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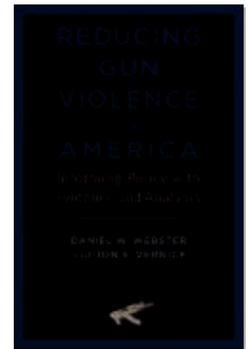
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Curtailing Dangerous Sales Practices by Licensed Firearm Dealers

Legal Opportunities and Obstacles

Jon S. Vernick and Daniel W. Webster

It is an enlightening truism of gun policy that, in the United States, the vast majority of guns used in crime were originally sold by federally licensed firearm dealers. The primary exceptions are the modest number of guns stolen from manufactures or dealers or illegally imported from abroad. This does not mean that most gun dealers flout the law or knowingly sell guns to criminals. But it does suggest that one potentially fruitful approach to make it harder for firearms to flow from the legal to the illegal market is through enhanced regulation and oversight of firearm dealers.

There are approximately 55,000 federally licensed gun dealers in the United States (ATF 2013). Yet data from a 2000 analysis indicate that just over 1% of these dealers sold more than half (57%) of the guns later traced to crime (BATF 2000a). This disproportionate supply of crime guns is not explained solely by the dealers' sales volume, local crime rates, or buyer demographics

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(Wintemute, Cook, and Wright 2005). In addition, analyses of gun trafficking investigations have found that licensed gun dealers accounted for the largest single source of guns diverted to the illegal market (BATF 2000b; Braga et al. 2012). From a policy perspective, this concentration of crime gun suppliers among a relatively small group of licensed dealers bolsters the case for increased oversight. It suggests that focusing enforcement resources on this set of dealers has the potential for substantial payoff in reducing the diversion of guns to criminals.

Interventions more widely focused on a larger set of dealers are also needed. For example, there is evidence that a substantial proportion of gun dealers are willing to make a sale under conditions of questionable legality. In one national study, more than half (52.5%) of dealers surveyed were willing to make a “straw sale,” where one person unlawfully buys a gun intended for another (Sorenson and Vittes 2003). In another study of California firearm dealers, 20% were willing to participate in a straw sale (Wintemute 2010).

This essay examines some of the law and policy opportunities for improved regulation and oversight of firearm dealers. Existing law also creates certain obstacles for law enforcement efforts. Recommendations to address these legal obstacles are provided.

Dealer Licensing and Inspection

Under federal law, persons “engaged in the business” of selling firearms must obtain a dealer’s license from the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF). The initial license costs \$200 and is good for three years. Licensed dealers may purchase firearms directly from manufactures or distributors and may transfer a firearm to another licensed dealer, even across state lines, without a background check.

Seventeen U.S. states and the District of Columbia also require a state-level firearm dealer’s license. Criteria for obtaining the license vary widely. Some states impose conditions such as minimum age, criminal history standards, and fingerprinting. Others simply mandate the completion of a form and payment of a licensing fee (Vernick, Webster, et al. 2006).

Regular inspection of licensed gun dealers can serve to identify those who fail to account for their inventory, violate record keeping rules, or otherwise disobey the law. Frequent or serious violations can result in revocation of a

dealer's license. Even if no violation is found, regular inspection sends the message that law enforcement takes its dealer oversight mission seriously and that dealers are at greater risk if they break the law.

At the federal level, dealer oversight and inspection are the responsibility of ATF. Under the federal Firearm Owners' Protection Act (FOPA) of 1986, however, ATF is limited to one routine inspection of licensed gun dealers per year (18 U.S.C. 923(g)(1)(B)(ii)(I)). Resources for dealer oversight are also modest. As a result, most dealers are inspected much less frequently (Office of the Inspector General 2004). In 2007, ATF reported that it inspected each dealer on average only once every 17 years, though this figure may have improved more recently (Mayors Against Illegal Guns 2008). FOPA also raised the legal standard for revocation of a dealer's license to require a "willful" violation of the law—a much higher standard than the law usually imposes (18 U.S.C. § 923 (e)).

