

## IMAGINING GUN CONTROL IN AMERICA: UNDERSTANDING THE REMAINDER PROBLEM

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### INTRODUCTION

Gun control in the United States generally has meant some type of supply regulation. Some rules are uncontroversial like user-targeted restrictions that define the untrustworthy and prohibit them from accessing the legitimate supply.<sup>1</sup> Some have been very controversial like the District of Columbia's recently overturned law prohibiting essentially the entire population from possessing firearms.<sup>2</sup> Other contentious restrictions have focused on particular types of guns—e.g., the now expired Federal Assault Weapons Ban.<sup>3</sup> Some laws, like one-gun-a-month,<sup>4</sup> target straw purchases but also constrict overall supply. Various other supply restrictions operate at the state and local level. Proposals for stricter gun control typically involve expansion of supply controls toward the goal of bringing the U.S. rate of gun crime down to the levels of other first-tier industrialized nations—places where background conditions along with supply-side restrictions have resulted in dramatically

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1. See, e.g., 18 U.S.C. § 922(d)(1)–(9) (2000) (prohibiting the sale of firearms to fugitives from justice, drug addicts, the mentally ill, military personnel who have been dishonorably discharged, undocumented immigrants, former U.S. citizens who have renounced their citizenship, and anyone who has been convicted of a misdemeanor involving domestic violence, among others).

2. D.C. CODE ANN. § 7-2502.02 (LexisNexis 2001) (prohibiting registration certificates from being issued for sawed-off shotguns, machine guns, short-barrelled rifles, and pistols registered after the law's enactment), *invalidated by* District of Columbia v. Heller, 128 S. Ct. 2783 (2008).

3. 18 U.S.C. § 922 (2000) (codifying Title XI of the Federal Violent Crime Control and Law Enforcement Act of 1994, which expired in September 2004).

4. See, e.g., CAL. PENAL CODE §§ 12071(b)(7)(F), 12072(a)(9), (c)(6) (Deering 2008); MD. CODE ANN., PUB. SAFETY § 5-128(b) (LexisNexis 2003); VA. CODE ANN. § 18.2-308.2:2(P) (2004).

lower inventories of guns than in the United States.

None of these measures have been particularly successful and, upon reflection, have been somewhat peculiar. We have pressed supply-side rules at the margin—e.g., with prospective limits on supply and restrictions on obscure categories of guns—all while denying that disarmament is the ultimate goal.<sup>5</sup> This recipe for gun control has yielded disappointing results.

Stringent de jure supply restrictions actually have correlated with higher levels of gun crime.<sup>6</sup> This is not surprising. De jure supply restrictions are not the same as de facto supply reduction. Effective supply-side regulation requires earnest pursuit and eventual achievement of an environment where the civilian gun inventory, both legitimate and contraband, is very small (“the supply-side ideal”). In the handful of municipalities that have attempted true gun bans, supply has continued to meet demand primarily because the existing inventory of guns is vast, and people have real world incentives to defy gun bans.<sup>7</sup> These two phenomena, elaborated here as the “remainder problem” and the “defiance impulse,” have confounded supply restrictions for decades.

Now that the Supreme Court has ruled in *District of Columbia v. Heller* that the Second Amendment prohibits general disarmament,<sup>8</sup> the temptation is to view *Heller* as the central

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5. The leading gun-control organization in the country did exactly this in proposed legislation, dubbed “Brady II.” S. 631, 104th Cong. § 2 (1995); H.R. 1321, 104th Cong. § 2 (1995) [hereinafter Brady II]. This was, according to Handgun Control Inc. (“HCI”) Executive Director Richard Aborn, a manifestation of HCI’s decision to switch from an incremental strategy to a comprehensive approach that put forward the organization’s full agenda in one proposal. This was partly a response to accusations by the NRA that HCI had a “secret plan” to ban all firearms and that each new gun law was a step in that direction: as Aborn stated, “We wanted to put all our cards on the table.” James B. Jacobs & Kimberly A. Potter, *Comprehensive Handgun Licensing & Registration: An Analysis and Critique of Brady II, Gun Control’s Next (and Last?) Step*, 89 J. CRIM. L. & CRIMINOLOGY 81, 84 (1998). As a candidate for the Democratic nomination for President, Hillary Clinton pursued a similar approach, using Barack Obama’s one-time support for a total ban just on handguns to call into question his electability. See, e.g., Press Release, Obama Forced to Defend Electability in Face of New Poll and Discovery of Questionnaire (Dec. 11, 2007), available at <http://www.hillaryclinton.com/news/release/view?id=4655>.

6. See *District of Columbia v. Heller*, 128 S. Ct. 2783, 2857–58 (2008) (Breyer, J., dissenting).

7. See David B. Kopel & Christopher C. Little, *Communitarians, Neorepublicans, and Guns: Assessing the Case for Firearms Prohibition*, 56 MD. L. REV. 438, 552 (1997).

8. *Heller*, 128 S. Ct. at 2822.

obstacle to effective gun controls.<sup>9</sup> This is a mistake born of our failure to confront the incoherence of supply-side controls pre-*Heller*. While *Heller* technically prohibits the supply-side ideal, supply-side rules are, and long have been, blocked by structural barriers rooted in the nature of our armed society—*viz.*, 300 million guns tightly held by people who believe they are uniquely useful tools.<sup>10</sup>

Two things are foreseeable. First, supply regulations on the edges of *Heller* will have only symbolic effect because *Heller* plainly bars laws intended to cut supply to zero. Second, because *Heller* formally blocks the supply-side ideal, its trajectory will be the focus of political and constitutional warfare. Underlying this will be the mistaken perception that, with sufficient political shift and *Heller* nullified, supply controls still might work in America. Understanding the structural barriers to supply controls will help us avoid that mistake.

This Article will illuminate those structural barriers by removing, theoretically, the constitutional impediment of *Heller* and the political impediments to the supply-side ideal. Assume, therefore, that *Heller* is reversed or explained away. Assume further that the political barriers to sweeping supply controls are overcome. *Now* imagine gun control in America.

Part I elaborates on the supply-side ideal as the foundation of

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9. Before the ink was dry on the Supreme Court's 5-4 decision in *Heller*, holding that the Second Amendment guarantees an individual the right to bear arms, speculation began about how robust and enduring that right would turn out to be. *Id.* With only one vote between the opinion by Justice Scalia and something entirely different, the stage is set for confirmation controversies involving a nominee's commitment to stare decisis, strict construction, originalism, and other coded inquiries intended to determine whether the nominee would vote to uphold, undermine, or reverse the result in *Heller*. This is entirely understandable. It seems inevitable in modern America that today's losers on big constitutional questions will view a changed lineup on the Court as more promising than the long work and long shot of a constitutional amendment. America will spend much time and effort fighting over the boundaries of *Heller*. Battles about the evolution of *Heller* will find partisans claiming that something vitally important is at stake. Most of those claims will be wrong.

Because most states do not require registration or licensing of firearms and therefore have incomplete record-keeping, inaccessible data, and unobserved levels of illegal firearms ownership, most firearm research must make use of alternative measures . . . [such as] production-based estimates . . . and nationally representative surveys. COMM'N TO IMPROVE RESEARCH INFO. & DATA ON FIREARMS, NAT'L RESEARCH COUNCIL, FIREARMS AND VIOLENCE: A CRITICAL REVIEW 56 (Charles F. Wellford et al. eds., 2004) [hereinafter FIREARMS RESEARCH & DATA COMM'N] (citation omitted).

10. FIREARMS RESEARCH & DATA COMM'N, *supra* note 9, at 56.

our most ambitious gun control proposals. Part II explains the primary structural challenges to the supply-side ideal and introduces the remainder problem as a peculiarly American obstacle to supply controls. Part III presents the remainder problem and the defiance impulse as both cultural and physical phenomena that block supply-side rules. Part IV evaluates a series of familiar gun-control proposals in the context of the structural (and incidentally constitutional) barriers to supply-side regulation.

### I. THE SUPPLY-SIDE IDEAL

The conclusion that some horrible gun crime would not have happened if we had prevented the scoundrel from getting a firearm is straightforward and quite natural. This calculation is the foundation for views that advance supply-side gun regulation as a recipe for crime control.<sup>11</sup> It conforms to simple tests of logic. Consider two scenarios. In the first, we are sitting in a room with a gun in the middle. In the second, our room is gun free and sealed—the supply-side ideal. The risk of gun violence is obviously higher in the first scenario. Indeed, absent creative cheating, it is zero in the second. Projecting this dynamic to society generally allows the claim that laws limiting the supply of guns in private hands will dramatically reduce gun crime.<sup>12</sup>

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11. See, e.g., JOHN GODWIN, MURDER U.S.A.: THE WAYS WE KILL EACH OTHER 281 (1978) (claiming that places with the most gun owners also have the highest homicide ratios); PETE SHIELDS, GUNS DON'T DIE—PEOPLE DO 64 (1981) (“[T]he availability of firearms breeds violence.”) (internal quotation marks omitted); Frank Zimring, *Is Gun Control Likely to Reduce Violent Killings?*, 35 U. CHI. L. REV. 721, 735 (1968) (citing a study showing an increased ratio of deaths per 100 reported attacks involving firearms, as compared to knives, in order to suggest that “the absence of firearms would depress the otherwise expectable homicide rate”); Deane Calhoun, *From Controversy to Prevention: Building Effective Firearm Policies*, INJURY PREVENTION NETWORK NEWSLETTER, Winter 1989–90, at 17 (“[G]uns are not just an inanimate object [sic], but in fact are a social ill.”); Janice Somerville, *Gun Control as Immunization*, AM. MED. NEWS, Jan. 3, 1994, at 7 (describing guns as a “virus that must be eradicated”).

12. In contrast, Don Kates and Gary Mauser argue that the more guns, more murder “mantra” is undercut by both historic and current correlations between gun ownership and murder. Don B. Kates & Gary Mauser, *Would Banning Firearms Reduce Murder and Suicide: A Review of International and Some Domestic Evidence*, 30 HARV. J.L. & PUB. POL’Y 649, 687–90 (2007). According to Kates and Mauser, Franklin Zimring, one of the architects of those conclusions, has admitted that they were made speculatively and essentially without an empirical basis:

In the 1960s after the assassinations of President John F. Kennedy, Dr. Martin Luther King, Jr., and Senator Robert F. Kennedy, [gun control] became a major subject of public passion and controversy . . . [sparking a debate that] has been heated, acrimonious, and

Tracking violent crime rates in jurisdictions with generous concealed carry laws, John Lott reaches the opposite conclusion. Lott posits that laws enabling trustworthy citizens to carry guns in public are a deterrent to crime.<sup>13</sup> Lott has drawn criticism<sup>14</sup> and support<sup>15</sup> sufficient to leave doubters and believers nearly exactly

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polarized. . . . It began in a factual vacuum [in which] . . . neither side felt any great need for factual support to buttress foregone conclusions. *In the 1960s, there was literally no scholarship on the relationship between guns and violence and the incidence or consequences of interpersonal violence, and no work in progress.*

FRANKLIN E. ZIMRING & GORDON HAWKINS, *THE CITIZEN'S GUIDE TO GUN CONTROL* xi (1987) (emphasis added).

Kates and Mauser contend that much of the early support of supply restrictions was grounded on little to no empirical evidence. So much so that prominent criminologist Hans Toch recanted his support of handgun prohibition: “[I]t is hard to explain that where firearms are most dense, violent crime rates are lowest and where guns are least dense, violent crime rates are highest.” Kates & Mauser, *supra* at 675 (internal quotation marks omitted). Professor Toch was a consultant to the 1960s Eisenhower Commission and, until the 1990s, he endorsed its conclusions that widespread handgun ownership causes violence and that reducing ownership would reduce violence.

13. John R. Lott, Jr. & David B. Mustard, *Crime, Deterrence, and Right-to-Carry Concealed Handguns*, 26 J. LEGAL STUD. 1, 28 (1997). *See generally* JOHN R. LOTT, JR., *MORE GUNS, LESS CRIME: UNDERSTANDING CRIME AND GUN CONTROL LAWS* 19 (2000). Several critics have now replicated Lott's work using additional or different data, additional control variables, or new or different statistical techniques they deem superior to those Lott used. Interestingly, the replications all confirm Lott's general conclusions; some even find that Lott underestimated the crime-reductive effects of allowing good citizens to carry concealed guns.

14. *See, e.g.*, Albert W. Alschuler, *Two Guns, Four Guns, Six Guns, More Guns: Does Arming the Public Reduce Crime?*, 31 VAL. U. L. REV. 365, 366–71 (1997); Ian Ayres & John J. Donohue III, *Shooting Down the “More Guns, Less Crime” Hypothesis*, 55 STAN. L. REV. 1193, 1197–1202 (2003); Dan A. Black & Daniel S. Nagin, *Do Right-to-Carry Laws Deter Violent Crime?*, 27 J. LEGAL STUD. 209 (1998); D.W. Webster et al., *Flawed Gun Policy Research Could Endanger Public Safety*, 87 AM. J. PUB. HEALTH 918 (1997); Franklin Zimring & Gordon Hawkins, *Concealed Handguns: The Counterfeit Deterrent*, 7 RESPONSIVE COMMUNITY 46 (1997); *see also* John J. Donohue III & Steven D. Levitt, *The Impact of Legalized Abortion on Crime*, 116 Q.L. ECON. 379 (2001).

15. *See, e.g.*, Bruce L. Benson & Brent D. Mast, *Privately Produced General Deterrence*, 44 J.L. & ECON. 725 (2001); John R. Lott, Jr. & John E. Whitley, *Safe-Storage Gun Laws: Accidental Deaths, Suicides, and Crime*, 44 J.L. & ECON. 659 (2001); Thomas B. Marvell, *The Impact of Banning Juvenile Gun Possession*, 44 J.L. & ECON. 691 (2001); Jeffrey A. Miron, *Violence, Guns, and Drugs: A Cross-Country Analysis*, 44 J.L. & ECON. 615 (2001); Carlisle E. Moody, *Testing for the Effects of Concealed Weapons Laws: Specification Errors and Robustness*, 44 J.L. & ECON. 799 (2001); David B. Mustard, *The Impact of Gun Laws on Police Deaths*, 44 J.L. & ECON. 635 (2001); David E. Olson & Michael D. Maltz, *Right-to-Carry Concealed Weapon Laws and Homicide in*

where they started.

The supply-side ideal remains the philosophical foundation of the modern quest for restrictions on access to firearms sufficient to thwart gun crime. But there is a problem. In our political skirmishes over new, more aggressive supply regulation, the supply-side ideal has receded into the background. We have not talked candidly about what is necessary for the supply-side formula to work. We have not confronted the reality that the existing inventory of guns is vast.

As a consequence, supply-side controls, often implemented prospectively, without explicit commitment to disarming ordinary Americans,<sup>16</sup> have affected only a tiny fraction of the inventory. It is as if we are in the sealed room, but now everybody has a gun or two tucked away, there are piles of them in the corners, and we are debating reducing gun violence with laws that allow only one more gun a month or no more guns with high capacity magazines.<sup>17</sup> Our results have been disappointing because supply-side rules depend, ultimately, on cutting the inventory close to zero.<sup>18</sup> And that, in America, is a problem.

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*Large U.S. Counties: The Effect on Weapon Types, Victim Characteristics, and Victim-Offender Relationships*, 44 J.L. & ECON. 747 (2001); Jeffrey S. Parker, *Guns, Crime, and Academics: Some Reflections on the Gun Control Debate*, 44 J.L. & ECON. 715 (2001); Florenz Plassmann & John Whitley, *Confirming "More Guns, Less Crime,"* 55 STAN. L. REV. 1313 (2003); see also Florenz Plassmann & T. Nicolaus Tideman, *Does the Right to Carry Concealed Handguns Deter Countable Crimes? Only a Count Analysis Can Say*, 44 J.L. & ECON. 771 (2001) (supporting Lott's analysis of the impact of right-to-carry laws with respect to decreases in *some* categories of crimes). In 2003, Lott extended his findings. JOHN R. LOTT, JR., *THE BIAS AGAINST GUNS: WHY ALMOST EVERYTHING YOU'VE HEARD ABOUT GUN CONTROL IS WRONG* (2003).

16. In 1998 as the House debated the Brady II gun control legislation, Richard Aborn (then Executive Director of HCI) said that the organization had abandoned its incrementalist strategy and was putting its full agenda forward in one proposal. This was partly a response to the NRA claim that HCI had a "secret plan" to ban all guns and that every new piece of gun legislation was another scot down that pole. See Jacobs & Potter, *supra* note 5, at 84.

17. One-gun-a-month laws have been debated and implemented in several states. See, e.g., John P. Flannery, *Students Died at Virginia Tech Because Our Government Failed to Act!*, 18 GEO. MASON U. CIV. RTS. L.J. 285, 300-02 (2008). Restrictions on high-capacity magazines were part of the now expired Federal Assault Weapons Ban and continue as part of restrictions in several states. 18 U.S.C. § 922(v)(3)(C)-(D) (2000) (expired Sept. 2004); see, e.g., N.J. STAT. ANN. § 2C:39-3(j), -9(h) (West 2005).

18. The National Research Council is agnostic on the effectiveness of gun control. See FIREARMS RESEARCH & DATA COMM'N, *supra* note 9, at 10.

