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## ARTICLES

### NEW YORK STATE AND THE NEW YORK SAFE ACT: A CASE STUDY IN STRICT GUN LAWS

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#### I. INTRODUCTION

The perennial political struggle over gun policy in America typically focuses, for understandable reasons, at the national level. Yet the American political system continues to be a system of federalism, where the states, and state policymaking, shape much of the American landscape. Thus, much attention was focused on President Barack Obama's ultimately unsuccessful effort in early 2013 to press Congress to enact a series of new national gun laws in the wake of the uniquely senseless and brutal slaying of twenty children and six adults at Sandy Hook Elementary School in December 2012.<sup>1</sup>

Less recognized, however, was the fact that prolific action at the state level on gun policy exploded in 2013. The purpose of this article is to examine the case of New York—a state that has long been in the forefront of tougher gun laws,<sup>1</sup> and that has, in the minds of some, become a gun owner's nightmare since its enactment of new gun regulations in 2013. But has it? With so much hand-wringing among gun rights activists nationwide about the reputedly adverse effects of stricter gun laws, it is not only useful, but

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<sup>1</sup> The Brady Campaign, a pro-gun control organization, ranks New York in the top five among states with the strictest gun laws. See *2011 Brady Campaign State Scorecard*, BRADY CAMPAIGN TO PREVENT GUN VIOLENCE (2011), <http://www.bradycampaign.org/sites/default/files/2011%20Final%20state%20scoresA3-2%20Sheet1.pdf> (last visited Jan. 20, 2015). In its 2011 rankings, New York ranks fourth, behind California, New Jersey, and Massachusetts. See *id.* For more on New York and related matters, see ROBERT J. SPITZER, *GUNS ACROSS AMERICA: RECONCILING GUN RULES AND RIGHTS* (forthcoming May 2015).

instructive, to examine a place that already has such laws. New York offers a both concrete and contemporary case study of how the relationship between the armed citizen and the government actually functions. As I will argue here, that relationship, while different than that of the majority of states, functions effectively to preserve gun rights in the context of a feasible regulatory scheme.

## II. THE NEW NEW YORK GUN LAW

In January of 2013, the New York State Legislature moved rapidly—too rapidly, said many—to enact a sweeping and tough new set of gun regulations, the New York Secure Ammunition and Firearms Enforcement (SAFE) Act of 2013, at the behest of Democratic Governor Andrew Cuomo.<sup>2</sup> Two events were clear catalysts for this action: the elementary school shooting of twenty children and six adults in Connecticut the previous month, and, less than two weeks later, the murder of two fire fighters in Webster, New York by a man who deliberately set a house fire to draw first responders to the scene to then murder them (two others were injured).<sup>3</sup>

Relying on a power provided in the state constitution called a “message of necessity,” the Democratic governor was able to rush the bill through the legislature.<sup>4</sup> Since 1938, the state constitution has stipulated that legislation must be presented to the members of the legislature at least “three calendar legislative days” before it can be acted upon—unless the governor certifies that, in his or her opinion, circumstances “necessitate an immediate vote,” whereupon the three day rule is waived.<sup>5</sup> While the obvious purpose of the “message of necessity” provision is to address bona fide emergencies, the constitution’s language is broad enough to allow governors to define those circumstances as they see fit, and that is how governors have treated this power for decades.<sup>6</sup>

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<sup>2</sup> See Thomas Kaplan & Danny Hakim, *New York Has Gun Deal, with Focus on Mental Ills; Obama’s Plan to be Broad*, N.Y. TIMES, Jan. 15, 2013, at A1; Thomas Kaplan, *Sweeping Limits on Guns Become Law in New York*, N.Y. TIMES, Jan. 16, 2013, at A15.

<sup>3</sup> Kaplan & Hakim, *supra* note 2, at A1; Kaplan, *supra* note 2, at A15.

<sup>4</sup> N.Y. CONST. art. III, § 14; Michelle Breidenbach, *The Safe Act “Emergency,”* SYRACUSE.COM (March 13, 2013), [http://www.syracuse.com/news/index.ssf/2013/03/state\\_emergency\\_gun\\_law.html](http://www.syracuse.com/news/index.ssf/2013/03/state_emergency_gun_law.html).

<sup>5</sup> Breidenbach, *supra* note 4 (quoting N.Y. CONST. art. III, § 14).

<sup>6</sup> See N.Y. CONST. art. III, § 14; Breidenbach, *supra* note 4. A legal challenge was mounted against the SAFE Act based on the argument that the governor had abused the message of necessity power, but it was dismissed. See *Schulz v. N.Y. State Exec.*, No. 1232-13 (N.Y. Sup. Ct., Apr. 10, 2014).

After huddling with legislative leaders, the bill was formally presented to both the state assembly and state senate on January 14.<sup>7</sup> Both houses rapidly enacted the bill, by a vote of 104 to forty-three in the Democratic-controlled assembly, and forty-three to eighteen in the Republican-controlled senate.<sup>8</sup> Cuomo signed the bill into law the next day, on January 15.<sup>9</sup>

Critics from the state's gun community lambasted the bill for its strict new provisions, but also for the rapidity of its passage, charging that the governor was abusing his powers by avoiding hearings and the opportunity for opponents outside of the legislature to make their case.<sup>10</sup> Here, however, Cuomo was doing what New York governors often do, especially with controversial legislation. According to a good government group, Cuomo used messages of necessity twenty-nine times in 2011 (his first year in office), only five times in 2012, and three times in 2013.<sup>11</sup> Cuomo's previous two predecessors, both Democrats, averaged forty-one per year, and their predecessor, Republican George Pataki, averaged over fifty-three such messages per year in his last term of office.<sup>12</sup> Such messages have been used for legislation of every sort, from the legalization of gay marriage, to the establishment of public school teacher evaluations, to enactment of the entire state budget.<sup>13</sup> Still, the chief complaints revolved around the contents of the SAFE Act. (It takes no leap of faith to note that criticism of the process by which the bill was enacted would have been far more muted had groups like the gun community agreed with the content of the legislation.)

The law consisted of what the governor boasted was the toughest

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<sup>7</sup> *Bill S2230-2013—Enacts the NY SAFE Act of 2013*, OPEN, <http://open.nysenate.gov/legislation/bill/S2230-2013> (last visited Jan. 20, 2015).

<sup>8</sup> Kaplan, *supra* note 2, at A15.

<sup>9</sup> *Id.*

<sup>10</sup> See, e.g., Cheryl K. Chumley, *NY Gun Crackdown Marked by Protests, Lawsuits*, NEWSMAX (May 5, 2014), <http://www.newsmax.com/US/New-York-guns-SAFE-Act-register/2014/05/05/id/569575/>; *Statement from the National Rifle Association of America Regarding the Passage of S. 2230 in New York*, NRA (Jan. 15, 2013), <https://www.nraila.org/articles/20130115/statement-from-the-national-rifle-association-of-america-regarding-the-passage-of-s-2230-in-new-york>.

<sup>11</sup> Mike Vilensky, *Albany Question: What's Necessity?*, WALL ST. J., Apr. 2, 2014, at A20.

<sup>12</sup> See N.Y. PUBLIC INTEREST RESEARCH GROUP, 2013 SESSION ANALYSIS 6 (2013), available at [http://www.nypirg.org/pubs/goodgov/2013.06.28\\_NYPIRG\\_2013\\_Session\\_Analysis.pdf](http://www.nypirg.org/pubs/goodgov/2013.06.28_NYPIRG_2013_Session_Analysis.pdf) (analyzing the number of bills that passed either house with messages of necessity from 1995 to 2013).

<sup>13</sup> Peter J. Galie & Christopher Bopst, *"It Ain't Necessarily So": The Governor's "Message of Necessity" and the Legislative Process in New York*, 76 ALB. L. REV. 2219, 2223 (2013); Vilensky, *supra* note 11, at A20.

set of gun laws in the nation.<sup>14</sup> Chief among its provisions was the imposition of new restrictions on assault weapons.<sup>15</sup> State law first imposed limits on such weapons in 2000,<sup>16</sup> but the new law tightened those restrictions by categorizing assault rifles as those that can accept detachable magazines, and that have at least one additional characteristic (the earlier law specified two characteristics), including a folding or telescoping stock, a protruding pistol grip, a thumbhole stock, a second handgrip or protruding grip, a bayonet mount, flash suppressor, muzzle brake (erroneously spelled “break” in the legislation),<sup>17</sup> a muzzle compensator, a threaded barrel designed to accommodate any of the above features, or a grenade launcher.<sup>18</sup> Semiautomatic shotguns and pistols are also similarly restricted, as is the case with past assault weapons bans.<sup>19</sup> In the case of shotguns, they fall within the terms of the new law if they possess at least one characteristic named in the law,<sup>20</sup> even if the only feature it possesses is a detachable magazine.<sup>21</sup> New Yorkers who already lawfully owned assault weapons considered legal before 2013 under state law, but that would now be restricted under the new law, could keep them, but they had to now register them with the state (the registration must be renewed every five years) by April 2014.<sup>22</sup>

Those who own an assault weapon, as defined by the law, can also eliminate design features to exempt it from registration by, for example, removing the bayonet lug or grinding off threading on the barrel.<sup>23</sup> A background check is also run during the registration process, and the State now maintains this information in a database.<sup>24</sup> While the owners of these weapons may keep them for

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<sup>14</sup> See NYSAFE, [www.governor.ny.gov/nysafeact/gun-reform](http://www.governor.ny.gov/nysafeact/gun-reform) (last visited Jan. 20, 2015).

<sup>15</sup> N.Y. STATE POLICE, OFFICE OF DIV. COUNSEL, GUIDE TO THE NEW YORK SAFE ACT FOR MEMBERS OF THE DIVISION OF STATE POLICE 3 (2013), available at [http://www.nypdcea.org/pdfs/NYSP\\_Safe\\_Act\\_Field\\_Guide.pdf](http://www.nypdcea.org/pdfs/NYSP_Safe_Act_Field_Guide.pdf).

