by creating a penalty for the violation of prohibited individuals from attempting to acquire firearms from the online gun marketplace and criminalizing those individuals who aid and abet this activity.

#### B. NEW AMENDMENTS: A PROPOSED SOLUTION

The right to keep and bear arms is a fundamental right guaranteed to American citizens in the Second Amendment.<sup>189</sup> When Congress wants to pass legislation that will limit or regulate a fundamental right, the legislation must clear one of the levels of scrutiny for the Supreme Court of the United States. There are three recognized levels of scrutiny in a constitutional law analysis: rational basis review, intermediate scrutiny, and strict scrutiny.<sup>190</sup> In *Heller*<sup>191</sup> and *McDonald*,<sup>192</sup> the

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185. 18 U.S.C. § 922(g)(8)(B) (2014) (prohibiting the possession, transportation, or receipt of a firearm or ammunition by an individual who is subject to a restraining order or protective order issued by a court).

186. Luo, *supra* note 1.

187. *Id.*

188. *Id.*

189. *Dist. of Colum. v. Heller*, 554 U.S. 570, 595 (2008).

190. Habib, *supra* note 129, at 1366-68 (defining levels of scrutiny). Rational basis



Supreme Court gave little guidance as to which level of scrutiny ought to apply when determining whether a regulation restricting the Second Amendment will pass constitutional muster.<sup>193</sup> Yet, the Courts both identified the right to keep and bear arms as a long held tradition in the United States since its infancy. The Supreme Court held that preventing crime, ensuring safety, and protecting the lives of its citizens is a compelling government concern.<sup>194</sup> Moreover, the Court gave a non-exhaustive list of regulations that are likely to be constitutionally reconcilable with the Second Amendment.<sup>195</sup> The right to bear arms is uniquely exposed to regulation because it implicates public safety concerns to a greater extent than other fundamental rights.<sup>196</sup> However, regulations of the Second Amendment are not unlimited and it is invalid to prohibit the types of arms overwhelmingly used by American citizens for self-defense.<sup>197</sup> On the other hand, Congress can prohibit firearm possession by those individuals that are convicted felons and the mentally ill.<sup>198</sup>

This Comment proposes four new amendments to the current federal gun legislation of title 18 of the United States Code. The amendments include: (1) universal background checks; (2) regulations for online gun marketplaces; (3) penalties for violations for the online gun marketplace regulations; and (4) sunset clause. These amendments seek to address and create practical solutions for the three issues emerging from the existence of the online gun marketplace. In 1999, the failed Internet Gun Trafficking Act presented the idea of a regulatory framework for online gun transactions. However, currently there is an

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review is the default level of review that allows Congress to pass restrictive legislation on a right so long as the legislation is rationally related to a conceivable and legitimate government interest. *Id.* In order to pass intermediate scrutiny, the law must serve important government objectives and must be substantially related to the achievement of those objections. *Id.* Intermediate scrutiny is typically applied to gender-based sex discriminations under the Equal Protection clause. *Id.* Strict scrutiny is applied when the government is limiting or regulating a fundamental right, the legislation must be narrowly tailored to meet a compelling government interest. *Id.*

191. *Heller*, 554 U.S. at 570.

192. *McDonald v. City of Chi.*, 130 S. Ct. 3020, 3020 (2010).

193. *Habib*, *supra* note 129, at 1365.

194. *Id.* at 1368.

195. *Id.* at 1360; *Dist. of Colum. v. Heller*, 554 U.S. 570, 626-27 (2008) (emphasizing that firearm regulations do not violate the Second Amendment when those regulations prohibit convicted felons or mentally ill persons from possessing firearms, or place restrictions on where firearms may be carried).

196. *Habib*, *supra* note 129, at 1360.

197. *Heller*, 554 U.S. at 626.

198. *Habib*, *supra* note 129, at 1360; *Heller*, 554 U.S. at 626-27.

immediate need for new amendments to introduce the once-addressed concept in the current federal law on firearms. This is pertinent to take the law into the twenty-first century. Conversely, the proposed amendments are intended to address public safety and social concerns to comport with the Supreme Court interpretation of regulations concerning the Second Amendment. The proposed amendments balance policy considerations and serve as a compromise between gun control advocates and opponents.

