

**Taking Aim:  
New York State's Regulation of Firearms and Proposals for Reform**

Submitted by the Committee on State Affairs  
The Association of the Bar of the City of New York

Like the Second Amendment to the U.S. Constitution, Section 4 of the New York Civil Rights Law provides that, “[a] well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms cannot be infringed.”<sup>1</sup> The provision is interpreted, however, to “protect only the right to be armed with weaponry suitable for use by the militia in warfare and for the general defense of the community.”<sup>2</sup> Possession of a firearm in New York, therefore, is a privilege subject to reasonable regulation.<sup>3</sup>

This report provides an overview of existing firearms regulation in New York, and thereby identifies four specific areas in need of improved or additional regulation. These proposed reforms will make legally-owned firearms safer and will limit the proliferation of illegal firearms.<sup>4</sup> The four areas are:

- Licensing reform, primarily to improve enforcement of existing rules and regulations;
- Additional forms of protection against improper gun ownership and misuse, including safe storage rules, one-gun-a-month limits, ammunition controls, ballistic fingerprinting for long guns, and increased restrictions on specific weapons categories;
- Expanded civil liability for illegal sellers and manufacturers of firearms; and
- Enhanced interdiction programs to combat the illegal influx of guns from other states.

The following sections explore how each of these proposals would improve existing regulation.

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<sup>1</sup> U.S. CONST. amend. II; N.Y. CIVIL RIGHTS LAW § 4 (McKinney 1992). The Second Amendment itself “is a limitation only upon the power of Congress and the National government, and not upon that of the States,” and therefore does not apply to state legislation. *Presser v. Illinois*, 6 S. Ct. 580, 584 (1886); *see also Malloy v. Hogan*, 84 S. Ct. 1489, 1491 n.2 (1964); *Citizens for a Safer Comm. v. Rochester*, 627 N.Y.S.2d 193, 197 (Sup. Ct. 1994).

<sup>2</sup> *Guida v. Dier*, 375 N.Y.S.2d 826, 828 (Sup. Ct. 1975).

<sup>3</sup> *Kaplan v. Bratton*, 673 N.Y.S.2d 66 (1<sup>st</sup> Dep’t 1998); *Williams v. Bratton*, 656 N.Y.S.2d 626 (1<sup>st</sup> Dep’t 1997); *Tartaglia v. Kelly*, 626 N.Y.S.2d 156 (1<sup>st</sup> Dep’t 1995).

<sup>4</sup> A discussion of the criminal sentences provided by New York law for crimes that involve firearms are outside the scope of this report. This omission is not intended in any way to suggest that reforms to such criminal laws are not worthy of analysis or consideration.

## **I. Proposals for Strengthening New York's Licensing Regime.**

### **A. The Current Licensing System.**

Possession of a “firearm” in New York requires a license, pursuant to Section 400 of the Penal Code.<sup>5</sup> However, “firearms” are defined to include only: pistols and revolvers; shotguns with barrels less than eighteen inches in length; rifles with one or more barrels less than sixteen inches in length; any weapon made from a shotgun or rifle by alteration or modification; and, beginning in 2000, assault weapons.<sup>6</sup> Rifles and shotguns that do not fall within this definition are known as “long guns” and, except in New York City, require no license.<sup>7</sup>

To hold a firearms license, an applicant must be twenty-one years of age and of good moral character. In addition, an applicant cannot have been convicted of a felony or other serious offense, and must not be disqualified by mental illness or by a court pursuant to an order of protection.<sup>8</sup> Further, there must be no “good cause” for the denial of a license.<sup>9</sup> The applicant also must provide a photograph, fingerprints, and physical descriptive data to local law enforcement authorities to enable the State’s Division of Criminal Justice Services in Albany and the Federal Bureau of Investigation to determine whether he or she has a criminal record.<sup>10</sup>

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<sup>5</sup> N.Y. PENAL LAW § 400.00(2) (McKinney 2000).

<sup>6</sup> *Id.* § 265.00(3).

<sup>7</sup> Localities may promulgate regulations on the public storage, possession, and display of firearms, ammunition, and explosives. However, these local regulations may “not apply to the personal possession, use or ownership of firearms or ammunition therefor.” N.Y. GEN. MUN. LAW § 139-d (McKinney 1999); N.Y. TOWN LAW § 130(5) (McKinney 1987).

<sup>8</sup> N.Y. PENAL LAW § 400.00(1). On the issuance or violation of a temporary or final order of protection, a court may suspend the defendant’s firearms license, order him ineligible for a firearms license, or order the immediate surrender of all his firearms and weapons. N.Y. CRIM. PROC. § 530.14 (McKinney 2000); N.Y. FAM. CT. ACT § 842-a (McKinney 2000).

<sup>9</sup> N.Y. PENAL LAW § 400.00(1). Examples of “good cause” include public safety concerns, misrepresentations on the application, and sexual misconduct. *See, e.g.,* Nash v. Police Dep’t of the City of New York, 708 N.Y.S.2d 61 (1<sup>st</sup> Dep’t 2000); Harris v. Codd, 394 N.Y.S.2d 210 (1<sup>st</sup> Dep’t 1977).

<sup>10</sup> N.Y. PENAL LAW §§ 400.00(3), (4). Non-discrimination provisions do not bar inquiry into prior arrests and convictions. N.Y. EXEC. LAW § 296(16) (McKinney 2000).

The State must issue or deny the application within six months of filing.<sup>11</sup> The successful applicant, whose name thereby becomes public record, may then receive a license for a pistol or revolver, but not an assault weapon or disguised gun.<sup>12</sup>

The basic license permits the holder to keep a gun in his or her home or place of business.<sup>13</sup> However, a licensed firearm may not be willfully discharged in a public place, or aimed or fired at another person unless in self-defense or in the discharge of official duty.<sup>14</sup> To obtain a broader license to carry a concealed weapon, the applicant must show proper cause for the license, meaning “a special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession.”<sup>15</sup>

Licenses are non-transferable and are generally valid throughout the state. In New York City, they must be renewed every three years, and in Nassau, Suffolk, and Westchester counties, every five years.<sup>16</sup>

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<sup>11</sup> N.Y. PENAL LAW § 400.00(4-a).

<sup>12</sup> *Id.* §§ 400.00(5), (2).

<sup>13</sup> Licensees may also use pistols and revolvers at pistol and shooting ranges, or as part of a university pistol team. *Id.* § 265.20(7),(12). Nonresidents may travel into the State with unlicensed pistols and revolvers to competitive pistol matches or competitions, organized conventions, and exhibitions, provided that the guns are transported unloaded in locked, opaque containers with documentation about the event. *Id.* § 265.20 (13).

<sup>14</sup> *Id.* § 265.35. Special provisions have been made for peace officers, security guards, and the militia. Pursuant to training and licensing requirements, peace officers are empowered to possess and take custody of firearms. N.Y. CRIM. PROC. LAW § 2.20. Security and armored car guards are entitled to use their weapons for the protection of others. N.Y. GEN. BUS. § 89-f, -n (McKinney 1998). Members of the state militia have the exclusive right to parade with firearms. N.Y. MIL. LAW § 170 (McKinney 1990).