<sup>16</sup> *Gun Law Reform*, N.Y. ST. DIVISION CRIM. JUST. SERVS., [http://www.criminaljustice.ny.gov/legalservices/ch189\\_firearmballisticdatabank.htm](http://www.criminaljustice.ny.gov/legalservices/ch189_firearmballisticdatabank.htm) (last visited Jan. 20, 2015); e.g., N.Y. GEN. BUS. LAW § 396-ee (McKinney 2014).

<sup>17</sup> N.Y. State Rifle & Pistol Ass’n v. Cuomo, 990 F. Supp. 2d 349, 377 (W.D.N.Y. 2013).

<sup>18</sup> N.Y. STATE POLICE, *supra* note 15, at 3.

<sup>19</sup> *Id.*; *Gun Law Reform*, *supra* note 16.

<sup>20</sup> These include a folding or telescoping stock, thumbhole stock, second handgrip or protruding grip that a person can hold with his or non-trigger hand, or a magazine capacity that exceeds seven rounds. N.Y. STATE POLICE, *supra* note 15, at 3.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 4.

<sup>23</sup> N.Y. PENAL LAW § 265.00.22(a)(v)–(vi) (McKinney 2014); N.Y. STATE POLICE, *supra* note 15, at 3–4; *Frequently Asked Questions*, NYSAFE, <http://www.governor.ny.gov/nysafeact/gun-owners> (last visited Jan. 20, 2015).

<sup>24</sup> PENAL §§ 400.00.1–2 (setting forth the background check requirements and establishing

life, they may not transfer or sell them to anyone else, including family members.<sup>25</sup> They can, however, transfer them to authorized sources, including the police, a firearms dealer, or to someone out of state for whom ownership is legal in that state.<sup>26</sup> A related new provision now requires surrogate's courts around the state (each county has one), which handle all probate and estate matters, to inventory a person's firearms separately from other possessions when people die, to identify the existence of assault weapons.<sup>27</sup>

The law also imposed new restrictions on high-capacity bullet feeding devices (i.e., magazines).<sup>28</sup> Under previous law, those obtained before 1994, of any capacity, were grandfathered in (that is, were legal to own).<sup>29</sup> New magazines from 1994 on were limited to those that could hold no more than ten bullets.<sup>30</sup> Under the 2013 law, however, all magazines, including pre-1994 versions, are now illegal to own if they hold more than ten bullets—however, a legal magazine may be used if loaded with no more than seven bullets.<sup>31</sup> That is, gun owners may not have more than seven rounds in any weapon's bullet feeding device. Not surprisingly, this provision prompted particular ridicule and dismay.<sup>32</sup> Owners could transfer now-illegal magazines to dealers, transfer them to individuals out of state, or modify the magazine to reduce its capacity to seven rounds.<sup>33</sup> (Owners were given until January 15, 2014 to effect such transfers; police and police-issued firearms are exempted from this and some other regulations.)<sup>34</sup> The law also noted that police have no presumptive right to inspect magazines, unless they first have probable cause.<sup>35</sup> Regarding pre-1994 magazines that were

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a statewide database for the background check records); N.Y. STATE POLICE, *supra* note 15, at 2.

<sup>25</sup> PENAL § 265.00.22(h); N.Y. STATE POLICE, *supra* note 15, at 4.

<sup>26</sup> PENAL § 265.00.22(h); N.Y. STATE POLICE, *supra* note 15, at 4.

<sup>27</sup> N.Y. SURR. CT. PROC. ACT § 2509 (McKinney 2014).

<sup>28</sup> N.Y. STATE POLICE, *supra* note 15, at 7.

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

<sup>30</sup> John J. Phelan IV, Comment, *The Assault Weapons Ban—Politics, the Second Amendment, and the Country's Continued Willingness to Sacrifice Innocent Lives For "Freedom,"* 77 ALB. L. REV. 579, 586 (2013/2014).

<sup>31</sup> PENAL §§ 265.36–37; N.Y. STATE POLICE, *supra* note 15, at 7, 9.

<sup>32</sup> See, e.g., Phil Fairbanks, *Federal Judge Upholds Majority of SAFE Act*, BUFF. NEWS, Jan. 1, 2014, at A1 (“The judge called the seven-round limit ‘tenuous, strained and unsupported.’”); Kaplan, *supra* note 2, at A15 (“Gun-rights advocates denounced the measure. The New York State Rifle and Pistol Association said New York gun owners ‘should be ashamed and afraid of our state,’ and the National Rifle Association said, “These gun-control schemes have failed in the past and will have no impact on public safety and crime.”).

<sup>33</sup> See N.Y. STATE POLICE, *supra* note 15, at 7–8.

<sup>34</sup> PENAL § 265.20.11; N.Y. STATE POLICE, *supra* note 15, at 4.

<sup>35</sup> N.Y. STATE POLICE, *supra* note 15, at 10; Nancy A. Fischer, *Lockport Police Catch Flak*

formerly legal to own but now illegal to own, the 2013 law has a kind of forgiveness provision saying that if a person believes mistakenly that possession of such a pre-1994 magazine was still legal, they may avoid being charged under the law if they then lawfully dispose of it within thirty days.<sup>36</sup> (Ignorance of the law is rarely a basis of avoiding prosecution, but it is in this case.) Non-complying assault weapons and feeding devices more than fifty years old are exempted from these new restrictions as antiques, curios, or relics.<sup>37</sup>

An additional significant change now extends background checks, which were formerly limited to commercial weapon sales, to private gun and ammunition sales. Under the new procedure, an individual wishing to make a private gun sale may still do so but must go to a licensed dealer, pay a fee of up to ten dollars, and have the dealer run a background check (using the National Instant Criminal Background Check System (NICS)) before the sale can be completed.<sup>38</sup> The only individuals exempted from the background check are transfers to immediate family members (spouses, domestic partners, children, and stepchildren).<sup>39</sup> Direct sale of ammunition was barred as of 2014, although such sales can be routed through firearms dealers, as is already true with online gun sales.<sup>40</sup> Ammunition sale records and checks that occur at the state level (not through the NICS system) are required to be purged yearly by the State and are exempted from freedom of information inquiries.<sup>41</sup> This restriction would theoretically bar the sale or giving of even a few rounds between individuals, but the expectation is that there is no interest in tracking down, much less prosecuting, the sharing of ammunition between two hunters in the woods or two shooters at a firing range.<sup>42</sup>

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for *SAFE Act Arrest*, BUFF. NEWS, Oct. 16, 2013, at B1.

<sup>36</sup> N.Y. STATE POLICE, *supra* note 15, at 7.

<sup>37</sup> N.Y. STATE POLICE, *supra* note 15, at 7; *N.Y. SAFE Fact Sheet: Gun Owners—What the Law Means to You*, NYSENATE.GOV 4, <http://www.nysenate.gov/files/pdfs/NYSAFE-Fact-Sheet.pdf> (last visited Jan. 20, 2015).

<sup>38</sup> N.Y. GEN. BUS. LAW § 898.2 (McKinney 2014); N.Y. STATE POLICE, *supra* note 15, at 11.

<sup>39</sup> N.Y. STATE POLICE, *supra* note 15, at 11.

<sup>40</sup> Rick Karlin, *Ammo Sales Rule Put Off*, TIMES UNION (Albany, N.Y.), Jan. 15, 2014, at A1; Open Letter from New York State Police Superintendent Joseph A. D'Amico, GOVERNOR.NY.GOV, <https://www.governor.ny.gov/sites/default/files/documents/nysafeact/OpenLetterfromNewYorkStatePoliceSuperintendent.pdf> (last visited Jan. 20, 2015).

<sup>41</sup> See N.Y. PENAL LAW § 400.03(5) (McKinney 2014); Press Release, Governor Andrew M. Cuomo, Governor Cuomo Signs Groundbreaking Legislation That Will Give N.Y. State the Toughest Protections Against Gun Violence in the Nation (Jan. 15, 2013), <https://www.governor.ny.gov/press/01152013-outline-of-nys-groundbreaking-gun-legislation>.

<sup>42</sup> When I posed the ammunition question to a representative responding on the SAFE Act

The SAFE Act also requires pistol permits to be renewed every five years; formerly, they never had to be renewed.<sup>43</sup> And while information concerning the identification of pistol permit holders is public, permit holders can now, under the new law, file for an exemption from any public disclosure with the state (this provision is under court challenge from newspapers and First Amendment advocates),<sup>44</sup> which has been inundated with such requests.<sup>45</sup> In Cortland County, local officials report receiving 1000 exemption requests in 2013 out of around 7000 permits identified in the county.<sup>46</sup> This matter garnered considerable attention when, beginning in late 2012, reporters for local downstate county newspapers published the names and addresses of pistol permit holders in Rockland and Westchester counties.<sup>47</sup> Permit holders were outraged, some county governments refused to release any permit holder information, and local reporters received death threats.<sup>48</sup>

Another significant portion of the new law requires certain categories of mental health professionals to report to state authorities any persons under their care who they believe are

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hotline operated by the State, I was told that private ammunition exchanges would not be subject to state scrutiny.

<sup>43</sup> N.Y. STATE POLICE, *supra* note 15, at 1. Prior to the 2013 amendments to the penal law, a pistol permit issued outside of New York City or Nassau, Suffolk, or Westchester Counties was valid until revoked. N.Y. PENAL LAW § 400.00.10 (McKinney 2005) (amended 2013).

<sup>44</sup> *See, e.g.*, Gannett Satellite Information Network, Inc., v. Cnty. of Putnam, No. 003564/13 (N.Y. Sup. Ct., Mar. 5, 2014) (requiring the county to grant a newspaper's request for information on pistol permit holders who were not otherwise exempt under the SAFE Act); *County to Appeal Decision on Gun Records*, LEGAL MONITOR WORLDWIDE, Mar. 13, 2014, available at 2014 WLNR 6885291; *see also* Emily Bazelon, *The First Amendment Versus the Second Amendment*, SLATE.COM (Jan. 3, 2013), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2013/01/the\\_journal\\_news\\_gun\\_map\\_the\\_first\\_amendment\\_and\\_state\\_law\\_gave\\_the\\_new.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2013/01/the_journal_news_gun_map_the_first_amendment_and_state_law_gave_the_new.html) (noting that newspapers have First Amendment rights to publish gun permit information).

