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The Brady Handgun Prevention Act and the Community Protection Initiative: Legislative Responses to the Second Amendment?

*Orrin G. Hatch**

I. INTRODUCTION

I want to extend my thanks to the Federalist Society at the J. Reuben Clark Law School for inviting me to share some thoughts on the Second Amendment “right to keep and bear arms.”¹ The primary federal response I will analyze is the Brady Handgun Violence Prevention Act,² (Brady Act) named for anti-gun lobbyist Sarah Brady.³ The Brady Act, by-in-large, requires a waiting period of five state government business days before the purchaser takes possession of the firearm.⁴ During this waiting period, the chief law enforcement officer (CLEO) must make a “reasonable effort” to determine if a buyer is prohibited from buying a handgun.⁵ States are exempt from the five-day waiting period if they have their own laws requiring a records check before a handgun purchase.⁶ The constitutionality of the Brady Act recently went before the United States Supreme Court.⁷ At

* This article is an elaboration of a lecture given by United States Senator Orrin G. Hatch (R-UT), Chairman of the United States Senate Committee on the Judiciary, during the Brigham Young University Federalist Society Symposium on the Second Amendment. The symposium took place on March 22, 1997, at the J. Reuben Clark Law School in Provo, Utah.

1. U.S. CONST. amend. II.

2. Brady Handgun Violence Prevention Act, Pub. L No. 103-159, 107 Stat. 1536 (1993) (codified in scattered sections of 18 U.S.C.).

3. See *The “Brady Handgun Violence Prevention Act” Does it Live up to its Name?*, FACT SHEET (Institute for Legislative Action, National Rifle Ass’n, Fairfax, Va.), May 1, 1997 [hereinafter FACT SHEET].

4. See 18 U.S.C. § 922(s)(1)(A)(ii)(I) (1994).

5. See *id.* § 922(s)(2).

6. See *id.* § 922(s)(1)(C).

7. Since Senator Hatch gave this lecture, the Supreme Court handed down its decision in *Printz v. United States*, 117 S. Ct. 2365 (1997). The ruling struck down parts of the Brady gun control law that required local law enforcement officials to perform background checks on prospective handgun purchasers. The Scalia opinion, for

oral argument, it was maintained that the Brady Act violates the Tenth Amendment because it requires state officials to enforce federal law and, thus, treats the states as mere administrative appendages of the federal government.⁸ The Court seemed to agree and held that the federal government can not "commandeer" state officers.⁹ By the terms of the statute, the Brady Act will expire on November 28, 1998.¹⁰ Undoubtedly, anti-gun members of Congress will seek to extend the life of the bill. Therefore, it is still important to analyze the Brady Act provisions both to assay the philosophical underpinnings of the Act and to suggest a better approach.

I will then focus my remarks on a specific congressional response to protecting the Second Amendment, the Community Protection Initiative of 1997.¹¹ In essence, this Initiative allows qualified current and former state and local law enforcement officers to carry a concealed firearm nationwide, notwithstanding state law.¹² The Initiative also provides for advance congressional approval for states to enter into interstate compacts for the recognition of each other's laws allowing individuals to carry concealed weapons.¹³

My firm belief is that implementation of this Initiative will both enhance the Second Amendment and reduce crime. Indeed, protection of the "right to keep and bear arms" and reduction of crime are mutually reinforcing goals. This conclusion is supported by a recent July 1996 study done under the aegis of the University of Chicago.¹⁴ This "mutually reinforcing" belief runs counter to the gestalt of the politically correct, who cry that firearm possession is a root cause of crime—a position that is increasingly intellectually unsupportable.

a 5-4 majority, found the provision violated "the very principle of separate state sovereignty," *id.* at 2383, which he called "one of the Constitution's structural protections of liberty." *Id.* at 2378. The Court noted that the federal government may not require states to help administer federal programs.

8. See Petitioner's Oral Argument, *Printz v. United States*, Nos. 95-1478, 95-1503, 1996 WL 706933, at *10 (Dec. 3, 1996).

9. See *Printz*, 117 S. Ct. at 2384.

10. See Brady Handgun Violence Prevention Act, 18 U.S.C. § 922(a)(1) (1994).

11. S. 3, 105th Cong. tit. IV (1997).

12. See *id.*

13. See *id.*

14. See John Lott & David B. Mustard, *Crime, Deterrence, and Right-To-Carry Concealed Handguns*, 26 J. LEGAL STUD. 1 (1997).

It is my conclusion that the Brady Act is symptomatic of pervasive federal gun control programs that reflect the ideology of the left and of gun control interest groups, and yet does precious little to reduce crime or keep firearms out of the hands of criminals. Gun control today has taken on the mantra of almost religious zealotry. The liberal dominated national media has fostered this ardor to the point where many in the public believe that private ownership of firearms is a major cause of violent crime and the primary reason why the United States' homicide rate is higher than other industrialized nations.¹⁵ The White House propaganda machine, which is perfectly described by the maxim as being "seldom right, but never in doubt," has also promulgated this belief.¹⁶ Nevertheless, the underlying assumption—that there is an ironclad correlation between the availability of firearms, especially legally obtainable firearms, and the rise of violent crime—is patently false. Accordingly, we should not be surprised to learn that the effects of implementing many gun control programs, such as the Brady Act, have been disappointing at best and often counterproductive.

II. THE BRADY VIOLENCE PREVENTION ACT

The Brady Act is a good case for testing the anti-Second Amendment paradigm of gun control and left-leaning groups; to wit: that even lawful possession of firearms is a major cause of violent crime. My conclusion is that the left paradigm is not supported by the facts. Indeed, far from it, gun control measures, such as the Brady Act, delay or deny lawful citizens from obtaining firearms and do virtually nothing to prevent criminals from obtaining firearms.¹⁷ They also have a pernicious effect of actually increasing in certain circumstances the national rates of crime and violence.¹⁸ In his new book, *Slouching Towards*

15. See, e.g., Joy Powell, *FBI Reports Violent Crime Declined in First Half of '97*, STAR TRIB. (Minneapolis), Nov. 24, 1997, at 1A ("As police seized more guns on the streets, the homicide rate dropped. So did aggravated assaults, [Minneapolis police chief Robert] Olson said."); Cindy Richards, *Legalizing Hidden Guns Will Increase Slaughter*, CHI.-SUN TIMES, Mar. 12, 1997, at 36.