## II. CHALLENGES TO THE SUPPLY-SIDE IDEAL

Erring on the high side, there are around 13,000 gun homicides in the United States each year.<sup>19</sup> Suicides with a firearm add another 17,000 deaths.<sup>20</sup> If there were only 30,000 private guns in America, and we knew where they were, it would be easy to imagine mustering the political will to confiscate those guns and ban new ones. If our borders were reasonably secure against illegal imports and contraband guns could not be manufactured domestically, we would expect dramatic reductions in gun crimes, accidents, and suicides.

But our problem is different. The guns used in our roughly 30,000 annual gun deaths are drawn from an inventory approaching 300 million.<sup>21</sup> This is far more guns than the countries in any of the cross-cultural comparisons—<sup>22</sup> far more private guns than any other country ever.<sup>23</sup> Americans own close to half the private firearms on the planet.<sup>24</sup> Plus, our borders are permeable, and guns and ammunition are relatively easy to manufacture. So achieving the supply-side ideal is not just a matter of channeling enough outrage to finally get the right words enacted into law.

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19. NAT'L CTR. FOR INJURY PREVENTION & CONTROL, CTR. FOR DISEASE CONTROL, WISQARS INJURY MORTALITY REPORTS, 1999–2005, [http://webappa.cdc.gov/sasweb/ncipc/mortrate10\\_sy.html](http://webappa.cdc.gov/sasweb/ncipc/mortrate10_sy.html) (using 2005 data).

20. *Id.*

21. There are different estimates of the civilian gun stock. The Small Arms Survey, an independent research project of the Graduate Institute of International Studies in Geneva, Switzerland, estimated the U.S. inventory to be between 238 million and 276 million in 2003. By 2006, its estimate was between 250 million and 290 million. SMALL ARMS SURVEY, GRADUATE INST. OF INT'L STUDIES, SMALL ARMS SURVEY 2007: GUNS AND THE CITY 47, tbl.2.3 (2007) [hereinafter SMALL ARMS SURVEY 2007]. This number grows by almost 5 million per year. *Id.* at 46.

22. See David B. Kopel, *The Samurai, the Mountie, and the Cowboy: Should America Adopt the Gun Controls of Other Democracies?* 21, 60 (1992), for estimates of guns in the United Kingdom before the handgun ban and estimates of guns in Japan. See also SMALL ARMS SURVEY 2007, *supra* note 21, at 47 tbl.2.3.

23. See Nicholas Dixon, *Why We Should Ban Handguns in the United States*, 12 ST. LOUIS U. PUB. L. REV. 243, 248–51 (1993).

24. The 2003 Small Arms Survey estimated the worldwide total of privately held guns at 639 million and put the high estimate for the U.S. inventory at 276 million. There were roughly 67 million guns in private hands in the European Union. Estimates put the number of private guns in Afghanistan between 1.5 and 10 million. The Small Arms Survey estimates the total number of guns (government and private) in sub-Saharan Africa at 30 million. SMALL ARMS SURVEY, GRADUATE INST. OF INT'L STUDIES, SMALL ARMS SURVEY 2003: DEVELOPMENT DENIED 57 (2003) [hereinafter SMALL ARMS SURVEY 2003].

A. *Porous Borders*

We modeled the supply-side ideal on the gun-free sealed room. The single qualification was the assumption that no one in the room was cheating. And cheat they might, if the incentives were sufficient and the boundaries of the room permeable. Effective supply-side restrictions at the societal level have to account for this.

So what about this cheating? If we managed to enact supply-side restrictions with real bite, would cheating be pervasive? Could it be controlled? Perhaps the level of cheating would be small. A black market fueled just by this cheating might make guns prohibitively expensive for many people with bad intentions. With fewer bad people able to afford the higher prices caused by restricted supply, there should be a reduction in gun crime.

One worry, however, is the argument that the most dangerous among us have an inelastic demand for guns. Criminal penalties for gun possession or use will not matter much to people whose primary activities are already illegal. Daniel Polsby contends that their static demand will be supplied through the same channels that distribute other contraband.<sup>25</sup> Plus, they have a lot of guns already.

Polsby's argument is compelling in the abstract, but it is hard to know how much sweeping supply restrictions would increase prices. It is a plausible bet that borderline bad men (and more so bad kids) would be pushed to less dangerous activity by the increased costs of acquiring and risks of owning guns. Further, the impetuous shooter, the kid who takes the family gun to school, and other spontaneous, hot-blooded shootings should decrease if getting the gun really is harder and more expensive, and owning it is riskier.<sup>26</sup>

Another worry is that some contraband imported guns will be more lethal than the ones they replaced. In Britain, after further tightening of already stringent gun laws, the black market began supplying previously unseen and more lethal guns.<sup>27</sup> Ireland banned handguns in the early 1970s and a large group of rifles and repeating shotguns in 1976.<sup>28</sup> "Despite these measures, in the early 2000s the Irish police . . . were reporting steep increases in gun crime."<sup>29</sup> The most serious concern being "an invasion of handguns and automatics smuggled in from Europe," many of them "semi-automatic pistols and sub-machine guns, previously unknown in

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25. Daniel D. Polsby, *The False Promise of Gun Control*, ATLANTIC MONTHLY, Mar. 1994, at 57, 58–59, 62.

26. See Kates & Mauser, *supra* note 12, at 665–70 (stating that hot-blooded gun crime by ordinary people is rare).

27. *Id.* at 655–56.

28. SMALL ARMS SURVEY 2007, *supra* note 21, at 44.

29. *Id.*

public hands.”<sup>30</sup> Swedish police report a similar phenomenon: “Before, there were a lot of shotguns—now it’s all automatic weapons.”<sup>31</sup> Even without sweeping supply restrictions, the United States has encountered this phenomenon. In 1996, authorities intercepted a shipment of two thousand AK-47s from China.<sup>32</sup> Unlike the semi-automatic rifles that were prohibited under the expired 1994 Assault Weapons Ban, these black-market imports really were fully automatic machine guns. In 2005, federal authorities broke up a network of arms suppliers who illegally imported fully automatic rifles from Russia and had arranged to sell anti-tank guns to an undercover officer.<sup>33</sup>

Some of this type of response to gun prohibition seems inevitable. Whether it is enough to actually make things worse is hard to predict. All policymaking requires guesses about the future. We might reject the static-demand analysis as just a guess and hope that drastic reductions in supply (conceding some level of cheating) still will make us better off.<sup>34</sup> Indeed, if we expanded cooperation with other nations, the global supply might shrink sufficiently such that the black market price would start to become prohibitive for many of the people we are worried about. But there is more cheating to consider.

### B. *Ancient Technology*

Although it seems far-fetched in the context of the sealed-room model that cheaters would build contraband firearms while the rest of us were policing the gun-free zone, the real-world problem is open to essentially that type of cheating. Gun technology is ancient. The essential parts are a cylinder blocked at one end and a striker. Even modern commercial firearms production is typically a small-scale, unsophisticated affair:

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30. *Id.* (citation omitted).

31. *Id.* at 56 (internal quotation marks omitted) (citation omitted).

32. Melinda Liu, *A Sting for Beijing: Which Officials—and How High Ranking—Knew of the Plan To Smuggle 2,000 AK-47s?*, NEWSWEEK, June 3, 1996, at 40, 40 (discussing a scheme to import machine guns and grenades from Norinco and Poly Tech factories). Analysts dismiss high-level collusion: “You can always bribe a customs official to look the other way.” *Id.* (internal quotation marks omitted).

33. Julia Preston, *Arms Network Is Broken Up, Officials Say*, N.Y. TIMES, Mar. 16, 2005, at B1.

34. Incorporation of the individual right to arms as a limit on state action is still in question. In the handful of states that have no state constitutional right to arms, this means state prohibition is still an option. That type of legislation should fail, as completely as the D.C. gun ban failed, because it is impossible for isolated states to secure their borders against the supply of guns from other states.

Of the 184 small arms factories reported in the industry census taken in 2002, only 56 employed more than 20 people. Eighty-four factories had four or fewer employees . . . . Of the 110 small arms ammunition companies (and corresponding 112 factories) in the United States in 2002, 66 had four or fewer employees; only two employed more than 1,000 people.<sup>35</sup>

Historians trace the early development of guns to the thirteenth century, and gunpowder even earlier.<sup>36</sup> The mountain culture book series *Foxfire* describes the work of old-time gunsmiths who built prized firearms under truly primitive conditions.<sup>37</sup> The Model 1911 .45 caliber semi-automatic pistol, still preferred by elite military and law enforcement personnel, is so designated because it was introduced as the U.S. military sidearm in 1911.<sup>38</sup> The notorious AK-47 can be assembled from a kit of roughly-machined parts using only hand tools.<sup>39</sup> Gun prohibition then is not the same as banning DDT or leaded gasoline. It is more like banning fire.

Perhaps the best illustration of this point is the gun club near my home. It is rich in lessons about gun culture. Every year it has an open house where members bring exotic firearms for demonstrations. One fellow brings a formidable Gatling gun. It is a hand-cranked machine with a full automatic rate of fire. The remarkable thing is that he made it from scratch. More remarkable is that he is not very remarkable. Scores of guys show up to display and shoot fearsome guns that they have cobbled together. Some are assembled from manufactured components. Some are built entirely from scratch. Supply-side rules are undercut by the fact that guns

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35. Tamar Gabelnick et al., *A Guide to the U.S. Small Arms Market, Industry, and Exports, 1998–2004*, at 33 (2006), available at [http://www.smallarmssurvey.org/files/sas/publications/o\\_papers\\_pdf/2006-op19-US.pdf](http://www.smallarmssurvey.org/files/sas/publications/o_papers_pdf/2006-op19-US.pdf).

36. “The Chinese had some notion as early as the ninth century that saltpeter, sulfur and carbon would burn with unprecedented vigor.” JACK KELLY, *GUNPOWDER, ALCHEMY, BOMBARDS & PYROTECHNICS: THE HISTORY OF THE EXPLOSIVE THAT CHANGED THE WORLD* 20 (2004).

37. *FOXFIRE* 5, at 208 (Eliot Wigginton ed., 1979).

38. IAN V. HOGG, *THE STORY OF THE GUN* 123 (1996).

39. Steve Mathews, *Build Your Own AK? Yes You Can: With a Little Patience and Common Hand Tools, You Can Save Hundreds by Assembling Your Own AK. Here's How*, reprinted in *SHOTGUN NEWS TREASURY* 6, A COLLECTION OF THE BEST ARTICLES PUBLISHED IN 2005. The regulated receiver that officially is the gun starts as a piece of sheet metal that is simply not that hard to cut into the proper shape, bend at the right angles, and pierce in the right spots to allow fitting of the remaining parts of the gun. The remaining parts, odd pieces of metal, springs, and rivets, are literally impossible to regulate. See also ROBERT D. KAPLAN, *SOLDIERS OF GOD* 31 (1990) (describing the open-air gun market in Darra, Pakistan, where handmade versions of most popular military small arms are available).

are not so hard to make that shutting down commercial manufacturers will eliminate the supply.<sup>40</sup>

It is still plausible to bet that black-market manufacturers will be few in number and generally less competent than commercial manufacturers, thus producing a relatively small number of unreliable weapons. Also, many people will be afraid to access the black market that supplies these guns. The average homeowner, who has much to lose by breaking the law, might never enter the market for such guns. This means that the distressed teen could not so readily take the family gun to answer some schoolyard offense. Likewise, gun accidents involving children in good homes and those where June mistakes Ward for a burglar should decline. Demand might be so slim, limited to a relatively few bad men, that the illegal manufacturers' incentives to supply the market with decent-quality contraband guns would be low. Criminals, left to their own devices, might end up with low-powered, unreliable renditions of the infamous zip gun, giving police an advantage in confrontations.

It is plausible to believe that the problem of post-ban manufactured contraband is not insurmountable, or at least that its unintended consequences will not leave us worse off. This might be wrong, but it is not an obviously silly bet.

### C. *The Remainder Problem*

There are, then, plausible responses to the importation and manufacturing cheats. But the primary problem remains. There already are enough private guns in the United States to give one to every adult, with many left over.<sup>41</sup> Roughly half of the homes in America contain at least one gun according to the high estimate.<sup>42</sup>

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Ignition translates gunpowder's stored chemical energy into thermal energy of flame and the mechanical energy of compressed gases. Simple tools, containers of one sort or another, are needed to direct that energy and put it to work. It's likely that fireworks craftsmen designed the four basic forms of containment that have dictated all the uses of gunpowder from medieval China down to our own time.

KELLY, *supra* note 36, at 7.

41. SMALL ARMS SURVEY 2007, *supra* note 21, at 46–47 (estimating the number of guns in the United States at 250 to 290 million in 2006, with roughly 5 million guns added to that number each year). According to the U.S. Census Bureau, the current population of the United States is roughly 300 million. U.S. Census Bureau, U.S. Population Clock, <http://www.census.gov/population/www/popclockus.html> (last visited Nov. 11, 2008).

42. This estimate is an average. The actual concentration varies by region, among other things. An estimated seventy percent of homes in the Southeast contain guns. In New England the estimate is thirty-eight percent. GUN CONTROL AND GUN RIGHTS: A READER AND GUIDE 282–83 (Andrew J. McClurg et

The low estimate puts guns in about forty percent of homes.<sup>43</sup> The existing gun inventory increases by between one and two percent each year.<sup>44</sup>

So heated debates about new prospective restrictions<sup>45</sup> fail even to mention ninety-nine percent of the supply. And it is no wonder. Because this “remainder problem” is far more formidable than the importation and manufacturing cheats already discussed. The next section discusses what it means to engage it.

### III. DEFIANCE AND THE REMAINDER PROBLEM

#### A. *The Defiance Impulse*

Three hundred million guns is more than a logistical problem. If it were just a matter of saying “please turn them in,” the only issue would be having enough trucks and personnel to haul them to the crusher. But this problem is deeper. Many Americans believe guns are important tools for protecting their lives and liberty and have a deep cultural attachment to them.<sup>46</sup> Many people—perhaps many millions<sup>47</sup>—would view gun confiscation the same way others would view *de jure* racial or gender discrimination, or an abortion ban.<sup>48</sup> How would these people behave in the face of laws that

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al. eds., 2002).

43. FIREARMS RESEARCH & DATA COMM'N, *supra* note 9, at 58.

44. On average there are 4.5 million new guns sold each year against an existing inventory of around 300 million. *Id.* at 73.

45. *See* Jacobs & Potter, *supra* note 5, at 84 (discussing the proposals of Brady II).

46. David Kopel elaborates on this. KOPEL, *supra* note 22, at 381–82, 387.

47. *See* George F. Will, *Bringing Out the Big Guns*, WASH. POST, Oct. 14, 2004, at A31. Will compares membership in the NRA, what he calls a “coast-to-coast nation within the nation,” to other organizations:

AARP (formerly the American Association of Retired Persons), with nearly 36 million members, is the nation's third-largest organization (behind the Catholic Church and the American Automobile Association). The NRA has “only” 4 million adult members. Thirty states and the District of Columbia have smaller voting-age populations. And whereas slightly more than 50 percent of age-eligible Americans have voted in recent elections (51 percent voted in 2000), about 95 percent of NRA members vote. Liberals who lament voter apathy should be careful what they wish for.

Each of the 4 million pays \$35 in annual dues. Polls indicate that another 14 million Americans think that they are NRA members and an additional 28 million think they are affiliated in some way with the NRA because of their membership in one or more of the 35,000 shooting and hunting clubs.

*Id.*

48. *See* Nicholas J. Johnson, *Principles and Passions: The Intersection of Abortion and Gun Rights*, 50 RUTGERS L. REV. 97 (1997).

seriously pursued the supply-side ideal? What impulses would drive their behavior?<sup>49</sup>

One is the familiar, only-outlaws-will-have-guns anxiety: that sweeping restrictions will shift the distribution of guns sharply toward people who are not worried about breaking the law—crack dealers, the Aryan Brotherhood, and others with a highly inelastic demand curve for firearms and an existing pile of guns they will not turn in.<sup>50</sup> This, the argument goes, will make people who comply with confiscation laws softer targets for emboldened “bad men.”<sup>51</sup> Otherwise upstanding citizens who reason this way will be tempted to defy confiscation laws.

Blunting this temptation would require a mixture of coercion (tough criminal penalties for possessing the contraband guns) and convincing people that a real alternative is in place. This means convincing people that collective security measures are up to the task, convincing them at some level to trust government with their lives. Just saying it illustrates the problem.<sup>52</sup>

There are strong arguments that our political system is rooted in distrust of government, and some people will view resistance to gun confiscation as a natural extension of this healthy distrust. But much of this distrust is prosaic, based on practical observations about the design limitations of government security forces. Police of whatever stripe are mainly after-the-fact investigative bodies—no one really expects them to interrupt violent crimes in progress.<sup>53</sup> Even the attempt would require many times more security forces than we have, operating in ways that many of us might dislike, plus lots of dumb luck. This *ordinary* design incompetence helps explain

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49. What I reflect here is anecdotal but from a significant data base. Over the past twenty years, I have pursued these questions in countless conversations with gun people at shooting clubs, shooting competitions, gun shows, gun shops, and NRA meetings. What I attempt to reflect here is the distilled conventional wisdom of our gun culture.

50. Polsby, *supra* note 25, at 57–58.

51. David Kopel argues this was the result in Jamaica where a sweeping ban was enacted. KOPEL, *supra* note 22, at 257–72. It would substantially curtail additions to the long list of publicly reported self-defense shootings on Clayton Cramer’s Civilian Self-Defense Blog, <http://www.claytoncramer.com/gundefenseblog/blogger.html> (last visited Nov. 19, 2008).