<sup>45</sup> N.Y. STATE POLICE, *supra* note 15, at 1; Haley Viccaro, *New N.Y. Gun Law's Opt-Out Forms Overwhelm Clerks*, USA TODAY (Mar. 30, 2013), <http://www.usatoday.com/story/news/nation/2013/03/30/new-york-gun-law-forms/2036327?AID=10709313&PID=6152037&SID=1dvzjm6ql087>. Individuals can prevent their information from being released publicly by filling a form and having it approved by the superintendent of the New York State Police. STATE OF N.Y., NYS Firearms License Request for Public Records Exemption, available at [https://troopers.ny.gov/Firearms/Public\\_Records\\_Exemption/FOIL\\_Exemption\\_Form.pdf](https://troopers.ny.gov/Firearms/Public_Records_Exemption/FOIL_Exemption_Form.pdf) (last visited Jan. 20, 2015).

<sup>46</sup> Viccaro, *supra* note 45.

<sup>47</sup> *See* K.C. Maas & Josh Levs, *Newspaper Sparks Outrage for Publishing Names, Addresses of Gun Permit Holders*, CNN (Dec. 27, 2012), <http://edition.cnn.com/2012/12/25/us/new-york-gun-permit-map/>.

<sup>48</sup> Christine Haughney, *After Pinpointing Gun Owners, Paper Is a Target*, N.Y. TIMES, Jan. 7, 2013, at A1; Patrik Jonsson, *New York Paper That Published Gun-Owners Map Sues County for Names*, CHRISTIAN SCI. MONITOR, Oct. 4, 2013, available at 2013 WLNR 24918447.

“likely to engage in conduct that would result in serious harm to self or others.”<sup>49</sup> Those persons are then to be checked to see if they are licensed to own firearms.<sup>50</sup> If so, the state police are notified and a judgment made as to whether to suspend or revoke their licenses, and then retrieve the guns.<sup>51</sup> Beyond these measures, criminal penalties for firearms-related violations were enhanced, including possession or use of firearms while on school property;<sup>52</sup> in connection with drug trafficking;<sup>53</sup> straw gun purchases;<sup>54</sup> and other felonies, including the killing of first responders (e.g., fire fighters).<sup>55</sup> The law also allows those under an order of protection issued by a court to have their gun license suspended or revoked, requires that firearms be stored safely in homes where others with criminal backgrounds live, and that gun owners report stolen guns within twenty-four hours.<sup>56</sup>

This new law put the Empire State in the forefront of those with tough, or toughened, laws. New York was the first state to act after the December elementary school shooting.<sup>57</sup> To date, only five other states (California,<sup>58</sup> Connecticut,<sup>59</sup> Hawaii,<sup>60</sup> Maryland,<sup>61</sup> and Massachusetts)<sup>62</sup> and the District of Columbia<sup>63</sup> have a ten-round magazine limit, and none has a limit as low as seven.<sup>64</sup> In the balance of 2013, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maryland, Massachusetts, New Jersey, Washington, South Carolina, Minnesota, Florida, and Rhode Island

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<sup>49</sup> N.Y. STATE POLICE, *supra* note 15, at 13.

<sup>50</sup> *Id.*

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

<sup>52</sup> N.Y. PENAL LAW § 265.01-a (McKinney 2014); N.Y. STATE POLICE, *supra* note 15, at 14.

<sup>53</sup> PENAL § 10.00.21; N.Y. STATE POLICE, *supra* note 15, at 14.

<sup>54</sup> PENAL § 265.17; N.Y. STATE POLICE, *supra* note 15, at 14.

<sup>55</sup> PENAL §§ 125.26.1(a)(ii-a), 125.27.1(a)(ii-a); N.Y. STATE POLICE, *supra* note 15, at 14.

<sup>56</sup> PENAL § 265.45; N.Y. STATE POLICE, *supra* note 15, at 2, 13, 15; *Cuomo Signs NY SAFE Act: 13 Provisions of the New Gun Control Law*, HUFFINGTON POST (Jan. 16, 2013), [http://www.huffingtonpost.com/2013/01/16/cuomo-signs-ny-safe-act-new-gun-control-laws\\_n\\_2487966.html](http://www.huffingtonpost.com/2013/01/16/cuomo-signs-ny-safe-act-new-gun-control-laws_n_2487966.html).

<sup>57</sup> Barbara Goldberg, *New York Enacts Gun-Control Law, First Since Newtown Attack*, REUTERS, Jan. 15, 2013, available at <http://www.reuters.com/article/2013/01/15/us-usa-guns-newyork-idUSBRE90E06L20130115>.

<sup>58</sup> CAL. PENAL CODE § 16740 (West 2014).

<sup>59</sup> CONN. GEN. STAT. ANN. § 53-202w (West 2014).

<sup>60</sup> HAW. REV. STAT. ANN. § 134-8(c) (LexisNexis 2014).

<sup>61</sup> MD. CODE ANN., CRIM. LAW § 4-305(b) (LexisNexis 2014).

<sup>62</sup> MASS. GEN. LAWS ANN. ch. 140, § 121 (West 2014).

<sup>63</sup> D.C. CODE § 7-2506.01(b) (LexisNexis 2014).

<sup>64</sup> See generally *State Restrictions on Magazines, Chemical Sprays and Stun Guns*, HANDGUNLAW.US 1, 4, 6–8, (2014), <http://www.handgunlaw.us/documents/NoHiCapChemSpray.pdf> (describing each state that bans or restricts higher capacity magazines and omitting those states in which higher capacity magazines are legal).

all toughened their gun laws.<sup>65</sup> Moving in the contrary direction however, over a dozen states moved to loosen gun regulations, including Arkansas, Indiana, Kansas, Kentucky, Louisiana, Maine, Mississippi, Missouri, South Dakota, Tennessee, Texas, Virginia, and Wyoming.<sup>66</sup> These states enacted a variety of measures including laws to make it easier for school personnel to bring guns to schools, to allow guns in churches, and to loosen concealed carry regulations.<sup>67</sup> By one count, during 2013, states enacted thirty-nine laws of various types to tighten gun regulations and seventy laws that loosened gun regulations.<sup>68</sup>

### III. THE POLITICAL REACTION

Opponents of the SAFE Act were vocal, visible, and angry.<sup>69</sup> The criticisms of the strict new assault weapons restrictions were similar to those of other, similar measures, arguing that such weapons are rarely used in crimes and that the new standard would restrict or bar legitimate hunting weapons.<sup>70</sup> Many questioned the new seven-bullet limit on magazines, considering it an arbitrary number that did not readily conform to the capacities of existing magazines (for example, semiautomatic handguns typically come with magazines holding more than seven rounds).<sup>71</sup> And joining gun rights activists were many in the mental health community, who objected to the new reporting procedures pertaining to those with mental illness, fearing that the new law would drive gun

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<sup>65</sup> See Karen Yourish & Larry Buchanan, *State Gun Laws Enacted in Year Since Newtown*, N.Y. TIMES, Dec. 11, 2013, at A20.

<sup>66</sup> See *id.*

<sup>67</sup> Reid Wilson, *Gun-Control Advocates Losing Ground Despite Recent Rampages*, WASH. POST, Sept. 22, 2013, at A13; Yourish & Buchanan, *supra* note 65, at A20.

<sup>68</sup> Yourish & Buchanan, *supra* note 65, at A20.

<sup>69</sup> See, e.g., Jim Kenyon, *Thousands Protest NY SAFE Act in Albany*, CNYCENTRAL.COM (Feb. 28, 2013), <http://www.cnycentral.com/news/story.aspx?id=866365#.VLwedSy2djU>.

<sup>70</sup> See Fredric U. Dicker, *Year's Winners & Losers*, N.Y. POST, Dec. 16, 2013, at 24; Paul Bedard, *CRS: Under 2 Percent of Gun Crimes Involve Assault Weapons*, WASH. EXAMINER (Dec. 19, 2012), <http://washingtonexaminer.com/crs-under-2-percent-of-gun-crimes-involve-assault-weapons/article/2516512>; Brad Plumer, *Everything You Need to Know About the Assault Weapons Ban, In One Post*, WASH. POST (Dec. 17, 2012), <http://www.washingtonpost.com/blogs/wonkblog/wp/2012/12/17/everything-you-need-to-know-about-banning-assault-weapons-in-one-post/>; *Sheriffs' Response to NY SAFE Act*, N.Y. ST. SHERIFFS' ASS'N, <http://www.nysheriffs.org/articles/sheriffs%E2%80%99-response-ny-safe-act> (last visited Jan. 20, 2015).

<sup>71</sup> Jon Campbell, *A Year After SAFE Act, is New York Safer?*, USA TODAY (Jan. 12, 2014), <http://www.usatoday.com/story/news/nation/2014/01/12/new-york-safe-act/4430741/>; Andrew Branca, *Federal Court Voids 7-Round Mag Limit of NY's SAFE Act, Allows Rest*, LEGAL INSURRECTION (Dec. 31, 2013), <http://legalinsurrection.com/2013/12/federal-court-voids-7-round-mag-limit-of-nys-safe-act-allows-rest/>; *Sheriffs' Response to NY SAFE Act*, *supra* note 70.

owners with mental health problems away from treatment for fear of losing their firearms.<sup>72</sup> They also objected to possible violations of patient privacy and the substantial new reporting procedures.<sup>73</sup>

Leading the opposition, as is typical of gun politics rhetoric, was a chorus of charges that the new law was taking away peoples' rights.<sup>74</sup> As the president of the New York State Rifle and Pistol Association said, there was "a 'whole spectrum of constitutional rights being infringed on.'"<sup>75</sup> Chief among them, of course, was said to be the Second Amendment<sup>76</sup> (the New York State Constitution is one of six in the country that has no Second Amendment-type provision in it).<sup>77</sup> Many howled that the law would make criminals out of formerly law-abiding citizens.<sup>78</sup>

The courts will ultimately sort out the constitutionality of the new law.<sup>79</sup> Without question, activities and items that were once legal would now become either illegal (e.g., possession of pre-1994 large

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<sup>72</sup> Tamer El-Ghobashy, *Law's Mental-Health Provision Draws Ire*, WALL ST. J., Jan. 16, 2013, at A17; Jessica Bakeman, *Mental-Health Officials Clash on N.Y. Gun Law Reporting*, USA TODAY (Mar. 24, 2013), <http://www.usatoday.com/story/news/nation/2013/03/24/mental-health-new-york-gun-law/2011399/>.