16. See, e.g., President Bill Clinton, Remarks on Crime (Jan. 12, 1998), available in LEXIS, Nexis Library, Federal News Service File ("Over the past five years, we've done our best . . . to bear on the fight against crime. . . . We've . . . taken criminals' guns . . . off the streets.").

17. See *infra* notes 43-44 and accompanying text.

18. See *infra* notes 48, 51 and accompanying text.

Gomorrhah, Judge Robert Bork opined on the failure of the anti-Second Amendment paradigm:

Gun control laws raise the cost of obtaining a firearm. This is a cost the criminal will willingly pay because a gun is essential to the business he is in. He probably will not have to pay the increased cost, because illicit markets adapt to overcome difficulties. There are, moreover, 200,000,000 firearms in the United States now, many of them unregistered, and it is easy to smuggle guns in or to make them in basements and garages. A gun need not be state of the art to serve a criminal's purpose. Criminals will never have difficulty getting guns. The citizen who wants a firearm for self-defense will not have access to illicit markets and will be deterred by the higher costs charged in legal transactions. The result is a steady supply of guns for criminal aggression and a diminished supply for self-defense.¹⁹

I believe that the facts overwhelmingly support Judge Bork's contention. Nevertheless, because of the steady drumbeat of the liberal media and misinformation disseminated by the Clinton Administration, the contention that firearm possession reinforces efforts to reduce violent crime appears counterintuitive to many in the public. Let's turn to the Brady Act to verify which hypothesis is correct.

A. *The Brady Act—Ineffective on its Face*

It may seem strange, but the Brady Act was designed to fail. By its opt-out provision,²⁰ most high crime states are exempted from the Act's strictures. To explain this, a few words on the Brady Act and how it works are in order. The Brady Act was approved by Congress in November, 1993, signed into law by President Clinton later that month, and took effect February 28, 1994.²¹ Simply put, the Act imposes a five-day waiting period for any handgun purchase from a federal firearm licensee.²² During the five-day delay, the CLEO must make a "reasonable effort" to discover if the buyer is prohibited from possessing a handgun.²³

19. ROBERT BORK, *SLOUCHING TOWARDS GOMORRAH* 166-67 (1996).

20. *See* Brady Handgun Violence Prevention Act, 18 U.S.C. § 922(s)(1)(C)-(D) (1994).

21. *See id.* § 922(s).

22. *See id.*

23. *See id.*

A gun may be obtained before five days "if the records check has been completed or if the CLEO believes the purchaser needs a handgun to protect himself or a member of his household."²⁴

Not every state is forced to adopt the requirements of the Brady Act. States that have their own laws requiring a records check before a handgun purchase are exempt.²⁵ As of February 28, 1994, eighteen states and the District of Columbia had such laws, and were thus exempt, leaving only thirty-two states subject to the Brady Act waiting period.²⁶ This would be an irrelevant statistic if these eighteen states and the District of Columbia did not together account for 63% of this nation's violent crimes, including 58% of its murders.²⁷ If this law's purpose was to substantially decrease crime in the nation, why did it originally exempt the states that make up 63% of the crime? "Today, 30 states and D.C. are exempt from Brady's 5-day wait, and they account for 75% of violent crimes."²⁸

Well before 1994, when the Brady Act became law, it was known that laws delaying the purchase of handguns had no effect on crime. In 1992, California had a fifteen-day waiting period on all firearm sales, yet its "murder and total violent crime rates were 44% and 58% higher, respectively, than rates for the rest of the country."²⁹ "Anti-gun researcher David McDowell had concluded that 'waiting periods have no influence on either gun homicides or gun suicides.'³⁰ "During 1992, twenty-four states and Washington D.C. delayed the purchase of handguns, some for much longer than the five days imposed by the Brady Act. These states and D.C. had much higher overall violent crime rates, compared to states that did not delay handgun purchases."³¹

These facts raise the real possibility that the Brady Act was promulgated for mere ideological reason, a kind of "feel good" measure for the unthinking politically correct left. Apparently,

24. FACT SHEET, *supra* note 3; see also 18 U.S.C. § 922(s)(1) (1994).

25. See FACT SHEET, *supra* note 3.

26. See *id.*

27. See *id.*

28. *Id.*

29. *Id.*

30. *Id.* (quoting David McDowell, Address at the Annual Meeting of the American Society of Criminology on Preventative Effects of Firearm Regulations on Injury Mortality (1993)).

31. *Id.*

these groups feel good when lawful citizens are hindered in obtaining firearms.

B. The Brady Act—Ineffective as Applied

President Clinton, an anti-firearm interest group, and the national media howl that the Brady Act is a resounding success.³² These liberal entities claim that its five-day waiting period resulted in disapprovals of tens of thousands of retail handgun purchase applications, resulting in “keeping handguns out of the hands of dangerous and irresponsible persons,”³³ thereby reducing crime. In fact, the federal five-day waiting period and the denials that occur under the law do not come close to accomplishing that objective.³⁴

As the National Rifle Association (NRA) points out, the Brady Act’s five-day wait does not prevent criminals from obtaining handguns.³⁵ It should not be a surprise, then, that the Government Accounting Office (GAO) has stated: “Brady may not directly result in measurable reductions of gun-related crimes.”³⁶ During the first seventeen months after the law was enacted, just seven individuals were convicted of illegal attempts to buy handguns.³⁷ Three of them were sentenced to twelve to twenty-four months prison or custody, and four were only placed on probation.³⁸ Out of 250 cases that were referred for prosecution during the Brady Act’s first year, only thirty-three were prosecuted.³⁹ To put this lack of success into perspective, “the Virginia State Police report[ed] that between November 1989 and June 1996 the state’s Instant Check system—which conducts records checks in minutes—facilitated the arrest of 2,479 individuals, including 304 wanted persons.”⁴⁰

32. *See id.*

33. James B. Jacobs & Kimberley A. Potter, *Keeping Guns Out of the 'Wrong' Hands: The Brady Law and the Limits of Regulation*, 86 J. CRIM. L. & CRIMINOLOGY 93, 118-19 (1995).