Regardless of licensing, possession or display of a pistol, revolver, rifle, shotgun, machine gun or other firearm during the commission of a violent felony is an “armed felony.” N.Y. PENAL LAW § 265.08, .09. Similarly, criminal use of a firearm in the first degree carries an enhanced sentence of five additional years. *Id.* § 265.09(2). Sentences are also enhanced for commission of certain general crimes with a firearm, including: menacing, *id.* § 120.14; criminal trespass, *id.* § 140.17; grand larceny, *id.* § 155.30; and criminal contempt, *id.* § 215.51.

<sup>15</sup> *Klenosky v. New York City Police Dep’t*, 428 N.Y.S.2d 256, 257 (1<sup>st</sup> Dep’t 1980).

<sup>16</sup> N.Y. PENAL LAW § 265.17(10).

Throughout the rest of the state, however, gun owners are not required to renew their licenses, and licenses to carry or possess are valid for life.

When delivering a firearm or ammunition, a seller must require the buyer to produce a license.<sup>17</sup> The licensed buyer must register each firearm with local law enforcement authorities upon purchase. The authorities then record the new firearm on the buyer's license, and send the purchase record and a copy of the amended license to the New York State Police's Pistol Permit Bureau. The Bureau records these transactions in a statewide database in an effort to track the ownership status of all legally-owned firearms in the State.<sup>18</sup>

Possession of a firearm without a license is punished under Section 265 of the New York Penal Law. It is illegal to dispose of any weapon without a license.<sup>19</sup> In 2000, the New York Penal Law was amended to prevent any person who is prohibited by law from possessing a firearm, rifle, or shotgun from attempting to purchase one. More importantly, the amendments outlawed straw purchases, whereby one person, who is legally entitled to possess a weapon, purchases a weapon for another who is not.<sup>20</sup> All sales at gun shows were also made contingent upon a national criminal background check.<sup>21</sup>

The 2000 amendments to the New York Penal Law also clarified the State's assault weapons law. Tracking federal legislation, state law now defines "firearms" to include assault weapons.<sup>22</sup> Assault weapons thereby became the subject of already existing laws prohibiting the possession, use, and sale of firearms.<sup>23</sup> At the same time, certain assault weapons, such as semiautomatic rifles, shotguns, and pistols,

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<sup>17</sup> *Id.* § 400.00(12); *Id.* § 270.00(5).

<sup>18</sup> *See* <http://www.troopers.state.ny.us/Firearms/Firearmsindex.html>.

<sup>19</sup> N.Y. PENAL LAW § 265.10(7). It is also criminal knowingly to buy, receive, dispose of, or conceal a weapon that has been defaced for the purpose of concealment, prevention of the detection of a crime, or misrepresentation of the identity of the weapon. *Id.* § 265.10(3).

<sup>20</sup> *Id.* § 265.17.

<sup>21</sup> *Id.* §§ 896(1), 897(1).

<sup>22</sup> *Id.* § 265.00(3)(e).

<sup>23</sup> Finally, the legislation amended a number of crimes to specifically include assault weapons and large capacity ammunition feeding devices. *Id.* §§ 265.02(7), (8).

and a number of specifically delineated weapons, including TEC-9s and Uzis, are banned outright.<sup>24</sup> However, outside of New York City, if such weapons were lawfully possessed prior to September 14, 1994, they are not defined as assault weapons, and are subject to the relevant licensing provisions for firearms.<sup>25</sup>

## **B. Proposals to Improve the Licensing System.**

The State's licensing system suffers from three shortcomings that limit its effectiveness in keeping guns out of the hands of ineligible purchasers.

### **1. Improving License Renewal Requirements.**

To ensure that newly-ineligible purchasers do not possess firearms, the law should be changed to require every license to be renewed every three years. This renewal requirement will also enable law enforcement to verify that licensees have properly registered the guns in their possession and have properly recorded all secondary sales. Further, it will help ensure that the database of firearm owners kept by the State Police includes updated information, and thus improve the tracking of firearms used in crimes.

Similar reforms have been implemented outside New York. For example, California recently established a renewal requirement that allows law enforcement authorities to compare the records of handgun buyers going back to 1991 with criminal and other records to identify handgun owners who are no longer allowed to possess their weapons.

### **2. Licensing Rifles, Shotguns, and Other Long Guns.**

The Center for Disease Control and Prevention's Firearm Injury Surveillance Study estimates that from 1993 to 1997 shotguns or rifles inflicted 18% of nonfatal gunshot wounds in the United States.<sup>26</sup> The FBI's Supplemental Homicide Reports estimate that during the same period the same kind of weapons were

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<sup>24</sup> *Id.* §§ 265.00(22)(a),(b),(c),(d).

<sup>25</sup> *Id.* § 265.00(22)(e)(v). The exception tracks federal law.

<sup>26</sup> *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FIREARM INJURY AND DEATH FROM CRIME, 1993-1997, at 4 (2000) (*citing* CENTERS FOR DISEASE CONTROL AND PREVENTION, NATIONAL CENTER FOR INJURY PREVENTION, FIREARMS INJURY SURVEILLANCE STUDY, 1993-1997).

responsible for approximately 11% of all homicides.<sup>27</sup> Moreover, according to the federal Bureau of Alcohol, Tobacco and Firearms' ("ATF") 1999 Crime Gun Trace Report, shotguns and rifles comprised 21% of all crime guns traced by law enforcement.<sup>28</sup> Twelve percent of all crime gun trace requests involved two types of long gun, the 12-gauge shotgun and the .22 caliber rifle,<sup>29</sup> which together accounted for more than 57% of all long gun trace requests.<sup>30</sup> Yet, as noted, outside of New York City, there is no license required to possess or purchase a long gun.<sup>31</sup>

Undeniably, handguns are used much more often than long guns in the commission of crimes. But the findings above show that the criminal use of long guns is too significant to exempt such weapons from the State's licensing regime entirely. Rifles pose a particular threat to law enforcement officers because a rifle bullet travels much faster, and will therefore pierce body armor more easily, than a bullet fired from a handgun.<sup>32</sup>

The local regulation of rifles and shotguns in New York City provides a workable model for statewide statutory reform. Section 10-303 of New York City's Administrative Code mandates that a permit is required for possession and purchase of rifles and shotguns. To be eligible for a permit in New York City, an applicant must affirm that he or she meets certain eligibility requirements,<sup>33</sup> and provide a recent photograph, fingerprints, physical description, name, occupation, residence, date of birth, and a fifty-

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<sup>27</sup> *See id.* (citing FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS, SUPPLEMENTARY HOMICIDE REPORTS, 1993-1997).

<sup>28</sup> *See* BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, U.S. TREASURY DEP'T, CRIME GUN TRACE REPORTS 1999, NATIONAL REPORT at x, 14-15 (2000) [hereinafter NATIONAL REPORT].

<sup>29</sup> *Id.* at 14.

<sup>30</sup> *Id.* at 14-15, Table 4.