<sup>73</sup> El-Ghobashy, *supra* note 72, at A17; James Mulder, *Mental Health Advocates: State Gun Law is Unfair and Misguided*, POST-STANDARD (Syracuse, N.Y.), March 17, 2013, at A-1; Bakeman, *supra* note 72.

<sup>74</sup> See Jesse McKinley, *Gun Group to Hold Concert As Part of Fund-Raising Push*, N.Y. TIMES, July 11, 2013, at A24.

<sup>75</sup> McKinley, *supra* note 74, at A24.

<sup>76</sup> Phelan IV, *supra* note 30, at 611; Campbell, *supra* note 71.

<sup>77</sup> See *State Constitutions*, KEEP AND BEAR ARMS, <http://www.keepandbeararms.com/information/XcIBViewItem.asp?ID=841> (last visited Jan. 20, 2015).

<sup>78</sup> See, e.g., Frank Minter, *As Many as One Million Armed New Yorkers Are About to Break the Law*, FORBES (Mar. 13, 2014), <http://www.forbes.com/sites/frankminter/2014/04/13/as-many-as-one-million-armed-new-yorkers-are-about-to-break-the-law/>; *Sheriffs' Response to NY SAFE Act*, *supra* note 70.

<sup>79</sup> Opponents of the law filed suit against it in *New York State Rifle & Pistol Ass'n v. Cuomo*. In a ruling handed down on the last day of 2013 by the United States District Court, Western District of New York, a federal judge largely upheld the law but did strike down four specific provisions. *N.Y. State Rifle & Pistol Ass'n v. Cuomo*, 990 F. Supp. 2d 349, 381 (W.D.N.Y. 2013). Concluding that the law's seven-bullet limit for magazines was "a largely arbitrary number" that the State failed to explain or justify, the court concluded that it could adversely affect a citizen's Second Amendment self-protection rights, and therefore struck it down (leaving the pre-existing ten-bullet standard in place). See *id.* at 372–73. Three other minor provisions of the law were struck down by the judge on the grounds of vagueness: an ambiguous "and if" clause that followed wording barring the possession of large-capacity bullet feeding devices; references to "muzzle breaks" in the law, erroneously spelled "break" instead of the correct "brake" (a device to minimize recoil and barrel rising during rapid fire); and language referencing "semiautomatic version[s] of an automatic rifle, shotgun or firearm." *Id.* at 376–77 (citation omitted). In each instance, however, elimination of the language in question did not affect the law's regulations (except for the elimination of muzzle brakes as a listed trait identifying assault weapons). See *id.* at 381. Both sides vowed to appeal the ruling. Rick Karlin, *Guide: Ignore 7-Round Rule*, TIMES UNION (Albany, N.Y.), March 28, 2014, at A1.

bullet magazines and private, unrecorded gun sales) or subject to regulation (e.g., assault weapons registration). But the act of governance continually grapples with redefining the dividing line between freedom and government control. So how do these new restrictions stack up?

The short answer is that there is no simple answer. To gun owners, especially those who own any of the items subject to new regulations, such restrictions are both unnecessary and burdensome. One of the most frequently raised objections was that “only law-abiding citizens/gun owners are hurt by this new law, because criminals won’t obey the new laws anyway, and the law makes criminals out of honest citizens.”<sup>80</sup> As noted, the law does indeed impose new obligations on gun owners. But there is nothing new about this in the realm of public policy. The idea of something once legal becoming illegal has and does occur in many areas in law—when, for example, it became illegal to drive an automobile without wearing a seat belt, when it formerly was legal to do so.<sup>81</sup> Smoking in public places, like restaurants and bars, became illegal in many places in recent years when it was formerly legal.<sup>82</sup> More significantly, however, is the omnipresent complaint, heard ubiquitously from critics in the gun debate, that gun laws generally are of no use because criminals disregard them.<sup>83</sup>

The problem with such blithe assertions is that they are rarely examined. The very trait ascribed to gun laws—that criminals ignore them—is equally applicable to all law. Every law ever written has been violated, from jaywalking to murder. Should those laws be repealed, vilified, ignored, or dubbed a failure because they are violated by “criminals” who, by definition, have become “criminals” because they have violated the law? While the

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<sup>80</sup> I have heard this objection personally from gun owners on numerous occasions, but especially in recent months. Prolific sources replicate these grievances. See, e.g., Mark Boshnack, *Local Sheriff: I Won't Enforce Gun Law*, THE DAILY STAR.COM (Sept. 17, 2013), [http://www.thedailystar.com/news/local\\_news/article\\_8e03d506-966a-5c22-9b2d-b507810d80bf.html](http://www.thedailystar.com/news/local_news/article_8e03d506-966a-5c22-9b2d-b507810d80bf.html) (discussing the view that generally law-abiding citizens would be harmed if they unintentionally violated the SAFE Act, whereas criminals would disregard the law); Minter, *supra* note 78 (“[P]oliticians and police forces are reluctant to enforce their gun bans and gun-registration schemes that are now making tens of thousands otherwise law-abiding residents into potential criminals.”); *Sheriffs' Response to NY SAFE Act*, *supra* note 70 (“We are convinced that only law abiding gun owners will be affected by these new provisions, while criminals will still have and use whatever weapons they want.”).

<sup>81</sup> See *infra* notes 250–61 and accompanying text.

<sup>82</sup> See *infra* notes 262–66 and accompanying text.

<sup>83</sup> Phelan IV, *supra* note 30, at 613 (“Critics claim that gun regulations only keep firearms out of the hands of law abiding citizens and that criminals who want to commit a terrible act will always get their hands on firearms.”).

questioning of laws' effectiveness is an appropriate inquiry (for example, laws against marijuana possession and use have been gradually decriminalized or repealed entirely in some places in recent years, partly on the argument that they are widely ignored),<sup>84</sup> gun laws as a whole are no less or more enforceable than most other laws. What sets them apart is the relentless political drumbeat against them—most easily understood as an effort to delegitimize, if not repeal, them. At the federal level, efforts by gun groups to weaken, water down, under enforce, emasculate, and roll back federal laws are well known and amply documented.<sup>85</sup> And they are efforts designed to strengthen the very argument that such laws are ineffective—even as their ineffectiveness arises largely from political and legal efforts to make sure that they are as ineffective as possible.<sup>86</sup>

To return to the specifics of the New York law, Governor Cuomo did run afoul with the seven-bullet magazine limit. As Cuomo admitted two months after the SAFE Act's enactment, manufacturers do not generally produce seven-bullet magazines (not that it would be very difficult to do so), obliging him to roll back this part of the law to continue to allow ten-bullet magazines to be sold, even though they must still contain no more than seven rounds.<sup>87</sup> According to manufacturers, however, the chief reason seven-bullet magazines are not available is simply because of a lack of demand.<sup>88</sup> New York's law would be likely to create just such a

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<sup>84</sup> See Eric Blumenson & Eva Nilsen, *No Rational Basis: The Pragmatic Case for Marijuana Law Reform*, 17 VA. J. SOC. POL'Y & L. 43, 48, 50, 70 (2009) (emphasizing the number of marijuana users as support for a new legal regime); Cynthia S. Duncan, Note, *The Need for Change: An Economic Analysis of Marijuana Policy*, 41 CONN. L. REV. 1701, 1730–31 (2009) (identifying high arrest numbers as a strong argument given by proponents of marijuana legalization); Editorial, *Let States Decide on Marijuana*, N.Y. TIMES, July 27, 2014, at 10 (noting that states are tired of arresting thousands of people on marijuana charges); *Marijuana Use Rising in U.S., National Survey Says*, REUTERS, Sept. 8, 2011, available at <http://www.reuters.com/article/2011/09/08/usa-drugs-idUSN1E7870N520110908> (noting that over seventeen million Americans admitted to using marijuana in 2010).

<sup>85</sup> See, e.g., ROBERT J. SPITZER, *THE POLITICS OF GUN CONTROL* 145–49 (6th ed. 2015); Jackie Kucinich, *NRA Focused and Effective in Efforts to Weaken ATF and Gun Laws*, USA TODAY, Feb. 8, 2013, at 3A.

<sup>86</sup> See SPITZER, *supra* note 85, at 145–49; Erica Goode & Sheryl Gay Stolberg, *Legal Curbs Said to Hamper A.T.F. in Gun Inquiries*, N.Y. TIMES, Dec. 26, 2012, at A1; Robert J. Spitzer, *Government Can Improve Gun Records*, THE HILL (Washington, D.C.), Jan. 15, 2013, at 16.

<sup>87</sup> Freeman Klopott, *Cuomo's 7-Bullet Limit to Be Suspended Indefinitely, Skelos Says*, BLOOMBERG NEWS (Mar. 24, 2013), <http://www.bloomberg.com/news/2013-03-25/cuomo-s-7-bullet-limit-to-be-suspended-indefinitely-skelos-says.html>; Jacob Sullum, *Andrew Cuomo Realizes He Mandated Gun Magazines That Don't Exist*, REASON.COM (Mar. 21, 2013), <http://reason.com/blog/2013/03/21/cuomo-realizes-he-mandated-gun-magazines>.