34. *See* FACT SHEET, *supra* note 3.

35. *See infra* note 61 and accompanying text.

36. FACT SHEET, *supra* note 3 (quoting STAFF OF THE GAO, REP. NO. GAO/GGD-96-22 GUN CONTROL, REPORT ON THE IMPLEMENTATION OF THE BRADY HANDGUN VIOLENCE PREVENTION ACT 8 (Jan. 1996) [hereinafter GAO/GGD]).

37. *See id.*

38. *See id.*

39. *See id.*

40. *Id.*

According to New York University professors James B. Jacobs and Kimberley A. Potter,

It is hard to see the Brady law, heralded by many politicians, the media, and Handgun Control, Inc. as an important step toward keeping handguns out of the hands of dangerous and irresponsible persons, as anything more than a sop to the widespread fear of crime There is little reason to accept the claim that Brady is preventing 40,000 dangerous and irresponsible persons per year from obtaining handguns.⁴¹

Furthermore, a poll of the National Association of Chiefs of Police released in May asserted that 85% of police chiefs believe that the Brady Act has not stopped criminals from obtaining handguns from illegal sources.⁴²

In fact, the law hardly limits criminal access to firearms. According to the Bureau of Alcohol, Tobacco and Firearms (ATF), only 7% of armed career criminals obtain firearms from licensed gun shops.⁴³ Similarly, the Department of Justice did a study that found that only 7% of "handgun predators" obtain firearms from licensed gun shops.⁴⁴ Even Handgun Control, Inc. (HCI) admits that the five-day wait "does not cut off to prohibited purchasers all avenues to handguns."⁴⁵

From the beginning, the Brady Act has not prevented, nor was it intended to prevent, handgun violence in many high-crime states and cities.⁴⁶ Gun control proponents have represented to the public that the Brady Act's five-day wait was meant to prevent criminals from getting guns when in fact the states with the highest crime rates were never required to become Brady states.⁴⁷ Indeed, violent crime trends in states sub-

41. Jacobs & Potter, *supra* note 33, at 114.

42. See FACT SHEET, *supra* note 3.

43. See *id.* (quoting DEPARTMENT OF THE TREASURY, BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, PROTECTING AMERICA: THE EFFECTIVENESS OF THE FEDERAL ARMED CAREER CRIMINAL STATUTE 28 (1992)).

44. See *id.* (quoting JAMES D. WRIGHT & PETER H. ROSSI, ARMED AND CONSIDERED DANGEROUS: A SURVEY OF FELONS AND THEIR FIREARMS 187 (1986)).

45. *Id.* (quoting Douglas Weil, *Denying Handguns To Prohibited Purchasers: Quantifying The Impact Of The Brady Law*, CENTER REP. (Handgun Control Inc.'s Center to Prevent Handgun Violence, Wash. D.C.), Aug. 26, 1996.

46. See *id.*

47. See *id.*

ject to the Brady Act's five-day wait have worsened since Brady was imposed upon them.⁴⁸

The Brady Act has had the greatest impact on historically low-crime states, such as North Dakota, South Dakota, Montana, Wyoming, Alaska, West Virginia, Rhode Island, Maine, and Vermont.⁴⁹ Other traditionally low-crime states, such as Idaho, New Hampshire, and Utah, have become exempt from the Brady Act by adopting the more efficacious Instant Check program.⁵⁰

Furthermore, the argument propounded by gun control advocates that the implementation of the Brady Act has helped to lower the overall violent crime rate is wrong. Total violent crime and firearm-related violent crime have declined nationwide during the 1990s, but since imposition of the Brady Act the rates have declined less in states upon which the five-day waiting period has been imposed.⁵¹ In terms of violent crime, let me point out the salient facts that seven of every ten violent crimes are not committed with firearms of any sort,⁵² "29% of homicides, 90% of rapes, 59% of robberies, and 77% of aggravated assaults are committed with weapons other than handguns or other firearms."⁵³ Thus, it is chimerical to believe that imposition of the Brady waiting period would have a significant effect on the reduction of violent crime.

C. The Clinton Administration's Claim of its Success and the BJS Report

In gun control and other matters, the Clinton Administration has heeded the advice of Mark Twain, who noted that "truth is the most valuable thing we have. [Therefore] let us economize it." I am not saying anyone has lied, but the Clinton Administration has certainly economized on the truth, keeping the public in the dark about the real effectiveness of the Brady Act.

President Clinton recently claimed that the Brady Act has prevented more than 186,000 illegal over-the-counter gun sales

48. *See id.*

49. *See id.*

50. *See id.*

51. *See id.*

52. *See id.*

53. *Id.*

through background checks on prospective buyers.⁵⁴ The Administration's proclaimed source of this new information is a recent Bureau of Justice Statistics (BJS) Bulletin, entitled "Presale Firearm Checks."⁵⁵

There are, however, a number of problems with the Administration's self-proclaimed success of the Brady Act. First of all, counting the total number of potential gun buyers' denials is not probative of a potential reduction in violent crime because the denial numbers themselves are meaningless. Contrary to the BJS report's assertions, the number of handgun purchase denials under the Brady Act do not tell us how many criminals are prevented from getting handguns by other means, nor whether or not they already possess handguns illegally. Significantly, the few criminals who do choose to go into a retail gun store to purchase firearms and are then denied one, are not arrested or prosecuted.⁵⁶ They are then able to go out on the street and obtain a gun illegally, as most in fact do from the start.⁵⁷