### 1. The Immediate Need for Universal Background Checks

A universal background check amendment must be adopted to expand the current background check system to include the occasional and private sales of firearms by non-licensed dealers. In 2013, the 113th Congress introduced The Fix Gun Checks Act.<sup>199</sup> The bill, eventually rejected by the Senate, proposed to ban a list of specific semi-automatic weapons and magazines that hold more than ten rounds.<sup>200</sup> The most significant proposal was amending the Brady Act and expanding the current NICS background check system to encompass universal background checks.<sup>201</sup> This Comment will adopt the language of the universal background check amendment from The Fix Gun Checks Act.

In summary, the Gun Control Act, as it stands today, only prohibits those individuals who are in the business of selling firearms or licensed individuals to sell to individuals who are legally barred from firearm possession.<sup>202</sup>

The current definition of “Dealer” in 18 U.S.C. § 921(a)(11) is:

(A) any person engaged in the business of selling firearms at wholesale or retail, (B) any person engaged in the business of repairing firearms or of making or fitting special barrels, stocks, or trigger mechanisms to firearms, or (C) any person who is a pawnbroker. The term “licensed dealer” means any dealer who is licensed under the provisions of this chapter.<sup>203</sup>

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199. The Fix Gun Checks Act of 2013, S. 649, 113th Cong. (2013).

200. *Id.*

201. Michael Martinez, *Universal Background Check: What Does it Mean?*, CNN (Jan. 28, 2013), <http://www.cnn.com/2013/01/14/us/universal-background-checks/>.

202. 18 U.S.C. § 922 (2014) (looking at the current law on the federal regulatory scheme for firearms and listing the amendments made to the section).

203. § 921(a)(11) (2014) (defining 18 U.S.C. § 921 et seq. to include “person,” “interstate or foreign commerce,” “firearm,” “dealer,” “destructive device,” etc.).

One sale is not ordinarily enough to constitute “engaging in the business of firearms” under the meaning of 18 U.S.C. § 922.<sup>204</sup> In addition, “dealing” means a regular course of conduct carried out over a period of time.<sup>205</sup> The expansion of the definition will close in on the secondary market for firearms that was left unregulated by the current state of the law.

Congress explicitly intended Subtitle B of The Fix Gun Checks Act to extend the Brady Law background check procedures to all sales and transfers of firearms.<sup>206</sup> It sought to amend Section 922 of title 18<sup>207</sup> and states the following:

(t)(1) Beginning on the date that is 180 days after the date of enactment of the Fix Gun Checks Act of 2013, it shall be unlawful for any person who is not licensed under this chapter to transfer a firearm to any other person who is not licensed under this chapter, unless a licensed importer, licensed manufacturer, or licensed dealer has first taken possession of the firearm for the purpose of complying with subsection (s). Upon taking possession of the firearm, the licensee shall comply with all requirements of this chapter as if the licensee were transferring the firearm from the licensee’s inventory to the unlicensed transferee.<sup>208</sup>

The inclusion of the universal background check language from The Fix Gun Checks Act into the proposed amendments for the online gun marketplace will not only affect transactions through the online gun marketplace, but will also have an effect on other secondary markets such as gun shows. While private sales at gun shows account for a small proportion of private gun sales, they have been found vulnerable to abuses.<sup>209</sup> For example, in 2009, New York City sent undercover private investigators to a gun show in an attempt to buy guns from private sellers.<sup>210</sup> The NYPD reported that nineteen of the thirty sellers they approached agreed to sell them guns even after they were told that the buyers “probably couldn’t pass a background check.”<sup>211</sup> A universal

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204. § 922.

205. *United States v. Tarr*, 589 F.2d 55, 58 (1978) (vacating the judgment of defendant’s conviction for aiding and abetting two principals in unlawful dealing in firearms in violation of 18 U.S.C. § 922(a)(1) but affirming the judgment of conviction as to the count of aiding and abetting the same principal in the unauthorized transfer of a machine gun in violation of 26 U.S.C. § 5861(e)).

206. The Fix Gun Checks Act of 2013, S. 649, 113th Cong. (2013).

207. 18 U.S.C. § 922 (2014).