<sup>31</sup> N.Y. PENAL LAW § 265.35(3). Shotguns having barrels less than 18 inches, rifles having barrels less than 16 inches, or any weapon made from a shotgun or rifle having an overall length of less than 26 inches must be licensed. N.Y.C. ADMIN. CODE § 10-301(1)(a).

<sup>32</sup> NATIONAL REPORT at xi.

<sup>33</sup> N.Y.C. ADMIN. CODE §§ 10-303(a), (b).

five dollar application fee.<sup>34</sup> The New York City Police Department must investigate each application, including a criminal background check on every applicant.<sup>35</sup> New York City rifle and shotgun permits are non-transferable and are valid for three years.<sup>36</sup> They can be automatically renewed, without further investigation, unless the police commissioner has reason to believe the applicant's status has changed since the prior permit was issued.<sup>37</sup>

Just as New York State requires every firearm that is purchased to be recorded both on the purchaser's license and in the State Police database, New York City requires that all rifles and shotguns be registered with the Police Commissioner.<sup>38</sup> Within seventy-two hours of the transfer of ownership of a rifle or shotgun, the seller is obligated to report the disposition of the weapon to the Commissioner, along with the permit numbers of both the seller and purchaser, and the make, caliber, type, model and serial number of the rifle or shotgun.<sup>39</sup> The evidence suggests that New York City's requirement of both licensing and registering rifles and shotguns may reduce the likelihood of criminals and juveniles possessing these guns.<sup>40</sup>

New York City further mandates that only people 18 years and older may obtain a license to purchase and possess a rifle or shotgun.<sup>41</sup> The restriction appears effective. In the United States as a

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<sup>34</sup> *Id.* §§ 10-303(b), (d).

<sup>35</sup> *Id.* § 10-303(c).

<sup>36</sup> *Id.* 10-303(f).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* § 10-304.

<sup>39</sup> *Id.* § 10-304(e).

<sup>40</sup> A recent study by researchers at the Johns Hopkins Bloomberg School of Public Health's Center for Gun Policy and Research found that states that require both licensing and registration of handguns make it more difficult for criminals and juveniles to obtain guns from within the state than in states that only require either licensing or registration. *Study: Firearms Licensing, Registration Deters Criminals, Juveniles*, THE GAZETTE ONLINE, THE NEWSPAPER OF THE JOHNS HOPKINS UNIVERSITY, available at <http://www.jhu.edu/ngazette/2001/10sep01/10deters.html> (Sept.10, 2001).

<sup>41</sup> N.Y.C. ADMIN. CODE § 10-303(a)(1).

whole, 13% of long guns used in commission of a crime during 1999 were traced to juveniles.<sup>42</sup> In New York City, by contrast, only 7.8% of such guns were traced to juveniles.<sup>43</sup>

New York State, therefore, should extend its firearms licensing requirements to long guns, using New York City regulation as its template. Specifically, state law should require that all purchasers of long guns obtain a license to own such a gun; register each gun with local law enforcement authorities; and notify authorities of any transfer of ownership, theft, or loss of the gun within a specified time period. Failure to comply with these requirements should lead to an automatic and permanent loss of the right to obtain a license for any firearm. Additionally, the law should require that the loss or theft of any firearm, rifle, or shotgun be reported to the police within twenty-four hours.<sup>44</sup>

Furthermore, as in New York City, an unlicensed person should be required to wait up to a period of thirty days before a license is issued and a rifle or shotgun can be legally purchased.<sup>45</sup> The licensing system for long guns also should include a background check to ensure that the applicant is not an ineligible purchaser.

Finally, New York State should re-examine the sale of rifles, shotguns and other long guns to juveniles. The dangers of mishandling or misusing any kind of gun are exacerbated by poor judgment, which is reasonably assumed to correlate with age. In New York State, while it is currently unlawful to sell a rifle or shotgun to a minor under the age of sixteen,<sup>46</sup> it is legal for a minor to purchase or possess such a weapon if he is in possession of a valid hunting license.<sup>47</sup> The statistics from New York City suggest that imposition of a statewide age requirement of at least sixteen years for possession of a long gun — regardless of the possession of a valid hunting license — would lower juvenile criminal use of these

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<sup>42</sup> See NATIONAL REPORT at 10.

<sup>43</sup> *Id.* at 11.

<sup>44</sup> N.Y. PENAL LAW § 400.10(1).

<sup>45</sup> N.Y.C. ADMIN. CODE § 10-303(e)(1).

<sup>46</sup> N.Y. PENAL LAW. § 265.10(5).

<sup>47</sup> *Id.* § 265.05. Minors younger than 14 years of age may not obtain a hunting license or permit. N.Y. ENVTL. CONSERV. LAW § 11-0929 (McKinney 2000).

dangerous weapons. In addition, the requirement should be raised to eighteen years of age if the individual does not possess such a valid hunting license.

### **3. Safety Training.**

California prohibits purchasing or receiving a handgun without a Handgun Safety License issued upon successful completion of a safety test. In New York State, however, only Westchester County requires applicants for a gun license to complete a safety training course prior to being approved for a license.<sup>48</sup> The New York Senate has proposed legislation to extend this requirement statewide. We recommend that New York require that all applicants take a gun safety training course and successfully pass a safety test as a condition for obtaining a license.

## **II. Specific Measures to Restrict Improper Access To or Handling of Firearms.**

### **A. Safe Storage Laws.**

At least seventeen states have in place what are known as safe storage or child access prevention (“CAP”) laws. In essence, these laws impose criminal and, in certain states, civil liability on any firearm owner who negligently stores a firearm to which a child gains access and uses to injure or kill himself or another person.<sup>49</sup> The principal purpose of such laws is to prevent accidental shootings in the home, but interest in their value in preventing intentional shootings by teenagers outside the home has increased in the wake of well-publicized school shootings that have occurred over the last several years.<sup>50</sup> While legislators in New York State have introduced CAP bills in the past, the Legislature has not passed such a law to date.

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<sup>48</sup> N.Y. PENAL LAW § 400.00(4-b).

<sup>49</sup> The states with CAP laws include California, Connecticut, Delaware, Florida, Hawaii, Iowa, Maryland, Minnesota, Nevada, New Jersey, North Carolina, Rhode Island, Texas, Virginia, and Wisconsin. Andrew J. McLurg, *Child Access Prevention Laws: A Common Sense Approach to Gun Control*, 18 ST. LOUIS U. PUB. L. REV. 47, nn.75-89 (1999) (listing statutory citations).

<sup>50</sup> *See id.* (discussing shooting at school in Jonesboro, Arkansas). Thankfully, New York State has not suffered such large-scale school shootings in recent years. Researchers have also identified the prevention of adolescent suicide as another objective served by these laws. *See* Andrew J. McLurg, *The Public Health Case for the Safe Storage of Firearms: Adolescent Suicides Add One More “Smoking Gun,”* 51 HASTINGS L.J. 953, 972-99 (2000) (summarizing research showing link between suicide and firearms stored in the home and extent of unsafe firearms storage).