The correct standard to measure the success of the law is whether or not the criminals are still committing the crimes by obtaining handguns illegally. As stated above, crime has actually decreased at a slower rate in the states subject to the Brady Act since the law was imposed upon them as it has in other states.⁵⁸ If the Brady Act was intended to and could prevent crime, surely the states with even more restrictive gun control laws would have lower rates of crime; for the District of Columbia, New York, and California, this is not the case.⁵⁹

On the front page of the BJS report it clearly states that "[t]he data do not indicate whether rejected purchasers later obtained a firearm through other means."⁶⁰ According to studies from the Department of Justice and the ATF, 93% of criminals

54. See President Bill Clinton, Remarks at the Democratic National Committee Dinner at Hay-Adams Hotel (June 16, 1997), available in LEXIS, Nexis Library, Federal News Service File ("186,000 . . . felons, fugitives . . . have not been able to buy handguns.").

55. *Presale Firearm Checks*, BUREAU JUSTICE STAT. BULL. (Office of Justice Programs, U.S. Dep't of Justice, Wash. D.C.), Feb. 1997, at 1 [hereinafter BJS BULL.].

56. See FACT SHEET, *supra* note 3 (citing GAO/GGD, *supra* note 36).

57. See Daniel D. Polsby, *Daniel D. Polsby Replies*, 86 J. CRIM. L. & CRIMINOLOGY 227, 229 (1995) ("Only about 16% of 'crime guns' were acquired in lawful retail transactions.").

58. See FACT SHEET, *supra* note 3.

59. See *id.*

60. BJS BULL., *supra* note 55.

get their guns from sources other than licensed gun shops.⁶¹ The GAO has reported that there were only seven convictions for illegal attempts to buy handguns under the Brady Act's first seventeen months.⁶²

The GAO has also "found that nearly half of denials result from administrative errors."⁶³ GAO reported that handgun purchase denial statistics "do not reflect the fact that some of the initially denied applications were subsequently approved, following administrative or other appeal procedures."⁶⁴ Moreover, the Administration and the BJS mislead the public into believing that the Brady Act alone has been responsible for rejecting 186,000 handgun purchasers. But this figure includes the rejections in the non-Brady states as well.⁶⁵

The maxim "half-truths are worse than lies" applies to the figures the Administration touts as proving the success of the Brady Act. The front page of the BJS report clearly states that "between March 1994 and June 1996, for *all States together*, there were . . . an estimated 186,000 rejections."⁶⁶ Since only twenty states are subject to the Brady Act's five-day waiting period, most of the denials the President attributes to the Brady Act's waiting period actually occurred in non-Brady states—such as the thirteen states that have Instant Check laws.⁶⁷

BJS recognized that "18 states and the District of Columbia have never been subject to Brady's waiting period."⁶⁸ When the Brady Act took effect, only thirty-two states were subject to the waiting period, and the BJS reports that of the 186,000 denials nationwide, only 86,000 occurred in the thirty-two "original Brady states."⁶⁹ Of course, twelve of those states have also become exempt from the Brady Act's waiting period, by adopting Instant Check or modifying existing purchase laws,⁷⁰ so you

61. See FACT SHEET, *supra* note 3 (citing WRIGHT & ROSSI, *supra* note 44; Weil, *supra* note 45).

62. See *id.* (citing GAO/GGD, *supra* note 36).

63. *Id.*

64. *Id.*

65. See *id.* (citing BJS BULL., *supra* note 55).

66. BJS BULL., *supra* note 55 (emphasis added).

67. See FACT SHEET, *supra* note 3.

68. *Id.* (quoting BJS BULL., *supra* note 55).

69. *Id.*

70. See *id.*

have to reduce the number of denials even further, to know how many have occurred in Brady states.

Indeed, handgun purchase denial statistics do not identify whether a denial is the result of committing violent crime, since some felonies are nonviolent. The GAO “warned against making national projections on the basis of limited data, [and] found that only 7% of denials in two states and two urban counties were for violent offenses.”⁷¹

The GAO studied twenty Brady jurisdictions, fifteen of which—Arizona; Arkansas; Kentucky; Nevada; Ohio; South Carolina; Clayton and Fulton Counties (Georgia); Bossier and Caddo Parishes (Louisiana); and Abilene, Fort Worth, Harris County (Houston area), Houston, and Pasadena (Texas)—had records identifying general reasons for purchase denials. GAO reviewed 384,301 retail handgun purchase applications occurring between February 28, 1994 and February 28, 1995, and found that 95.2% of applicants were approved without question. Of the 4.8% disapproved, nearly half involved administrative errors (applications prepared or mailed incorrectly, etc.) or erroneous denials for traffic tickets. Persons denied for violent and nonviolent crime-related reasons accounted for 2.4% of applicants; denials due to administrative errors, 2%; and denials due to traffic tickets, 0.4%. Only four jurisdictions—Ohio; South Carolina; and Harris (Houston) and Tarrant (Fort Worth) Counties, Texas—had records identifying denials for violent crime reasons, and 0.2% of handgun purchase applications were so denied.⁷²

The GAO “reports that during the Brady Act’s first year 95.2% of handgun purchase applicants were approved without a hitch. Of the denials, nearly half were due to traffic tickets or administrative problems with application forms.”⁷³

Law-abiding citizens are often incorrectly denied as “criminals” because their names or other identifying information are similar to those of criminals, triggering “false hits” during records checks. GAO notes that denials reported by ATF in its one-year study of the Brady Act, “do not reflect the fact that some of the initially denied applications were

71. *Id.*

72. *See id.*

73. *Id.* (citing GAO/GGD, *supra* note 36, at 64-66).

subsequently approved, following administrative or other appeal procedures." Professors James Jacobs and Kimberley Potter have concluded "it is *possible* that the many people found to be ineligible to purchase handguns were misidentified because they had the same name as a person who is ineligible."