208. The Fix Gun Checks Act of 2013, S. 649, 113th Cong. (2013).

209. Cooper, Schmidt, & Luo, *supra* note 7.

210. *Id.*

211. *Id.*

background check system has previously, and still will, come under criticism by gun control opponents. The overhaul of the NICS system will take a concerted effort between the ATF, FBI, and Congress. Congress should re-introduce a bill that contains the same language of The Fix Gun Checks Act with regard to background checks. This is pertinent to ensure the safety and the lives of the American public, which is a compelling government concern.

## 2. The Online Gun Marketplace must be Recognized by the Law

Regulations of the online gun marketplace must be added into the current federal legislation on firearms in title 18 of the United States Code. The current law makes no mention of the Internet in the statutory language, since the Act was drafted in the 1960s before the introduction of the Internet. The proposed regulation in the Internet Gun Trafficking Act of 1999<sup>212</sup> should be re-examined by Congress and used as a foundation for the language in this section. The proposed amendment is necessary for the law to stay current with the times. The Gun Control Act must recognize the existence and the emergence of the Internet as a form of market for the sale, transaction, and trade of firearms.

This proposed amendment does not propose the elimination and prohibition of online gun marketplaces. Rather, it proposes that FFLs are the only individuals who can post advertisements for sale of firearms on websites such as Armslist. Private sellers, themselves, cannot place a firearm for sale on the website. Since FFLs will be conducting the transactions, all individuals who wish to purchase a firearm from the contacts made through the website will be subject to current federal regulations and a NICS background check. This is already happening on Armslist where verified FFLs are posting advertisements for their inventory. Although under the previous proposed amendment for universal background checks to encompass private sales, FFLs should only be allowed to perform online firearm sales because they have undergone a federal licensing program, and they have a close relationship with the FBI and ATF.

The Internet Firearm Trafficking Act was a proposed amendment to title 18 of the United States Code.<sup>213</sup> It was aimed to regulate the transfer of firearms over the Internet, and for other purposes.<sup>214</sup> The Internet Firearm Trafficking Act intended to insert subsection (z) into

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212. The Internet Gun Trafficking Act of 1999, S. 637; 113 H.R. 21, 113th Cong. (1st Sess. 2013).

213. *Id.*

214. *Id.*

Section 922<sup>215</sup> by including:

Regulation of Internet Firearm Transfers:

(1) In General.—It shall be unlawful for any person to operate an Internet website, of a purpose of the website is to offer 1 or more firearms for sale or exchange, or is to otherwise facilitate the sale or exchange of 1 or more firearms posted or listed on the website, unless—

(A) the person is licensed as a manufacturer, importer, or dealer under section 923<sup>216</sup>;

(2) Transfers by Persons Other than Licensees—It shall be unlawful for any person who is not licensed under section 923<sup>217</sup> to transfer a firearm pursuant to a posting or listing of the firearm for sale or exchange on the Internet website described in paragraph (1) to any person other than the operator of the website.<sup>218</sup>

The proposed amendment would similarly be added as subsection (v) or alternatively (w) to 18 U.S.C. § 922,<sup>219</sup> as that these subsections have been repealed, and (z) is currently “Secure Gun Storage and Safety Device.”<sup>220</sup> Yet, the proposed amendment will differ slightly in that the operation of the Internet website does not have to be by a licensed manufacturer, importer, or dealer. The drafters of the Internet Trafficking Act of 1999,<sup>221</sup> due to the available Internet capabilities at the time, more than likely did not consider the existence of Internet classified websites or ISPs when drafting this bill. The definition of ISP was created by the CDA in 1996, yet the development of these types of websites skyrocketed in the new millennium.<sup>222</sup> The operators of an ISP, here Internet classified websites like Armslist, should still be able to own and operate their websites. However, these types of websites must agree to change the structure of their websites to only allow FFLs to advertise their inventory and engage in the sale process.

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215. 18 U.S.C. § 922 (2014).

216. *Id.* at § 923 (the current law on the licensing regulations for manufacturers, importers, and dealers of firearms).

217. *Id.*

218. The Internet Gun Trafficking Act of 1999, S. 637; 113 H.R. 21, 113th Cong. (1st Sess. 2013).

219. § 922.

220. 18 U.S.C. § 922(z) (2014) (regarding secure gun storage and safety device).