52. For a detailed assessment that trusting either the state or federal government for personal security is a bad bet, see George A. Mocsary, *Explaining Away the Obvious: The Infeasibility of Characterizing the Second Amendment as a Nonindividual Right*, 76 *Fordham L. Rev.* 2113, 2158–59, 2168–69 & nn.507 & 511 (2008).

53. Courts have consistently held that police have no obligation to protect anyone in particular and cannot be sued for failure to do so. *See, e.g., Riss v. City of New York*, 240 N.E.2d 860 (N.Y. 1968).

why tens of millions of rational people have acquired the same types of weapons that police use to confront criminals.<sup>54</sup> Some of these people will be tempted to keep their guns in defiance of commands to turn them in.

People might make the same decision on fears, perhaps exaggerated, of *episodic* design incompetence. A familiar example is the public emergency, the risk of which has prompted the National Governors Association to complain that heavy use of the National Guard in war-fighting leaves states vulnerable in events of natural disaster or civil unrest.<sup>55</sup> These episodes are relatively rare, and we might bet that many people would not defy gun laws on fears of such low probability events.<sup>56</sup>

But other prompts are more common, like the basic inadequacy of resources that caused New Orleans police one year after Hurricane Katrina to respond twelve hours late to 911 calls,<sup>57</sup> or the town council of Brownsville, Pennsylvania to layoff its entire police force.<sup>58</sup> These limitations are no surprise to many rural people, who live far enough away from police that public security is always more abstract than real—people for whom defiance might be the norm.

Another category of distrust is harbored by people who think they have not gotten a fair shake from local, state, or national governments. Robert Cottrol and Raymond Diamond's examination of the Second Amendment from a minority perspective reflects some of this distrust.<sup>59</sup> More recently, the complaints of some Katrina survivors, and members of urban communities in the wake of police shootings of unarmed men, suggest that some governments have earned not just distrust, but also contempt.<sup>60</sup> People pushed to this

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54. See SMALL ARMS SURVEY 2007, *supra* note 21, at 61.

55. See Jacques Billeaud, *Some Governors Worry Plan Could Stretch Guard Too Thin*, DALLAS MORNING NEWS, May 16, 2006 (reporting that a group of governors expressed worry about Guard availability for domestic emergencies), available at <http://www.dallasnews.com/sharedcontent/APStories/stories/D8HKJU181.html>.

56. The competing impulse is that on the rare occasions where need for the weapon arises, the perceived cost of not having it is extremely high.

57. Shaila Dewan, *New Orleans's New Setback: Fed-Up Residents Giving Up*, N.Y. TIMES, Feb. 16, 2007, at A1.

58. Brownsville Borough's financial crisis reached such proportions that it recently had to lay off police and all but one borough employee. Cindi Lash, *Brownsville's Last Stand: Struggling Fayette County Town Furloughs Its Entire Work Force, Except for Its Part-time Municipal Manager*, PITT. POST-GAZETTE, Dec. 17, 2006, at B1.

59. Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309 (1991).

60. Whether one is inclined toward a collective or an individual solution to the problem is influenced by factors deeper and more complicated than I can

view will not suddenly come to believe in benevolent government to such a degree that they will hand over the weapons they believe (accurately or not) keep them safe.

Finally, the evident collective action problem presented by the supply-side model should fuel defiance of confiscation. Effective supply restrictions require the selfless cooperation of many tens of millions of self-interested citizens and stellar performance by layers of government employees. The risk seems real that many Americans will not cooperate, starting with the truly bad among us. Self-help, on the other hand, requires a gun, competency with it, good judgment, and some amount of luck—variables that seem more subject to personal control. People who reason this way should selfishly but rationally decide to resist the collective experiment.

I have tried here to illustrate the kind of thinking that might cause people to resist serious moves toward the supply-side ideal. A real test, though, requires actual legislation and assessment of responses to it. Aggressive experiments with supply-side legislation and gun registration supply this test.

### *B. Defiance in Practice*

Data tracking defiance of registration and prohibition internationally, and similar domestic experiments, provide a basis for projecting how people will react to aggressive supply-side rules. The most notable domestic experiment with prohibition was in Washington, D.C. Until the challenge culminating in *Heller*, the District of Columbia banned handguns and required long guns to be kept disassembled and locked away from their ammunition.<sup>61</sup> Overall, this was the most aggressive set of supply restrictions in the country.<sup>62</sup> There is no dispute that handgun prohibition failed to stop gun crime in D.C.<sup>63</sup> The District has been perennially at or close to the top of the list for gun crime in American jurisdictions.<sup>64</sup>

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evaluate. What I can say is that the choice is not entirely logical. Part of it certainly is cultural. People who are more comfortable with collective solutions to life's challenges might naturally be less worried about turning over individual security to a collective fix.

The individualist response seems grounded in a distrust of collective action or a perception that the collective fix in this case is simply impractical. Part of this may be projection an analysis something like, "I would not turn mine in, so I must believe that many others would not turn in theirs either and the collective fix will fail in implementation."

61. D.C. CODE ANN. §§ 7-2502.02, -2507.02 (LexisNexis 2001).

62. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2818 (2008).

63. *See Jacobs & Potter, supra* note 5, at 88 n.29 (citation omitted) (noting that D.C. leads the nation in percentage of "handgun related homicides").

64. Gun rights activists say it confirms the idea that demand will find

The efforts of other restrictive U.S. jurisdictions tell more about the defiance impulse and the character of the remainder problem. New York City imposes stringent requirements on purchase and ownership of handguns. Still, handgun crime persists. New York City Mayor Michael Bloomberg's straw purchase "stings" confirm that tough municipal laws alone are not enough.<sup>65</sup> The source of some of the contraband guns in Bloomberg's sights come from scofflaw dealers from other states.<sup>66</sup> But this is literally only a basketful of guns. The number of illegal guns in New York City is in the range of two million.<sup>67</sup> This is in a region where the overall rate of gun ownership is lower than average and gun culture is less robust.<sup>68</sup> The roughly two million guns owned by the residents of New York City are from sources much more disparate than rogue dealers.<sup>69</sup> Some of these guns are new, but an inventory this large suggests that many New Yorkers have had guns, have been acquiring guns, and deciding to keep guns illegally for a long time. This type of defiance should be stronger in most other parts of the

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supply. Supporters of strict gun control argue that the D.C. approach is a failure because national policy has failed to keep pace. Guns reach D.C., goes the argument, from less stringent jurisdictions. This suggests that cheating is a significant problem for supply-side restrictions. But is it inevitable that cheating will overwhelm stringent controls?

65. See, e.g., Posting of Ray Rivera to CityRoom, <http://cityroom.blogs.nytimes.com/2008/02/15/bloomberg-on-illegal-guns-and-rampages> (Feb. 15, 2008, 12:10 EST).

66. *Id.*

67. It is estimated that as many as two million illegal guns were in circulation in New York City in 1993. Ninety percent of the guns seized in New York City that year were originally purchased in other states. There are no precise measurements of what proportion of New York's total contraband inventory are recent imports versus classic remainders. See U.S. DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PROGRAMS, GETTING GUNS OFF THE STREETS (1994-2008), [http://ojjdp.ncjrs.org/pubs/gun\\_violence/profile19.html](http://ojjdp.ncjrs.org/pubs/gun_violence/profile19.html) (last visited Nov. 19, 2008).

68. Gun ownership varies significantly in the United States with the Northeast lagging behind the Southeast and the West. See Mark S. Kaplan & Olga Geling, *Firearm Suicides and Homicides in the United States: Regional Variations and Patterns of Gun Ownership*, 46 SOC. SCI. MED. 1227, 1232 (1998). In many regions of the country, there are multiple retail outlets for firearms ranging from Wal-Mart, to sporting goods chains, to mom-and-pop gun shops. By contrast, it is nearly impossible to find a retail gun seller in New York City.

69. The roughly two million illegal guns in New York City have been there for some time. Some will be pure black-market guns. Some might have been owned for decades. Some will have come into the city as the property of people who acquired them legally in other jurisdictions and then moved to New York where, either knowingly or not, they are breaking the law by possessing the gun.

country, where gun culture runs deeper.<sup>70</sup>

The city of Chicago also has very restrictive gun laws.<sup>71</sup> Still, between 1999 and 2003, Chicago averaged about 10,000 illegal gun confiscations per year.<sup>72</sup> In one particular high-crime neighborhood studied by Cook et al., there was approximately one illegal gun sale per thirty people each year.<sup>73</sup> Stripping out children from the count, this rate seems sufficient to achieve saturation in less than a generation.

The rates of non-compliance with state assault weapons bans tell a similar story. James Jacobs and Kimberly Potter report:

In recent years, several states and municipalities passed laws mandating the registration [and subsequent prohibition] of assault rifles. These laws failed miserably, primarily due to owner resistance. In Boston and Cleveland, the rate of compliance with the ban on assault rifles is estimated at 1%. In California, nearly 90% of the approximately 300,000 assault weapons owners did not register their weapons. Out of the 100,000—300,000 assault rifles estimated to be in private hands in New Jersey, 947 were registered, an additional 888 were rendered inoperable, and four were turned over to the authorities.<sup>74</sup>

Data from international experiments with gun prohibition and registration illustrates a powerful and nearly universal individual impulse to defy gun bans. With data from seventy-seven countries, the International Small Arms Survey reports massive illegal parallel holdings with an average defiance ratio of 2.6 illegal guns for every legal one.<sup>75</sup> This average is pulled down by rare cases like Japan.<sup>76</sup> But even the Japanese, whose society David Kopel casts as the polar opposite of our gun culture,<sup>77</sup> experience “unregistered

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70. See *supra* note 68.

71. See James Oliphant, *The Mud Hits Chicago: The Murder Rate in the City is up 18 Percent Over Last Year. Republicans and Attack Ads are Trying to Put the Blame on Barack Obama. We Examine the Record*, CHI. TRIB., Aug. 17, 2008, at 1.

72. See, e.g., Philip J. Cook, et al., *Underground Gun Markets* 4–5 (Nat'l Bureau of Econ. Research, Working Paper No. 11737, 2005), available at <http://www.nber.org/papers/w11737>.

73. *Id.* at 6.

74. See Jacobs & Potter, *supra* note 5, at 106 (citations omitted).

75. See SMALL ARMS SURVEY 2007, *supra* note 21, at 55

76. *Id.* at 55 & n.5.

77. David Kopel's comparative study of firearms laws suggests that this peculiar U.S. demand is cultural. He argues that the Japanese policy is unworkable in the United States because Americans are attached to firearms in a way the Japanese are not, and they enjoy constitutional protections that bar the regulatory intrusions necessary to enforce the Japanese model. KOPEL,

[gun] holdings . . . one-quarter to one-half as large as registered holdings.”<sup>78</sup> Extrapolating to the United States, a ratio of one-to-four still leaves us with sixty million guns held in defiance. That is more illegal guns than any other nation has in total.<sup>79</sup> And this is based on the extreme low-end defiance rate. A more realistic estimate, taking into account our robust gun culture, is something above the international average, and that yields an estimate of well over 200 million guns held in defiance.

This level of defiance cannot be explained by the observation that criminals have an inelastic demand curve.<sup>80</sup> A large slice of the ordinary citizenry seems to be operating under the same curve. Across the board, for countries large and small, developed and emerging, a strong defiance impulse is evident.

In England and Wales there were 1.7 million legally registered firearms in 2005; illegal, unregistered guns were estimated as high as 4 million.<sup>81</sup> The Chinese reported 680,000 legal guns in 2005, with estimates of nearly 40 million illegal guns.<sup>82</sup> The German police union estimates that Germany has “about 45 million civilian guns: about 10 million registered firearms; 20 million that should be registered, but apparently are not; and 15 million firearms—such as antiques . . . and black-powder weapons . . . that do not have to be registered.”<sup>83</sup>

The German experience also tells us something about the staying power of defiance. Registration was introduced in Germany in 1972 “when the nation’s civilian holdings reportedly totalled [sic] 17–20 million firearms.”<sup>84</sup> Only 3.2 million of these guns were registered. “In the thirty-five years since then, roughly 8 million additional firearms were legally acquired, accounting for the rest of the registered guns thought to exist today.”<sup>85</sup>

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*supra* note 22. Beyond this, he suggests there is something peculiar about American culture that generates overall much higher demand for firearms in the United States than in Japan. *Id.* Consider our constitutional enshrinement of violence as a control on federal power in the Bill of Rights (on any view of it, the Second Amendment is about *someone* retaining tools of violence to resist some sort of impairment to liberty), powerful gun lobby, formative war of rebellion, transformative civil war, and frontier/wild west mythology.

78. SMALL ARMS SURVEY 2007, *supra* note 21, at 55.

79. *Id.* at 47 (noting that the country with the next-highest number of firearms, India, is estimated to have no more than sixty million guns).

80. Polsby, *supra* note 25.

81. SMALL ARMS SURVEY 2007, *supra* note 21, at 50.

82. *Id.* at 47, 50.

83. *Id.* at 51.

84. *Id.*

85. *Id.* “Similar totals come from scaling up regional estimates. . . . [Bavaria] has some 1.5 million legal and 3 million unregistered firearms.” *Id.*

With close to 7 million registered guns, Canada is estimated to have about 10 million unregistered guns.<sup>86</sup> Brazil reports nearly 7 million registered guns and estimates 15 million unregistered.<sup>87</sup> India reports fewer than 6 million registered guns against an estimated 45 million illegal ones. France has less than 3 million guns registered and estimates nearly 20 million unregistered. Mexico reports fewer than 5 million registered with about 15 million unregistered guns. Jordan has 126,000 registered guns and an estimated 500,000 illegal ones. Sudan reports about 7,000 registered and 2.2 to 3.6 million illegal ones.

While there are exceptions like Japan, where illegal guns are a *fraction* of those legally registered, nearly every country surveyed produced estimates of illegal guns that are a *multiple* of legal guns.<sup>88</sup> Extrapolation from these rates of defiance to projections about the United States also must account for our unparalleled gun culture.<sup>89</sup> Extrapolating ninety to ninety-nine percent defiance from state or municipal assault weapons bans seems too aggressive. But, conservatively, the international data show that we should expect three or more people to defy confiscation for every one who complies.

Nothing else in our experience contradicts these signals. Many people evidently believe guns protect against things they fear more than criminal sanctions. The risk-reward calculation that pushes ordinary people to obey a wide array of criminal laws seems different here.<sup>90</sup>

The American attachment to the gun is exceptional.<sup>91</sup> We own

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86. *Id.* at 56 (referencing fig.2.2)

87. *Id.* (providing gun ownership data for Brazil as well as India, France, Mexico, Russia, and South Africa, among others).

88. *Id.*

89. “[A]ny discussion of civilian gun ownership must devote disproportionate attention to the United States, if only because of the scale of its gun culture.” *Id.* at 46. *See also id.* at 59 (contrasting “England and Wales, [where] a strong anti-gun culture suppresses demand” with the United States and its “permissive gun laws” and “generally positive gun culture”).

90. One explanation for the defiance of assault weapons bans is that the people who made the initial decision to buy an assault rifle are the more “hard core” gun owners and therefore predisposed to flout confiscation laws. If this intuition is true, the important question is how many of these hard core gun owners are there? Is it just the four million NRA members? Does it include the forty million or so fellow travelers? *See Will, supra* note 47. What about people who would not dream of joining the NRA but might think it’s rational to hold back a gun for a stormy day?

91. In this context we can understand both the slippery slope fears of the NRA and the avowed strategy of gun control organizations. Those who desire Japanese style gun controls have said that the goal will only be achieved incrementally. *See SHIELDS, supra* note 11. This generates fierce battles pressed by gun rights groups who perceive each additional step as one more

close to half the world's private firearms<sup>92</sup> and buy half the world's output of new civilian guns each year.<sup>93</sup> This demand and cultural attachment highlight an obstacle to the supply-side ideal that may be unique to the United States. Whatever courts say about the Second Amendment, a majority of Americans believe they have a right to own a gun.<sup>94</sup> This belief, as much as any court pronouncement, will drive defiance of confiscation. Even if *Heller* is ultimately nullified, the opinion itself, along with the powerfully reasoned circuit court opinions in *Parker v. District of Columbia*<sup>95</sup> and *United States v. Emerson*,<sup>96</sup> are more than sufficient to rationalize civil disobedience by people who ultimately would have defied confiscation anyway. If the Supreme Court fails to incorporate the individual right as a limitation on state lawmaking, the capacity of individual states to implement confiscation laws still seems near zero, with the defiance impulse of gun-owning citizens validated by recognition of a federal right, and few people bothering with the federalist details.

The risk of noncompliance in this context is different from the run-of-the-mill cheating that might afflict any prohibition legislation. This means we must expand our thinking about noncompliance beyond the idea that criminals will resist confiscation. What does it mean that otherwise law-abiding people will hold back some portion of the gun inventory in defiance of sweeping supply-side restrictions? What consequences should we anticipate?

### C. *Defiance Implications: From Remainder to Market*

How would the remainder impact the supply of crime guns under a scheme of prohibition? Strictly speaking, prohibition would render all remainder guns "crime guns." But if guns retained in defiance were mainly hidden away by modern Walter Mittys with

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down the slippery slope.

92. SMALL ARMS SURVEY 2007, *supra* note 21, at 46.

With less than 5 per cent [sic] of the world's population, the United States is home to roughly 35–50 per cent [sic] of the world's civilian-owned guns . . . . Of some eight million new firearms manufactured annually around the world, roughly 4.5 million are bought by the people of the United States. . . . [A]ny discussion of civilian gun ownership must devote disproportionate attention to the United States, if only because of the scale of its gun culture.