Academic research on the effectiveness of CAP laws is quite limited, in part because the first CAP law was not passed until 1989 in Florida. One study of twelve states with CAP laws in place for at least one year found a 23% reduction in accidental firearm-related deaths among children under 15.<sup>51</sup> It is also possible, but unproven, that CAP laws also reduce the number of guns in illegal circulation by preventing them from being stolen by intruders.<sup>52</sup> However, some studies have questioned the effectiveness of these laws, and suggest that safe storage requirements prevent the defensive use of firearms to the detriment of law-abiding victims of crime.<sup>53</sup> Finally, there is evidence that prosecutors choose not to prosecute offenders under CAP laws, although that does not mean that these laws are not, to some significant degree, self-enforcing.<sup>54</sup>

With the exception of Hawaii, all state CAP laws impose criminal liability for negligent storage of a *loaded* firearm only.<sup>55</sup> There is no solid policy reason for this limitation on liability because a child or teenager may obtain access to an unloaded firearm *and* ammunition in the home, with deadly consequences.

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<sup>51</sup> Peter Cummings & Frederick P. Rivara, *State Gun Safe Storage Laws and Child Mortality Due to Firearms*, 278 J.A.M.A. 1084, 1085 (1997); *see also* McClurg, *supra* note 49, at 57 (discussing this study).

<sup>52</sup> The connection between crime guns and gun theft is a subject of intense and unresolved debate. *See* McClurg, *supra* note 49 (reviewing theft statistics). The significance of illegally possessed firearms that were, at one time, stolen from owners who legally possessed them is disputed. While it is beyond dispute that substantial number of guns are obtained by criminals in this manner, what is less clear is whether those same criminals would have had access to a gun in any event and whether the firearms-related crimes they committed would thus have occurred regardless. *Compare id.* (arguing that reducing the sizable numbers of stolen guns possessed by criminals should reduce firearms-related violence) *with* Gary Kleck, *Policy Lessons From Recent Gun Control Research*, 49 LAW & CONTEMP. PROBS., No. 1, at 57 (1986) (concluding from surveys conducted of criminal inmates that because criminals can obtain firearms without stealing them, theft statistics do not mean that reductions in firearms-related crime would follow from reducing firearms ownership generally).

<sup>53</sup> JOHN R. LOTT, JR. & JOHN E. WHITLEY, SAFE STORAGE GUN LAWS: ACCIDENTAL DEATHS, SUICIDES, AND CRIME (Yale L. Sch. Program for Studies in Law, Econ. and Pub. Policy Working Paper No. 237, 2000); *see also* Daniel D. Polsby, *Firearms Costs, Firearms Benefits and the Limits of Knowledge*, 86 J. CRIM. L. & CRIMINOLOGY 207, 209-20 (1995) (discussing difficulties of determining provable correlations between access to firearms and crime).

<sup>54</sup> That may be in part because offenders have often already suffered extreme loss as a result of the shooting in question. JOHN LOTT, JR., MORE GUNS LESS CRIME 292 n.9 (University of Chicago Press 1998).

<sup>55</sup> McClurg, *supra* note 49, at 63.

Similarly, most states' CAP statutes do not apply if the child who caused the injury was more than sixteen.<sup>56</sup> Yet, while the risk of accidental injuries presumably decreases with an increase in the child's age, the threat of intentional injuries may increase or at least remain constant. A statute that imposed liability for negligent storage of a firearm used injuriously by a shooter of any age would increase incentives for safe storage even for owners without children in the home. Any CAP statute passed in New York State should therefore not be limited to incidents involving children under age sixteen.

The various CAP laws across the country, as well as the federal legislation introduced but not passed in 1998, enumerate several defenses to conviction.<sup>57</sup> These include: a "safe storage" defense, applicable, for example, if the gun was stored in a locked firearm safe<sup>58</sup>; an "illegal entry" defense, applicable if the child gained access to the firearm because of burglary or other unlawful entry<sup>59</sup>; and a "close proximity" defense, applicable if the firearm was carried by the defendant on his person, or within close proximity, when the child obtained access to it.<sup>60</sup> Such defenses appear to eviscerate some of the principal benefits of a CAP law and should be included in a New York law sparingly, if at all.

Although only Nevada's CAP law expressly provides for civil liability, it has been argued that courts could find negligence *per se* following a criminal violation.<sup>61</sup> Civil sanctions may be preferable, given the general reluctance to impose criminal penalties for negligence. Civil actions may also provide a valuable avenue for victims or their families to obtain redress, particularly where prosecutors choose not to

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<sup>56</sup> Iowa, Virginia, and Wisconsin law cover only children under fourteen years of age; California, Florida, Hawaii, Maryland, New Jersey, and Rhode Island law cover children under sixteen years of age; Texas law covers children under seventeen years of age; and Minnesota, Nevada, and North Carolina law cover children under eighteen years of age. *Id.*

<sup>57</sup> The federal legislation was introduced by Senator Kennedy and Representative Carolyn McCarthy.

<sup>58</sup> *Id.* at 64-66. These defenses do not appear to have been fully tested or interpreted yet, as prosecutions under CAP laws have been virtually non-existent to date.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* This defense appears only in California's statute.

<sup>61</sup> *Id.* at 73.

prosecute the owner of the firearm. Accordingly, a New York CAP law should provide for a private right of action and civil damages in addition to criminal penalties.

Since 2000, New York has required all firearms sold in the State to have a child safety trigger lock.<sup>62</sup> No weapon may be sold without a locking device and the following accompanying statement:

The use of a locking device or safety lock is only one aspect of responsible firearm storage. For increased safety firearms should be stored unloaded and locked in a location that is both separate from their ammunition and inaccessible to children and any other unauthorized person.<sup>63</sup>

While commendable, this requirement does not address the mass of firearms already owned by New Yorkers. Nor does it cover guns purchased outside New York but stored within the State. A CAP law could encompass these. Moreover, this law does not require the actual *use* of the trigger lock or the safe storage of guns once they are purchased. In New York, 38% of owners either fail to lock their firearms or fail to keep ammunition in a separately locked location.<sup>64</sup> In addition, it is unclear that the required locks provide the same level of safety as gun safes or other security devices likely to be used by owners facing potential liability under a CAP law. For these reasons, the need for a CAP law in New York remains intact despite passage of the 2000 legislation.

We recommend that New York adopt an aggressive CAP law that imposes both civil and criminal liability for the negligent storage of a firearm leading to the injury or death of a person. This law should apply regardless of the age of the shooter; create a private right of action for the victim or his estate to impose civil liability and obtain damages against the negligent party; and allow for only limited affirmative defenses that the firearm was obtained by the shooter as a result of burglary or theft from the owner.

New York should also strengthen its regulation of firearm storage safety. In 2001, the New York State Assembly introduced the Safe Gun Storage Act.<sup>65</sup> Among this legislation's key provisions are

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<sup>62</sup> N.Y. GEN. BUS. LAW § 396-ee (McKinney 1998). Additional safety standards may be established by the superintendent of the state police with regard to the manufacture, assembly, storage, shipment, and quality of firearms. N.Y. PENAL LAW § 400.00(12-a).