221. The Internet Gun Trafficking Act of 1999, S. 637; 113 H.R. 21, 113th Cong. (1st Sess. 2013).

222. Radbod, *supra* note 95.

The amendment, if passed under Section § 922, would read as follows:

(v) Internet Firearm Sale, Transaction, or Transfer—

(1) In General. It shall not be unlawful for any person to operate an Internet website, if the purpose of the website is to facilitate the sale or exchange of 1 or more firearms posted or listed on the website, except--

(A) the firearms posted or listed for sale on the website must be posted or listed for sale by a person licensed as a manufacturer, importer, or dealer under section 923;

(2) It shall be unlawful for any person except a licensed importer, licensed manufacturer, or licensed dealer to engage in the sale of firearms or posting of firearms for sale, transaction or transfer on an Internet website.

The proposed amendment provides a practical and realistic compromise for a solution to the issues presented by the online gun marketplace. It does not propose a complete ban on online gun marketplaces. This amendment recognizes the benefits of the Internet for easy and accessible transactions. Yet, by allowing only FFLs to advertise firearms on classified websites, it fixes the loophole that is present in the current state of the law. If FFLs advertise their inventory of firearms online, then an individual, who wishes to acquire one of these weapons, must undergo a NICS background check by the FBI. This amendment will ensure the lawful transaction of firearms while heavily limiting already designated dangerous individuals from acquiring these firearms.

If this proposed amendment was in effect during the illustrative cases of Smirnov and Haughton, both men would have been barred from acquiring the firearms that they had used in their respective killings. Furthermore, the respective firearms would have been advertised by an FFL. Both men would have had to present proper identification, complete ATF Form 4473, and be subject to a NICS background check based on the descriptive information provided on the Form. Since both men were prohibited from possessing a firearm respectively under 18 U.S.C. § 922(g)(5)<sup>223</sup> and 18 U.S.C. § 992(g)(8)-(9),<sup>224</sup> they would have been denied from receiving the advertised firearm under this proposed

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223. 18 U.S.C § 922(g)(5) (2014) (prohibiting the possession, transportation, or receipt of a firearm or ammunition by an individual who is an alien in the jurisdiction of the United States).

224. § 922(g)(8)-(9) (prohibiting the possession, transportation, or receipt of a firearm or ammunition by an individual subject to a restraining order or protective order issued by a court and by an individual convicted of a domestic violence misdemeanor).

amendment. Yet, an individual who wishes to lawfully acquire a firearm through the Internet, is not barred from doing so. This individual will contact the FFL whose firearm he is interested in through the website. Next, the FFL will complete the same federally mandated steps for this potential buyer. Finally, the system will produce a “proceed” response and the transaction will be complete upon receipt of the firearm.

The proposed amendments acknowledge that the Internet is a powerful and valuable tool for those who engage in transactions. Thus, there are benefits of an online gun marketplace. The FFL and their gun store can advertise their inventory on the Internet. The accessibility of the Internet will cause their inventory and their business to be viewable and available to more individuals than those who physically visit the store establishment. Individuals who seek to acquire a gun lawfully may be able to do so easier on the Internet. Armslist states that the purpose of their website is to provide a simple and easy-to-use marketplace.<sup>225</sup> Potential buyers can browse through the inventory of various FFLs and compare prices, models, and locations at the ease of a button. Buyers and sellers can continue to connect through the Internet platform. But, the caveat is that the sellers must be an FFL. The Internet is only growing to provide more capabilities for users and expanding to more populations. A complete prohibition of the online marketplace would be unrealistic in the current twenty-first century. Yet, the dangerous loophole that exists now must be fixed to prevent firearms getting to the hands of prohibited persons.

### 3. Enforcement Mechanism: Proposed Penalties for Violations of the Law

A penalty section must be added to act as a deterrence and enforcement mechanism for the added regulation on the online gun marketplace. The Internet Gun Trafficking Act provided an amendment to Section 924(a) of title 18 which stated, “(b) Penalties—(7) Whoever willfully violates section 922(z)(2) shall be fined under this title, imprisoned not more than 2 years, or both.”<sup>226</sup> The penalties in the Internet Gun Trafficking Act should be increased for the proposed amendment on online gun marketplaces. The penalty should be increased to reflect the other penalties provided in Section 924. A violation of Section 922(g) results in a fine under the title, imprisonment not more than ten years, or both.<sup>227</sup> In order for this amendment to act as a deterrent for future

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225. ARMSLIST, *supra* note 19.