<sup>88</sup> See Sullum, *supra* note 87 (noting that manufacturers have had little to no incentive to make seven-round magazines because no state law required it until the SAFE Act).

market. While many have questioned the selection of seven bullets as the cutoff as opposed to ten, it turns out that many states in the early-twentieth century imposed restrictions on possession of bullet magazines and those restrictions varied widely in their magazine bullet maximums.<sup>89</sup> And aside from production of new magazines holding seven rounds, larger-capacity magazines can be altered by insertion of a simple block to reduce a magazine's capacity (this can be done by gunsmiths or by enterprising gun owners).<sup>90</sup> Yet these considerations may ultimately prove moot, as a federal district judge struck down the seven-bullet limit (retaining the state's pre-existing ten-bullet magazine loading limit) on the last day of 2013 in *New York State Rifle & Pistol Ass'n v. Cuomo*.<sup>91</sup>

The provision ending private, nonbackground check gun sales addresses one of the most commonly cited reforms that could have beneficial effects on illegal gun trafficking and use, and it is one proposed change that has garnered support from elements of the gun community. In the U.S. Senate in April 2013, gun rights groups, including the Citizens Committee for the Right to Keep and Bear Arms, supported a universal background check bill sponsored by gun rights advocates Joe Manchin (D-WV) and Patrick Toomey (R-PA) (the measure garnered fifty-four senate votes in favor, but failed to reach the sixty-vote minimum needed to end a filibuster).<sup>92</sup>

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<sup>89</sup> Early-twentieth-century laws in many states limited bullet magazines ranging from those holding no more than five bullets to those holding no more than eighteen. See SPITZER, *supra* note 2. Under regulations of the New York State Department of Environmental Conservation, hunters are restricted from bringing firearms holding more than six rounds into the field. *Deer and Bear Hunting Regulations*, N.Y. STATE DEP'T OF ENVTL. CONSERVATION, <http://www.dec.ny.gov/outdoor/8305.html> (last visited Jan. 20, 2015). Also, up until 1991, the federal assault weapons ban, eventually enacted in 1994, included a magazine round limit of seven. See PAUL M. BARRETT, GLOCK: THE RISE OF AMERICA'S GUN 108 (2012).

<sup>90</sup> See *Frequently Asked Questions*, *supra* note 23. This is actually a fairly routine alteration. For example, an National Rifle Association competitive shooting manual stipulates at one point that a "reduced capacity magazine" is allowable for use in shooting competitions where a variety of stipulations are imposed for the weapons used. NAT'L RIFLE ASS'N OF AM., NRA HIGH POWER RIFLE RULES 10 (2012), available at <http://compete.nra.org/documents/pdf/compete/rulebooks/hpr/hpr-book.pdf>.

<sup>91</sup> N.Y. State Rifle & Pistol Ass'n v. Cuomo, 990 F. Supp. 2d 349, 372–73 (W.D.N.Y. 2013).

<sup>92</sup> Tom Hamburger & Ed O'Keefe, *For Gun Lobby, A Rare Schism*, WASH. POST, Apr. 15, 2013, at A1; Ted Barrett & Tom Cohen, *Senate Rejects Expanded Gun Background Checks*, CNN (Apr. 18, 2013), <http://www.cnn.com/2013/04/07/politics/senate-guns-vote/>. Forty-six senators voted against the bill. Barrett & Cohen, *supra*. The NRA played both sides of the fence on this measure: while publicly vilifying the bill and working for its defeat, it also helped write the bill behind the scenes. Hamburger & O'Keefe, *supra*, at A1; Kucinich, *supra* note 85, at 3A. The bill was also endorsed by another gun group, the Independent Firearm Owners Association. *Independent Firearm Owners Association Supports the Manchin-Toomey Background Check Bill: S-649*, PAT TOOMEY U.S. SENATOR FOR PA. (Apr. 15, 2013), [www.toomey.senate.gov/?p=news&id=970](http://www.toomey.senate.gov/?p=news&id=970).

A 2012 survey of gun owners and NRA members found that eighty-seven percent of non-NRA gun owners, and seventy-four percent of NRA gun owners, supported criminal background checks for all gun purchases.<sup>93</sup> As if to punctuate the point, a convicted bank robber, serving time in a maximum security prison in Colorado, wrote a letter to the editor of a Connecticut newspaper in June of 2013, in which he thanked the NRA for opposing universal background checks.<sup>94</sup> In part, he wrote: “As a lifelong career criminal . . . I’d like to take a moment to express my appreciation to the National Rifle Association for . . . protecting my ability to easily obtain [guns] through its opposition to universal background checks.”<sup>95</sup> Obviously, criminal Gary Bornman may be nothing more than a bored publicity hound; still, it is clear that a great many people can and do obtain guns without background checks through unregulated private sales.

Indeed, a uniform system of background checks would forestall what is reputed to be a significant gap between background check firearms transactions versus nonbackground check transactions. What limited studies exist suggest that, nationwide, between thirty and forty percent of all gun sales are private—that is, occur without background checks.<sup>96</sup> While that figure is surely lower in New York as compared with other states with more guns and fewer regulations, even New York has encountered problems with off-the-book gun sales (gun transfers that could be later claimed as recordless private sales). In 2011, for example, the state attorney general’s office conducted an undercover operation at a half-dozen gun shows around the state where they were able to make numerous off-the-books gun purchases.<sup>97</sup> In 2013, gun show organizers, working with the attorney general’s office, established tighter procedures to end this problem.<sup>98</sup> And as for the mechanics

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<sup>93</sup> William Saletan, *Goon Control*, SLATE.COM (Jan. 11, 2013), [http://www.slate.com/articles/health\\_and\\_science/human\\_nature/2013/01/guns\\_don\\_t\\_kill\\_people\\_people\\_kill\\_people\\_so\\_keep\\_dangerous\\_people\\_away.html](http://www.slate.com/articles/health_and_science/human_nature/2013/01/guns_don_t_kill_people_people_kill_people_so_keep_dangerous_people_away.html). The poll was conducted at the behest of Mayors Against Illegal Guns, a pro-gun-control group. *Id.*

<sup>94</sup> Justin Peters, *Felon Pens a ‘Heartfelt Thank You to the NRA’ for Opposing Universal Background Checks*, SLATE.COM (Jun. 13, 2013), [http://www.slate.com/blogs/crime/2013/06/13/gary\\_w\\_bornman\\_felon\\_pens\\_a\\_heartfelt\\_thank\\_you\\_to\\_the\\_nra\\_for\\_opposing.html](http://www.slate.com/blogs/crime/2013/06/13/gary_w_bornman_felon_pens_a_heartfelt_thank_you_to_the_nra_for_opposing.html).

<sup>95</sup> *Id.*

<sup>96</sup> Timothy Johnson, *Discredited Gun Researcher John Lott’s Failed Attempt To Correct Obama’s Gun Statistic*, MEDIA MATTERS FOR AM., (Jan. 25, 2013), <http://mediamatters.org/blog/2013/01/25/discredited-gun-researcher-john-lotts-failed-at/192391>.

<sup>97</sup> Thomas Kaplan, *New York Deal Adds Controls at Gun Shows*, N.Y. TIMES, Mar. 15, 2013, at A1.

<sup>98</sup> *Id.*

of a New York gun owner wishing to sell a gun directly to another person, the procedure of going to a licensed dealer and paying a small fee for the background check is similar to other types of private sales where the government takes an interest in the sale. For example, a car owner in New York who wishes to sell a car to another person directly may do so through a direct transaction of the car for payment, but both buyer and seller are required to fill out and sign a simple form with an accompanying fee to be delivered to the department of motor vehicles to record the sale.<sup>99</sup>

Finally, opponents of universal background checks often argue that such a system amounts to de facto gun registry, by virtue of the data submitted to the system.<sup>100</sup> Leaving aside the fact that the national NICS background check system has already existed for decades and has not resulted in a gun registry, de facto or otherwise, the inclusion of more sales checks would simply be that—more checks. Since the NICS system was established, it always included a protocol to destroy the records of approved transfers.<sup>101</sup> Any change in that could only occur through the regular legislative process.

#### IV. THE POLITICS OF GUNS IN NEW YORK

The passage of the SAFE Act sparked protests of many sorts throughout the state, but especially in upstate New York.<sup>102</sup> Aside from multiple rallies and demonstrations in the state capitol and elsewhere, the law's opponents pressured local governments to register their opposition.<sup>103</sup> Of the state's sixty-two counties, fifty-two enacted resolutions critical of the new state law within the space of about five months of the law's enactment.<sup>104</sup> The ten

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<sup>99</sup> See *Register and Title a Vehicle*, N.Y. ST. DEP'T MOTOR VEHICLES, <http://dmv.ny.gov/registration/register-and-title-vehicle-or-trailer> (last visited Jan. 20, 2015) (describing the registration process for private sales of motor vehicles). Having both bought and sold cars in this manner over the years, I can attest to the relative simplicity and utility of this process.

<sup>100</sup> Greg Botelho, *NRA Promises New Ads, Blasts "Real Consequences" of Background Checks*, CNN (Feb. 24, 2013), <http://www.cnn.com/2013/02/23/politics/nra-new-ads/>.

<sup>101</sup> Benjamin Hayes, *Stop Lying About Universal Background Checks*, CRIME REPORT (June 20, 2013), <http://www.thecrimereport.org/news/articles/2013-06-stop-lying-about-universal-background-checks>.

<sup>102</sup> See, e.g., Matt Surtel, *DiPietro Starting Effort: to Repeal NY SAFE Act*, DAILY NEWS (Batavia, N.Y.), Apr. 18, 2013, at 1A.

<sup>103</sup> Kevin Doonan, *Locals to Join in NY SAFE Act Protest in Albany Thursday*, EVENING SUN (Norwich, N.Y.), Feb. 27, 2013, at 1; Surtel, *supra* note 102, at 1A; see *Resolutions*, N.Y. SAFE RESOLUTIONS, <http://www.nysaferesolutions.com/resolutions/#counties> (last visited Jan. 20, 2015).