GAO reports that "[o]nly 4 of the 15 jurisdictions (studied) had sufficiently detailed records to permit GAO to quantify denials based on violent crimes," and that denials of applicants who had been convicted of or indicted for aggravated assault, murder, rape, or robbery totaled 371 and represented 0.2% of the applications and 4.9% of the denials in these jurisdictions.⁷⁴

Consequently, there is not any hard evidence that the Brady Act has reduced violent crime one iota. There is evidence, on the other hand, that the Brady Act has prevented innocent, law-abiding citizens from obtaining firearms for family defense and for other legitimate purposes.⁷⁵ Far from being a panacea for reducing crime, the Brady Act has proven that the anti-gun hypothesis for gun control is a mirage.

D. The Answer is the Instant Check Program

I certainly agree with the NRA statements on this issue:

Though claiming to support the "Brady Act," gun control advocates continue to oppose its national Instant Check requirement, preferring that handgun purchases be delayed, regardless of the speed with which purchasers can be verified as law-abiding citizens. The NRA supports laws prohibiting the possession of firearms by persons convicted of violent crimes, fugitives, and certain other individuals, thus, NRA supports "Instant Check" systems which require a computerized search of criminal and other records to verify that a prospective firearm purchaser is not prohibited from possessing firearms. Unlike waiting periods and other schemes delaying handgun purchases for days or weeks, an "Instant Check" usually lasts a matter of minutes. Thus, when a person prohibited from possessing firearms attempts to buy a firearm, he is identified by police while on the [merchant's] premises. A law-

74. *Id.* (quoting GAO/GGD, *supra* note 36, at 30, and Jacobs & Potter, *supra* note 34, at 103).

75. *See id.* (citing GAO/GGD, *supra* note 36, at 30).

abiding citizen, however, can exercise the right to purchase firearms without delay, an issue always of principle and sometimes of life and death.⁷⁶

Indeed, a "cooling off period" has never been empirically shown to prevent "crimes of passion," and has no efficacy if the individual already owns a firearm, as do many purchasers. And in fact, no less an "authority" than Sarah Brady was quoted as agreeing that waiting periods won't "stop crimes of passion or drug-related violence."⁷⁷ The question is—why wait?—particularly if the goal to be accomplished, namely keeping firearms out of criminal hands, can be accomplished better by an Instant Check system.

State Instant Check systems are equal or superior to state waiting periods. The protection of the Second Amendment should not be minimized or disparaged. Prior restraint on the exercise of a constitutional right by a law-abiding citizen should never be accepted as legitimate, but particularly when it is unnecessary. The Instant Check system is the most effective means of insuring that those who should not be allowed to own firearms are identified, while preserving our essential freedoms. More and more states are moving towards an instant check system on their own. They are moving away from ineffective waiting periods that impose administrative burdens on the states and are ineffectual against stopping crime.

In summary, Instant Check is better than a waiting period because it: (1) protects the right of a law-abiding citizen to buy a handgun without delay, which can be of life-saving importance in terms of self defense; and (2) enables the police to apprehend illegal handgun purchasers, because the records check is done while the criminal is in the gun store. Virginia and Delaware, two longtime Instant Check states, have arrested hundreds of wanted persons, outperforming Brady states by leaps and bounds, in terms of apprehending suspects.⁷⁸

III. THE COMMUNITY PROTECTION INITIATIVE OF 1997

An example of legislation that engenders the Second Amendment right to "keep and bear arms," yet reinforces the battle to

76. *Id.*

77. *Id.*

78. *See id.*

cut the violent crime rate, is the Community Protection Initiative of 1997 (Initiative), which I introduced on January 21, 1997 as Title IV of S. 3, the Omnibus Crime Control Act of 1997.⁷⁹

Over the last decade, nearly two-thirds of the states have enacted what have come to be known as "right-to-carry" laws.⁸⁰ These laws create an exemption for private citizens from statutes that make it a crime—usually a misdemeanor—to possess a concealed weapon.⁸¹ These statutes are a departure from the laws that have been on the books for quite some time. Some background, therefore, is helpful in this regard.

Historically speaking, some concealed weapons laws contained an exception for, among other persons, law enforcement officers and persons who could prove they had a need to carry a concealed firearm.⁸² The exception could apply to a person who carries large quantities of money or other valuable property or a person who has been threatened with violence. These laws did not guarantee a private person who fit into one of these categories the right to carry a concealed firearm. Instead, those states operated under what has come to be known as a "may issue" standard.

States that observed "may issue" laws placed the decision-making authority in certain state officials, who had the responsibility of screening concealed carry permit applicants.⁸³ These state officials, such as a county sheriff, had the authority to measure the need demonstrated by applicants to carry a firearm. Along with other considerations, those officials would approve or deny an application on the basis of a proven need. Unfortunately, what resulted in these states was an arbitrary system of issuing concealed carry permits.⁸⁴ Local officials could engage in favoritism when issuing permits, for instance, by issuing them to family and friends. Even if local officials did not act

79. S. 3, 105th Cong. tit. IV (1997). The Omnibus Crime Control Act of 1997, is currently under consideration by the Senate Committee on the Judiciary, which Senator Hatch chairs.

80. See Lott & Mustard, *supra* note 14, at 4 & n.13.

81. See *id.*

82. See Clayton E. Cramer & David B. Kopel, "Shall Issue:" *The New Wave of Concealed Handgun Permits*, 62 TENN. L. REV. 679, 681 (1995).

83. See *id.*

84. See *id.* at 682-85 (explaining that "[i]n many jurisdictions which continue to retain unlimited administrative discretion, abuse of discretion is common" and providing examples of such abuses).

arbitrarily, they had tremendous authority to deny permits, thereby discouraging many individuals from obtaining permits, or even from applying for them. One state, Vermont, recognized a citizen's right to carry a concealed weapon without a permit, prohibiting only the carrying of a concealed weapon for an unlawful purpose.⁸⁵ But Vermont was a minority of one.