*Id.* (citation omitted).

93. *Id.*

94. Joan Biskupic, *Do You Have a Legal Right to Own a Gun?*, USA TODAY, Feb. 27, 2008, at 1A.

95. 478 F.3d 370 (D.C. Cir. 2007).

96. 270 F.3d 203 (5th Cir. 2001).

delusions of Russian invasions, they might be fairly well removed from the active inventory and unlikely to end up the tool of a drive-by shooting. We could distinguish these as gray market<sup>97</sup> guns, subject to periodic or continuing amnesty programs, allowing relatives, survivors, or caretakers to bring in guns without penalty. If that is the primary character of noncompliance, then perhaps it is not so formidable a problem. But this view ignores too much. First, gray-market gun owners would not entirely control whether their guns moved from the gray to the black market. The problem is theft. Around 500,000 guns are stolen each year.<sup>98</sup> For the sake of a rough estimate, stipulate 75 million guns are turned in on prohibition day.<sup>99</sup> The remainder rounds down to about 200 million guns.<sup>100</sup> Assuming gun thefts of about 500,000 per year,<sup>101</sup> this inventory will take about 400 years to exhaust.<sup>102</sup>

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97. "Gray market" describes guns that are legal before confiscation day and retained in defiance by the eccentric "Uncle Charlies" of the world, people who will keep a gun hidden away as a small act of rebellion. On one view, these guns are not as worrisome as those kept by younger, more aggressive men. As long as they remain with Uncle Charlie they are unlikely to be used in crime. Uncle Charlie, of course, would still be guilty of a status crime just for owning the gun.

98. FIREARMS RESEARCH & DATA COMM'N, *supra* note 9, at 74. Yearly gun theft estimates vary based on the methodology. A government survey counting "incidents" of firearms thefts estimated 341,000 thefts, but failed to ask how many guns were stolen per event. Some private surveys have calculated fewer incidents, but assumed that more than one gun was stolen. Those methodologies produce estimates approaching 600,000 firearms stolen each year. The most aggressive estimate (taking high estimates for both "incidents" and "guns per incident") puts the number of stolen guns at nearly 1.4 million per year. See George J. Benston & Frank J. Vandall, *Legal Control Over the Supply of Handguns: An Analysis of the Issues, With Particular Attention to the Law and Economics of the Hamilton v. Beretta Lawsuit Against Handgun Manufacturers*, 26 PACE L. REV. 305, 360–62 (2006).

99. This assumes U.S. defiance only at the average international rate of 2.6 illegal guns to every legal one. It is fair to expect that the robust gun culture of the United States would produce a higher rate.

100. If we assume 300 million guns and ninety percent noncompliance per the assault weapons experience, then we would start with 270 million. If we assume just the ratio of another first-tier industrialized nation like Germany, the remainder is around 200 million.

101. FIREARMS RESEARCH & DATA COMM'N, *supra* note 9, at 74.

102. There are other ways to whittle down this estimate. Assuming many guns are kept unlocked, perhaps universal confiscation will prompt refuseniks to lock or secret away their guns in a fashion that will reduce the number of thefts. As time goes on, assuming no black market manufacturing or imports, values will increase and owners should take greater precautions. However, they also will face greater temptations to sell these increasingly valuable assets. Plus, friends or relatives who have knowledge about and access to the guns will

Certainly this calculation is simplistic. Confiscation is likely to be more of a rolling phenomenon. When yesterday's refusenik dies, in some cases his survivors will find the gun and turn it in. Some refuseniks will get caught trying to transport their guns. Some will use their guns in self-defense. If they are caught, the guns will be confiscated. So 400 years to "exhaust" the inventory may be too high an estimate.

On the other hand, we estimated the inventory low. The worst case of ninety percent (or more) noncompliance raises the starting inventory significantly.<sup>103</sup> Plus, the turn-in rate for holders of the five million guns that are stolen every decade should be lower than average because those guns more likely have moved from the gray, firmly into the black market. Moreover, saying that the remainder will take 400 years to "exhaust" implies an endpoint and a resolution, when really, exhausting the inventory only means that gray-market guns have moved from the attics of eccentric old men fully into the illicit marketplace.<sup>104</sup>

What should we project about the people willing to buy and sell stolen guns? Maybe they are no different from our refuseniks—*viz.* "honest citizens" who decide to resist gun confiscation for reasons they consider rational or even noble, civil disobedience.<sup>105</sup> Maybe there is no reason for extra worry about the shift of the illicit gun inventory from gray to black markets. But if the black market is more willingly accessed by more worrisome people—people who are younger, more desperate than Uncle Charlie, who will carry the illegal gun, trade it off to other dangerous people—then the shift

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face greater temptation to take them and sell the guns into the black market.

103. See Jacobs & Potter, *supra* note 5, at 105–08 (describing in excess of ninety percent defiance of local and state gun prohibitions).

104. Assuming the rate of theft remains roughly constant, the raw number of thefts would obviously decline as the gray-market inventory declined over time. So it likely would take longer than 400 years to "exhaust" the gray-market inventory. However, by that time (and perhaps much sooner), depending on intervening enforcement measures, the line between gray and black markets might easily have disappeared.

105. See, e.g., Seth Mydans, *California Gun Control Law Runs Into Rebellion*, N.Y. TIMES, Dec. 24, 1990, at A1 ("Many gun owners are calling their defiance an act of political protest in the tradition of the Rev. Dr. Martin Luther King, Jr. and Mahatma Gandhi. . . . As a one-year registration period draws toward an end on Dec. 31, only about 7,000 weapons of an estimated 300,000 in private hands in the state have been registered."). Similar movements might be grounded on popular understanding of the Second Amendment, supplemented by opinions like *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001), along with *Heller* and the opinions leading up to it. See, e.g., *Parker v. District of Columbia*, 478 F.3d 370 (D.C. Cir. 2007) (arising from the same fact pattern as *Heller*); *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008).

from gray to black leaves us much worse off.<sup>106</sup>

Theft is only one route from the gray to the black market. Some guns, initially secreted away for some imagined emergency by previously lawful owners, will filter into the black market as prices rise. It is difficult to project the rate of these sales. If, like buyers ahead of the first assault weapons ban,<sup>107</sup> these refuseniks think their guns have a peculiar utility for which there are no perceived good substitutes, then the rate of these sales should be low. But there is a complicating factor.

In many cases, spouses, children, relatives, friends, and, ultimately, survivors will know about and have access to these refusenik guns. These people, who did not initially make the risk calculation to retain the gun in defiance, may share our refusenik's valuation, in which case they should make similar decisions about retaining it. But many of them will have different valuations and different appetites for risk. As a result, some of these shared-access and legacy guns should be both surrendered (if there is an ongoing amnesty program) and sold into the black market, at higher rates than original refusenik guns. This means that the gray-market inventory should shrink faster than we projected purely through thefts.

This raises an opportunity. Within the life span of people present on confiscation day, nearly every contraband gun will become a legacy gun—i.e., it will come under the control of the survivors and friends of our original refuseniks. If the survivors surrender this contraband at a very high rate, then the remainder inventory will shrink substantially.<sup>108</sup>

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106. In a study of the illicit gun market in Chicago, Cook et al. concluded that there is notable friction (e.g., problems of trust and verification) in the black market for guns that street gangs are uniquely positioned to navigate. Cook et al., *supra* note 72, at 12–18. If this is right, then eradicating the illegal market with prohibition laws should enhance such street gangs' position as market brokers.

107. An early study of responses to assault weapons prohibitions observed that lawful owners of grandfathered assault weapons did not sell them even though (1) it was generally legal to do so and (2) the market value of the guns was boosted as a result of the prospective ban. The authors, assuming rational self-interested behavior, predicted that owners of these guns would dump them into either the legitimate or the black market at a substantial profit. The absence of profit taking suggests that these legal owners assigned a peculiar utility to these guns not provided by available substitutes. See JEFFREY A. ROTH & CHRISTOPHER S. KOPER, U.S. DEP'T OF JUSTICE, IMPACTS OF THE 1994 ASSAULT WEAPONS BAN: 1994–96 (1999), available at <http://www.ncjrs.gov/pdffiles1/173405.pdf>.

108. Germany's residual illegal gun inventory has remained steady since 1979. See SMALL ARMS SURVEY 2007, *supra* note 21, at 51, 56 (referencing

Measuring this possibility depends on what we think about the defiance decision and the people who make it. What incentives drive the decisions of people whose defiance impulse renders them felons on confiscation day? What about the people around them and the ones who come after? What risks and bets will influence people to defy or comply with confiscation?

*D. Refusenik Bets*

The classic refusenik is a legal gun owner before confiscation day whose decision to defy the law makes him a felon a day later. Thinking of refuseniks purely in terms of eccentric Uncle Charlie, who stubbornly keeps the rusty gun he brought back from the war, underestimates the problem. We know for sure that tens of millions of people possess guns<sup>109</sup> and thus believe guns have some utility for sport or self-defense. Those motivated to own guns purely for sport and who perceive a gun as having little utility or some actual disutility in keeping them safe from violence should be unwilling to take much risk of criminal prosecution in order to retain their firearm. Those who think a gun has some self-defense utility will see the choice as endangering their lives to some degree versus accepting some ongoing risk of detection and criminal penalties. On this balance, how many rational people really will defy confiscation?

Some people will defy confiscation out of an exaggerated sense of the gun's utility. Some commentators have urged that the decision to keep a gun, even where lawful, stems from an exaggerated sense of the gun's utility.<sup>110</sup> If this miscalculation is pervasive within gun culture, then the number of gun owners who are prompted to defiance by that same miscalculation may be substantial. Contributing to this decision is the seemingly reasonable bet that actually using the gun for self-defense presents a low practical risk of detection.

Consider the scenarios our refuseniks might imagine as they decide whether to break the confiscation law. The highest-risk scenario is using the gun in self-defense under circumstances where witnesses and police are quickly on the scene. There, the refusenik gambles on the discretion of prosecutors, judges, or a jury willing to nullify the gun legislation, or resigns himself to the adage "better to be tried by twelve than carried by six."

But from there on, the risk declines. Since the vast majority of defensive gun uses do not result in shots fired,<sup>111</sup> refuseniks can

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fig.2.2).

109. See Jacobs & Potter, *supra* note 5, at 110.

110. See, e.g., Cook et al., *supra* note 72, at 7–8.

111. Philip J. Cook et al., *The Gun Debate's New Mythical Number: How*

plausibly bet that their gun will render significant defensive utility without being detected by authorities. Some people may operate on the more risky assumption that discharge of the gun will not be detected. The rural hiker might imagine a self-defense shooting she just walks away from.<sup>112</sup> Others will proceed on the potentially less risky stormy-day rationale: on a truly stormy day, when you really need a gun (episodes like the Los Angeles riots, or the aftermath of hurricane Katrina),<sup>113</sup> the authorities might very well be irrelevant.<sup>114</sup> On these bets, rational people might anticipate enough utility from their contraband guns to justify the risk of defying confiscation.

As confiscation matures, later generations of potential refuseniks (survivors of the original defiant class, and a new population of otherwise “honest” citizens who have otherwise acquired contraband guns) will incorporate new information into their calculations. If confiscation produces quick and dramatic reductions in gun crime, it will make less sense to risk buying or keeping a contraband gun. But if confiscation tracks the curve of similar efforts in other countries and actually correlates with an increase in violent crime,<sup>115</sup> then many will calculate that the state has not provided an adequate substitute for private firearms, and they will more likely defy confiscation.

On the other hand, it is likely that the class of people who attach high enough utility to the illicit gun to risk jail time should treat it like the more valuable commodity it has become. They should guard it more closely against theft than before. This is particularly true for the class of stormy-day guns. On the view that these stormy-day scenarios are uncommon, the deep storage of these

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*Many Defensive Uses Per Year?*, 16 J. POL'Y ANALYSIS & MGMT. 463, 467 (1997); Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense With a Gun*, 86 J. CRIM. L. & CRIMINOLOGY 150, 185 (1995).

112. Smith & Wesson latches onto this imagery. Its back-page advertisement in *Women & Guns* magazine shows a woman hiking in the desert with the caption, “I hike alone, I bike alone, I climb alone. But with My Smith & Wesson, I’m never alone.” *WOMEN & GUNS*, Jan.–Feb. 2006, at back cover.

113. Congress has recognized the idea and responded with the Disaster Recovery Personal Protection Act of 2006, 42 U.S.C.A. § 5207 (Supp. 2008) (prohibiting confiscation of personal firearms during emergencies). This Act was an explicit reaction to New Orleans municipal government confiscations of personal firearms in the aftermath of Hurricane Katrina.

114. The “stormy-day” scenario might extend quite far beyond episodes of foul weather. The *New York Times* reports that more than one year after the hurricane, New Orleans residents waited overnight for police response. See Dewan, *supra* note 57.

115. See Kates & Mauser, *supra* note 12, at 655.

guns may be nearly the equivalent of removing them from circulation, at least temporarily. Of course, when the owner dies and someone new gets the gun, its trajectory will shift based on the valuations and bets of the new owner.

A less sanguine view is that while sitting around awaiting a storm, these guns still are subject to theft and sale as their market value increases in the face of a constricted supply. Still, the general characteristics of these guns diminish this danger to some degree. Stormy-day guns, reserved for public security breakdowns versus private problems like the random burglar, are more likely to be long guns. They should remain in the shadows, stowed in the attic or buried in the garden. If this is what defiance means, then perhaps this slice of the remainder is not enough of a problem to render confiscation ineffective. Even though some will slip back into circulation as rising prices prompt sales into the black market, the special utility owners and their survivors attach to these guns should be sufficient to keep most of them out of the broader black market.

This might justify the policy bet that confiscation can overcome the remainder problem. Except that what we really care about for purposes of gun crime is not the riot shotgun or the semiautomatic rifle hidden away in anticipation of public disorder. Gun crime is a handgun problem.<sup>116</sup> And that seems different.<sup>117</sup>

While the handgun would be no match for the rifle in the various scenarios anticipated by the stormy-day refusenik, it has higher utility in situations where quick access and close-quarters ergonomics are higher values. Refuseniks who keep handguns in defiance will be thinking more about tense moments of private self-defense than stormy days of public insecurity. People who make these bets will keep their tense-moment handguns more accessible than any stormy-day long guns. These handguns will be more

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116. Indeed, the most predictable stormy-day scenario is the confiscation attempt itself. Some stormy-day refuseniks will be in the “cold dead fingers” cohort of resisters. For some portion of them, aggressive supply-side legislation will cross the line in the sand. Some have suggested that the prohibition measures required to make the supply-side model work will produce very bad things in the form of active resistance (as distinguished from passive disobedience). Kopel & Little, *supra* note 7, at 552. We cannot know how real this possibility is, but we cannot say its chance is zero or that it would be just a minor problem.

117. If the Supreme Court ever entertains line drawing between constitutionally protected long guns and handguns (subject to more intense regulation or perhaps even prohibition), it would encourage the choice of long guns for in-home self-defense. Since long guns are ballistically superior to handguns, home defense and accidental shootings should result in more fatalities.

exposed to theft or shared access dispositions than stormy-day long guns. And these guns, handguns, are the primary guns used in crime.<sup>118</sup>

But at what rate will refuseniks really defy confiscation for the benefits of tense-moment handguns? From the start, these bets seem riskier. In contrast to the stormy day, where public security forces are overwhelmed or irrelevant, tense moments of high handgun utility are the everyday problems assigned to the police.<sup>119</sup>

Keeping a contraband handgun in anticipation of fighting off such private threats requires seemingly riskier bets that the defensive gun use will go undetected, that the state will not prosecute, or that peers will not convict the refusenik for defending himself with an illegal gun.<sup>120</sup> These seem like decidedly bad bets. So maybe the remainder problem really is less substantial for handguns. Maybe people will comply with handgun confiscation at a very high rate.

Our best estimates suggest that people have widely retained handguns in defiance of municipal laws banning them.<sup>121</sup> It is tempting to classify this as irrational behavior, until we consider the character of typical defensive gun uses. We know from the work of Gary Kleck and others that defensive gun uses (“DGU”s) overwhelmingly involve simply brandishing the gun with no shots fired.<sup>122</sup> According to Kleck and others, these DGUs number in the millions per year, suggesting that we have dramatically underestimated the utility of private firearms.<sup>123</sup>

It is rational, then, for our handgun refusenik to retain his gun in defiance, with realistic expectations of extracting utility from it in a tense moment, without ever being detected by authorities. One consequence is that the rational refusenik will be very reluctant to

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118. See U.S. DEPT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, HOMICIDES BY WEAPON TYPE, <http://www.ojp.usdoj.gov/bjs/homicide/tables/weaponstab.htm> (last visited Nov. 11, 2008) (showing that handguns are used in gun homicide two to three times more often than other guns).

119. Bruce Gross, *Officer Down: Characteristics of Cop Killings*, FORENSIC EXAMINER, Spring 2008, at 15.

120. Even people who have never heard of jury nullification appreciate the power of an appeal to the humanity of one’s neighbors in the face of failure by the state to protect citizens from the violent men among us.

