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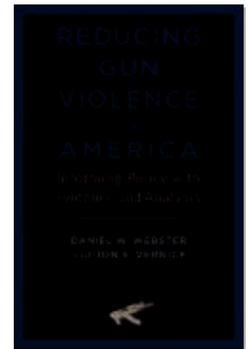
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Comprehensive Background Checks for Firearm Sales

Evidence from Gun Shows

Garen J. Wintemute

Many lines of evidence bear on whether to institute a comprehensive background check policy that would extend the current background check and recordkeeping requirements for sales by licensed retailers to sales by private parties. This essay presents evidence from observational and other research related to gun shows and makes recommendations based on that evidence. For simplicity's sake, "sales" will be used to refer to transfers of all types.

Background

In 1995, Philip Cook and colleagues defined buying and selling by licensed retailers as the primary market for firearms; both new and used firearms are involved (Cook, Molliconi, and Cole 1995). The secondary market consists of

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transfers by unlicensed private parties such as the individual attendees at gun shows (Cook, Molliconi, and Cole 1995, Braga et al. 2002).

The secondary market is quite large. According to the National Survey of Private Ownership of Firearms, approximately 40% of all firearms transactions occur directly between private parties (Cook and Ludwig 1996). Other estimates concur. In the 2004 National Firearms Survey, for example, 55% of 566 firearm owners reported that their most recent acquisition had been from a store (Hepburn et al. 2007). Another 8% reported purchasing their firearm from a licensed retailer at a gun show (unpublished data, National Firearms Survey).

The Federal Double Standard

In order to sell a firearm, a federally licensed retailer must see the buyer's identification. The buyer must complete a lengthy Firearms Transaction Record and certify, under penalty of perjury, that he is buying the firearm for himself and is not a member of any prohibited class. The National Instant Criminal Background Check System (NICS), administered by the Federal Bureau of Investigation (FBI), must perform a background check. In over 90% of cases this background check is completed within minutes, but if important information is missing the buyer may have to wait up to three business days to acquire the firearm (Federal Bureau of Investigation 2012b).

The retailer must keep a permanent record of each purchase that includes specific identifying information for both the buyer and the firearm. If the same person buys more than one handgun from him within five business days, the retailer must file a special report with the U.S. Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF).

These procedural safeguards are intended to ensure that the buyer is who he says he is, that he and not someone else will be the actual owner of the firearm, and that he is not prohibited from owning it. They help prevent the large-volume purchasing that otherwise might fuel trafficking operations. They establish a chain of ownership that will help law enforcement authorities link the firearm to its buyer if it is used in a future crime.

But a private party can sell that same firearm—or many firearms—and none of these federal safeguards will be in place. Private-party sellers are not required to ask for identification. They *cannot* initiate a background check, except in Delaware, Nevada, and Oregon, where they may do so voluntarily. There are no forms to fill out, and no records need be kept.

Even if the purchaser is a prohibited person, let alone a non-prohibited person with criminal intent, a private party may sell him a firearm without committing a crime. The key is that while it is always illegal for a prohibited person to buy a firearm, it is only illegal to sell a firearm to a prohibited person if the seller knows or has “reasonable cause to believe” that he is doing so (U.S. Code).

How did this come to pass? The provisions of the federal Gun Control Act apply only to those who are “engaged in the business” of selling firearms. Any clear understanding of what “engaged in the business” might mean was abolished by the 1986 Firearm Owners’ per style sheet Protection Act (U.S. Code). FOIPA specifically excluded from the scope of engagement in the business a person who makes “occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby, or who sells all or part of his personal collection of firearms” (U.S. Code).

The practical result was to make it much more difficult to set an upper limit to the number of firearm sales that an individual could make without being required to have a license and comply with the safeguards described above (Braga and Kennedy 2000, Wintemute 2007, 2009b). ATF summarized the situation this way in a 1999 study of gun shows: “Unfortunately, the effect of the 1986 amendments has often been to frustrate the prosecution of unlicensed dealers masquerading as collectors or hobbyists but who are really trafficking firearms to felons or other prohibited persons” (Bureau of Alcohol, Tobacco and Firearms 1999b).