That is where matters stood until 1987. In that year, after a tough legislative battle, Florida passed the first "right-to-carry" law.⁸⁶ Florida replaced its discretionary permit system with one that (generally speaking) gave private citizens the right to carry a concealed firearm.⁸⁷ The Florida "shall issue" law established a uniform standard that allows any citizen, at least twenty-one, who can show that he or she does not have a felony conviction, a conviction relating to a controlled substance, is not habitually intoxicated, does not have a history of mental illness, and is trained in the use of a firearm to receive a permit to carry a concealed weapon.⁸⁸ Individual citizens, therefore, are able to make a personal decision about their need to carry a firearm.

Some citizens want to carry a firearm for self-protection. Provided that citizens meet the requirements of "shall issue" laws, these statutes enable law-abiding citizens to carry a firearm without having to demonstrate they have a particular need to do so. These laws therefore allow citizens to make this choice for themselves and have several beneficial results. An obvious benefit is the increase in personal freedom these laws create.

Moreover, by allowing each citizen to make that decision for himself or herself, society recognizes that each person is a better judge of his or her needs and fears about crime than the police may be. Given that in many communities the police are incapable of protecting the public from violent crime, there is much to be said in favor of a law that allows each citizen to protect himself or herself. Those benefits are valuable ones; but that is not all. There is an additional benefit from the new wave of "shall issue" laws, a benefit that opponents of such legislation never imagined. What has resulted in states with such laws is truly remarkable. These states have witnessed a clear, material, posi-

85. *See id.* at 682 & n.10 (citing VT. STAT. ANN. tit. 13, § 4003 (1974)).

86. *See* FLA. STAT. ANN. § 790.06 (West 1996).

87. *See id.*

88. *See id.*

tive benefit from an armed citizenry, specifically a reduction in violent crime.

Proponents of the Florida "shall issue" legislation argued that allowing citizens to carry a firearm would reduce crime rates because criminals are more likely to victimize individuals who do not carry a firearm. Proponents believed that the right-to-carry laws would have a deterrent effect on criminals. Opponents of the legislation, however, bitterly disagreed.⁸⁹ They believed that increasing the number of citizens with guns would exacerbate the crime problem, simply because more guns would be on the streets.⁹⁰ Opponents feared Florida would become known as the "Gunshine State."⁹¹ The right-to-carry legislation passed however, with broad support from the Florida law enforcement.⁹² Since 1987, when the Florida law went into effect, the effect of that legislation on state crime rates has been astonishing. The predictions of the gun-control advocates were wrong, flat wrong.

Subsequent to the enactment of the 1987 Florida right-to-carry legislation, homicide, firearm homicide, and handgun homicide rates have all decreased. Homicide is down 36%; firearm homicide is down 37%; and handgun homicide is down 41%.⁹³ In fact, Florida's violent crime trends are better than the trends for the country as a whole. Since 1987, Florida's violent crime rate has increased only 4.5%, while the violent crime rate has increased nationwide by 12.3%.⁹⁴ As for city trends, eight of the ten largest cities in Florida have experienced drastic decreases in homicide rates since 1987 and through 1995: Jacksonville is down 46%; Miami is down 13%; Tampa Bay is down 24%; Or-

89. See *The Gun Lobby Rides High Series*, ST. PETERSBURG TIMES, Feb. 16, 1987, available in 1987 WL 6738847.

90. See Jennie Hess, *South Florida Fears Gun Law Will Turn it into "Dodge City,"* ATLANTA J. & CONST., Apr. 5, 1987, available in 1987 WL 5277587 (quoting a prominent Florida gun control advocate as having said that the proposed legislation would mean "more deaths and less tourists in Florida").

91. See *Goodbye "Gunshine,"* TIME, Oct. 19, 1987, at 25 (explaining that after the passage of the Florida statute, "editorial cartoonists dubbed Florida the 'Gunshine State'").

92. See WAYNE LAPIERRE, GUNS, CRIME AND FREEDOM 34 (1994) (reporting that representatives from various law enforcement associations showed their support of the bill at a press conference).

93. See *The Right to Carry Firearms*, FACT SHEET (Institute for Legislative Action, National Rifle Ass'n, Fairfax, Va.), May 1996.

94. See *id.*

lando is down 41%; Fort Lauderdale is down 53%; Hollywood is down 30%; Clearwater is down 21%; and Miami Beach is down 93%.⁹⁵

The success of Florida's right-to-carry law, however, is not documented just by those statistics. As the Commissioner of the Florida Department of Law Enforcement, James T. Moore, wrote in a memo to Florida's Governor, Attorney General, and Secretary of State:

From a law enforcement perspective, the licensing process has not resulted in problems in the community from people arming themselves with concealed weapons. The strict provisions of 790.06, Florida Statutes, preclude the licensing of convicted felons, etc., thus allowing the permitting of law abiding citizens who do not routinely commit crimes or otherwise violate the law.⁹⁶

Also, the Director of Florida's Licensing Division, John Russi, has stated that

Florida's concealed weapon law has been very successful. All major law enforcement groups supported the original legislation and in the eight years the program has been in place, none of these groups have requested any changes. . . . [S]ome of the opponents of concealed weapon legislation in 1987, now admit the program has not created the problems many predicted.⁹⁷

Florida's officials therefore seem satisfied with the Florida law.

Opponents of the Florida legislation predicted that, regardless of the benefits that could result from the law, there would be a large number of instances in which members of the public would misuse their newly granted authority. That prediction proved mistaken. Florida has not witnessed rampant misconduct by its citizens. Consider these statistics: From 1987, when the Florida law took effect, through April 30, 1994, 221,443 concealed carry permits have been issued in Florida.⁹⁸ Of these, only twenty-two have been revoked because licensees committed

95. *See id.*

96. *National Rifle Association: NRA Urges Careful Examination of Facts About "Right-to-Carry,"* M2 PRESSWIRE, Sept. 15, 1995, available in 1995 WL 10483997.