121. See *supra* text accompanying notes 74–89 (discussing national and international defiance rates).

122. Kleck & Gertz, *supra* note 111, at 173.

123. *Id.* at 164. Cook et al. are skeptical of Kleck’s conclusions, even though they produced similar estimates using the same widely accepted methodology. Cook et. al., *supra* note 111, at 465. For a chronicle of publicly reported DGUs, see generally Civilian Gun Self-Defense Blog, <http://www.claytoncramer.com/gundefenseblog/blogger.html> (last visited Nov. 11, 2008).

actually fire the gun. As a result, an entire category of shootings—e.g., those like the mistaken shooting of a Japanese exchange student in Louisiana by a homeowner who mistook him for a burglar—should be less likely to occur.<sup>124</sup>

It may be a positive consequence of confiscation that refuseniks are more reticent to pull the trigger than before, but that does not diminish the broader remainder problem. Rational people (not just first-generation refuseniks) will keep handguns in defiance of confiscation laws.<sup>125</sup> Anticipating real utility from brandishing a gun, rational refuseniks will keep them closer at hand, more accessible.<sup>126</sup> With demand for guns unabated, the incentive to burglarize in search of easily accessed handguns will be substantial.<sup>127</sup> Since the guns are contraband, the incentive to report their theft will be nil. These thefts from the vast remainder inventory seem far more than necessary to generate the 14,000-or-so annual gun homicides we are trying to stop.<sup>128</sup>

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124. *Defense Depicts Japanese Boy as "Scary,"* N.Y. TIMES, May 21, 1993, at A10.

125. Perhaps the answer lies in educating people about the folly of self-defense. But that is a difficult task. The problem is twofold. First, any such effort will rely on broad statistical analysis. It is hard to convince people that those odds dictate individual results. Social scientists highlight how the perception of control reduces the assessment of risk. *See, e.g.,* STEVEN D. LEVITT & STEVEN J. DUBNER, *FREAKONOMICS: A ROGUE ECONOMIST EXPLORES THE HIDDEN SIDE OF EVERYTHING* 136 (2005); Peter M. Sandman, *Meeting Management: Where Does Risk Communication Fit in Public Participation?*, THE PETER SANDMAN RISK COMMUNICATION WEBSITE, <http://www.psandman.com/col/meeting.htm> (last visited Nov. 17, 2008). We are more hostile to and fearful of threats we do not control. More people are scared of flying in an airplane than driving a car. The thinking is: "I am in control of the car. I am keeping myself safe. In the airplane, I am at the mercy of external factors." Similarly, when making plans for their physical security, many people will bet on what they know and control rather than betting their lives that the state will protect them. Second, there is serious debate about the utility of self-defense, and many think that self-defenders have won the empirical battle. *Compare* Kleck & Gertz, *supra* note 111, *with* Cook et al., *supra* note 111.

126. Ratcheting up penalties for defiance is the natural tool for combating the problem. But it is plausible that even under the threat of stiff punishment, many millions of American gun owners would not just turn in their guns—they haven't so far in the few municipalities that have tried prohibition. The problem of disproportionate punishment is another risk. *See, e.g.,* Robert J. Cottrol, *Submission Is Not the Answer: Lethal Violence, Microcultures of Criminal Violence and the Right to Self-Defense*, 69 U. COLO. L. REV. 1029, 1069–70 (1998).

127. Add to this thefts by family and acquaintances who know about the guns.

128. This, of course, assumes a blanket prohibition. If the prohibition exempts "sporting" long guns, then thefts will focus on those softer

*E. Confronting Defiance: The Problem with Democracy*

Toward the goal of dramatic supply restrictions, there is another category of resistance to consider. Gabelnick et al. observe empirically: “[t]he rebounding demand for small arms . . . paradoxically, have been influenced by the anticipated passage of tighter gun control laws—and resulting decreased access to firearms.”<sup>129</sup> There are many variations on this phenomenon. One emerged in the context of the 1994 Federal Assault Weapons Ban. It was enabled by our democratic system. During the Clinton Administration, Congress enacted supply restrictions on certain semiautomatic guns and magazines.<sup>130</sup> As the legislation was debated, and then sitting on the President’s desk, manufacturers were pumping out grandfathered guns and magazines, and buyers were stocking up.<sup>131</sup> That experience suggests that future supply-side measures will telegraph the same signals. There will be a rise in sales as aggressive supply restrictions are debated. There will be enormous lead time for stockpiling because the debate is likely to be contentious (consider the rancor of the assault weapons ban that restricted only a small, obscure subcategory of firearms), especially if firearms as widely owned as handguns are targeted.

There are other versions of this problem. Political divisions over gun regulation suggest that supply limitations may come and go before they really take hold. When Republicans took the Congress and the White House in 2000, the outlook for gun owners brightened. Reflecting the broader trend, concealed-carry legislation spread to all but ten states.<sup>132</sup> In the fall of 2004, the

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targets guns that still can be made concealable with a hacksaw.

129. GABELNICK ET AL., *supra* note 35, at 13. “According to Ken Jorgensen, of Smith & Wesson, ‘When people think their ability to buy a gun is threatened either by legislation or litigation, they start buying guns.’” *Id.* at 101 n.20 (citation omitted); *see also* Kim Bell, *Brady Bill Triggered Jump in Pistol Sales, Police Officers Say*, ST. LOUIS POST-DISPATCH, Jan. 18, 1994, at B1.

130. Violent Crime Control and Law Enforcement Act, Pub. L. No. 103-322, §§ 110101–110103, 108 Stat. 1796, 1996-99 (1994).

131.

[NRA head Wayne] LaPierre recalled that the gun industry named Mr. Clinton its “gun salesman of the year” in 1994, when the Congressional assault-weapons ban, which the President had pushed, prompted a huge increase in sales before the ban went into effect. The gun industry may once more name him salesman of the year, Mr. LaPierre said, because his impending clampdown has again spurred sales.

Katharine Q. Seelye, *Gun Importers Are Rushing for Permits, Eye on Clinton*, N.Y. TIMES, Nov. 14, 1997, at A22.

132. NAT’L RIFLE ASS’N, INST. FOR LEGIS. ACTION, RIGHT-TO-CARRY 2008 (2008), <http://www.nrila.org/Issues/FactSheets/Read.aspx?ID=18>.

assault weapons ban of 1994 quietly expired.<sup>133</sup> In another turn of the same dynamic, one month after the 2006 elections when Democrats recaptured the House and Senate, anecdotal evidence suggested an upsurge in customers for firearms that might be the targets of a renewed assault weapons ban.<sup>134</sup> Having experienced ten years of embargo pricing under the previous legislation, consumers saw the changing political landscape as a signal to buy.<sup>135</sup> Public debate preceding any new supply restrictions should incite similar spikes in demand. Thus, our democratic process and past experiments with selective gun prohibition present real incentives and years of lead time for hoarding and stockpiling by people who intend to keep their guns regardless of what the new rules say.

It is possible, in theory, to reduce this problem with an end run around the traditional lawmaking process.<sup>136</sup> A technique that might send less of a signal in an ordinary market is regulatory tightening. Rulemaking occurs in the shadows. Sometimes only the agency and the regulated entities really pay attention to notice and comment periods, or shifts in regulatory interpretations.<sup>137</sup> Regulation sends weaker market signals than legislation. That

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133. See Fox Butterfield, *With Ban Lifted, Some Gun Shoppers Find Lower Prices*, N.Y. TIMES, Sept. 16, 2004, at A23.

134. Stephanie Simon, *Firearms Sales Show Rise Ahead of Obama Presidency*, WALL ST. J., Nov. 8, 2008, at A2 (“Buyers anticipate additional restrictions on gun ownership as soon as Democrats control both Congress and the White House.”).

135. See, e.g., Jeff Knox, *The Year of the AR and FUD*, SHOTGUN NEWS, Mar. 17, 2008, at 9. The AR-15 rifle, the semiautomatic version of the U.S. military’s M-16 rifle, is the fastest selling firearm in the country. Something driving sales of these rifles is what the online community calls FUD—Fear, Uncertainty, and Doubt. As consumers, dealers, and the industry look at the way the 2008 presidential race is shaping up, they increasingly believe that a new assault weapons ban is possible. This is driving AR-15 production and sales to record numbers.

136. Most lawyers, politicians, and regulated industries understand the rudiments of the regulatory process. But average citizens who might be roughly familiar with the legislative process generally have much less familiarity with the regulatory process. Indeed, most of the first-year students I survey in our introductory Legal Process course are only glancingly familiar with the regulatory process.

137. See ROBERT MONKS & NELL MINOW, *POWER AND ACCOUNTABILITY* 131 (1991) (“The ultimate commercial accomplishment is to achieve regulation under law that is purported to be comprehensive and preempting and is administered by an agency that is in fact captive to the industry.”); see also David Martimort, *The Life Cycle of Regulatory Agencies: Dynamic Capture and Transaction Costs*, 66 REV. ECON. STUD. 929, 929 (1999) (stating that regulatory capture comes from the repeated interaction between an interest group and a regulatory agency).

difference may be worrisome in a democracy. But it presents a chance to circumvent market reactions that undermine legislation—at least in ordinary markets.

The American gun market is special, though. The gun lobby is one of the significant participants in the regulatory process.<sup>138</sup> Indeed, the NRA might be the biggest player on the field, and it maintains a direct line of communication with its constituency. Its funding comes substantially from grassroots, diehard gun owners.<sup>139</sup> The single-issue-gun-rights voter, receiving constant mail and e-mail communications from the NRA, Gun Owners of America, or the Second Amendment Foundation, is less likely to be snookered by rulemaking in the shadows.<sup>140</sup>

Numerically, the problem of hoarding guns in anticipation of sweeping supply restrictions seems minor compared to the primary remainder problem. It should amount to only a few million guns bought ahead of publicly contested supply restrictions and is insignificant when compared to the 300 million guns in inventory.<sup>141</sup>

#### IV. FAMILIAR GUN CONTROL PROPOSALS AND THE REMAINDER PROBLEM

So far we have evaluated the theoretical implementation of gun prohibition—the outcome on which successful supply-side rules depend. Many familiar gun-control proposals have submerged or even disclaimed this goal. Pure supply-side rules are fatally compromised by the remainder problem, as previously discussed. Some proposals are hybrids, however, and thus are affected by the

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138. See Jeanne Cummings, *Why the Gun Lobby Usually Wins*, POLITICO, Apr. 17, 2007, <http://www.politico.com/news/stories/0407/3563.html>.

139. See Will, *supra* note 47.

140. One example of this is ATF's retroactive categorization of two shotguns as destructive devices. See BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, DEP'T OF THE TREASURY, VOL. 1, ALCOHOL, TOBACCO & FIREARMS Q. BULL. 22 (1993–1994) (publishing ATF Ruling 94-1, which reclassified the USAS-12 shotgun); *id.* at 24, (publishing ATF Ruling 94-2, which reclassified the Striker-12 and Streetsweeper shotguns). Before the rulings, these guns could be purchased from an ordinary dealer. After the rulings, they were classified as Class III destructive devices to be sold only by dealers licensed to sell machine guns. Also, ATF notified 8200 record owners of these guns that the guns must now be registered as destructive devices. The registration period was closed in 2001. People who purchased these guns in secondary sales, who may never have been notified about the reclassification, are now in possession of illegal destructive devices. See U.S. DEP'T OF JUSTICE, BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, FEDERAL FIREARMS REGULATIONS REFERENCE GUIDE (2005), available at <http://permanent.access.gpo.gov/lps41631/2005/p53004.pdf>.

141. This will be the riskiest class of refusenik guns. Bought from dealers just ahead of supply restrictions, these will be the easiest to connect to owners.

remainder problem in more limited and unique ways. Other proposals detach from supply-side theory almost entirely and are not snared by the remainder problem. This section discusses these measures in the context of the remainder problem and defiance impulse.

A. *Registration*

Registration is commonly advanced as a regulatory measure that will make things better. Registration promises little immediate impact as a direct restriction on supply. It might aid investigations where a criminal successfully flees the scene but leaves behind a gun registered to him or someone who can be traced to him.<sup>142</sup> Also, owners of registered guns should be less likely to sell them to seemingly untrustworthy characters. But registration does not directly advance the supply-side goal of a gun-free environment. Only confiscation can do that.

However, for people who believe they will resist confiscation, registration is the ball game. They should view registration as the precursor to confiscation for several reasons. The progression from registration to confiscation actually has occurred both domestically and internationally. The evolution of supply controls in Washington, D.C.,<sup>143</sup> New York City,<sup>144</sup> California,<sup>145</sup> New Jersey,

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142. For example, if the gun is left at the scene or otherwise identified, and all guns are registered, the record owner of the gun has some explaining to do. If the registered owner must notify authorities whenever he moves, then those who comply will be easy to find. The information gathered might aid in solving crimes on the margins. But registration is unlikely to operate as a preventative measure, since the obvious criminal response is to obliterate the serial number with a Dremel tool or just avoid leaving the gun behind.

143. See Meg Smith, *A History of Gun Control*, WASH. POST, Mar. 11, 2007, at C4.

144.

Confiscation has eventually followed gun registration in England, New York City, and Australia. While it's impossible to be sure that registration helped cause confiscation in those cases, it seems likely that people's compliance with the registration requirement would make confiscation easier to implement, and therefore more likely to be enacted. And Pete Shields, founder of the group that became Handgun Control, Inc., openly described registration as a preliminary step to prohibition, though he didn't describe exactly how the slippery slope mechanism would operate.

Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026, 1040 (2003) (citations omitted); see also James Bovard, *The Assault-Weapons Scam* (pt. 1), FREEDOM DAILY, Mar. 1996, <http://www.fff.org/freedom/0396d.asp> (discussing gun bans and confiscation policies in New York City, New Jersey, and California).

145. BUREAU OF FIREARMS, CAL. DEP'T OF JUSTICE, RELINQUISHMENT OF [REGISTERED] ASSAULT WEAPONS BULLETIN (1999), available at

Massachusetts, England,<sup>146</sup> Canada,<sup>147</sup> and Australia<sup>148</sup> illustrates that registration is an important precursor to any viable confiscation plan.

Without registration, confiscation ultimately requires a house-by-house search—a tactic that seems unworkable, both logistically and constitutionally.<sup>149</sup> Registration avoids affronts to the Fourth Amendment. An official record of title connecting an individual with a particular gun is a fair basis for demanding surrender of the gun and perhaps for searching the record owner's home if the gun is not turned in.

Imagine a confiscation scheme not preceded by registration. How do we determine who has the guns? The best uniform information now available is in the federal Firearms Transaction Record form (form 4473) filled out by retail purchasers.<sup>150</sup> The government already has some of these forms (from federal firearm license dealers ("FFLs") who have gone out of business). With changes in legislation, the Bureau of Alcohol, Tobacco and Firearms

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<http://www.gunowners.org/lockyer1.gif>.

146. Joseph E. Olson & David B. Kopel, *All the Way Down the Slippery Slope: Gun Prohibition in England and Some Lessons for Civil Liberties in America*, 22 *HAMLIN L. REV.* 399 (1999).

147. See INST. FOR LEGIS. ACTION, NAT'L RIFLE ASS'N, CANADA: WHERE GUN REGISTRATION EQUALS CONFISCATION (2000), <http://www.nrila.org/Issues/Articles/Read.aspx?id=4&issue=006>. In May of 1995, Canada's Bill C-68 prohibited previously legal and registered small-caliber handguns. Current owners of such guns were "grandfathered," which means that the guns are to be forfeited upon death of the owner. Bill C-68, The Firearms Act, c. 39 (1995), amended by S. 76.1, ch. 19 (1996). Bill C-68 also authorizes the Canadian government to enact future weapons prohibitions. *Id.*

148. "On 10 May 1996, Australia banned most semi-automatic rifles and semi-automatic and pump shotguns. Prior to this law, many Australian states and territories had firearms registration. Owners of these newly outlawed firearms were required to surrender them (with some monetary compensation)." Bartholomew Roberts [pseud.], *Gun Registration and Gun Control*, [http://www.guncite.com/gun\\_control\\_registration.html](http://www.guncite.com/gun_control_registration.html) (last visited Nov. 11, 2008).

149. Conceptually, there are alternatives, like universal searches of all homes and random searches of any dwelling for illegal guns. But these measures seem facially prohibited by the Fourth Amendment's requirement of probable cause.

150. Record keeping under state law varies. For a summary of state requirements see Bureau of Alcohol, Tobacco, Firearms and Explosives, U.S. Dept of Justice, ATF Publ'n 5300.5, *St. Laws and Published Ordinances—Firearms* (2005), available at <http://www.atf.treas.gov/firearms/statelaws/26thedition/index.htm> [hereinafter *ST. LAWS AND PUBLISHED ORDINANCES*], or CNN.com, *A State-by-State Look at Gun Laws in the U.S.*, <http://www.cnn.com/SPECIALS/1998/schools/gun.control> (last visited Nov. 11, 2008).

(“ATF”) might gain access to those now kept by active dealers.<sup>151</sup> But even these records are of limited utility. Even with form 4473 data in hand, the government can only say that the person on the form was the first retail purchaser. If authorities sent that person a letter or knocked on his door asking for the gun (assuming he had not moved or died), he might respond (truthfully or not) that the gun was sold or traded years ago to some guy at a gun show, through the newspaper, at the gun club, or on a previous job. All of these types of transfers are legal today.<sup>152</sup>

It is possible that courts might say that the homes of these people can be searched for the firearms they claim to have sold, traded, or lost to carelessness or theft.<sup>153</sup> Some of them will be lying and bad hidens and their guns will be confiscated. But many of them will have moved or died, particularly where the record of purchase is several years or decades old. Plus, many of them will be telling the truth. Thirty to forty percent of gun sales per year are secondary-market trades between private individuals.<sup>154</sup> Some of these transfers are by the first retail purchaser and some by the second or fifth or tenth owner of the gun. In theory, these early, middle, and late-stage “no-paper” transfers would be captured by registration—per the demand that everyone must register their guns, regardless of where or when the purchase was made. That is the theory.