State Regulation of Firearm Sales

In 33 states, statutes regulating firearm sales do not go beyond those enacted by Congress. But 17 states regulate at least some private-party sales, usually by requiring that the seller have the transaction processed by a licensed retailer (Table 7.1) (Bureau of Justice Statistics 2006). Such transactions are then subject to the same procedural safeguards that apply to the retailer’s own sales that identity is confirmed, a background check is performed, and a record is kept. Six states require background checks for all firearm sales, regardless of firearm type or place of sale, and another nine do so for all handgun sales.

In at least 17 states, the background check can be waived for holders of permits to carry concealed weapons and similar permits, whether at gun shows or elsewhere (Bowling et al. 2010). This has adverse consequences that will be discussed later in this essay.

Table 7.1 State regulation of private-party firearm sales

| State | Handgun sales | | Long gun sales | |
|----------------|---------------|----------------|----------------|----------------|
| | All sales | Gun shows only | All sales | Gun shows only |
| California | • | | • | |
| Colorado | | • | | • |
| Connecticut | • | | | • |
| Hawaii | • | | • | |
| Illinois | • | | • | |
| Iowa | • | | | |
| Maryland | • | | | |
| Massachusetts | • | | • | |
| Michigan | • | | | |
| Missouri | • | | | |
| Nebraska | • | | | |
| New Jersey | • | | • | |
| New York | • | | | • |
| North Carolina | • | | | |
| Oregon | | • | | • |
| Pennsylvania | • | | | |
| Rhode Island | • | | • | |

Source: From *Survey of state procedures related to firearm sales, 2005*. Washington, DC: Bureau of Justice Statistics, 2006. NCJ 214645.

Note: In the remaining 33 states, private-party firearm sales are not regulated.

In California, a comprehensive background check and recordkeeping policy has been in place since 1991. In essence, private-party sales must be routed through a licensed retailer. At gun shows, designated retailers serve as transfer agents to facilitate sales between individual attendees.

All firearm types are covered, but there are exceptions for certain transactions. These include a transfer between spouses or vertically between other immediate family members, such as from a parent to a child or a grandparent to a grandchild. Temporary transfers, such as infrequent and short-term loans between persons who are personally known to each other, are also exempted.

There are no exemptions for holders of concealed weapon or other permits. Private parties are still allowed to sell firearms in small numbers, involving a licensed retailer to satisfy the background check and recordkeeping requirements.

There is no requirement that the seller and buyer be present at the licensed retailer simultaneously. Many sales are done on consignment; the seller deposits firearms with the retailer for sale, and the seller and buyer never meet. Some retailers maintain separate a display space for consignment firearms.

The retailer is allowed to charge a fee of up to \$10 per firearm for serving as a transfer agent (the fee is less per firearm for transfers involving multiple firearms). Whether the sale occurs at a gun show or elsewhere, the purchaser may take delivery of his firearm from the retailer only after the state's 10-day waiting period has expired. The increased foot traffic at participating retailers provides opportunities to develop new customers. As one retailer explained, "when they come in to do the paper, everybody needs bullets and cleaning supplies" (Matthews 2009).

The system does not appear to impair the operations of California's legal firearms market. More than 601,000 firearms were sold in the state in 2011 (California Department of Justice). Trends in the California market reflect those occurring nationwide. Firearm sales increased 15.6% per year, on average, over the last five years for which we have data (California Department of Justice 2012). A leading industry newsletter has described California's market as "lucrative" (Anonymous 2007).

Criminal Acquisition of Firearms from Private Parties

Private-party firearm sales are quick—they can be completed in less than a minute—and convenient. Even a law-abiding purchaser might appreciate the absence of paperwork that characterizes private-party sales. Their anonymity attracts those who put privacy at a premium.