226. 18 U.S.C. § 924 (2014) (stating the current federal penalties for the violation of the Gun Control Act and its provisions).

227. *Id.*

violations, the years of potential imprisonment should be raised to five years. The proposed amendment, if passed, Section 924(a)(8) would read as follows:

(8) willfully or knowingly violates subsection (v) of Section 922 shall be fined as provided by this title, imprisoned not more than five years, or both.

(A) aiding or abetting an individual who violates subsection (v) of Section 922 shall be fined as provided by this title, imprisoned not more than two years, or both.

Under the penalties for Section 922 of the Gun Control Act, specific intent or specific knowledge by the defendant that he has violated the law is not an essential element of the crime of unlawful dealing of firearms.<sup>228</sup> Moreover, “knowingly” as used in Section 922, encompasses actual knowledge and willful blindness of deliberately disregarding the truth or falsity of a statement with the conscious purpose to avoid learning the truth.<sup>229</sup> This penalty will serve as a deterrent for those who have knowledge of their prohibited status in regards to firearms and choose to violate the system. In addition, it will reduce the opportunity of individuals to use false identification and deception to acquire the firearm. The increase in the potential years of imprisonment is an attempt to ensure that the online gun marketplace is used for a lawful purpose for law-abiding citizens to purchase firearms.

In order to prove an aiding or abetting violation under Section 922(g), the government must show that the defendant knew or had cause to know that the principal was a convicted felon.<sup>230</sup> Moreover, it is

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228. *United States v. Powell*, 513 F.2d 1249, 1250 (1975), *cert denied*, 423 U.S. 853 (affirming the conviction of the defendant for engaging in the business of dealing in firearms without a license and receiving and possessing firearms after previously being convicted of a felony in violation of 18 U.S.C. § 922(a)(1) and 18 U.S.C. § 1202); *United States v. Miller*, 644 F.2d 1241, 1244 (1981), *cert. denied*, 454 U.S. 850 (1981) (affirming the defendant’s conviction for aiding and abetting a third party in the business of dealing in firearms without a license in violation of 18 U.S.C. § 922(a)(1) and 18 U.S.C. § 924(a)).

229. *United States v. Hester*, 880 F.2d 799, 801 (1989) (holding that a jury rationally could have inferred from the evidence that the defendant actually knew when he made a particular statement that the statement was false, or that he made the statement with disregard as to whether it was false, and that he was under incitement at the time for knowingly making a false statement in connection with the acquisition of a firearm in violation of 18 U.S.C. § 922(a)(6) and unlawful receiving of a firearm in violation of 18 U.S.C. § 922(n); and holding that the errors in the jury instructions were harmless).

230. *United States v. Gardner*, 488 F.3d 700, 715 (2007) (affirming three of the four convictions against the defendant for conspiracy to possess cocaine in violation of 21 U.S.C. § 846, attempt to possess cocaine in violation of 21 U.S.C. § 846, and the possession of a firearm in violation of 18 U.S.C. § 924(c); the aiding-and-abetting a felon in the pos-



not a specific intent statute and an individual can be convicted as an aider and abettor under Section 922(g)(1) if he knew or had reason to know that he was aiding and abetting possession of a firearm by a convicted felon.<sup>231</sup> The addition of a penalty for an aider and abettor of an individual violating Section 922 is pertinent to address the issue of selling to a prohibited person. Although the proposed amendment of subsection (v) to Section 922 only allows FFLs to engage in the sale and transfer of firearms through the Internet, straw-purchases may arise as a tactic to bypass this law. Straw purchases are when individuals who are legally able to purchase a firearm do so for the purpose of transferring it to an individual who is legally barred from purchase.<sup>232</sup> As a preventative measure to combat straw-purchasers arising out of the online gun marketplace context, this proposed penalty criminalizes the act of the purchaser who intends to transfer the firearm after acquiring it off the Internet through an FFL to a person he knows is prohibited from possessing or purchasing a firearm. Conclusively, the proposed penalties amendment will seek to enforce the previously proposed amendments and combat the issues presented by the online gun marketplace.