<sup>63</sup> N.Y. GEN. BUS. LAW § 396-ee.

<sup>64</sup> 4 BRADLEY HUTTON & JOHN FUHRMAN, NEW YORK DEP'T OF HEALTH, *Firearm Ownership and Safe Storage in New York State* (Winter 1996).

<sup>65</sup> N.Y. SAFE GUN STORAGE ACT, § 7885-A (1997).

regulations mandating that gun owners lock firearms in a storage unit or, alternatively, use a safety locking device to render firearms incapable of being fired. The Safe Gun Storage Act would further require that firearms sellers inform new purchasers about the safe storage law by including a warning with the firearm. Penalties for violations would be quite limited, with most violations constituting Class A misdemeanors and aggravated violations constituting Class E felonies. The Assembly has not voted on this legislation. If signed into law, this or similar legislation could substantially improve firearm safety.

**B. A One-Gun-A-Month Law**

New York does not currently limit the number of weapons that may be purchased at one time by an individual. However, the evidence strongly suggests that the State should act to restrict such multiple sales.

According to the ATF, some 22% of all guns used in the commission of a crime and recovered in 1999 were originally part of multiple purchases.<sup>66</sup> The ATF has also found that handguns sold in multiple sales accounted for 51% of all trace guns with obliterated serial numbers.<sup>67</sup>

Four states — Maryland, California, South Carolina and Virginia — limit gun purchases to one gun a month. Virginia's law, passed in 1993, produced dramatic results. The percentage of New England crime guns originating in Virginia dropped from 35% to 16%.<sup>68</sup> Similarly, the number of handguns seized in Washington D.C. that originated in Maryland dropped from 20 to zero after Maryland passed the same law.<sup>69</sup> One-gun-a-month laws clearly have an effect of stemming the tide of weapons being brought into New York from states with weaker gun laws.

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<sup>66</sup> NATIONAL REPORT at 40.

<sup>67</sup> *Id.*

<sup>68</sup> Garen J. Wintemute, *The Future of Firearm Violence Prevention: Building On Success*, JAMA 1999; 282:5 at 475; see also Benjamin Bejar, *Wielding the Consumer Protection Shield: Sensible Handgun Regulation in Massachusetts a Paradigm for a National Model?*, 7 B.U. PUB. INT. L.J. 59, 84-85 (1998) (citing D.S. Weil & R. Knox, *Evaluating the Impact of Virginia's One-Gun-A-Month Law*, CENTER TO PREVENT HANDGUN VIOLENCE, reprinted in 141 CONG. REC. S11201-03, at S11209, available at 1995 WL 458462 (Cong. Rec.))

<sup>69</sup> Vincent Schiraldi, *Roadblock for Gun Traffickers*, WASH. POST, June 07, 1998, at C8.

Opponents of such laws argue that their right to purchase guns should not be curtailed. However, the clear and proven benefit of curtailing gun trafficking outweighs the inconvenience imposed by a limit of 12 purchased guns a year. Of the crime guns traced in New York in 1999, nearly a fifth originated within the state.<sup>70</sup> Over 72% of those guns were used and seized outside the county of purchase.<sup>71</sup> Although there are no statistics by which to determine how many of the guns that migrated across county lines were originally part of multiple sales, a one-gun-a-month law in New York would curtail some of this cross-county migration.

Accordingly, we recommend that New York State adopt a one-gun-a-month law to curtail the ultimate illegal use of firearms. Exceptions to the law can allow for replacement of lost or stolen handguns, permit purchases by law enforcement or security personnel, and protect trade in antique weapons.

### **C. Ballistic Fingerprinting of Long Guns**

As noted, every sale of a firearm within New York State requires that the parties provide certain information to the State Police. The purchaser must provide his license to local law enforcement officials, who then provide documentation for the purchaser to show to the seller as proof that he possesses a valid license. Once the purchase is complete, the purchaser must register the firearm in question with local officials. All gun dealers must maintain a record of the date the gun was sold, the name, age, occupation, and residence of the purchaser, and the caliber, make, model, manufacturer's name and serial number, or any other distinguishing characteristics of the weapon, and forward that record to the state police within ten days of sale.<sup>72</sup> Upon sale or delivery of any pistol or revolver, the dealer must also forward to the police a sealed container with a shell casing from the pistol or revolver to be entered in the State's electronic ballistic identification databank, a process known as "ballistic fingerprinting."<sup>73</sup>

In the wake of the sniper shootings in the Washington, D.C. area in 2002, advocates in New York have called upon the State Legislature and Governor to extend the State's ballistic fingerprinting law to

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<sup>70</sup> See NATIONAL REPORT at 7, 17.

<sup>71</sup> See *id.*

<sup>72</sup> N.Y. PENAL LAW § 400.00(12).

<sup>73</sup> N.Y. GEN. BUS. LAW § 396-ff.

cover long guns as well as just firearms, as currently defined. In addition, United States Senators Schumer and Kohl have introduced federal legislation to establish a national ballistic fingerprint database to assist law enforcement officials in identifying shooting suspects. In conjunction with our other recommendations for enhanced regulation of long guns, we recommend that state law require long guns to be “fingerprinted” in this fashion, thus assisting law enforcement authorities in identifying and prosecuting criminals who use weapons illegally.

#### **D. Ammunition Magazines**

Federal gun laws have long taken into account the importance of regulating ammunition. The federal Gun Control Act includes comprehensive provisions relating to ammunition control. The transfer and possession of high-capacity ammunition feeding devices are prohibited,<sup>74</sup> and a knowing violation of the law’s ammunitions control provisions<sup>75</sup> is ground for fines or imprisonment up to five years.<sup>76</sup>

New York law currently tracks federal law in banning high-capacity ammunition magazines that carry over ten rounds. Both the federal and New York bans, however, apply only to magazines manufactured after 1994. New York should extend its ban to all magazines of this kind, regardless of their year of manufacture. An exception should be included for antique firearms.

#### **E. Assault Weapons, “Junk” Guns, and Sniper Rifles**

Several classes of guns are so dangerous, and have such limited purpose beyond the commission of violent crime, that they should be subject to increased regulation. There are several steps New York should take in this respect.

First, it should consider broadening the current ban on assault weapons. In September 1994, Congress passed the Violent Crime Control and Law Enforcement Act of 1994 (“the Anti-Crime Act”),

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<sup>74</sup> 18 U.S.C. § 922(w)(1). Again, the provision is not retroactive. 18 U.S.C. § 922(w)(2). Regulation extends to weapons with a high ammunition capacity. Thus, possession of a semiautomatic assault weapon during and in relation to any crime of violence or drug trafficking crime is subject to a minimum sentence of ten years. *Id.* § 924(c)(1)(B)(i). The minimum sentence increases to 25 years for a second conviction. *Id.* § 924(c)(1)(C)(i). California also prohibits the sale or transfer of ammunition magazines capable of holding more than 10 rounds. *California Enacts Nation’s Strongest Assault Weapon Ban, Limits Handgun Purchases*, U.S. NEWSWIRE, July 19, 1999.