But these same attributes make private-party sales the only viable option for prohibited persons and the principal option for purchasers with criminal intent, for whom a record of the sale would be hazardous. Again, it is only illegal to sell a firearm to a prohibited person if the seller knows or has "reasonable cause to believe" that he is doing so (U.S. Code). The matter is easily finessed. As one private-party seller said while contemplating a possibly illegal handgun sale at a gun show, "Of course, if I don't ask, nobody knows" (Wintemute 2009b).

Private-party sales are critical to illegal commerce in firearms. As discussed earlier, perhaps 40% of all firearm sales nationwide are private-party transactions. For those who commit crimes with firearms, that percentage at least doubles. Four large-scale surveys of persons incarcerated for firearm-related felonies in the 1990s asked inmates where they acquired the firearm they used in the crime for which they were incarcerated. Between 12% and 21% of these inmates acquired their weapons from licensed retailers (Harlow 2001, Scalia 2000, Wright and Rossi 1986). An analysis of more recent data also considered whether the inmates were prohibited from possessing firearms at the time of acquisition (Vittes, Vernick, and Webster). Overall, 13.4% of respondents obtained their firearms from licensed retailers. For prohibited persons, purchases from licensed retailers fell to just 3.9%.

For juveniles, direct purchase of any type of firearm from a licensed retailer is illegal, as are handgun purchases for people aged 18 to 20. Private-party sales are essentially their only source of firearms (Ash et al. 1996, Webster et al. 2002).

Private-party sales are also an important component of firearm trafficking operations. Of 1,530 trafficking investigations conducted by ATF during 1996 to 1998, 314 (20.5%) involved unlicensed sellers (Bureau of Alcohol, Tobacco and Firearms 2000b). A related study evaluated data for trafficking operations involving juveniles and youth (Braga and Kennedy 2001). Of 648 such operations, 92 (14.2%) involved private-party sellers.

There is no current estimate of the proportion of private-party sales that involve prohibited persons. But when background checks for licensed retailer sales were first required in some states by the Brady Act, as many as 9.4% of prospective purchasers were prohibited persons (Manson and Gilliard 1997). It is reasonable to estimate that the proportion is similar or higher for private-party sales that do not involve background checks.

At gun shows, some private-party handgun sellers make a point of checking the buyer's driver's license to be sure that they are not making an illegal sale to an out-of-state resident (Wintemute 2009b). But asking questions about the buyer's eligibility to purchase firearms, theoretically something that private-party sellers could do, guarantees unpleasantness (or worse) and risks the loss of the sale. In observational research at nearly 80 gun shows, such questioning was never observed (Wintemute 2009b). Other private party vendors serve as "hotspots," making repeated sales that serve criminal purposes

(Bureau of Alcohol, Tobacco and Firearms 2000b, Braga and Kennedy 2000, Wintemute 2009b).

Criminal Acquisition of Firearms at Gun Shows

Gun shows present a special case, in that large numbers of licensed retailers and private-party sellers are active in the same setting and competing for customers (Bureau of Alcohol, Tobacco and Firearms 1999b, Wintemute 2007, 2009b). Between 25% and 50% of firearm sellers who rent table space at gun shows are private parties (Bureau of Alcohol, Tobacco and Firearms 1999b, Wintemute 2007). Such tables frequently carry “Private Sale” signs implying that purchases require no paperwork, no background check, no waiting period, and no recordkeeping. Individual attendees who do not rent table space but bring firearms to sell are common. In a study by the author, as many as 31.6% of gun show attendees were armed, and many of these attendees were unambiguously offering their firearms for sale (Wintemute 2007).

While there are no data on the frequency of illegal private-party sales at gun shows, it is clear that some sellers are willing to make them. Private investigators recently conducted “integrity tests” of 30 private-party sellers at seven gun shows in Nevada, Ohio, and Tennessee (City of New York 2009). The subjects were selected after observation suggested they were effectively in the business of selling firearms. An investigator then negotiated the purchase of a firearm with each seller, but during the negotiation said that he “probably could not pass a background check.” Of the 30 sellers, 19 completed the sales despite the clear indication that the buyer was a prohibited person.

As a highly visible marketplace for private-party sales, gun shows have received a great deal of attention. As detailed elsewhere, however, three points suggest a more nuanced understanding of the role gun shows play in legal and illegal commerce in firearms (Wintemute 2009b).