Some people will indeed register their no-paper guns just because the law requires it. Collectors who view their guns mainly as investments should generally comply in order to maintain liquidity. Some people will partially comply, registering some guns, but holding back some or all no-paper guns for a stormy day. Some people will not comply with registration at all. And if their only guns are no-paper guns, they will remain comfortably under the

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151. The 1986 Firearms Owners Protection Act prohibits the federal government from retaining firearms transaction records (e.g., form 4473) for the purpose of creating “any system of registration of firearms, firearms owners, or firearms transactions.” 18 U.S.C. § 926(a)(3) (2000).

152. See, e.g., NRAILA.org, A Citizen’s Guide to Federal Firearms Laws, <http://www.nraila.org/GunLaws/Federal/Read.aspx?id=60> (last visited Nov. 11, 2008).

153. It seems reasonable today to expect that purchasing a gun from a FFL in 1974 does not establish probable cause for a search of one’s premises for that gun in 2004 not in a regulatory regime where it is entirely lawful and predictable that the gun will be sold or traded off over that period of time. Still, one can imagine arguments that probable cause exists where the gun or multiple guns are purchased within months of the confiscation date. See also *supra* note 147 and accompanying text.

154. FIREARMS RESEARCH & DATA COMM’N, *supra* note 9, at 74.

radar, operating on the defiance bets discussed above.<sup>155</sup>

Any expectation that the majority of gun owners will comply with registration presumes that these people do not view the decision to register as an accelerated decision to comply with any subsequent confiscation law. It takes little imagination to understand that defying confiscation of a registered gun means expensive and doomed legal challenges, or physical confrontation with the state. Rational people who believe they would retain contraband firearms in defiance of prohibition should disobey commands to register.

Refusal to register exposes the owner to whatever penalties attach to possessing the unregistered weapon (the choice made by countless New Yorkers, Chicagoans, and Washingtonians and tens of millions of people internationally)<sup>156</sup> and pushes ownership, transportation, and transfer decisions underground. But the owner retains an effective tool of violence for a stormy day or tense moment. Of course, if the contraband weapon is stolen, it will not be reported. When the owner dies and his survivors discover it, there is some chance that it will be turned in. Alternatively, it will flow into some other channel of the illicit market or simply be retained by survivors who are either ignorant of the prohibition law or willing to flout it on the view that the gun cannot be connected to them. Their risk would rise if they used the gun. But they might calculate that just being in the vicinity of it (e.g., the son living in a home where the father died and left a contraband gun) is less risky than accessing the black market directly.<sup>157</sup>

In the years of debate preceding any confiscation law, there will

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155. Gun owners who are five or ten private transactions or many years removed from the original retail buyer, or own pre-1968 guns that may have never been recorded on any government form, would be told that registration is required to maintain legal ownership of guns the government does not know they have.

156. See, e.g., Cook et al., *supra* note 72, at 4–6. Between 1999 and 2003 Chicago averaged about 10,000 illegal gun confiscations per year. In one particular high crime neighborhood studied by Cook et al., there is approximately one illegal gun sale per thirty people each year. *Id.* Stripping out children from the count, this rate seems sufficient to achieve saturation in less than a generation. See *supra* text accompanying notes 71–88 (discussing defiance ratios).

157. The proposal that all private transfers go through an FFL was the backbone of Brady II. For an analysis of transfer laws under Brady II, see Jacobs & Potter, *supra* note 5, at 89–90. A scheme like Brady II might be a back door into registration except that tens of millions of guns are many steps out of the system. No one knows who has these guns. No paper trail attaches them to the owner. In an environment with impending supply restrictions, these “no-paper guns” will command higher prices.

be a great deal of private buying and selling, with a premium on the unregistered no-paper gun.<sup>158</sup> Anyone who intends to resist confiscation will prefer the no-paper gun with multiple prior owners (the “late-stage no-paper gun”). If a buyer has only purchased no-paper guns, there will be no government records anywhere that identify him as ever having been a gun owner.<sup>159</sup> Even if the potential Fourth Amendment barrier to inspections or searches of anyone ever identified on a form 4473 is breached, the owner of the no-paper gun remains off the radar. Absent surprise searches of every American home for contraband firearms, his exposure is limited to serendipitous detection or arrival of authorities in the aftermath of his using the illegal gun. The owner of some no-paper guns is similarly protected if he decides to register or later turn in all his guns of record but withholds his no-paper guns.

Registration compliance numbers will signal fairly well the size of the ultimate black-market inventory under any subsequent confiscation law. The ultimate black market inventory equals the inverse of registered weapons. This number will increase by some measure because some people will try to defy confiscation of registered guns, claiming they have been lost or stolen.<sup>160</sup> The number will decrease because some people who failed to register, or their successors, will respond to predictable amnesty programs or buy-backs.<sup>161</sup>

In this sense, registration would provide an important piece of information about the viability of subsequent confiscation. Large-scale resistance to registration will signal that large numbers of people intend to resist confiscation. And that knowledge would

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158. This dynamic should operate without regard to whether confiscation targets sub-categories of guns or the entire inventory. Section IV.G, *infra*, discusses how sub-categories of firearms might be subject to confiscation despite the Supreme Court’s endorsement of an individual right to arms.

159. Cook et. al. detail the phenomenon in their treatment of Chicago police efforts to trace confiscated guns:

53.5% were successfully traced . . . . This tracing success rate is also quite similar to national data for 1999 (54%). Nationwide in 1999, 10% of guns could not be traced because the guns were too old, while others could not be traced because of problems with the serial number or errors in the paperwork and the like. It is important to note that even when guns are successfully traced this process can only identify the first purchaser from a FFL, and provides no information on subsequent transactions in the underground distribution chain.

*Supra* note 72, at 31.

160. They will either have miscalculated the chances of a confiscation law passing or their own willingness to comply with prohibition.

161. See, e.g., Metropolitan Police Department: MPD Gun Amnesty Program, New Gun Amnesty Announced!, [http://mpdc.dc.gov/mpdc/cwp/view,a,1242,q,546745,mpdcNav\\_GID,1541.asp](http://mpdc.dc.gov/mpdc/cwp/view,a,1242,q,546745,mpdcNav_GID,1541.asp) (last visited Nov 11, 2008).

allow better measurement of the resources and strategies necessary to attempt confiscation.<sup>162</sup>

The analysis is complicated by the constitutional protection of the individual right to bear arms in *Heller*. For this exercise, we have assumed that *Heller* is nullified or explained away. But for this discrete point, the timing of that nullification makes a difference. If the individual right were extinguished before the registration attempt, the analysis remains the same. People should defy registration on fear of confiscation. However, if registration is attempted during a temporary period of individual right protection, and *then Heller* is nullified, things change dramatically. Under that scenario, potentially large numbers of people will comply with registration, trusting that the Constitution bars confiscation. A large segment of no-paper guns might be brought within the system. Confiscation that follows, aided by the registration records gathered under the protection of *Heller*, should more effectively confront the remainder problem.

The precise degree to which this order of events would diminish the remainder problem is hard to call. Things are complicated by the possibility of residual distrust of the newly-recognized constitutional right. The *Heller* court was sharply divided. The decision is only the first step in the long process of building a Second Amendment jurisprudence.

Like any first step, *Heller* leaves open a variety of avenues for weakening the perfunctorily acknowledged right (e.g., the idea advanced by Justice Breyer in oral argument that a total handgun ban might be “reasonable” under the circumstances in Washington D.C.; or the idea that the protected right only applies to an increasingly limited class of guns or explicitly excludes some categories of guns). This produces uncertainty and forward risk and, consequently, induces distrust.<sup>163</sup> Also, the vigorous dissents in *Heller*<sup>164</sup> should leave lingering uncertainty that will cause some continued resistance to registration. They suggest that since the newly-minted individual right is only one or two new Justices away from reversal or curtailment, resistance to registration should remain substantial.

The final risk is systemic, regardless of how supportive the current majority is of the individual right, the idea of a “living

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162. Some states also collect information about the first retail sale of a firearm. See ST. LAWS AND PUBLISHED ORDINANCES, *supra* note 150.

163. Transcript of Oral Argument at 50–53, *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008), available at [http://www.supremecourtus.gov/oral\\_arguments/argument\\_transcripts/07-290.pdf](http://www.supremecourtus.gov/oral_arguments/argument_transcripts/07-290.pdf).

164. Justices Bryer, Ginsburg, Souter, and Stevens dissented in *Heller*.

Constitution,” articulated, for example, by Justice Breyer at oral argument,<sup>165</sup> means, ultimately, that the content of even fundamental constitutional rights might change as circumstances change. This really means “as perceptions” of circumstances change. Ultimately, only five perceptions count. If the meaning of a constitutional right can evolve based just on the perceptions of five justices, people to whom the right is important should worry about relying too heavily on current articulations of it and the location of the barriers it creates. People who appreciate this should respond to post-*Heller* registration laws with pre-*Heller* rates of defiance.

*B. The Gun Show Loophole and Secondary Market Controls*

Criticisms of the “gun show loophole” imply that federal regulations allow otherwise prohibited retail purchases (“primary market sales”) of firearms at gun shows. This implication is false. The real criticism is leveled at secondary market sales by private citizens.<sup>166</sup>

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165. Transcript of Oral Argument at 63–64, *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008), available at [http://www.supremecourtus.gov/oral\\_arguments/argument\\_transcripts/07-290.pdf](http://www.supremecourtus.gov/oral_arguments/argument_transcripts/07-290.pdf).

166. Criticism of the gun show loophole in some ways suggests a separate way of defining the scofflaw dealer. Indeed, litigation by ATF has pursued a category of scofflaw dealer separate from the one we discussed in the context of one-gun-per-month laws. These scofflaws do not have FFLs at all. Instead, they sell or trade firearms privately in quantities ATF deems illegal. The details of this litigation and surrounding regulations are worth attention. The Gun Control Act of 1968 disrupted the gun culture of traders and collectors. The requirement that dealers have licenses raised questions about whether some gun enthusiasts who bought, sold, or traded perhaps scores of guns over the course of a year (people who thought of themselves as active collectors) were really doing business in firearms without a license. Some were prosecuted for illegal dealing in firearms. In 1986, the McClure-Volkmer Firearms Owners’ Protection Act, Pub. L. No. 99-308, 100 Stat. 449 (codified as amended at 18 U.S.C. § 921 (1986)), in part a response to these prosecutions, established a variety of protections for collectors who wished to dispose of their private firearms. However, prosecutions of private sellers who are deemed to be selling guns as a business without a license are still authorized and continue. See, e.g., Joe Johnson, *Five Plead Guilty in Illegal Gun Sales at J&J*, ATHENS BANNER HERALD, [http://onlineathens.com/stories/040407/news\\_20070404061.shtml](http://onlineathens.com/stories/040407/news_20070404061.shtml) (last visited Nov. 11, 2008) (describing illegal gun sales at a flea market outside of Athens, Georgia). These sales do not go through the National Instant Check System (“NICS”) and are at least early-stage and maybe late-stage no-paper transfers. There are rules in place that attach real risk to repeated private party sales at places like gun shows. Regulations protect individuals liquidating private collections. But the active hobbyist who buys, sells, and trades in a way that is similar to the profit-motivated FFL is flirting with prosecution for unlicensed dealing in firearms.

Retail sales of firearms are highly regulated. Pursuant to the Gun Control Act of 1968, all retail gun sellers must apply for and maintain a Federal Firearms License (FFL refers to both the license and the licensee).<sup>167</sup> These FFLs are permitted to purchase and receive guns by common carrier from wholesalers, manufacturers, other FFLs, and private sellers.<sup>168</sup>

To purchase a gun through retail channels (the primary market), the individual buyer must trade through an FFL in his state.<sup>169</sup> If the purchase is from an out-of-state FFL, the buyer must have the firearm shipped from the out-of-state FFL to an FFL in the buyer's home-state.<sup>170</sup> The out-of-state FFL will log the gun out as transferred to the buyer's home state FFL. The home state FFL will then have the buyer complete form 4473 (which requires the buyer to represent that he is not a criminal, domestic abuser, etc.). Then, the home state FFL must call the National Instant Check System ("NICS") and read off the Buyer's information from form 4473, including a partial social security number. The NICS determines whether the buyer is disqualified from owning the gun. If the buyer is approved by the NICS, the FFL is given an approval number to

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Objections to gun shows that permit these active hobbyists to set up tables to sell their private guns constitute the purest form of opposition to the "gun show loophole." However, once we introduce the remainder problem, the concerns that prompt criticism of the gun show loophole have much broader implications.

167. FIREARMS RESEARCH & DATA COMM'N, *supra* note 9, at 37–38.

168. Collectors who obtain a Curio and Relics ("C&R") license, can in fact buy guns over the Internet. The C&R license permits licensees to purchase and have delivered by common carrier, any firearm that ATF has placed on the C&R list. See BUREAU OF ALCOHOL, TOBACCO, & FIREARMS, U.S. DEPT OF JUSTICE, FIREARMS CURIOS OR RELICS LIST (1972–2001) (with update through 2007), <http://www.atf.gov/firearms/curios/index.htm> (providing that "firearms automatically attain curio or relic (C&R) status when they are 50 years old" or otherwise determined by the ATF). So the C&R holder may not buy new guns from dealers, wholesalers, or manufacturers. A C&R license is not a license to deal in firearms. The licensee must comply with record keeping requirements and his application must be approved by the chief law enforcement officer in his municipality. Otherwise, private parties may not receive firearms by common carrier except in limited cases e.g., return of a gun they already own, sent to a manufacturer for repair.

169. To legally buy and have a gun shipped from an Internet seller in another state, whether the seller is an FFL or private party, the transfer must be made through an FFL in the buyer's state. The seller will deliver the firearm to an FFL for transfer to the buyer. He may deliver it to an FFL in his state, and that FFL will ship it to an FFL in the buyer's state. Or the seller may ship the gun directly to an FFL in the buyer's home state. In either case, the buyer (who usually will pay the seller directly) still must go to his home-state FFL, fill out a Form 4473, and gain NICS approval. 18 U.S.C. §§ 921–931 (2000).

170. *Id.*

write on the form 4473. With this approval, the buyer may take delivery of the firearm.<sup>171</sup>

In contrast, private/secondary market sales involve simply a trade between individuals of a firearm for dollars or something else. Secondary sales occur through contacts at work; social networking; newspaper classifieds; Craigslist; the neighborhood grapevine; the Lions Club; the shooting range; deer camp; swap meets; Hooters; the gym; the holiday table; at the end of business when people talk cars, sports, and tell jokes; or countless other gatherings between friends, family, acquaintances, co-workers, and strangers (including people who meet in the aisles of gun shows).<sup>172</sup> These secondary sales are not recorded and, over time, guns transferred this way account for a substantial portion of the firearms inventory.<sup>173</sup>

Requiring private sales at gun shows to be routed through a dealer might lay the foundation for regulating secondary-market sales. But we know that sales by FFLs are only about half of all gun transfers, and sales at gun shows are only a fraction of those. With nearly half of gun transfers involving private trades out of the existing inventory, people who complain about the gun show loophole can really only be satisfied by a flat ban on private transfers—e.g., requiring all transfers go through an FFL, who will

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171. *Id.*

172. The gun show is usually a weekend gathering in a venue large enough to accommodate perhaps one hundred or more FFLs who set up tables with a portion of their inventory. They buy, sell, and trade guns with patrons who usually pay a fee to enter the show. Just like all other sales by FFLs, these sales must go through the NICS, now made efficient by cell phones.

The gun show is also populated by private buyers (customers) and some private sellers. These private sellers will be interested in selling or trading with the dealers at the tables, but may also sell or trade with people they meet in the aisles. These are the same sales that occur at the end of negotiations that start with newspaper ads (at least where the sale is to an in-state resident) or just a casual inquiry to the guys at work, at the game, or at the gun range.

173. By their nature, there is no precise data on the number of these transactions. Survey estimates from 1997 put the number at about two million secondary market transfers per year, making up thirty to forty percent of total transfers. FIREARMS RESEARCH & DATA COMM'N, *supra* note 9, at 74.

The secondary sales dynamic is complicated by disparate state regulations. In some jurisdictions, state law requires that secondary sales go through an FFL or that the buyer show something like a firearms owners identification card, which verifies he has been deemed trustworthy by the state to own a firearm. *See, e.g.*, N.J. ADMIN. CODE §13.54-1.3 (2007) (requiring purchasers to show a valid firearms purchaser identification card). In other jurisdictions, private or secondary sales or transfers between individuals are like buying and selling any other personal property, at least as a legal matter. It is this category of sales that seem really to be the focus of control proposals that focus nominally on “the gun show loophole.”

route the buyer through the NICS.<sup>174</sup>

Competing impulses complicate projections about defiance of rules that would introduce the government as a filter between all private buyers and sellers. The defiance impulse that confounds registration and confiscation operates here for obvious reasons. Channeling secondary sales through a government filter brings no-paper guns back into the system. Indeed, this type of system would be one way to confront the remainder problem that otherwise impairs attempts at gun registration. If all secondary sales were required to go through FFLs and all FFL transactions were recorded,<sup>175</sup> eventually, in theory, most guns would be registered.<sup>176</sup> However, where registration and confiscation are background possibilities, the impulse to resist secondary sales restrictions will be similar to the impulse to resist registration and confiscation.<sup>177</sup> The no-paper gun will continue to have premium value. People will pay extra for them and have powerful incentives to retain and acquire them in various ways.<sup>178</sup> These incentives will fuel defiance of secondary sales restrictions.