<sup>104</sup> Christian Gomez, *New York Counties Work to Repeal State Gun Control Laws*, NEW

contrary counties included eight downstate (including the five boroughs of New York City), plus Albany County (incorporating the state capitol), and Tompkins County (home of the liberal college town, Ithaca).<sup>105</sup> Another 271 towns and villages also enacted resolutions expressing opposition to the law (this list also included three small cities).<sup>106</sup> Nine municipalities, including two counties (Tompkins and Westchester) approved resolutions in support of the law.<sup>107</sup>

These many dissenting resolutions would seem to reflect state-wide repudiation of the new law, but multiple state poll numbers tell a very different story. A February 2013 Siena College poll found that sixty-five percent of voters statewide supported the SAFE Act, with thirty percent opposed.<sup>108</sup> While support for the law was stronger downstate (New York City and surrounding suburbs), fifty percent of upstate voters reported supporting the law, with forty-six percent opposed.<sup>109</sup> Opposition was greater among Republicans and conservatives, with support higher among Democrats, liberals, moderates, and Independents.<sup>110</sup> A Marist College Poll taken in March 2013 reported that forty-one percent of New York's registered voters felt the SAFE Act was "about right," and another nineteen percent that it did not go far enough (totaling sixty percent support), with thirty percent saying that the law went too far.<sup>111</sup> Among upstate residents, forty-six percent reported that the law either was good as it was or should have gone further, compared to forty-eight percent saying it went too far.<sup>112</sup> A March 2013 Siena

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AMERICAN (Mar. 12, 2013), <http://www.thenewamerican.com/usnews/constitution/item/14752-new-york-state-counties-pass-anti-gun-control-resolutions>.

<sup>105</sup> See *Resolutions*, *supra* note 103.

<sup>106</sup> See *id.*

<sup>107</sup> *Id.*

<sup>108</sup> SIENA RESEARCH INST., SIENA COLLEGE POLL TRENDS—FEBRUARY 2013, at 2 (Feb. 4, 2013), available at [https://www2.siena.edu/uploadedfiles/home/parents\\_and\\_community/community\\_page/sri/sny\\_poll/SNY%20February%202013%20Poll%20Release%20--%20FINAL.pdf](https://www2.siena.edu/uploadedfiles/home/parents_and_community/community_page/sri/sny_poll/SNY%20February%202013%20Poll%20Release%20--%20FINAL.pdf).

<sup>109</sup> See *id.* at 2 (noting that the New York City and suburban regions supported the gun laws eighty-two percent and sixty-one percent respectively, while the upstate region supported the gun laws fifty percent).

<sup>110</sup> See *id.* at 2 (noting that Democrats and Independents supported the gun laws eighty-two percent and sixty-two percent respectively, Republicans supported the laws thirty-three percent, and liberals, moderates, and conservatives supported the law eighty-eight percent, sixty-eight percent, and thirty-six percent, respectively).

<sup>111</sup> MARIST COLL. INST. FOR PUB. OP., MARIST POLL MARCH 2013: NEW YORK STATE TABLES, at 3 (Mar. 7, 2013), available at [http://maristpoll.marist.edu/wp-content/misc/nyspolls/NY130226/Cuomo/Complete%20March%207,%202013%20NYS%20NBC%20NY\\_Wall%20Street%20Journal\\_Marist%20Poll%20Release%20and%20Tables.pdf](http://maristpoll.marist.edu/wp-content/misc/nyspolls/NY130226/Cuomo/Complete%20March%207,%202013%20NYS%20NBC%20NY_Wall%20Street%20Journal_Marist%20Poll%20Release%20and%20Tables.pdf).

<sup>112</sup> *Id.*

poll showed support for the law at sixty-one percent, with thirty-five percent opposed.<sup>113</sup> An April 2013 Quinnipiac University poll reported sixty-three percent in support of the law with thirty-three percent opposed.<sup>114</sup>

A revealing poll of one of the most rural, conservative, and gun-owning counties in the state was conducted in Jefferson County, located in rural northern New York (55.8 percent of county residents reported owning at least one gun in a 2013 survey).<sup>115</sup> Fort Drum military installation is near the county's largest city, Watertown.<sup>116</sup> A survey of county residents conducted in April 2013 reported that approximately fifty percent of respondents said that the NY SAFE Act had gone too far, with forty-one percent saying that it had either not gone far enough or was about right.<sup>117</sup> More report opposing the law than supporting it, but the margin is surprisingly close for one of the most conservative areas in the state.<sup>118</sup> When asked if they favored repealing the law, approximately forty-four percent said they opposed repealing any part of it, approximately twenty-eight percent favored repealing parts of the law, and seven percent favored repealing the law entirely.<sup>119</sup> Yet in the same survey, approximately eighty-six percent reported support for background checks for assault weapons purchasers at gun shows.<sup>120</sup> Among county gun owners, support for the measure was approximately seventy-nine percent, and ninety-seven percent among non-gun owners.<sup>121</sup> Approximately seventy-

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<sup>113</sup> SIENA RESEARCH INST., SIENA COLLEGE POLL TRENDS—MARCH 2013, at 2 (Mar. 11, 2013), available at [http://www2.siena.edu/uploadedfiles/home/parents\\_and\\_community/community\\_page/sri/sny\\_poll/SNY%20March%202013%20Poll%20Release%20-%20FINAL.pdf](http://www2.siena.edu/uploadedfiles/home/parents_and_community/community_page/sri/sny_poll/SNY%20March%202013%20Poll%20Release%20-%20FINAL.pdf).

<sup>114</sup> QUINNIPIAC U. POLLING INST., NEW YORK REPUBLICANS SHIFT BACK TO CUOMO, QUINNIPIAC UNIVERSITY POLL FINDS; VOTERS GIVE GOV LOW MARKS ON CORRUPTION 10 (Apr. 17, 2013), available at <http://www.quinnipiac.edu/images/polling/ny/ny04172013.pdf>.

<sup>115</sup> CTR. FOR CMTY. STUDIES AT JEFFERSON CMTY. COLL., FOURTEENTH ANNUAL JEFFERSON COUNTY SURVEY OF THE COMMUNITY 18, 74 tbl.58 (2013), available at [http://www.sunyjefferson.edu/sites/default/files/Jefferson\\_Survey\\_Report\\_2013.pdf](http://www.sunyjefferson.edu/sites/default/files/Jefferson_Survey_Report_2013.pdf). The survey of Jefferson County residents was conducted by the Center for Community Studies at Jefferson Community College in April 2013, based on a telephone survey of 400 county residents. *Id.* at 5–6. My thanks to Center Director Dr. Raymond Petersen for sharing the results. The Center has conducted county surveys annually since 2000. *Id.* at 5.

<sup>116</sup> *Area Demographics*, CITY OF WATERTOWN LOCAL DEV. CORP., <http://www.watertownldc.com/> (last visited Jan. 20, 2015).

<sup>117</sup> See CTR. FOR CMTY. STUDIES AT JEFFERSON CMTY. COLL., *supra* note 115, at 72 tbl.56.

<sup>118</sup> See *id.*

<sup>119</sup> *Id.* at 73 tbl.57 (reporting the results of a survey question asking residents whether they would repeal “Mark’s Law,” a provision of the NY SAFE Act designed to make the killing of a first responder a crime punishable by life without parole).

<sup>120</sup> *Id.* at 69 tbl.53.

<sup>121</sup> *Id.*

five percent favored background checks for nonassault weapon gun purchases at gun shows, and eighty-one percent favored background checks for assault weapons sales between private individuals.<sup>122</sup>

Even as the law has taken a political battering, it has remained popular with most New Yorkers, and its specific (and most controversial) provisions are even more popular than the law itself.<sup>123</sup>

The disparity between clear-cut public approval, even in conservative areas of the state, and substantial repudiation of the law by most county governments is one of many instances of the collision between interest politics and mass politics—and is typical of gun politics dynamics.<sup>124</sup> As is often the case at the national level, gun rights advocates were highly motivated to engage in significant political activism—attending meetings, writing letters and emails, attending rallies, and otherwise vocally expressing their dismay in a way to put direct pressure on local political leaders.<sup>125</sup> Nearly all of those who support the law, however, lack corresponding zeal, and so by and large were not a presence at local meetings with county legislatures and town boards, in communications with office-holders, and at meet-your-representative sessions around the state. Thus, local governments responded to the pressures, knowing as well that the resultant resolutions were largely symbolic and that the likelihood of the state legislature reversing course (much less the governor) was nil.

One of the clearest expressions of this pressure group effort was the reaction of the New York State Sheriffs' Association (NYSSA). Law enforcement has generally been highly supportive of stronger gun laws, including restrictions on assault weapons and high capacity magazines.<sup>126</sup> After passage of the new law, NYSSA issued a statement that leveled some criticisms at it.<sup>127</sup> While immediately extolled by SAFE Act opponents as a ringing repudiation of the law by law enforcement,<sup>128</sup> the organization's actual statement was

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<sup>122</sup> *Id.* at 70–71 tbl.54 & 55.

<sup>123</sup> Matthew Dondiego, *Poll Shows NYers Support Safe Act by Two-to-One*, LEGIS. GAZETTE (Albany, N.Y.), Apr. 1, 2014, at 9.

<sup>124</sup> SPITZER, *supra* note 85, at 91–136.

<sup>125</sup> *See, e.g.*, Doonan, *supra* note 103; Surtel, *supra* note 102.

<sup>126</sup> Dan Mosher, *SAFE Act Gets Support for Key Law Enforcement Officials*, LEGIS. GAZETTE (Albany, N.Y.), July 9, 2013, at 6.

<sup>127</sup> *See Sheriffs' Response to NY SAFE Act*, *supra* note 70.