Gun shows account for a small proportion of firearm sales. According to the National Survey of Private Ownership of Firearms, discussed earlier, 3.9% of firearms are acquired at gun shows (Cook and Ludwig 1996). Unpublished data from the National Firearms Survey (Hepburn et al. 2007) yield a similar result; 9% of firearm owners acquired their most recent firearms at a gun show.

Most sales at gun shows probably involve licensed retailers. Most vendors at gun shows are licensed retailers, as are nearly all of the largest and most active vendors (Wintemute 2009b). Again, unpublished data from the National

Firearms Survey agree (Hepburn et al. 2007). Of respondents who purchased firearms at gun shows, more than 75% bought them from licensed retailers.

Licensed retailers are the primary source of firearms acquired at gun shows that are later used in crime. A study of 314 ATF trafficking investigations involving gun shows reported that while an unlicensed seller was the main subject in most of the investigations (54.1%), two thirds of the trafficked firearms were linked to investigations involving a licensed retailer (Braga and Kennedy 2000).

Effectiveness of Background Checks

The evidence suggests that background checks and denials of purchases by prohibited persons reduce risk of arrest among the individuals who are directly affected and interfere with the operations of criminal firearm markets, particularly with firearm trafficking. This essay considers observational evidence on the latter point from gun shows, where large numbers of firearm sales can be observed directly in a short period of time (Wintemute 2009b, 2007).

The best such evidence comes from a study comparing gun shows in California, with its comprehensive background check policy and separate regulations for gun shows, to shows in four states without such policies (Arizona, Nevada, Texas, and Florida) that are leading sources of firearms used in crime in California (Wintemute 2007). Altogether, 28 shows were included. Events in all states were well attended, and commerce was brisk. Shows in California were smaller than those in the comparison states, whether measured by number of firearm vendors or number of attendees, but the number of attendees per vendor was larger.

No direct private-party sales between attendees were observed in California. Instead, private-party sales were completed with the assistance of a licensed retailer serving as transfer agent (Wintemute 2007). In the comparison states, such transactions occurred frequently; an appropriately-stationed observer could see several occurring at any one time.

One unintended effect of California's policies may have been to displace illegal sales to nearby and more permissive states. At some shows in Reno, Nevada, which is a short distance across the border, more than 30% of the vehicles in the parking lot were from California (Wintemute 2007). Such undermining of more rigorous regulation in some states by lack of regulation in others has long been an argument for more rigorous regulation at the federal level. However, an unexpected finding suggests diffusion of benefit. Though

surrogate, or “straw man,” purchases are illegal nationwide under federal law, they were more than six times as common in the comparison states as in California (Wintemute 2007).

Commenting on this study, *Shooting Sports Retailer*, a firearm industry trade magazine, agreed that “there is some evidence that gun shows with restrictive regulations mandating background checks have less illegal activity than shows in states or jurisdictions without this requirement” (Matthews 2009).

Recommendations

Anonymous, undocumented private-party sales are an important contributor to firearm violence in the United States. Comprehensive background check requirements restore a simple, single, equitable structure to retail commerce in firearms. They have been shown to be feasible, and the evidence is that they provide concrete benefits. The United States should adopt a comprehensive background check requirement for firearm sales.

The primary direct effect of such a requirement will be to prevent, or make substantially more difficult, the criminal acquisition of firearms. Many prohibited persons attempting to purchase firearms from private parties will be detected by the background checks, and their purchases will be denied. Background checks and denials reduce risk of violent and firearm-related crime among prohibited persons (Wintemute et al. 2001, Wright, Wintemute, and Rivara 1999). Non-prohibited buyers with criminal intent will be deterred by the new requirements for purchaser identification and record keeping. Recall that 80% of felons incarcerated for firearm-related crimes who were *not* prohibited persons nonetheless acquired their firearms from private parties (Vittes, Vernick, and Webster 2012).