At the state level, just two states (Massachusetts and Rhode Island) mandate regular inspections of dealers. Overall, 23 states permit but do not require such inspections (Vernick, Webster, et al. 2006).

Research clearly demonstrates that enhanced dealer oversight reduces illegal gun trafficking. Webster et al. studied guns recovered by the police in 54 U.S. cities from 2000 to 2002 to identify factors associated with intrastate gun trafficking (defined as the share of guns with an interval between retail sale and recovery by the police, from someone other than the buyer, of less than one year). The authors defined strong gun dealer regulation and oversight as requiring under state law (1) a dealer's license; (2) record keeping of firearm sales; (3) dealers' premises to be open for inspections; and (4) prompt reporting of firearm thefts from dealers. After controlling for other factors, cities in states with strong dealer regulation had a much lower measure of intrastate gun trafficking (Webster, Vernick, and Bulzacchelli 2009).

Regarding *interstate* gun trafficking, research by Mayors Against Illegal Guns has demonstrated that states neither requiring nor permitting inspections of gun dealers are much more likely to export crime guns to other states than are jurisdictions with these laws. In fact, the average exporting rate for states without dealer inspection laws is 50% greater than for states with these laws (Mayors Against Illegal Guns 2008). Other research has also demonstrated that comprehensive enforcement of gun sales laws reduced gun trafficking in Boston (Braga and Pierce 2005).

Undercover Stings and Lawsuits against Gun Dealers

In some jurisdictions, police have used crime gun trace data to identify local firearm dealers selling disproportionate numbers of guns used in crime. Law enforcement has then conducted targeted enforcement efforts.

In 1998 and 1999, law enforcement in Chicago, Detroit, and Gary, Indiana, conducted undercover stings of retail gun stores suspecting of facilitating large numbers of illegal firearm sales. Police posed as gang members looking to “settle scores” or as straw buyers. After a number of the dealers were videotaped making illegal sales, the cities each separately sued those gun dealers. The lawsuits in Chicago and Detroit received substantial press coverage. An evaluation of the stings and lawsuits in Chicago, Detroit, and Gary compared gun trafficking indicators in these cities with three comparable midwestern cities (Cincinnati, Cleveland, and St. Louis) that did not conduct stings. The researchers found a 62% reduction in trafficked guns sold by in-state retailers in Chicago ($p < 0.001$); a 36% decline in Detroit ($p = 0.051$); and a nonsignificant increase in Gary, where the intervention and publicity were less robust (Webster, Bulzacchelli, et al. 2006).

The ability for litigation to serve as an important public health tool to address scofflaw gun dealers and the supply of crime guns was diminished in 2005 with the enactment of the federal Protection of Lawful Commerce in Arms Act (PLCAA). Under the PLCAA, gun makers and dealers received substantial protection against lawsuits “resulting from the criminal or unlawful misuse of a qualified product by the person or a third party.” Following the PLCAA, numerous lawsuits brought by municipalities and individuals arguing, in part, that firearm manufacturers failed to adequately supervise their dealers, were dismissed (Vernick, Rutkow, and Salmon).

One important exception to the PLCAA allows lawsuits against gun dealers to proceed if the dealer “knowingly” violated laws governing firearm sales. A series of undercover stings and lawsuits brought by New York City took advantage of this exception. In 2006, New York City identified 55 gun dealers in seven states who were supplying guns used in crime in the city. During an undercover sting operation, 27 of these dealers were caught facilitating illegal sales and were sued by the city. Nearly all agreed to settle their case by agreeing to a number of changes to their business practices to reduce illegal gun sales. These changes were overseen by a special master. Webster and Vernick studied the effects of the settlement on crime guns recovered from

10 dealers. The odds that a crime gun sold by one of these 10 dealers was later recovered in New York City were 84% lower after the change in business practices (Webster and Vernick, in this volume).