97. John M. Russi, Testimony before the Michigan House of Representatives, Judiciary Committee (Feb. 28, 1995).

98. *See Cramer & Kopel, supra* note 82, at 691.

firearm crimes.⁹⁹ That number represents only 1/100th of 1% of total permits issued, which is a minuscule fraction of the total number of outstanding permits.

Other states have now followed Florida's lead by adopting their own "shall issue" laws. Since 1987, twenty-two states have either enacted new "shall issue" laws where none previously existed, have changed "may issue" laws to "shall issue" laws, or have reaffirmed a "shall issue" law through judicial ruling. In total, thirty-one states have "shall issue" right-to-carry laws on the books.¹⁰⁰

It is worth mentioning that the number of criminal homicides perpetrated by concealed carry permit holders in states with such laws is negligible. In many instances where permits were revoked, the permit holder did not commit a crime with a firearm.¹⁰¹ Standard reasons for revocations, for example, are alcohol and/or drug abuse, domestic violence, dishonorable discharge from the Armed Forces, misdemeanor offenses not involving a firearm, and felony offenses involving a firearm.

There have been a small number of cases in the last decade where a permit holder was charged with a felony homicide, but in most of these cases the court determined that the permitted firearm was used for self-defense¹⁰²—which, I might add, is precisely the purpose of having permissive concealed carry laws. I would also like to note that a study completed by Gary Kleck in the *Journal of Criminal Law and Criminology* showed that only 16% of gun defenders in the study actually fired their weapon at an offender and, only 8% actually shot and wounded an offender. The vast majority of gun defenders in their study, 76%, just showed or brandished their weapons to deter an offender.¹⁰³

If Florida and the success stories from other states are not persuasive enough evidence, there is more. Professor John Lott of the University of Chicago and a graduate student, David B.

99. *See id.*

100. *See* Lott & Mustard, *supra* note 14, at 12. Some of these states are: Virginia in 1988; Pennsylvania, West Virginia, and Georgia in 1989; Oregon, Idaho, and Mississippi in 1990; Montana in 1991; Alaska, Arizona, Tennessee and Wyoming in 1994; Arkansas, North Carolina, Oklahoma, Texas, Utah and Virginia in 1995; and Kentucky, Louisiana, and South Carolina in 1996. *See id.*

101. *See, e.g.,* LAPIERRE, *supra* note 92, at 36.

102. *See* Lott & Mustard, *supra* note 14, at 2-3.

103. *See* Gary Kleck & Mark Gertz, *Armed Resistance to Crimes: The Prevalence and Nature of Self-Defense with a Gun*, 86 J. CRIM. L. & CRIMINOLOGY 150, 185 (1995).

Mustard, recently completed an exhaustive nationwide study on the effect of "shall issue" laws on crime rates. The Lott-Mustard study is one of the most comprehensive studies ever conducted on the deterrent effect of firearms on crime. Professor Lott studied the FBI's crime statistics for all 3,054 American counties from 1977 to 1992. His regression analysis controlled for various factors, including arrest and conviction rates, prison sentences, changes in handgun laws such as waiting periods and the imposition of enhanced penalties for using a gun to commit a crime, income, unemployment, and demographic changes. This study shows that the new series of "shall issue" laws has had a considerable beneficial effect on deterring violent crime.¹⁰⁴

The Lott-Mustard study found that "shall-issue" laws have several positive effects on the crime rate. The first such effect is a reduction in violent crime. "Shall-issue" laws reduced murders by 7.65%, rapes by 5%, aggravated assaults by 7%, and robbery by 3%.¹⁰⁵ Put another way, over that period such laws would have spared society of 1,414 murders, 4,177 rapes, 60,363 aggravated assaults, and 11,898 robberies had "shall-issue" laws been in effect in states without such laws.¹⁰⁶ Interestingly, women benefit more than men from such laws. For each additional armed woman, the murder rate of women is reduced three or four times more than an additional armed man reduces the murder rate for men.¹⁰⁷ Also worth noting is a study which found that 40% of felons did not commit certain crimes for fear that their potential victims were armed.¹⁰⁸ As a result, the general level of violence is reduced, which in turn, can further reduce the level of crime in a community.

The second positive effect from such "shall issue" laws is the additional, so-called "free rider" benefits, they can have. The possibility that anyone might be armed makes attacking everyone less attractive, thereby deterring assaults on persons not so armed. Persons who decide not to carry a concealed weapon therefore benefit nonetheless, allowing them to "free-ride" on their armed fellow citizens.

104. See Lott & Mustard, *supra* note 14, at 6.

105. See *id.* at 19.

106. See *id.* at 29.

107. See *id.* at 28.

108. See WRIGHT & ROSSI, *supra* note 44, at 147.

The Lott-Mustard study also found that the "shall-issue" laws do not have unfavorable side effects. Owners of concealed handguns rarely commit crimes. For example, along with evidence that violent crime involving permitted handguns is extremely rare, the study showed that the potential for an increase in accidental deaths is very small.¹⁰⁹ Lott and Mustard estimate that in 1992, there could have been an increase of less than one accidental death per state if the "shall issue" laws were implemented in states without such a law.¹¹⁰ While every accidental death is a tragedy, it would be a mistake for society to focus on that small number of accidental deaths because the existence of such a harm is relatively small, especially considering that 1,414 homicides could be avoided.¹¹¹

The success of states with right-to-carry laws and the Lott-Mustard empirical study have been important in showing that responsible, law-abiding citizens can carry firearms and deter violent crime without simultaneously increasing gun-related deaths. These important empirical findings have terrified gun control advocates because they have cut the legs out from under their claims. We now can see that much of the argument for gun control is based, not on fact, but on fear. At a minimum, the debate has shifted in favor of the Second Amendment. No longer is the claim seriously made that "shall issue" laws will have no positive effect on crime, yet will lead to slaughter in the streets. Now the question is simply how beneficial are these laws, not whether there is a positive effect.