<sup>75</sup> 18 U.S.C. § 922(w)

<sup>76</sup> *Id.* § 924(d).

which banned assault weapons.<sup>77</sup> Codified at 18 U.S.C. § 922(v), the ban prohibits the manufacture, transfer, and possession of certain semiautomatic assault weapons.<sup>78</sup> The Act provides the first and only national statutory definition of an assault weapon. The term “semiautomatic assault weapon” means any of the firearms,<sup>79</sup> or copies or duplicates<sup>80</sup> of the firearms in certain listed calibers (including the Beretta AR70 and the Colt AR-15); semiautomatic rifles<sup>81</sup> and semiautomatic pistols that have an ability to accept a detachable magazine and have at least two listed, enhancing features; and semiautomatic shotguns that have at least two listed, enhancing features.<sup>82</sup> In addition to creating a statutory exemption for firearms that are manually operated, permanently inoperable or antique,<sup>83</sup> and for semiautomatic rifles or shotguns that cannot hold more than five rounds of ammunition,<sup>84</sup> the Act also expressly exempts over 650 conventional sporting firearms.<sup>85</sup>

New York law presently follows federal law by adopting the federal definition of “assault weapon.” Firearm safety advocates have argued that this definition is too narrow, and should be broadened to include any firearm that has even one specified military feature such as a pistol grip. We recommend that the State conduct a comprehensive study of weapons used in crimes within New York to determine if the ban should be broadened to include additional weapons.

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<sup>77</sup> Pub. L. No. 103-322 § 110102 (1994).

<sup>78</sup> It does not apply to assault weapons lawfully possessed at the time of enactment. 18 U.S.C. § 922(v)(2).

<sup>79</sup> The term “firearm” means “(A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. Such term does not include an antique firearm.” *Id.* § 921.

<sup>80</sup> The ban on “copycat models” seeks to ensure that minor alterations in the manufacture of the designated weapons will not slip through unforeseen loopholes. BUREAU OF ALCOHOL, TOBACCO AND FIREARMS ASSAULT WEAPONS PROFILE 1-17 (1994).

<sup>81</sup> A “semiautomatic rifle” is any repeating rifle which utilizes a portion of the energy of a firearm cartridge to extract the fired cartridge case and chamber the next round, and which requires a separate pull of the trigger to fire each cartridge. 18 U.S.C. § 921(a)(28).

<sup>82</sup> *Id.* § 921(a)(30).

<sup>83</sup> *Id.* § 922v(3)(B)

<sup>84</sup> *Id.* §§ 922v(3)(C), (D)

<sup>85</sup> *Id.* § 922(v)(3)(A) & App. A.

A second class of firearms that should be legally banned is comprised of so-called “junk” guns. These handguns are easily concealed and particularly accessible to criminals because of their low cost.<sup>86</sup> In 1993, 8 out of 10 guns confiscated by the police in California were classified as junk guns.<sup>87</sup> In addition, their shoddy manufacture makes these firearms a serious danger to their owners. They frequently misfire, fire accidentally or backfire.<sup>88</sup> A metal alloy body also makes the guns melt at a much lower temperature than typical steel firearms and thereby frustrates police efforts to identify these guns through ballistics and serial numbers.<sup>89</sup>

At least eight states have banned small “junk” handguns, otherwise known as “Saturday night specials,” most recently Massachusetts in 2000.<sup>90</sup> The Massachusetts ban only allows junk guns to be sold if they pass a series of test fires of 600 rounds and a drop test to ensure that they will not fire when dropped. The State of California passed a ban with test requirements similar to Massachusetts’ along with the additional requirement of a safety device to prevent accidental discharge.<sup>91</sup>

After Maryland passed its ban, the state saw a decrease in the proportion of gun crimes involving this type of handgun.<sup>92</sup> It remains unclear, however, what impact these bans have had on overall rates of firearms-related crime. Critics argue that bans on such handguns simply encourage criminals to substitute larger and thus more deadly guns for the smaller weapons.<sup>93</sup> The weight of evidence nevertheless suggests that the added dangers posed by easily-concealed “junk” guns outweighs the impact of any substitution

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<sup>86</sup> Michael Wallenstein, *Gun Manufacturers and Unfair Business Practices*, 30 SW. U. L. REV. 435, 469 (2001).

<sup>87</sup> Gunfree, Junk Guns FAQs *available at* <http://www.gunfree.org/csgv/junkfaq.htm>.

<sup>88</sup> Brent W. Stricker, *Gun Control 2000: Reducing the Firepower*, 31 MCGEORGE L. REV. 293, 312 (2000).

<sup>89</sup> *Id.* at 311.

<sup>90</sup> AP Newswire, *Massachusetts Institutes Tough New Gun Laws, But Foes Point to Regulations Already In Place*, ST. LOUIS POST-DISPATCH, Apr. 4, 2000, at A3.

<sup>91</sup> Stricker, *supra* note 88, at 313.

<sup>92</sup> Wintemute, *supra* note 68, at 476.

<sup>93</sup> *See, e.g.*, Kleck, *supra* note 52, at 49-50 (substitution effect and greater deadliness of long guns argues against bans on handguns alone or Saturday night specials in particular).

effect. Accordingly, New York should follow other states in banning these guns entirely, or requiring testing similar to that required in Massachusetts and California prior to their sale.

### **III. Proposals To Expand and Enforce Liability for Improper Manufacture, Sale, or Possession.**

#### **A. Civil Liability for Secondary Sales to Ineligible Purchasers.**

The federal Gun Control Act of 1968, which established the foundation for the current regulatory approach taken by the federal government toward guns,<sup>94</sup> centered its efforts on the sellers of firearms. The Gun Control Act established a licensing system that requires all persons intending to engage in the business of selling firearms to become federal firearms licensees or “FFLs.”<sup>95</sup> The Gun Control Act also makes it unlawful for any licensed dealers to sell “any firearm to any person who the licensee knows or has reasonable cause to believe does not reside in . . . the State in which the licensee’s place of business is located.”<sup>96</sup> A person who seeks to purchase a handgun from an FFL must provide the dealer with written assurance that he is not ineligible under the law.<sup>97</sup> The FFL faces criminal liability if he makes a sale without obtaining such an assurance, or knowingly sells a firearm to an ineligible person.<sup>98</sup> The Act does not require that the FFL verify the buyer’s purported place of residence, however, making it virtually impossible to prove a violation of this particular provision.

In 1993, federal legislation known as the Brady bill attempted to enhance federal regulation of handguns by imposing a waiting period on all handgun sales. Specifically, the Brady bill required that FFLs delay a handgun sale for up to five business days for a background check to be performed by the

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<sup>94</sup> *Id.* at 51.

<sup>95</sup> 18 U.S.C. §§ 922, 923(a). Individuals may sell firearms without a license, but must not sell to ineligible persons as defined below. Needless to say, the federal licensing system does not even cover all legal gun sales. *See generally* James B. Jacobs & Kimberly A. Potter, *Keeping Guns Out of the “Wrong” Hands: The Brady Law and the Limits of Regulation*, 86 J. CRIM. L. & CRIMINOLOGY 93, 94-96 (1995) (summarizing provisions of federal law).