#### 4. Sunset Clause: Congress' Alarm Clock for the New Legislation

The proposed amendments of Section 922 must include a sunset clause. Sunset clauses serve as democracy's alarm clock.<sup>233</sup> The mechanism of a sunset clause forces Congress to reconsider laws before they expire.<sup>234</sup> The proposed amendments need a sunset clause because of the ever-changing nature of the Internet and to ensure that the legislation is still meeting the demands of American society in the future. For example, the Federal Assault Weapon Ban contained a ten-year expiration date after it was enacted on September 13, 1994.<sup>235</sup> When the expiration date was up, Congress allowed it to expire because it did not

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session of a firearm in violation of 18 U.S.C. § 922(g)(1) was reversed).

231. *United States v. Huet*, 665 F.3d 588, 595 (2012) (holding that the granting of the defendant's motion to dismiss should be reversed because the charge of aiding and abetting possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1), was proper and did not violate the defendant's Second Amendment rights).

232. *Jacobs & Kairys*, *supra* note 39.

233. David A. Fahrenthold, *In Congress, Sunset Clauses are Commonly Passed but Rarely Followed Through*, WASH. POST (Dec. 15, 2012), [http://articles.washingtonpost.com/2012-12-15/politics/35847138\\_1\\_expiration-dates-sunset-clauses-tax-cuts](http://articles.washingtonpost.com/2012-12-15/politics/35847138_1_expiration-dates-sunset-clauses-tax-cuts).

234. *Id.*

235. FIREARMS AND VIOLENCE: A CRITICAL REVIEW 97 (Charles F. Wellford, John V. Pepper, & Carol V. Petrie eds., 2004), available at [http://www.nap.edu/openbook.php?record\\_id=10881&page=97](http://www.nap.edu/openbook.php?record_id=10881&page=97).

reveal any significant impact on gun violence outcomes in the ten years of its effect.<sup>236</sup> The Assault Weapon Ban was effectively repealed out of the current law.<sup>237</sup>

The sunset clause for the proposed amendment, if passed, would read as follows “(1) Effective date. The amendments made by this Act-amending 18 USC § 922 and § 924 shall take effect on the thirtieth day beginning after the date of the enactment of this Act. (2) Sunset. Effective fifteen years after the effective date of this Act.” The proposed amendment on online gun marketplaces to title 18 should contain a fifteen-year expiration date. This sunset provision will prevent the bill from lasting too long without an amendment. Yet, fifteen years would be enough time to determine whether the law has a substantial impact on reducing secondary market sales and ensuring the lawful use of the online gun marketplace.

Critics of sunset clauses claim that sunset clauses do not work because Congress is often too busy or neglectful to re-examine the law before expiration.<sup>238</sup> For this issue, it will be imperative for Congress not to let this amendment expire because of the dangerous nature of the thing that is being regulated. In addition, the Internet is here to stay and will only keep growing as a platform for everyday transactions. Online gun marketplaces are an issue that needs continuous and frequent attention by Congress to meet the demands of the twenty-first century.

### C. POLICY CONSIDERATIONS AND GUN CONTROL CRITICS

Gun control legislation generates heated debate and functions as a symbol that polarizes American society.<sup>239</sup> Most recently, gun control opponents voiced their opposition to the proposed ideas in The Fix Gun Checks Act of 2013. Gun control opponents are primarily represented by the National Rifle Association and their lobbying wing, the Institute of Legislative Action.<sup>240</sup> Gun advocates intend to protect the right of all law-abiding individuals to purchase, possess, and use firearms for legitimate purposes guaranteed by the Second Amendment.<sup>241</sup> In regards to the debate on expanded background checks, opponents argue that they

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236. *Id.*

237. *Id.*

238. Fahrenthold, *supra* note 233.

239. Jacobs & Kairys, *supra* note 39.

240. *About NRA-ILA Brochure*, *supra* note 156.