Access to Trace Data and the Tiahrt Amendment

Firearm trace data supplied by ATF have been critical to identifying problem dealers in need of enhanced oversight. The case of a prominent gun dealer in the Milwaukee area, Badger Guns and Ammo, provides a powerful example of the potential utility of trace data. In May 1999, ATF publicly released information that Badger led the nation in the number of guns sold that were later traced to crime. Just a few days later, Badger announced that it would no longer sell small, poorly made handguns, known as “junk guns” or “Saturday Night Specials,” which are favored by some criminals and disproportionately traced to crime (Vernick, Webster, and Hepburn 1999; Webster, Vernick, and Hepburn 2002). Following this change in sales practices, there was a 71% decline in the number of new Saturday Night Special crime guns recovered in Milwaukee and an overall 44% decline in the recovery of all guns with indicia of trafficking (i.e., recovery within one year from a user other than the initial buyer) (Webster et al. 2006).

However, beginning in 2003, an amendment to ATF’s annual appropriation by Congress has limited the release of trace data. Named after its sponsor, Representative Todd Tiahrt (R-KS), the Tiahrt Amendment began modestly, stating: “No funds appropriated under this Act . . . shall be available to take any action based upon . . . [the Freedom of Information Act] with respect to records . . . maintained pursuant to [the Gun Control Act] . . . or provided by . . . law enforcement agencies in connection with . . . the tracing of a firearm” (Pub. L. No. 108-7 § 644 (2003)). From 2003 to 2008, the Tiahrt Amendment was slowly expanded to prohibit any release of individual trace data by ATF to the public (including researchers); use of trace data in civil litigation; requiring dealers to conduct a physical inventory of their firearms as part of a compliance inspection; and maintaining records of background checks from firearm purchase applications for more than 24 hours (Tang 2009; *Mayors Against Illegal Guns* 2013).

In addition to impeding research on illegal gun trafficking, there is evidence that the Tiahrt Amendment may have emboldened some gun dealers who no longer needed to fear disclosure of trace data to the public. Researchers were

able to obtain trace information directly from the Milwaukee police department (though not for comparison cities) for the period from 2003 to 2006 to study the effects of the Tiahrt Amendment on Badger Guns and Ammo. The adoption of the Tiahrt Amendment was associated with a 203% increase in the number of guns diverted to criminals within one year of retail sale by Badger (Webster et al. 2012).

Recommendations

The law has an important opportunity to either hinder or facilitate greater oversight of licensed gun dealers. Importantly, such oversight need not interfere with law-abiding citizens' rights under the Constitution's Second Amendment (Vernick et al. 2011).

The following six recommendations are based on the research findings described in this essay.

1. *Portions of the Firearm Owners' Protection Act (FOPA) should be repealed.* These portions limit routine dealer inspections by ATF to one per year and raise the legal standard for revocation of a dealer's license. Honest firearm dealers do not need these protections and they impede identification and prosecution of the minority of dealers who violate the law.

2. *Funds should be allocated to permit ATF to conduct regular routine inspections of gun dealers.* These inspections can identify inventory or record keeping irregularities and generally send the message that gun dealers face an increased risk of being caught if they flout the law.

3. *ATF should be granted authority to impose a range of sanctions—including license suspension, fines, or other penalties—for dealers who violate gun sales or other laws.* ATF needs the authority to impose a range of administrative sanctions, short of criminal prosecution, to address problems with scofflaw dealers before they escalate.

4. *All states should mandate a state-level firearm dealer's license in addition to the federal license.* This would provide states with leverage to revoke a license if a dealer is caught making illegal sales, without needing to rely upon the often lengthy federal revocation process. All 50 U.S. states require a license for persons engaged in practices as mundane as cosmetology. Businesses with the public safety implications of dealing in firearms merit at least as much state-level oversight.

5. *The Protection of Lawful Commerce in Arms Act (PLCAA) should be repealed.* The PLCAA interferes with litigation's ability to serve as a restraint on the dangerous practices of firearm dealers and manufacturers. There is no evidence that the firearm industry needs or merits this unprecedented liability protection.

6. *The Tiahrt Amendment should be repealed.* Researchers should have access to trace data to understand how illegal gun markets respond to changes in business practices, law enforcement efforts, or new legislation. Requiring dealers to conduct a physical inventory of their firearms as part of compliance inspections can help to identify those who sell guns off-the-books or who otherwise cannot account for their stock.

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