Many of the states that have adopted "right-to-carry" laws have reported that their concealed carry permit systems are working successfully. For example, in Utah, between February 12, 1996 and May 24, 1996, 3,106 concealed weapons permit background checks were made and forty-three permits were denied.¹¹² In 1997, only eighty concealed weapons permits were denied.¹¹³ Preliminary reports suggest the new Utah law is

109. See Lott & Mustard, *supra* note 14, at 64.

110. See *id.*

111. See *id.* at 29.

112. See BUREAU OF CRIM. IDENTIFICATION, STATE OF UTAH DEPT OF PUBLIC SAFETY, CONCEALED WEAPON PERMIT CRIMINAL RECORD STUDY 3 (1996).

113. See BUREAU OF CRIM. IDENTIFICATION, STATE OF UTAH DEPT OF PUBLIC SAFETY, CONCEALED FIREARMS PERMITS (1997).

working well and certainly has not had any negative impact on our community.

Am I advocating a national "right-to-carry" law? No. Rather, I believe Congress needs to recognize that the public is capable of protecting itself and that the public, through its elected representatives at the state level, has expressed its willingness to do so. Conservatives may differ on whether "right-to-carry" laws are good public policy, but in situations where the states have spoken, the federal government ought to get out of the way.

Accordingly, Congress should take steps to enhance the public's interest in protecting itself by removing federal obstacles to "right-to-carry" laws. The Community Protection Initiative of 1997 contains provisions aimed at giving both private citizens and police officers greater freedom to exercise their Second Amendment rights to protect and defend themselves with a firearm. This Initiative does not, however, create a federal right to carry a concealed firearm for the general public, nor does it expand the availability of firearms without ensuring that precautions for public safety are met.

The Initiative exempts current and former law enforcement officers from state and local laws prohibiting the carrying of concealed weapons.¹¹⁴ In so doing, this provision will adopt a clear and uniform rule in place of present laws that vary greatly from state to state. This provision would have a couple of very important effects. First, it would increase the number of police officers on the streets by allowing police officers to carry their firearms while off duty. Second, it would allow police officers to defend themselves and their families against an attack while off duty. I should note that this provision has the strong support of the Fraternal Order of Police and other law enforcement organizations, which also supported the Brady Act.

With respect to the general public, the Initiative authorizes, in advance, states to enter into interstate compacts that recognize the concealed carry laws in each participating state. Congressional approval of interstate compacts is required by the Constitution.¹¹⁵ The Initiative's provisions will allow citizens who have received a concealed carry permit in one state, to carry that weapon in another state, provided that such a state has

114. See Community Protection Initiative of 1997, S. 3, 105th Cong. tit. IV, § 411.

115. See U.S. CONST. art. I, § 10.

entered an interstate compact with the state that issued the permit.¹¹⁶ The added benefit to citizens is the ability to carry a firearm for self-protection while traveling.

Another provision of the Initiative authorizes federal block grant funds to train the public in the safe use of firearms.¹¹⁷ While I am committed to a citizens' rights to protect themselves, I am also committed to ensuring that public safety is not compromised through recklessness. As such, the Initiative authorizes federal funds to be used in order to train and educate the public about firearm safety.¹¹⁸

Finally, one provision of the Initiative waives the waiting period for the purchase of a firearm for any person who is the beneficiary of a protective or restraining order.¹¹⁹ When someone, particularly a woman, is protected by a restraining order or feels her life and safety is threatened, it is more than appropriate for her to immediately obtain a firearm for self-protection if she believes that doing so is necessary.

IV. CONCLUSION

I do not believe the Brady Act has carried its weight. To be sure, I do not mean that it has been utterly unsuccessful, nor do I believe that any critic of the Brady Act must carry that burden. The question is not whether the Brady Act has kept some felons from purchasing firearms. It may have achieved this result, at least for a while, for those felons who are so intellectually challenged that they believe law enforcement has forgotten their felony convictions. The question also is not whether the Brady Act, on balance, is a reasonable regulation of firearms. Even if the Brady Act has kept handguns out of the hands of a few felons, the cost to legitimate firearm ownership may be too high. But, at the end of the day that is not the reason why I believe the Brady Act is ultimately misdirected.

The Brady Act is misguided because it deals with crime control in the wrong way. Indeed, a strong case can be made that the Brady Act was adopted by people who are approaching this matter from exactly the wrong direction. If the purpose of the

116. See Community Protection Initiative of 1997, S. 3, 105th Cong. tit. IV, § 411.

117. See *id.* § 423.

118. See *id.* § 423(a).

119. See *id.* § 424.

Brady Act is to constitute just another step toward an ultimate ban on firearms—and if truth be known, I believe that is precisely the purpose—then it has been successful. The Brady Act is another step toward disarmament. No one realistically hopes that Congress, in one fell swoop, will prohibit all private firearm ownership. Congress will not enact any such sweeping law, and even if Congress did, the law would, I believe, be unconstitutional under the Second Amendment. No, the Brady Act is another effort to nickel and dime Americans who own firearms into disarmament. And if that is the purpose, then the law is a success.

However, if the purpose of the Brady Act is to reduce violent crime, then it approaches this issue in the wrong direction. Why? Because the supporters of the Brady Act are 180 degrees off course. There is a strong movement afoot in this country to recognize both the letter and intent of the Second Amendment and to allow each citizen to protect himself or herself, as well as his or her family.

In conclusion, analysis of the two federal acts—the Brady Act and the Community Protection Initiative—clearly demonstrate that the anti-Second Amendment paradigm of the left, that possession of firearms is a major cause of crime, is bankrupt. The hypothesis of the liberal left is merely indicative of a broader theme of big government regulation of all aspects of our private lives, communities, and, indeed, of civil society itself. Contrary to this species of big governmental control, the pro-Second Amendment paradigm once again demonstrates the wisdom of our Founding Fathers, who understood that the first principle of natural rights is the right to safety and self-protection.