<sup>128</sup> *See* Shawn Magrath, *County Calls for SAFE Act Changes*, EVENING SUN (Norwich, N.Y.), Mar. 15, 2013, at 1 (noting that Norwich county passed a resolution partially based on NYSSA's February statement); *see also Schuyler County Sheriff Statement on NY SAFE Act*, NY SAFE RESOLUTIONS (Jan. 18, 2013), <http://www.nysaferesolutions.com/2013/01/18/schuyler>

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more careful and nuanced.

In its statement, NYSSA said that sheriffs “support many of the provisions of the SAFE Act, and believe that they will enhance public safety and help to shield citizens from gun violence.”<sup>129</sup> They added, however, that “some parts of this new law . . . need clarification, and some . . . should be reconsidered and modified . . .”<sup>130</sup> The statement identified six provisions that the organization praised, including background checks for private gun sales, beefed up mental health background checks (this was a marked departure from the negative reaction of many in the mental health community), toughened penalties for gun crimes, and the safe storage provision.<sup>131</sup> Among the six provisions they criticized were what the statement said was an overly broad definition of assault weapons and the bullet magazine reduction regulation.<sup>132</sup> The other criticisms were jurisdictional or technical, such as arguing that pistol permit and assault weapons registration data should be maintained at the local level rather than by the State, that the law needed greater clarity regarding internet ammunition sales, and that exceptions for law enforcement officers needed to be clarified or strengthened (as, indeed, they later were).<sup>133</sup> Finally, the statement expressed concern about the bill’s rapid passage and the failure to consult significantly with relevant stakeholders.<sup>134</sup> The statement concluded by noting, correctly, that “Sheriffs and other law enforcement officers are not called upon by this new legislation to go door-to-door to confiscate any weapons newly classified as assault weapons, and will not do so.”<sup>135</sup> Many of the law’s critics continue to insist, erroneously, that the law requires officers to do exactly this.<sup>136</sup>

NYSSA’s cautious public (if partial) dissent, is notable because police have as their first and most important job that of carrying out the law, regardless of their personal feelings, and thus must tread

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-county-sheriff-statement-on-ny-safe-act/ (noting that a staunch opponent of the SAFE Act, the Schuyler County sheriff, endorsed NYSSA’s statement).

<sup>129</sup> *Sheriffs’ Response to NY SAFE Act*, CATTARAUGUS COUNTY (Jan. 25, 2013), <http://www.cattco.org/news/20132833-sheriffs-response-ny-safe-act>.

<sup>130</sup> *Id.*

<sup>131</sup> *Sheriffs’ Response to NY SAFE Act*, *supra* note 70.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> Alex Newman, *Gun Owners Refuse to Register Under New York Law*, NEW AMERICAN (Jan. 25, 2013), <http://www.thenewamerican.com/usnews/constitution/item/14322-gun-owners-refuse-to-register-under-new-york-law>.

carefully in criticisms of existing law that falls to them to enforce. Yet county sheriffs are different from the rest of law enforcement at every other level in the state because they are elected.<sup>137</sup> Thus, they were and are subject to the same electoral pressures as other local officials around the state, which largely explains their public position taking on the law. Some upstate county sheriffs have been highly vocal in expressing their dismay at the law, saying for example that their deputies “would not go out looking for people who failed to register certain guns,” and that “[w]e are never going to go door-to-door . . . and take guns that were legally obtained before Jan. 15.”<sup>138</sup> Yet even these statements are political posturing, because, as noted, the law does not require law enforcement to engage in the behavior decried by this and other sheriff critics. NYSSA also submitted a brief on behalf of those seeking to strike the law down in court.<sup>139</sup>

Other elements of the state criminal justice system lined up behind the SAFE Act. Shortly after its enactment, the president of the District Attorneys Association of the State of New York issued two statements voicing support for the new law.<sup>140</sup> And while the New York State Police took no official stand on the law (nor would they be expected to do so), state police counsel Kevin Bruen filed a brief on behalf of the law for the lawsuit filed against it, defending in particular the assault weapons ban and magazine limit provisions.<sup>141</sup>

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<sup>137</sup> *Qualifications for Sheriff*, N.Y. ST. SHERIFFS' ASS'N, <http://nysheriffs.org/qualifications-sheriff> (last visited Jan. 20, 2015).

<sup>138</sup> Teri Weaver, *New York Sheriffs Choose Targets in NY Safe Act*, SYRACUSE.COM (Oct. 10, 2013), [http://www.syracuse.com/news/index.ssf/2013/10/new\\_york\\_sheriffs\\_choose\\_targets\\_in\\_ny\\_safe\\_act.html](http://www.syracuse.com/news/index.ssf/2013/10/new_york_sheriffs_choose_targets_in_ny_safe_act.html).

<sup>139</sup> Amici Curiae Brief of New York State Sheriffs' Association et al. at 3, N.Y. State Rifle & Pistol Ass'n v. Cuomo, 990 F. Supp. 2d 349 (W.D.N.Y. 2013) (13-cv-00291-WMS).

<sup>140</sup> Press Release, Cyrus R. Vance, Jr., District Attorney, N.Y. Cnty., Statement of DAASNY President and Manhattan District Attorney Vance Regarding Governor Cuomo's Budget Address (Jan. 22, 2013), <http://www.manhattanda.org/press-release/statement-daasny-president-and-manhattan-district-attorney-vance-regarding-governor-cu>; Press Release, Cyrus R. Vance, Jr., District Attorney, N.Y. Cnty., Statement Regarding Passage of NY SAFE Act (Jan. 15, 2013), <http://manhattanda.org/press-release/statement-regarding-passage-ny-safe-act>; see also Teri Weaver, *State DA's Group Proposes Gun Rules*, POST-STANDARD (Syracuse, N.Y.), Jan. 9, 2013, at A-4 (noting Onondaga County district attorney's agreement with the district attorneys association's statements in support of the SAFE Act). Onondaga County District Attorney William Fitzpatrick, a conservative upstate Republican, said in an interview that he believed the law's seven-bullet magazine maximum was unconstitutional (as a federal judge had earlier ruled), but that “[m]ilitary weapons should not be in the hands of civilians” and that “the last thing we would need to do would be to ‘loosen up’ gun laws.” *DA: 7-Shot Maximum Clip is Unconstitutional*, POST-STANDARD (Syracuse, N.Y.), May 9, 2014, at A-3.

<sup>141</sup> See Declaration of Kevin Bruen, *N.Y. State Rifle & Pistol Ass'n*, 990 F. Supp. 2d 349

The final key political actor on this issue, Governor Andrew Cuomo, was the originator and chief proponent of this legislation. It was Cuomo who seized the political initiative in the weeks after the elementary school shooting in nearby Connecticut, who expedited the measure, and trumpeted it as a great victory for the citizens of the state.<sup>142</sup>

Since his election as governor in 2010, Cuomo has amassed a significant record of policy accomplishment while maintaining a high degree of popularity. The son of former three-term governor Mario Cuomo, prodigal son Andrew worked in his father's administration as a young man in the 1980s and then served as Assistant Secretary of the Department of Housing and Urban Development in the Clinton administration from 1993 until his elevation to secretary of the department in 1997, where he served until 2001.<sup>143</sup> After a failed try at the governorship in 2002, he was elected attorney general in 2006.<sup>144</sup> He swept into the governor's mansion with 61.4% of the vote in 2010.<sup>145</sup>

As governor, Cuomo has retained high popularity in large measure because of his shrewd understanding of state politics and ability to work with Republican and Democratic leaders in the state legislature, which has delivered an on-time state budget in each year of his first term as governor.<sup>146</sup> That accomplishment contrasts with the fact that state budgets were routinely enacted late—often months late—in the prior twenty years.<sup>147</sup> While considered moderate to conservative on fiscal issues,<sup>148</sup> Cuomo has demonstrated an aggressive social liberalism, advocating causes such as expanded women's rights (including fortifying abortion

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(1:13-cv-00291 (WMS)).

<sup>142</sup> See Kaplan & Hakim, *supra* note 2, at A1.

<sup>143</sup> *Andrew Cuomo Biography*, BIO., <http://www.biography.com/people/andrew-cuomo-21024931> (last visited Jan. 20, 2015).

<sup>144</sup> Jonathan P. Hicks, *Cuomo Wins Attorney General Race Handily After a Stormy Campaign*, N.Y. TIMES, Nov. 8, 2006, at P14; *Andrew Cuomo Biography*, *supra* note 143.

<sup>145</sup> *New York Governor—Paladino vs. Cuomo*, REAL CLEAR POLITICS, [http://www.realclearpolitics.com/epolls/2010/governor/ny/new\\_york\\_governor\\_paladino\\_vs\\_cuomo-1423.html](http://www.realclearpolitics.com/epolls/2010/governor/ny/new_york_governor_paladino_vs_cuomo-1423.html) (last visited Jan. 20, 2015).

<sup>146</sup> See Chelsea Bishop & Kelly McCarthy, *Cuomo: New York State Budget A 'Grand Slam,'* WBNG-TV (Apr. 1, 2014), <http://www.wbng.com/news/local/New-York-State-budget-passes-on-time-253314581.html>.

<sup>147</sup> *Late State Budgets*, NAT'L CONF. ST. LEGISLATURES (Aug. 27, 2010), <http://www.ncsl.org/research/fiscal-policy/late-state-budgets.aspx>.

<sup>148</sup> See Alan S. Chartock, *Cuomo Has Always Had The Tax Thing Figured Out*, LEGIS. GAZETTE (Albany, N.Y.) (Oct. 6, 2014), <http://www.legislativegazette.com/Articles-Publishers-Corner-c-2014-10-06-89440.113122-Cuomo-has-always-had-the-tax-thing-figured-out.html>.

rights for women),<sup>149</sup> same-sex marriage (enacted by the state legislature in 2011 largely because of his efforts),<sup>150</sup> and now gun control.