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174. Roughly, this requirement was part of the list of proposals in Brady II, *supra* note 5.

175. This is currently prohibited under 18 U.S.C § 922(t)(2) (2000).

176. *See* Brady II, *supra* note 5.

177. With the right to bear arms nominally protected, defiance of secondary sales bans will be driven by uncertainties about the scope and durability of the constitutional right. *See also supra* text accompanying notes 74–89 (discussing a nominal right to bear arms and defiance of registration).

178. Gun ownership is pressured by the continuing possibility of new regulations impairing or consuming long-standing interests. Gun prohibition is at the core of modern supply-side theory and so must be taken seriously, even if not an immediate threat. For people who think they will defy prohibition, the secondary market presents an important opportunity.

Up to forty percent of the guns sold in America each year are transferred in the secondary market. Every time one of these transfers occurs, the new owner is another step removed from being identified by the authorities as owner of the gun. The first retail buyer of course fills out forms at the FFL dealer that identify him as the buyer of the gun. Under a confiscation scheme, gun owners who attempt to retain firearms bought directly from a dealer are exposed to serious questions and investigation if they attempt to keep the gun in defiance.

Buyers from the secondary market face less risk. And the farther down the chain they are from the original retail purchaser, the less exposure they have. Moreover, tens of millions of guns entered the inventory before the Gun Control Act of 1968 required retail purchasers to provide personal information. These pre-1968 guns and their secondary sales are entirely outside of the regulatory system, unless they are sold or traded back to an FFL dealer. Potential refuseniks will obviously prefer no-paper guns. A secondary market pressured by continuing fear of confiscation should price them higher than primary market purchases.

On the other hand, compliance with secondary sales restrictions should be enhanced by the same dynamics that cause friction in the black market for guns. In a study of Chicago's illicit gun market, researchers concluded that the black market for guns is burdened by risks inherent in the act of meeting a stranger to exchange a deadly weapon for cash.<sup>179</sup> The risks are amplified by the uncertainty of whether the buyer/seller is a cop, someone intent on robbing you, or flat mad. Ironically, the best brokers of these risks, researchers found, were street gangs whose authority operated as a filter against bad behavior between traders.<sup>180</sup>

Also, if the seller bought the gun directly from an FFL, he must worry that an ill-intentioned buyer will commit a crime and leave the gun behind, sending the police directly to the seller's door. It is hard to know exactly how much this friction would reduce defiance of secondary sales rules, but generally it should pressure owners of remainder firearms to hold them close and avoid obviously risky illicit transfers.<sup>181</sup> This means that secondary sales rules should add little to the dynamic already discussed. People will hold stormy-day and tense-moment guns basically the same way, with transfers occurring mainly in the same close circle of family and friends.<sup>182</sup> Secondary sales rules will not capture these guns, and they will enter the broader market mainly through theft.<sup>183</sup>

This dynamic changes in an interesting way now that the Supreme Court has taken confiscation off the table. With gun confiscation prohibited as a constitutional matter, the perceived risk of telling the government you own a gun is nominally diminished. However, politicization of the judiciary on controversial issues (e.g., abortion and affirmative action) and the flexibility of the living

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179. See Cook et al., *supra* note 72, at 12–14.

180. *Id.*

181. Some people will sell into the black market because of the price premium created by the new regulation. The percentage may be low, but the numbers could be significant because we start with so many. Others will realize the enhanced monetary value of their guns, as well as their higher practical value in considering the need to dip in to a perilous black market to get a substitute. These people might not be tempted to sell into the black market, but would be inclined to resist the new transfer scheme. They might, however, be entirely willing to trade between relatives and friends. We could view these transfers either as gray market trades, within circles where these guns have existed for decades without trouble, or as black market trades between avowed and blatant resisters.

182. This calls up the adage coined by Gunner's Guru, Jeff Cooper, when asked where he bought his guns. His answer, "We don't buy our guns. We have our guns."

183. FIREARMS RESEARCH & DATA COMM'N, *supra* note 9, at 74 (approximately 500,000 guns are stolen each year).

Constitution will cause some to view the newly-pronounced constitutional protection as flimsy, and perhaps transitory. The continuing possibility that, as the Court sharpens its focus, the scope of the constitutional right will shrink to exclude certain sub-categories of firearms will further diminish confidence in the newly-resolved constitutional protection.<sup>184</sup> These factors will continue to fuel the defiance dynamic that, inter alia, elevates the value of the no-paper gun and encourages defiance of firearms recording schemes. Still, many casual gun owners may take the Supreme Court at its word or at least view the reward of defying secondary sales or registration rules (i.e. having a tool held back in case courts later renege) as not worth the risk of whatever sanctions are established.

With a right to arms of some sort protected for now, compliance with secondary sales restrictions should be encouraged by the same dynamics that cause friction in the black market for guns. While buyers (particularly those skeptical of the scope and duration of the Court's work in *Heller*) should still value no-paper guns and seek to acquire them when possible, sellers generally should be reluctant to defy secondary sales rules. Absent the full premium that the possibility of confiscation puts on no-paper guns, the incentive to confront these risks in a transaction outside the rules diminishes.<sup>185</sup> Certainly, friends, neighbors, and family members will continue to trade outside the rules.<sup>186</sup> Collectors and enthusiasts still operating

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184. Washington, D.C.'s new regulations that ban a class of semi-automatic handguns is already being challenged. David C. Lipscomb, *Heller, Others Challenge Semi-Automatic Ban*, WASH. TIMES, July 29, 2008, at A12.

185. This projects significant stagnation of secondary market trading between honest people in defiance of secondary sales limits. We should expect transfers to be limited within a known circle and some level of gray market self-policing, at least until the gun, through theft or a trade driven by aberrant incentives, falls fully into the illicit market. At some point, if we pressure supply sufficiently, people who would not sell into the black market for a \$500 profit will make different decisions as the price edges higher (or their needs, opportunity for a low risk sale, or appetite for risk shift).

186. One can imagine a scheme where secondary sales were so highly regulated that even the owner of the one-hundred-year-old pistol would fear transferring it outside the system. But if that owner were worried, ultimately, about confiscation, this would be the perfect gun for him to own and would take on enhanced value. He would only transfer it to someone he knew and trusted. Perhaps the gun would be turned in or registered when found by his survivors. So some guns in this category would circulate back into the regulatory net. But if these unrecorded guns have enhanced value in dollars or utility for people willing to risk owning contraband, many of them will remain outside the regulatory net. *See supra* notes 90, 116, and note 113 and accompanying text; *see also supra* Part III.B. This also highlights the difficulty introduced by the durability of firearms. It is a mistake to dismiss the one-hundred-year-old gun

under the residual impulses of a time when the right to arms was contested will develop networks of trusted acquaintances who will trade outside the rules.<sup>187</sup> These networks might use carryover filters for trustworthiness like state concealed carry licenses.<sup>188</sup> The residual distrust that fuels this brand of defiance should also diminish if judicial protection of private firearms solidifies and endures.

### C. *One-Gun-a-Month*

One-gun-a-month rationing targets nominally legal, straw buyers who purchase guns through retail channels and illegally transfer them to people they know are prohibited from having guns.

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as obsolete. The 1911 .45 caliber pistol, so called because it was introduced in 1911, is perfectly serviceable today, and the design is even preferred by some police and military special operations units. Countless 1911 .45s were made before 1968 and are still around, no worse for wear.

187. Noncompliance with private-sale restrictions may concentrate no-paper guns in venues that have had them and kept them for decades without much trouble. This might result in fewer no-paper guns in areas of the opposite character. It might mean fewer no-paper guns in urban underclass communities that have been under strict gun control for decades. We cannot discount entirely the guns already in these places, and the introduction of new contraband weapons through drug shipping channels or otherwise. But much of the remainder would become legacy pass downs in the very same places they now sit—i.e., regions and communities that have been thick with guns will retain many of them.

Some will say that achieving this limited goal is worth the effort. James Q. Wilson, for example, suggests that our gun problem is overwhelmingly an urban, underclass, black, male problem. James Q. Wilson, *Just Take Away Their Guns*, N.Y. TIMES, Mar. 20, 1994, (Magazine), at 46–47. If this is the case, legislation that kept guns out of poor urban neighborhoods might be considered a significant win. Indeed, the practical impact of the most imposing forms of gun control today—i.e., stringent supply restrictions imposed by municipalities with substantial underclass minority populations—is to limit the access that the urban poor have to guns. Private party transfers that promise to aid this result might become a popular idea even if people don't say the reason out loud.

However, if the black market price inflates substantially, more and more legacy guns will find their way into it. And so will guns of record that exit the system through the simple process of having serial numbers ground off, as well as contraband imports, and one-off guns made by basement manufacturers

188. Pennsylvania, for example, during the 1990s, allowed concealed weapon license holders to purchase firearms without a background check, reasoning that a background check was a prerequisite for the license. FIREARMS DIV., PA. STATE POLICE, INFORMATION FOR PENNSYLVANIA FIREARM PURCHASERS AND BASIC FIREARM SAFETY 3 (2003), *available at* [http://www.psp.state.pa.us/psp/lib/psp/pdf/firearm\\_brochure.pdf](http://www.psp.state.pa.us/psp/lib/psp/pdf/firearm_brochure.pdf). Today some private sellers ask to see a buyer's concealed weapon license before agreeing to the exchange.

This rationing is essentially a response to the importation cheat discussed earlier. The dynamic is well illustrated by the complaints from municipal officials in Washington, D.C. (a perennial contender for murder capital of the United States despite having the nation's strictest gun laws) that their gun laws were being thwarted by jurisdictions with looser rules (and lower gun-crime rates).<sup>189</sup>

Like other prospective restrictions that focus only on retail sales, one-gun-a-month programs are marginalized by the remainder problem. Some portion of the illegal guns in restrictive jurisdictions were there before supply was curtailed. Some of the guns that entered the jurisdiction later came from the existing secondary-market inventory. In a study of illegal guns in Chicago, whose municipal firearms regulations rival Washington, D.C.'s overturned ban, researchers found that straw purchases accounted for "only around one-tenth of the city's crime guns."<sup>190</sup>

So while the impact of one-gun-a-month schemes seems marginal, the concern that prompts them highlights a crime control opportunity that should be relatively uncontroversial. Understanding it requires some additional elaboration on the one-gun-a-month impulse.

One implication of one-gun-a-month laws is that some states have relatively lax gun regulations, while jurisdictions like Washington, D.C. take gun regulation more seriously. Realize however that Washington, D.C. had one of the few nearly complete handgun bans (and a de facto policy against armed self-defense) in the country.<sup>191</sup> No state and only a few municipalities have anything similar.<sup>192</sup> The states that D.C. officials complained about operate under the national system of controls that imposes several layers of restrictions on firearms access. Criticism of these states is really a complaint that they have not substantially supplemented the federal system discussed earlier.<sup>193</sup>

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189. See, e.g., Paul Duggan, *Effectiveness of D.C. Gun Ban Still a Mystery*, THE BOSTON GLOBE, Nov. 18, 2004, available at [http://www.boston.com/news/nation/articles/2007/11/18/effectiveness\\_of\\_dc\\_gun\\_ban\\_still\\_a\\_mystery/?page=1](http://www.boston.com/news/nation/articles/2007/11/18/effectiveness_of_dc_gun_ban_still_a_mystery/?page=1) (discussing the ban's failure to stem the flow of guns coming into Washington, D.C.).

190. Cook et al., *supra* note 72, at 11.

191. Long guns in the home had to be kept disassembled and locked away from ammunition. People who obeyed the D.C. gun laws were effectively barred from defending themselves using a firearm. See D.C. CODE ANN. §§ 7-2502.02, 7-2507.02, 22-4504(a) (LexisNexis 2001), *invalidated by* District of Columbia v. Heller, 128 S. Ct. 2783 (2008).

192. See Nicholas Johnson, *A Second Amendment Moment: The Constitutional Politics of Gun Control*, 71 BROOK. L. REV. 715, 746 (2005).

193. See *supra* notes 134-51 and accompanying text.

Recall that firearms purchasers, under the federal system, provide detailed personal information and then answer a series of questions that may disqualify the sale.<sup>194</sup> Then, to verify the answers and cull out liars, the dealer calls the purchase into the NICS. Whenever a purchaser attempts to buy more than one handgun, the dealer must notify ATF of the transfer.<sup>195</sup> The information from these multiple handgun sales reports offers an opportunity to detect suspected straw purchasers similar to rationing measures that garner so much controversy. The question really is how ATF will respond to information it already has.<sup>196</sup>

#### D. Ballistic Fingerprinting

Ballistic fingerprinting establishes a database of spent cartridge cases from new pistols sold at retail. The hope is that by evaluating ejection markings on fired cases and firing pin marks on spent primers, investigators can match shell casings left at crime scenes with casings in the database and thus identify the crime gun.<sup>197</sup> Microstamping is similar: the pistol is configured with a raised stamp that etches the spent cartridge case with a number that identifies the gun.<sup>198</sup> Either technology can be thwarted with a file or a rotary tool.

The technology only works for pistols—i.e., semi-automatic handguns that eject a spent shell casing when fired. It is irrelevant for revolvers where the spent cartridges remain in the cylinder until

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194. *Id.*

195. 27 C.F.R. § 478.126a (2008).

196. There is some evidence that ATF is doing exactly this. Josie Roberts's report on her purchase of an AK-47 includes this episode:

With my new driver's license in hand, I went back to Firearms Unlimited last Tuesday. Cop cars blocked several stalls when I pulled into the parking lot. Three people were being questioned. A woman had her hands behind her back. A violent crime impact team from the Bureau of Alcohol, Tobacco and Firearms was investigating a possible straw purchase, when a person with a clean record buys firearms for convicted criminals. . . .

"I don't have to sell anybody a gun I don't want to, and I don't have to have a reason," Canella [the gun shop owner] said when I got inside. "It's more gut than anything else. It's a major concern for us, and it's a duty."

Josie Roberts, *Me & My AK-47*, PITTSBURGH TRIB. REV., Mar. 29, 2005, [http://www.pittsburghlive.com/x/pittsburghtrib/search/s\\_318331.html](http://www.pittsburghlive.com/x/pittsburghtrib/search/s_318331.html). Anecdotally, FFL dealers report that these events are increasingly common. *See, e.g., id.*

197. *See generally* FORENSIC SCI. DIV., MD. STATE POLICE, MD-IBIS PROGRESS REPORT #2: INTEGRATED BALLISTICS IDENTIFICATION SYSTEM (2004) (on file with author).

198. Editorial, *A Crime-Fighting Opportunity*, N.Y. TIMES, Feb. 15, 2008, at A22.

manually ejected. More than this, it only applies to the new pistols that enter the market each year in the handful of jurisdictions that have these laws.<sup>199</sup> But even if it were a national program and captured all the new pistols (though none of the revolvers), it would only involve a small fraction of the full inventory. If layered with new requirements that all existing pistols had to be brought in for an official firing and collection of the spent case for the database, the scheme should encounter the same defiance impulses that fuel resistance to registration and confiscation.<sup>200</sup>

As explained in the discussion of registration, one impact of *Heller* should be to reduce the impulse to defy this type of measure, at least among the general population. Unfortunately, the target population, the class of criminal actors, will have very high incentives to obtain remainder guns withheld from the database, or replace the pistol's barrel,<sup>201</sup> or obliterate the microstamp, or change the firing pin contour or simply replace it.<sup>202</sup>

One of the unintended consequences of ballistic fingerprinting should be an increase in the value of revolvers with disparate implications for the black, gray, and legitimate markets. Revolver technology is older than pistol technology. The older portion of the handgun inventory is dominated by revolvers. Revolvers dominate the subcategory of early-inventory, no-paper handguns because there are more older revolvers than older pistols<sup>203</sup> and more of them were sold before the 1968 Gun Control Act established nominal recording of sales by serial number.<sup>204</sup> Ballistic fingerprinting will increase the gray- and black-market values of these revolvers.

However, these early-inventory revolvers have another characteristic that might produce positive consequences. Many of them are chambered in smaller calibers, and thus potentially less lethal than many modern guns. For example, the antiquated .32 caliber cartridge makes up a substantial share of early-inventory

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199. See Matt Apuzzo, *Study Pans Proposed Firearm Database*, FOX NEWS, Mar. 5, 2008, [http://foxnews.com/printer\\_friendly\\_wires/2008Mar05/0,4675,GunDatabase,00.html](http://foxnews.com/printer_friendly_wires/2008Mar05/0,4675,GunDatabase,00.html); C. Rodney James, NRA-ILA, *Why Microstamping and Bullet Serialization Won't Work*, <http://www.nraila.org/Issues/Articles/Read.aspx?ID=311> (last visited Nov. 11, 2008).

200. This includes all of the residual resistance impulses that will continue now that *Heller* has validated the individual right.

201. Barrel replacement on a pistol requires simply disassembling the pistol as if to clean it and reassembly using the new barrel.

202. The ease with which this is done confirms that guns are very simple machines.

203. For example, the ratio of revolver models to automatic pistols in the 1957 Gun Digest is about five to one. GUN DIGEST 202—11 (John T. Amber ed., 1957).