Some prohibited persons and others with criminal intent will continue to seek firearms from private-party sellers. There will still be individuals willing to sell firearms to prohibited persons. There are likely to be fewer, however, because a comprehensive background check policy changes the rules for sellers as well. Private parties will no longer be able to sell firearms legally, at least, without determining whether buyers can legally purchase them. Direct sales will now be crimes and could be made prohibiting offenses.

These effects at the individual level, taken together, will interfere with the operation of criminal firearm markets and disrupt firearm trafficking operations (Webster, Vernick, and Bulzacchelli 2009, Pierce et al. 2012). Mapping

trafficking networks and investigating individual crimes will be aided by more complete records of firearm transfers. Increasingly, it will be possible for law enforcement agencies to identify the most recent purchaser of a crime-involved firearm, not the first (Wintemute et al. 2004, Pierce et al. 2012).

California's policies provide a suitable model. Reasonable exemptions from the background check are allowed, and private-party sales may be made in small numbers if a licensed retailer is involved.

In order to avoid a massive increase in delayed denials, the current three-day limit to the waiting period for firearm purchases should be lifted. Firearm acquisition should be allowed once the buyer has passed the background check.

Pitfalls to Avoid

Closing the "Gun Show Loophole"

Requiring background checks for private-party sales only at gun shows is known as closing the "gun show loophole." There is no such loophole in federal law, in the limited sense that the law does not exempt private-party sales at gun shows from regulation that is required elsewhere. The fundamental flaw in the gun show loophole proposal is its failure to address the great majority of private-party sales, which occur at other locations and increasingly over the Internet at sites where any non-prohibited person can list firearms for sale and buyers can search for private-party sellers.

Creating an Exemption for Permit Holders

The Fix Gun Checks Act, introduced in the 112th Congress and expected to be reintroduced in 2013, is described as requiring a background check for all firearm purchases. It does not. A prospective purchaser in at least 17 states may avoid a background check by presenting an unexpired permit to carry a concealed weapon, or similar permit, for which a background check was required at the time of issuance. Such permits remain valid for as long as five years. An important fraction of permit holders become prohibited persons during that time (Wright and Wintemute 2010). Nationwide, there would be many thousands each year. Their new prohibitions will most often result from new convictions for serious crimes.

No state routinely recovers permits that have not reached their nominal expiration dates from people who are no longer eligible to have them. Thus,

under the Fix Gun Checks Act, those permits will allow newly prohibited individuals who are at high risk for committing further crimes to avoid background checks and acquire firearms. Moreover, a permit exemption is unnecessary; several states operate comprehensive background check systems without it.

Drawbacks, Costs, and Uncertainties

A comprehensive background check policy would make private-party sales less convenient. Airport security screening provides a useful analogy. All of us, regardless of our individual risk of committing violence in the air, are subjected to this inconvenience in one form or another. We tolerate it because it is one of the ways terrorists do get caught.

There would be a financial cost to firearm purchasers. In California, retailers may charge \$10 per firearm, in addition to other fees required by the state. This is a small fraction of the purchase price of all but the least expensive firearms, however.

Some private-party sellers will object, finding the new requirements burdensome. The great majority of individuals who sell firearms have no interest in providing weapons for use by criminals. They will see the value of background checks and recordkeeping as means to prevent violent crime. It is unreasonable to expect private parties to question potential buyers about their eligibility, initiate background checks, and retain records. Private parties who sell firearms infrequently, who are hobbyists or collectors, will encounter the new requirements infrequently. Those who sell more often are in the business and should obtain licenses.

Retailers will object if the fee they are allowed to charge is too low to cover their costs. In California, \$10 per firearm has proved satisfactory. Retailers will see an offsetting benefit in increased opportunities to develop new customers.

There will be costs to governments as they conduct background checks for nearly all firearm sales and issue more denials. The checks will only be as good as the data on which they rely. Efforts to improve the quality and completeness of these data must continue.

Implementing a comprehensive background check policy will be more a matter of substantial scaling up than of developing qualitatively new programs, which would be more expensive. In 11 states, including populous California, New York, and Pennsylvania, such policies are in effect now. Feasibility is proven.

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