241. *Id.*

would not prevent criminals from acquiring firearms since most of them acquire them through the black market or by straw-purchasers.<sup>242</sup> The president of the NRA, David Keene, stated that he favored background checks to block individuals that may be mentally ill or potentially violent from buying guns.<sup>243</sup> Yet, he claims that he has little faith in universal background checks by indicating that they do not work.<sup>244</sup> The NRA has tracked the developing issue of the online gun marketplace.<sup>245</sup> They recognize it as a medium for gun owners to have easy access to information about firearms and accessories.<sup>246</sup> Yet, they condemn a ban on these Internet mediums.<sup>247</sup> The NRA claims it is an attack on the First and Second Amendment, by prohibiting the free exchange of information about firearms on the Internet.<sup>248</sup>

The proposed amendments, in this Comment, serve as practical solutions that both sides could embrace in order to balance the Second Amendment right to keep and bear arms with the interest in public safety. Gun control legislation will never offer a magic solution to eliminate all unregulated transactions of firearms. Yet, closing the loopholes in the current state of the law will reduce the ability of a majority of individuals who have found the online gun marketplace as an easy tactic to bypass the law. The NICS background check system, as of May 31, 2014, has blocked 1,112,225 individuals from acquiring firearms out of the 191,032,240 checks completed since the inauguration of the program on November 30, 1998.<sup>249</sup> Out of those denied individuals, 630,604 were individuals convicted of a crime punishable by more than one year in prison; 13,486 were individuals who were illegal or unlawful aliens; 108,863 were individuals who were convicted of a misdemeanor crime of domestic violence; and 46,305 were individuals who possessed a court ordered stalking/restraining order for domestic violence.<sup>250</sup> These statistics speak for themselves. Without a NICS program, gun

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242. Cooper, Schmidt, & Luo, *supra* note 7.

243. Martinez, *supra* note 201.

244. *Id.*

245. *The Truth about "Internet" Gun Sales*, NRA-ILA (Jan. 11, 2013), <http://www.nraila.org/news-issues/fact-sheets/2013/the-truth-about-internet-gun-sales.aspx?s=online+gun&st=&ps=>.

246. *Id.*

247. *Id.*

248. *Id.*

249. *Total NICS Background Checks*, FED. BUREAU OF INVESTIGATION 1, [http://www.fbi.gov/about-us/cjis/nics/reports/1998\\_2014\\_monthly\\_yearly\\_totals-020614.pdf](http://www.fbi.gov/about-us/cjis/nics/reports/1998_2014_monthly_yearly_totals-020614.pdf) (last visited June 5, 2014) (listing statistics of total background checks under NICS from November 30, 1998 through May 31, 2014); *Denials: NICS Background Checks*, *supra* note 26.

250. *Denials: NICS Background Checks*, *supra* note 26.

possession among those individuals who are deemed to be dangerous persons would be widespread.

The existence of the online gun marketplace, as it stands today, is providing an open and unregulated tool for these 1,112,225 individuals to avoid the background check system. These individuals that were denied firearms before can now acquire them. The universal background check system is the most powerful tool to achieve the goals that the system intended to meet in its inception. In addition, this Comment did not propose an outright ban on the existence of online gun marketplaces. It serves as a compromise with gun control opponents and takes a realistic approach as to how these websites should operate.

## VI. CONCLUSION

Existing laws on firearms seek to limit and at times seek to entirely prohibit access to firearms.<sup>251</sup> However, the current federal legislation on firearms is outdated to meet the demands and emerging concerns of American society in 2014. The emergence of the online gun marketplace causes severe problems with the current state of the law under the Gun Control Act of 1968 and the Brady Act of 1993. Society has undergone an extensive transformation since 1993, especially since 1968. The pervasive nature of the Internet and the prevalence of gun violence have impacted American society. Internet classified websites have opened an avenue for the private and anonymous exchange of firearms and ammunition through advertisement posts. Recently, individuals have begun tapping into social media websites and smartphone applications to advertise their personal inventory of firearms.<sup>252</sup> The popular photo-sharing application, Instagram,<sup>253</sup> has become the newest platform for firearm advertisements.<sup>254</sup> Users can easily find “a chrome-plated antique Colt, a custom MK12-inspired AR-15 tricked

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251. Habib, *supra* note 129, at 1341.