<sup>96</sup> 18 U.S.C. § 922(b)(3).

<sup>97</sup> *Id.* §§ 922(s)(1)(A)(i)(a), (3).

<sup>98</sup> *Id.* §§ 924(a)(2), (5).

chief law enforcement officer in the dealer's jurisdiction.<sup>99</sup> The Brady bill required the FFL to obtain from the prospective buyer a written statement affirming that he is not ineligible and photo identification and, if satisfied, to forward this information and a completed "Brady form" published by ATF to the law enforcement officer within one business day.<sup>100</sup> The purchase could then only be consummated if the officer indicated that the prospective buyer is not ineligible under the law, or if the waiting period passed without a response from the officer.<sup>101</sup> The chief law enforcement officer needed only to "make a reasonable effort" to ascertain whether the prospective buyer was ineligible.<sup>102</sup>

In June 1997, the U.S. Supreme Court struck down on Tenth Amendment grounds that portion of the Brady bill which required state or local law enforcement agencies to conduct background checks.<sup>103</sup> While some localities stopped performing such checks, all but two states (Ohio and Arkansas) agreed voluntarily to continue performing this service in aid of the federal regulatory scheme.<sup>104</sup> The Brady bill's waiting period provision itself included a sunset provision that ended the federal requirement as of December 1, 1998, but the law continues to require that FFLs obtain the results of an instant background check through a nationwide database managed by the Federal Bureau of Investigation.<sup>105</sup>

Gun control advocates claim that the Brady bill has kept handguns out of the hands of hundreds of thousands of ineligible purchasers. In 1995, ATF completed a survey that concluded that, in one year, the law had prevented an estimated 41,000 ineligible persons from obtaining handguns through the background

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<sup>99</sup> *Id.* § 922(s)(1)(A).

<sup>100</sup> *Id.* § 922(s)(3).

<sup>101</sup> *Id.* §§ 922(s)(1)(A)(i)-(iii).

<sup>102</sup> *Id.* § 922(s)(2).

<sup>103</sup> *Printz v. United States*, 117 U.S. 2365 (1997).

<sup>104</sup> Jens Ludwig & Philip J. Cook, *Homicide and Suicide Rates Associated with Implementation of the Brady Handgun Violence Prevention Act*, JAMA 2000; 5:585 at 2; Lott, *supra* note 54, at 292 n.9.

<sup>105</sup> Ludwig & Cook, *supra* note 104.

check system.<sup>106</sup> Commentators have questioned such claims both because some of the prospective purchasers who were initially rejected were later approved after additional paperwork was provided and, more importantly, because there is little evidence to suggest that those who were rejected through Brady-required background checks did not simply obtain a handgun by other means. Indeed, research suggests that as many as five out of six felons who own handguns obtained them from the secondary market (i.e., a sale from the first retail purchaser to a second buyer) or by theft, and not from an FFL.<sup>107</sup> In other words, it remains far from clear that, even if states continue to conduct background checks, such regulation translates into reductions in handgun-related crime. In fact, the authors of the only true regression study analyzing the full period since the Brady bill became effective found no reduction in homicide rates resulting from the Brady bill's waiting period.<sup>108</sup>

One weakness of the federal licensing scheme is the low threshold for obtaining an FFL license in the first place. The ATF must approve an application to become an FFL if the applicant asserts in a written application that he or she is not ineligible to purchase or possess firearms, provides certain basic identifying information including a photograph and fingerprints, and pays a minimal fee of \$200.<sup>109</sup> The majority of FFLs are not true businesses, but simply individuals who wish to be able to obtain unlimited firearms through the mail.<sup>110</sup> While the ATF conducts occasional inspections of gun stores, few resources have been devoted to ensuring that FFLs selling out of their homes comply with the Brady bill at all.<sup>111</sup> Significantly,

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<sup>106</sup> See Jacobs & Potter, *supra* note 95, at 103-4 (discussing BATF study); see also Wintemute, *supra* note 68, at 475 (citing statistics showing that 70-80,000 ineligible persons are prevented from purchasing handguns each year); Jill A. Tobia, *The Brady Handgun Violence Prevention Act: Does It Have a Shot at Success?*, 19 SETON HALL LEGIS. J. 894, 904-07 (1995) (summarizing debate on effectiveness of waiting periods).

<sup>107</sup> *Id.* at 104-5 (discussing survey conducted by National Institute of Justice among felons in prison); see also Lott, *supra* note 54, at 109 (finding no reduction in crime resulting from Brady); Philip Heymann, *The Limits of Federal Crime-Fighting*, WASH. POST, Jan. 4, 1997, at C7 (concluding Brady not responsible for crime reductions because "most guns were never bought by youth from licensed gun dealers").

<sup>108</sup> Ludwig & Cook, *supra* note 104.

<sup>109</sup> 18 U.S.C. § 923; 27 C.F.R. §§ 178.47, 178.32, 178.44.

<sup>110</sup> Philip J. Cook et al., *Regulating Gun Markets*, J. CRIM. L. & CRIMINOLOGY 59, 75-76 (1995).

<sup>111</sup> *Id.*

when the Brady bill was passed, Congress chose not to provide any additional resources to the ATF to enforce its new requirements. As an unfunded mandate, the Brady bill's promise has rested entirely on state and local law enforcement officers who have responded in part by successfully challenging this burden in court. Not surprisingly, federal licensing of firearms dealers currently does little to prevent FFLs from illegally selling firearms to ineligible persons and across state lines.

Most importantly, the federal regulatory scheme does not reach the secondary market for firearms, where the vast majority of criminals obtain their weapons. Nor does it prevent "straw purchases" by eligible persons for ineligible friends, relatives, or associates. While laudable as a symbolic first step in nationwide gun control, therefore, Brady did not address the principal source of firearms for criminals.

Nor has New York law fully filled that gap. Under New York law, rifles, shotguns, and firearms may be sold by licensed dealers either on licensed premises or at a gun show.<sup>112</sup> Dealers must renew their licenses at least every three years, and they are also charged with fulfilling several other requirements in the sale of a gun.<sup>113</sup> But even though the secondary sale of a firearm without a dealer's license is a felony, such sellers escape arrest and prosecution for the most part. Neither federal nor state law addresses this problem.

One way to help fill this gap is through the creation of a civil right of action that would create liability for someone who sold a firearm in violation of the law. In 2002, Assemblyman Peter Grannis introduced a bill that would create a civil right of action on behalf of a person injured or killed by a firearm against a person, firm, or corporation who sold or transferred such firearm in violation of applicable state or local laws prior to the date of injury or death.<sup>114</sup> This proposal would create an added disincentive against illegal secondary sales and could provide valuable financial and emotional recompense for a victim's injuries.<sup>115</sup>

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<sup>112</sup> N.Y. PENAL LAW § 400.00(8). The sale of imitation weapons is absolutely prohibited, as is the manufacture of packaging in the shape of firearms. N.Y. GEN. BUS. LAW § 870; N.Y. AGRIC. & MKTS. LAW § 210 (McKinney 1992).