204. See *supra* note 163 (discussing the 1968 Gun Control Act).

revolvers. Many police agencies used the .32 before upgrading to the .38 Special revolver, which itself was replaced by more modern, ballistically superior sidearms.<sup>205</sup> So while ballistic fingerprinting may have limited value as a crime solving tool, it might produce marginal extra-design benefits by creating black market preferences for early-inventory, lower-powered handguns.

### *E. Smart Guns*

The “smart gun” concept envisions a technologically advanced weapon that can only be fired by designated users. The remainder problem confounds smart gun legislation in two ways. The familiar problem is that the remainder renders smart gun legislation irrelevant the way it does all prospective rules—i.e., the vast existing inventory will not be “smart.” The new problem is smart gun legislation may produce an unintended hazard. Even though only new guns will be smart, the legislation and publicity surrounding the implementation of the technology will create certain expectations and behaviors among gun users.

Under a scheme like New Jersey’s, once a viable smart gun is commercially available, sales of new handguns will be limited to smart guns.<sup>206</sup> From that day on, some people will mistakenly believe that all guns in the state are smart. The truth, obviously, is that the remainder—all of it—will consist of “dumb guns.” Even if the law is tightened eventually to outlaw even the possession rather than just new retail sales of dumb guns, resisters and contraband importers will ensure that dumb guns dominate the inventory. Some people will pull the trigger, expecting the gun to be safe and smart. This confusion problem might be rare, but the mistakes will be dramatic.<sup>207</sup> It is easy to imagine these accidents fueling calls for

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205. Modern cartridges like the .40 caliber S&W, the 10mm, the .45 G.A.P. and the .357 SIG—available in mass production only in the last twenty years—are far superior ballistically to the .38 caliber or .32 revolver cartridge.

206. See Jerry Gray, *New Jersey Senate Passes Bill Requiring “Smart Gun” Devices*, N.Y. TIMES, July 2, 1999, at B5. Laws like this will also introduce another risk that will fuel defiance of recording laws (e.g., registration, secondary sales limits, etc.) even where the right to arms is constitutionally protected. Courts might determine that a ban on every type of gun except smart guns is a reasonable regulation and constitutional. One consequence of such a ruling would be to eliminate, in theory, the multiple problems posed by the remainder inventory. All smart guns would be newly manufactured. Smart gun rules might dictate other characteristics—e.g., limited ammunition capacity, caliber restrictions, or other limiting characteristics. People who believe that these new guns are not adequate substitutes for the particular and special utilities of their old, dumb guns will defy recording laws in anticipation of defying smart gun laws.

207. Accidents typically account for a small percentage of gun fatalities. See,

dumb gun bans, which will amplify the defiance dynamic that makes successful gun prohibition such a long shot, especially where such rules are advanced by isolated states.

Also, smart gun legislation, so far, has applied only to handguns.<sup>208</sup> This creates another version of the confusion problem. Some fraction of the population, especially people unfamiliar with guns, will believe that long guns are smart guns too. Some number of accidental discharges will result. The available responses will be the same as in the handgun case. But the controversy over bans on dumb long guns will be more heated because they are valued by the powerful constituency of hunters.<sup>209</sup>

A separate problem is that dumb guns already in the inventory will take on added value. This has two implications. First, the yield from gun thefts or importation of contraband dumb guns will increase. Second, legitimate owners will have greater temptation to resist dumb-gun bans with the aim of retaining an asset with no real substitute, increasing rarity, and rising monetary value. As the premium on old technology escalates, new sales or trades into the black market from these resisters or their successors should rise.<sup>210</sup>

Smart gun laws are particularly interesting post *Heller*. These laws so far are experiments of limited application at the state level. If the individual right is incorporated as a limit on state action, it is not at all clear what courts would do with a statute that outlawed everything except smart guns or required dumb guns to be upgraded with smart technology. People who worry that the retrofit will reduce reliability should defy this measure. People who worry that bringing in their dumb guns, especially their no-paper guns, will create a government record of them and their gun should resist these measures, acting on the same impulses that drive defiance of registration.

#### *F. Litigation Against Suppliers*

Litigation against the gun industry is a powerful tool. Gun

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*e.g.*, GARY KLECK, *TARGETING GUNS, FIREARMS AND THEIR CONTROL* 293 (1997) (reporting that accidents accounted for about three percent of gun fatalities in 1995).

208. *See, e.g.*, S. 573, 210th Leg., Reg. Sess. (N.J. 2002); Assemb. 700, 210th Leg., Reg. Sess. (N.J. 2002).

209. *See* Kates & Mauser, *supra* note 12, at 655–57 (discussing the impact of England's ban on long guns).

210. As the market demand rises, the old-technology gun may ultimately become one of the valuable assets in the family. So the question is not simply whether the nominal owner of the contraband gun is immune to the temptations of the black market. Anyone family, friends, acquaintances who knows about it is a potential seller.

makers, for the most part, are small enterprises and thinly capitalized.<sup>211</sup> Gun dealers are often just small proprietorships. Before the passage of the 2006 Protection of Lawful Commerce in Arms Act, several small gun companies were driven out of business by the cost of litigating cases where they complied with regulatory requirements but were still sued in tort for damages caused by criminal misuse of firearms they bought and sold.<sup>212</sup> But for the intervention of Congress, this litigation strategy might have been quite effective in shrinking prospective supply. And still, the impact would have been relatively inconsequential in the context of the remainder problem.

There is still the problem of the scofflaw dealer—the focus of the urban mayors’ coalition—who knowingly breaks the law by making an illegal sale.<sup>213</sup> How do you police the dealer who is willing to risk prison to enhance his profit on a \$400 pistol? Since these dealers have already survived a background check that ensures they are not criminals, have put up capital in order to pay for the license, purchase inventory, and establish a retail location, they are probably not making the seemingly irrational calculation that appears to drive more desperate, less propertied criminals.<sup>214</sup> So what are the incentives to cheat under the current system?

Dealers have two sources of inventory. First, they can buy a gun “in the system” from a wholesaler, a manufacturer, or another dealer.<sup>215</sup> In all of these instances, two document entries are created. The seller records the gun sold in a disposition log and the buyer records the gun purchased as an acquisition. With the gun logged in, it cannot legally leave the dealer’s inventory without being logged out.<sup>216</sup> So when ATF inspects the dealer’s records and finds acquisitions unaccounted for, the dealer has committed a regulatory violation and maybe a felony.<sup>217</sup> Because the dealer knows that a corresponding entry in the records of another dealer also reflects the sale, he has every reason to avoid an “off-the-books”

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211. GABELNICK ET AL., *supra* note 35, at 32–35.

212. 15 U.S.C. §§ 7901–7903; David B. Kopel, *Protecting Makers of Weapons Boosts Democracy, Rights*, SECOND AMENDMENT PROJECT, Aug. 30, 2001, <http://www.davidkopel.com/2A/Lawsuits/MerrillvNavegar.htm> (“When Navegar’s lawyer called Navegar to convey the good news about the decision, he found that Navegar was shut down.”).

213. See Diane Cardwell, *Bloomberg Went Too Far in Gun Sting, Dealers Say*, N.Y. TIMES, Dec. 9, 2007, (Magazine), at 43.

214. See, e.g., 27 C.F.R. § 478.42 (2008) (requiring applicants for gun licenses to pay a fee).

215. *Id.* § 478.41.

216. *Id.* § 478.124.

217. *Id.* § 478.73.

sale of guns already in the system.

There is a second source of inventory for the dealer (and for all of us). It is the secondary market discussed above. When a private citizen sells or trades a gun to a dealer at a retail gun store, the dealer again is supposed to log the gun in as an acquisition.<sup>218</sup> But a dealer anticipating commission of a felony might neglect recording the gun as an acquisition and then take the risk of selling the gun off the books.

This dealer is betting that there is no corresponding entry in the regulatory system that shows the gun went to him. If the dealer believes this is a late-stage transfer gun—i.e., it has passed through multiple private hands since first sold at retail—he will have more confidence in this bet. But remember, unlike the private citizen who buys the late-stage no-paper gun, the dealer himself is “in the system.” His risks are greater.

To gauge the level of these risks, consider what we really care about. We worry that an off-the-books gun will be used in crime. If a crime gun was an off-the-books purchase from a scofflaw dealer, it will be traced back to that dealer in two different ways, depending on whether the dealer acquired it through the primary or secondary market.<sup>219</sup> If the dealer bought the gun in the primary market and was clueless enough to sell it off the books, the trail leads back to him this way: from the serial number and make of the gun, the manufacturer is identified. The manufacturer will have a record of who received the gun from the factory—usually a wholesale distributor.<sup>220</sup> That distributor will have a similar record showing the dealer to whom it sold the firearm.<sup>221</sup> When the dealer is asked who bought the gun, he will either have a form 4473 showing the retail purchase (or record of resale to another dealer also properly recorded), or he will have to call his lawyer who will try to help him explain how a gun got from his inventory to the crime scene without being logged out as a sale or reported as stolen.

When the dealer buys the gun from a private seller, and the gun is confiscated in connection with a crime, the inquiry starts off the

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218. *Id.* § 478.124.

219. In both cases, the dealer’s first risk is that the perpetrator or his seller will identify the dealer as the source of the gun. This risk is a wild card. The dealer cannot know how to assess it and must have a strong appetite for danger to accept it.

220. *See* 27 C.F.R. § 478.123 (2008) (imposing recording and records retention requirements on manufacturers).

221. This is essentially the ATF firearms tracing procedure described in U.S. Dep’t of Justice, Nat’l Tracing Ctr. Div., Office of Enforcement Programs & Services, ATF Publ’n No. 3312.7, Information for Law Enforcement Agencies (2005), available at [http://www.atf.treas.gov/pub/fire-explo\\_pub/p33127.pdf](http://www.atf.treas.gov/pub/fire-explo_pub/p33127.pdf).

same way. The make and serial number lead to a manufacturer, then to a wholesaler, and then to a retailer. But here is the difference: when the gun goes from a retailer to a private citizen, it moves out of the system. The authorities might contact the first retail buyer, the fellow who completed the form 4473, if he has not moved or died. He will say some version of "I sold it," "traded it," "gave it away," "lost it," "it was stolen," or "I handed it to the perpetrator." If he says "I sold the gun to a scofflaw dealer," then the authorities contact the scofflaw dealer and proceed just as in the first case (investigating the off-the-books sale). But if the first retail purchaser cannot be found, is dead, or claims to have sold or traded the gun to a friend, acquaintance, or stranger years ago, or that it was lost or stolen, the chain is much weaker. The more time and transfers there are between the primary-market sale and the secondary-market acquisition by the scofflaw dealer, the more difficult it is to track back to the scofflaw (again, assuming the illegal buyer does not get caught and give up the dealer to the police).

So the scofflaw dealer's incentives are basically these. To risk an off-the-books sale of a new firearm from within the system, he has to be incredibly naïve; to risk an off-the-books sale of a gun bought from a private citizen, he has to assume (1) that he has good information about the gun's chain of ownership, (2) that the chain of ownership is long enough to minimize the risk that the sale will be traced to him, (3) that the off-the-books buyer will not get caught with the gun and, in typical fashion, identify the source, and (4) that the buyer is not already working for law enforcement and engaged in a sting. Against these risks the FFL must weigh the premium he gets on the off-the-books sale, which must be competitive with the black-market price.

Whatever the inventory source, the off-the-books sale presents real risk and uncertainty for quite a small reward. One could imagine other disincentives for the scofflaw (tougher penalties for violations) or tougher approaches to the problem (like blanket gun bans), but under the existing system, rational FFLs have strong reasons not to make an off-the-books sale their first felony. This suggests that crime guns bought from dealers will not be off-the-books sales, but rather straw purchases where dealer culpability is more ambiguous.

And even here the scofflaw dealer should be a relatively minor source of crime guns when considered against the 500,000 guns stolen each year, or those just bought directly in the secondary market. So litigation against rogue dealers should have only a minor effect on the supply of black-market guns.

*G. The Bad Gun Formula and the Individual Right to Arms*

With the individual right to arms now established in *Heller*, it is tempting to speculate that the defiance impulse should disappear. But this is too optimistic. Given the sharply split decision, it is easy to imagine the scope of the individual right shifting as one season's dissenters become the next season's majority. Also, the Second Amendment has been so neglected by the judiciary that building a basic jurisprudence will be a decades-long enterprise. No constitutional right is absolute, and it is unclear how the protection will extend across disparate categories of firearms. There are myriad potential conflicts over what subclasses of guns are protected and under what circumstances.

Some potential parameters were illustrated at oral argument in *Heller*, when Justice Breyer suggested that under the peculiar circumstances of Washington, D.C., a total ban on handguns might be constitutional if citizens still could have long guns for self-defense.<sup>222</sup> Separately, counsel for *Heller* acknowledged that it would be quite sensible to place machine guns (which if made and registered before 1986 may still be privately owned) outside the scope of constitutional protection.<sup>223</sup>

Future Supreme Court panels and lower courts might develop all manner of criteria for placing particular guns outside the protection of the Second Amendment. This possibility complicates the defiance decisions of private citizens, and those decisions affect the viability of gun regulation outside the core of protected firearms.

One methodology legislatures might use to push categories of guns outside the boundaries of constitutional protection is the bad gun formula. It was used to advance the 1994 Assault Weapons Ban.<sup>224</sup> The argument was that assault weapons were peculiarly dangerous and removing them from the inventory would not impair legitimate interests.

The forward risk created by this form of line drawing is that every type of gun has its peculiarly dangerous characteristics. All guns are deadly and, ultimately, might be characterized as especially dangerous under the bad gun formula.<sup>225</sup> Within twenty yards, nothing is more devastating than the shotgun, and it can be easily sawed off for concealability. The long range precision

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222. Transcript of Oral Argument at 51, *District of Columbia v. Heller*, 128 S. Ct. 2783, available at [http://www.supremecourtus.gov/oral\\_arguments/argument\\_transcripts/07-290.pdf](http://www.supremecourtus.gov/oral_arguments/argument_transcripts/07-290.pdf).

223. *Id.* at 59.

224. See Nicholas J. Johnson, *Shots Across No Man's Land: A Response to Handgun Control Inc.'s Richard Aborn*, 22 *FORDHAM URB. L.J.* 441 (1995).

225. See *id.* (critiquing the "bad gun formula").

capabilities of the scoped bolt action rifle make it dramatically more deadly than any alternative on distant targets. These rifles are ballistically superior to other portable weapons—characteristics that have prompted some to label these ordinary hunting rifles “sniper rifles,” and to press for laws banning them.<sup>226</sup> The semi-automatic assault rifle, though typically chambered for a lower-powered, less-deadly cartridge than most deer rifles, can fire multiple rounds before reloading and can be more portable than standard hunting rifles.<sup>227</sup> Concealability makes the handgun a weapon of surprise, opportunity, and last-ditch defense.<sup>228</sup>

These distinct utilities might be the foundation for denying constitutional protection as circumstances evolve. They will also fuel defiance decisions in spite of nominal constitutional protection. For people who recognize a danger of confiscation with respect to

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226. California actually has banned rifles chambered in .50 caliber. See Carolyn Marshall, *California Bans a Large-Caliber Gun, and the Battle Is On*, N.Y. TIMES, Jan. 4, 2005, at A12.

227. These types of guns were subject of the 1994 Federal Assault Weapons Ban and similar state legislation. The 1994 ban was a limited, superficially serious pursuit of the supply-side ideal. However, in the details it sent such a variety of signals that it was virtually incoherent. The legislation only restricted a narrow category of bad guns and only prospectively. The legislation even included a long list of approved/good guns (some of them functionally identical to banned bad guns) that were seemingly endorsed as good, legitimate, or at least unproblematic.

The legislation did not address the remainder. Indeed, it created demand that actually increased the number and types of cosmetically modified but functionally identical guns manufactured and in circulation. Today, one of the main rifle configurations under the ban (the AR-15) is the best selling gun type in the country. See Knox, *supra* note 135, at 9.

The AWB also created substitution effects in the form of the so-called bureaucrat-style pistols. With large capacity magazines banned from 1994 to 2004, the industry turned to efficiency. The ideal was more power in a smaller gun. The power-to-size ratio increased decidedly with guns and calibers that did not exist in 2004. The North American Arms Guardian, the Kahr compact 9mm, and compact 9mm and .40 guns by Kel-Tec are examples. One lesson is that incremental steps toward the supply-side ideal risk serious unintended consequences. With a focus on accoutrements, the AWB ignored functionality, and the bad gun formula ignored the fact that different guns are dangerous in different ways, but all are deadly.

228. Small, cheap, low-caliber handguns have both been banned and been targets of ban proposals. The Gun Control Act of 1968 prohibited the importation of a class of small handguns deemed unsuitable for sporting purposes. See Gun Control Act of 1968, 18 U.S.C. § 925(d)(3) (2000) (banning imports of handguns not “generally recognized as particularly suitable for or readily adaptable to sporting purposes”). Proposals for bans of “Saturday night specials” seem more focused on cheap handguns that poor people might be able to afford.

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peculiar categories of firearms, the incentives to defy registration, secondary sales, or other recording statutes should continue. This is especially true for people who judge particular categories of guns to have no acceptable replacements.

#### CONCLUSION

Without a commitment to or capacity for eliminating the existing inventory of private guns, the supply-side ideal and regulations based on it cannot be taken seriously. It is best to acknowledge the blocking power of the remainder and adjust our gun control regulations and goals to that reality. Policymakers who continue to press legislation grounded on the supply-side ideal while disclaiming the goal of prohibition are deluded or pandering.