252. *InstaGUN: Photo-Sharing App has Become Marketplace for Buying and Selling Guns*, DAILY MAIL (Oct. 22, 2013 12:49 PM), <http://www.dailymail.co.uk/news/article-2471877/Instagram-marketplace-buying-selling-guns.html>; Brian Ries, *People are Using Instagram to Sell Their Guns...and It's Mostly Legal*, DAILY BEAST (Oct. 22, 2013 5:45 AM), <http://www.thedailybeast.com/articles/2013/10/22/people-are-using-instagram-to-sell-their-guns-and-it-s-mostly-legal.html>.

253. *Instagram*, ICONTACT, <http://www.icontact.com/define/instagram/> (last visited May 25, 2014) (defining Instagram as a free social network based photo-sharing program that enables Apple iPod, iPhone, iPad and Android users with a valid account to immediately take photos, apply a digital filter or hashtag, and then instantly share the photo on their profile page).

254. *InstaGUN: Photo-Sharing App*, *supra* note 252.

out with ‘all best of the best parts possible,’ just by searching hashtags,<sup>255</sup> such as #rifle, #ar15 or #forsalegun.”<sup>256</sup> The online gun marketplace is only rapidly growing and becoming more accessible to more individuals. The current law needs to reflect this growth.

It is imperative for Congress to address and amend the outdated federal legislation on firearms to close the gap of the secondary market. Under the current interpretation of the Second Amendment, individuals, not just the militia, have the right to keep and bear arms.<sup>257</sup> It is a fundamental right guaranteed to American citizens unless forfeited when the individual falls into one of the prohibited categories of 18 U.S.C. § 922(g).<sup>258</sup> Convicted felons are prohibited from possessing a firearm.<sup>259</sup> Non-American citizens are prohibited from possessing a firearm.<sup>260</sup> Individuals with stalking orders due to domestic violence allegations as well as those who are convicted of a misdemeanor crime of domestic violence are prohibited from possessing a firearm.<sup>261</sup> Nonetheless, these individuals have found an unregulated avenue in which to engage in firearm transactions. The emergence of the online gun marketplace amplifies the dangerous loopholes present in the current federal gun legislation. Congress indicated that the purpose behind this legislation is to prevent dangerous individuals from acquiring firearms which leads to adverse effects on the safety of the American public. Yet, the Congressional intent is not being met with the outdated legislation.

The proposed amendments to title 18 of the United States Code help redirect Congressional legislative intent by modernizing it to meet the twenty-first century. These amendments are practical and constitutionally-sound solutions to the problems arising from the online gun marketplace. The amendments do not infringe on the rights of American citizens who choose to lawfully acquire a firearm. They do not propose an unrealistic ban on the existence of online gun marketplaces. It recognizes the benefits and reality of the Internet as a vehicle for easy transactions and commerce. Yet, it places a restriction on those who can sell on these websites, as well as introduces a universal background

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255. *Using Hashtags on Twitter*, TWITTER, <https://support.twitter.com/articles/49309-using-hashtags-on-twitter#> (last visited May 25, 2014) (defining hashtag as the # symbol that is used to mark keywords or topics in a Tweet; it was created originally by Twitter users as a way to categorize messages).

256. *InstaGUN: Photo-Sharing App*, *supra* note 252.

257. *Dist. of Colum. v. Heller*, 554 U.S. 570, 595 (2008).

258. *See generally* 18 U.S.C. § 922(g) (2014).

259. *Id.* at § 922(g)(1).

260. § 922(g)(5).

261. § 922 (g)(8).

check in order to strengthen the current NICS structure maintained and enforced by the FBI.

As stated by President Obama during the 2013 State of the Union address in regards to gun reform:

our actions will not prevent every senseless act of violence in this country. In fact, no laws, no initiatives, no administrative acts will perfectly solve all the challenges . . . But we were never sent here to be perfect. We were sent here to make what difference we can, to secure this Nation, expand opportunity, uphold our ideals through the hard, often frustrating, but absolutely necessary work of self-government.<sup>262</sup>

Why does the country have to wait for another Columbine, Virginia Tech, or Newtown to act on the dangerous loophole in the current law when the solution is as simple as keeping laws up to date with the times?

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262. Barack Obama, President of the United States, Address before a Joint Session of Congress on the State of the Union (Feb. 12, 2013), *available at* <http://www.presidency.ucsb.edu/ws/index.php?pid=102826#ixzz2hWVTntzj>.