<sup>113</sup> N.Y. PENAL LAW § 400.00(10).

<sup>114</sup> *See generally* A00254 (2001).

<sup>115</sup> *See* Kleck, *supra* note 52 at 58-59 (recommending this approach).

### **B. Facilitating Litigation Against Firearms Manufacturers and Distributors**

In 2000, the Attorney General of the State of New York filed suit against various firearms manufacturers and distributors in New York State Supreme Court, asserting among other things that the defendants' manufacture and marketing of firearms without adequate protections against sales to criminals produced a public nuisance.<sup>116</sup> The defendants filed a motion to dismiss the complaint.

On a parallel but closely related front, numerous firearms manufacturers found liable for negligent firearms marketing and assessed damages on a market-share theory by a jury in the United States District Court for the Eastern District appealed that verdict to the Second Circuit.<sup>117</sup> The Court of Appeals for the Second Circuit then certified two questions to the New York Court of Appeals.<sup>118</sup> In answering those questions, the Court of Appeals rejected the market-share theory of damages and, more significantly, held that the manufacturers' duty of care did not extend to the general public without more. In order to prove such liability for negligence, the Court found that a tighter nexus of causation must be shown between the firearms produced and distributed by the defendants and those actually used to shoot the plaintiffs. Without that clearly delineated nexus, the finding of liability against the defendants would, in essence, hold them liable for the intervening criminal acts of an unrelated third party.<sup>119</sup> Following this decision by the New York State Court of Appeals, the Second Circuit reversed the verdict in *Accu-Tek*.<sup>120</sup> Justice York, in turn, dismissed the Attorney General's complaint in *Sturm*.<sup>121</sup>

Although the outcome of *Sturm* on appeal to the Appellate Division remains uncertain, these decisions suggest that the Legislature and Governor could remove at least some of the barriers to success

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<sup>116</sup> *People v. Sturm, Ruger & Co.*, 8/17/2001 N.Y.L.J. 18 (col. 1); see also John G. Culhane & Jean Macchiaroli Eggen, *Defining a Proper Role for Public Nuisance Law in Municipal Suits Against Gun Sellers: Beyond Rhetoric and Expedience*, 52 S.C. L. REV. 287, 301-10 (2001) (summarizing public nuisance claims brought by municipalities and explaining theory behind such claims).

<sup>117</sup> *Hamilton v. Accu-Tek*, 62 F. Supp. 2d 802 (E.D.N.Y.1999).

<sup>118</sup> *Hamilton v. Beretta U.S.A. Corp.*, 222 F.3d 36 (2d Cir. 2000).

<sup>119</sup> *Hamilton v. Beretta U.S.A. Corp.*, 96 N.Y.2d 222, 727 N.Y.S.2d 7, 750 N.E.2d 1055 (2001).

<sup>120</sup> *Hamilton v. Beretta U.S.A. Corp.*, 264 F.3d 21 (2d Cir. 2001).

<sup>121</sup> *People v. Sturm, Ruger & Co.*, 8/17/2001 N.Y.L.J. 18 (col. 1).

imposed by common tort law. Some commentators have proposed imposing strict liability on firearms manufacturers using this tort doctrine as it has been applied to ultra-hazardous activity in the past.<sup>122</sup> A more fruitful approach would be to define more clearly in statute the nature of the proof of causation needed to hold manufacturers, wholesalers, and dealers liable for negligence in marketing firearms or for the creation of a public nuisance. Any such approach should be narrowly tailored. Public debate over this issue would serve to determine popular support for expanded litigation against the firearms industry. If adopted, legislation to guide courts and juries in handling such cases could provide a critical avenue to limit the flow of illegal firearms into New York State.

#### **IV. Interdiction of Firearms Traffic From Other States**

In an effort to stop the flow of illegal guns into New York from so-called “supplier” states New York adopted a gun trafficking interdiction program in 2000.<sup>123</sup> The program’s strategies includes authorization and limited funding for New York district attorneys to enter into collaborative agreements with ATF and law enforcement agencies in supplier states to identify and prosecute gun traffickers who bring guns into New York State. The legislation also requires that the State police establish a central repository of information on all guns believed to have been used in the commission of a crime, and that State and local law enforcement coordinate with ATF to trace the origin of such guns.

In early 2001, Governor Pataki established the Special Weapons Interdiction Field Team (“SWIFT”), an elite division of the State Police focused on interdiction of illegal firearms. SWIFT analyzes gun trafficking patterns and is charged with establishing formal working agreements with the ATF and local law enforcement in states that supply illegal guns to New York.

Despite substantial progress in tracing guns used in crimes in New York State, these initiatives have been hampered by limited state funding. Without complete, accurate tracking and reporting of seized firearms by localities, the data used to monitor the origins of crime guns are insufficient. Similarly,

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<sup>122</sup> See, e.g., E. Judson Jennings, *Saturday Night, Ten P.M.: Do You Know Where Your Handgun Is?*, 21 SETON HALL LEGIS. J. 31, 60-64 (1997); see also Carl T. Bogus, *Gun Litigation and Societal Values*, 32 CONN. L. REV. 1353, 1372-78 (2000) (advocating for “generic” form of strict liability for firearms manufacturers).

<sup>123</sup> N.Y. EXEC. LAW § 230 (McKinney 2001).

resources are needed to investigate and prosecute these cases.<sup>124</sup> Accordingly, we recommend that additional resources be devoted to the State's existing interdiction efforts.

## **V. Conclusion**

New York State substantially regulates the possession and use of firearms, but these regulations have important shortcomings that could be solved through reasonable changes in the law. Such changes must be aimed at all stages of the life of a firearm, from production to possession.

State licensing requirements should be changed to require gun owners to renew their firearms licenses periodically, to require licenses for rifles, shotguns and other long guns, and to require safety training and testing prior to approval for a license. Although these changes will help law enforcement officials track legally owned firearms, it is also important to regulate the manner in which these weapons are stored and handled. Accordingly, we recommend the passage of a safe storage law, a one-gun-a-month law, a law requiring the ballistic fingerprinting of long guns, a study to determine whether the existing ban on assault weapons should be broadened, and a ban on junk guns.

In order to ensure that a more stringent licensing regime and increased regulation of firearms can be successfully implemented, these efforts should be combined with laws that expand the scope and enforcement liability for the improper manufacture and sale of firearms. And finally, to ensure that internal regulations are not thwarted by the continued influx of illegal guns from outside New York State, existing interdiction programs should be fully funded.

By adopting the measures recommended above, the State of New York could take giant strides to ensure that guns are manufactured and distributed legally, stored safely, monitored accurately and used properly. The public benefits of such reasonable reforms cannot be understated.

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<sup>124</sup> See Jacqueline A. Kuhls, *Gun Interdiction in New York, a Report to New Yorkers Against Gun Violence*, March 5, 2001, available at <http://www.nyagv.org/Interdiction>.