In his first two years in office, Cuomo's popularity in the state remained high, fluctuating between sixty-eight percent and eighty-two percent approval.<sup>151</sup> In the aftermath of the SAFE Act's passage, Cuomo's statewide popularity slipped some, to the low to mid-sixty percent range.<sup>152</sup> Even by the fall of 2013, his approval ratings remained in that range, only once dropping below sixty percent that year.<sup>153</sup> A poll conducted at the end of 2013 reported a sixty-two percent approval rating statewide and a fifty-three percent approval rating upstate.<sup>154</sup> Clearly, in liberal-leaning New York, Cuomo's aggressive advocacy on the gun issue (and gay marriage) has not materially harmed his popularity: in 2014, Cuomo was easily elected to a second term, besting his Republican opponent by 14 percent.<sup>155</sup> Like it or not, Cuomo's advocacy on the issue is consistent with the state's long history related to gun regulation.

## V. THE STATE GUN POLICY ENVIRONMENT

As noted earlier, New York has a long tradition of relatively tough gun laws. The first modern gun law, the Sullivan Law, was enacted in 1911.<sup>156</sup> Spreading urban crime (often involving handguns) and

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<sup>149</sup> Press Release, Governor's Press Office, Governor Cuomo Introduces Women's Equality Act Legislation (June 4, 2014), <http://www.governor.ny.gov/press/06042013Womens-Equality-Act-Legislation>.

<sup>150</sup> Press Release, Governor's Press Office, Governor Cuomo Announces Passage of Marriage Equality Act (June 24, 2011), <https://www.governor.ny.gov/press/062411passageofmarrriageequality>.

<sup>151</sup> QUINNIPIAC U. POLLING INST., MORE NEW YORK VOTERS PREFER SENATE COALITION, QUINNIPIAC UNIVERSITY POLL FINDS; GOV. CUOMO APPROVAL HITS NEW HIGH 3 (Dec. 12, 2012), available at <http://www.quinnipiac.edu/news-and-events/quinnipiac-university-poll/new-york-state/release-detail?ReleaseID=1824>.

<sup>152</sup> SIENA RESEARCH INST., *supra* note 113, at 1.

<sup>153</sup> Teri Weaver, *Siena Poll: New Low for Cuomo*, POST-STANDARD (Syracuse, N.Y.), Oct. 1, 2013, at A-8.

<sup>154</sup> Michelle Breidenbach, *Cuomo Approval Rating High Heading into '14 Election, Poll Says*, POST-STANDARD (Syracuse, N.Y.), Dec. 2, 2013, at A-3. The poll was conducted by Quinnipiac University. *Id.*; see QUINNIPIAC U. POLLING INST., NEW YORK'S CUOMO OPENS ELECTION YEAR WITH A ROAR, QUINNIPIAC UNIVERSITY POLL FINDS; 2-1 APPROVAL AND HUGE LEAD OVER UNKNOWN CONTENDER 1 (Nov. 26, 2013), available at <http://www.quinnipiac.edu/news-and-events/quinnipiac-university-poll/new-york-state/release-detail?ReleaseID=1824>.

<sup>155</sup> Thomas Kaplan, *Cuomo Secures a Second Term, but Loses Clout*, N.Y. TIMES, Nov. 5, 2014, at A1.

<sup>156</sup> Sandy Froman, *The History of Gun Control, Part 1*, WND (June 7, 2007), <http://www.wnd.com/2007/06/41950/>.

an attempt to assassinate New York City Mayor William Gaynor in 1910 provided the necessary impetus to move the state legislature to enact a new law that not only regulated the possession and carrying of pistols and other concealable weapons, but also their sale, as handguns could only be sold to individuals with valid permits and gun dealers were now required to maintain proper sales records.<sup>157</sup> These regulations were not unprecedented, but what was new was the establishment of a licensing requirement for handguns that covered possession both at home and at work.<sup>158</sup> Violation of the measure was made a felony.<sup>159</sup> That same year, the State also enacted a law giving the police the power to stop, search, and arrest anyone they suspected of carrying a gun illegally.<sup>160</sup> No warrant was required (this came decades before the Supreme Court applied the U.S. Constitution's Fourth Amendment to the states).<sup>161</sup> Police wasted no time in vigorously using this new power.<sup>162</sup> By one historical account, "[t]he Sullivan Law was a statute without precedent in the United States, since it subjected to strict regulation not only the carrying of deadly weapons, but also their sale and simple possession."<sup>163</sup> The idea of requiring permits for pistol possession spread to other places around the country.<sup>164</sup> The law withstood legal challenges, and while it has been amended many times, it is still on the books.<sup>165</sup>

The history of gun crime has been linked most directly to handguns, and that was the chief concern giving rise to the Sullivan Act. Despite a long history of crime-related problems in New York City,<sup>166</sup> in the contemporary crime environment, New York stands

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<sup>157</sup> ALEXANDER DECONDE, *GUN VIOLENCE IN AMERICA: THE STRUGGLE FOR CONTROL* 105, 108 (2001); LEE KENNETT & JAMES LAVERNE ANDERSON, *THE GUN IN AMERICA: THE ORIGINS OF A NATIONAL DILEMMA* 175, 182 (1975).

<sup>158</sup> DECONDE, *supra* note 157, at 109.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 109–10.

<sup>161</sup> *Id.* at 110. The Court did not require states to provide Fourth Amendment protections until *Mapp v. Ohio*, which overruled *Wolf v. Colorado*, 338 U.S. 25 (1949), and incorporated the Fourth Amendment into the Fourteenth Amendment Due Process Clause. *Mapp v. Ohio*, 367 U.S. 643, 654–55 (1961).

<sup>162</sup> KENNETT & LAVERNE ANDERSON, *supra* note 157, at 183.

<sup>163</sup> *Id.* at 175.

<sup>164</sup> Michael A. Ballesiles, *Firearms Regulation: A Historical Overview*, 28 *CRIME & JUST.* 137, 169 (2001).

<sup>165</sup> *See, e.g.*, *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 84–85, 101 (2d Cir. 2012) (“[T]he Sullivan Law was amended to impose a statewide standard for the issuance of licenses to carry firearms in public. . . . One hundred years later, the proper cause requirements remains a feature of New York’s statutory regime.”).

<sup>166</sup> *See, e.g.*, Christina Sterbenz, *New York City Used to be a Terrible Place*, *BUS. INSIDER* (July 12, 2013), <http://www.businessinsider.com/new-york-city-used-to-be-a-terrifying-place->

in relatively good stead in relation to most of the rest of the states, especially given that over eighty percent of firearm homicides nationwide occur in large and medium-sized urban areas.<sup>167</sup> The state has the fourth lowest gun death rate on a per capita basis among the fifty states and also has the sixth most strict gun laws.<sup>168</sup> The overall gun death rate includes gun homicides, suicides, and fatal accidents.<sup>169</sup> Focusing specifically on gun murders and non-lethal gun crimes, based on data from the FBI's Uniform Crime Reports from 2011, New York faces greater problems. New York's firearms murder rate is high—ninth highest, but it also is seventeenth lowest in firearms murders as a percentage of all murders (notable since murder attempts with firearms are more likely to result in death than attempts using other methods, such as knives).<sup>170</sup> It also ranks nineteenth lowest in its firearms robbery rate, and tenth lowest in its firearms assault rate.<sup>171</sup>

Overall, these rankings are consistent with a number of recent studies that have found a strong inverse correlation between the strength of a state's gun laws and its rate of gun deaths—that is, states with tougher gun laws tend to have the lowest gun death rates, and the reverse for states with few or lax laws.<sup>172</sup> This correlation seems even stronger with respect to gun suicides as compared with gun homicides<sup>173</sup> (nearly twice as many Americans

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photos-2013-7?op=1.

<sup>167</sup> Daniel W. Webster et al., *Effects of State-Level Firearm Seller Accountability Policies on Firearm Trafficking*, 86 J. URB. HEALTH 525, 525, 529 (2009) (finding that New York City was in the tenth percentile compared to fifty-four other cities for lowest intrastate gun trafficking).

<sup>168</sup> *Gun Laws Matter 2012: Understanding the Link Between Weak Laws and Gun Violence*, LAW CENTER TO PREVENT GUN VIOLENCE (Nov. 14, 2012), <http://smartgunlaws.org/gun-laws-matter-2012-understanding-the-link-between-weak-laws-and-gun-violence/>.

<sup>169</sup> *Statistics on Gun Deaths & Injuries*, LAW CENTER TO PREVENT GUN VIOLENCE (Nov. 16, 2012), <http://smartgunlaws.org/gun-deaths-and-injuries-statistics/> (explaining the different kinds of firearms-related deaths).

<sup>170</sup> See Simon Rogers, *Gun Crime Statistics By US State: Latest Data*, GUARDIAN (Dec. 17, 2012), <http://www.theguardian.com/news/datablog/2011/jan/10/gun-crime-us-state> (providing total firearm murders for each state in 2011 as well as data on the firearms murders as a percentage of all murders).

<sup>171</sup> *Id.* (listing the firearms robbery rate for New York State as 23.38 per 100,000 people and the firearm assaults rate as 20.06 per 100,000 people).

<sup>172</sup> See Andrew Anglemyer et al., *The Accessibility of Firearms and Risk for Suicide and Homicide Victimization Among Household Members*, 160 ANNALS INTERNAL MED. 101, 109 (2014); Eric W. Fleegler et al., *Firearm Legislation and Firearm-Related Fatalities in the United States*, 173 JAMA INTERNAL MED. 732, 735, 736 tbl.2 (2013); Michael Siegel et al., *The Relationship Between Gun Ownership and Firearm Homicide Rates in the United States, 1981-2010*, 103 AM. J. PUB. HEALTH 2098, 2103 (2013).

<sup>173</sup> See Anglemyer et al., *supra* note 172, at 109.

die from gun suicides as gun homicides annually),<sup>174</sup> and many studies have linked degree of gun prevalence with higher suicide rates.<sup>175</sup>

Aside from state laws, New York law enforcement, prosecutors, and political leaders have worked for many years to stem the flow of illegal guns into the state, long referred to as the “iron pipeline,” a gun trafficking pattern mostly originating from southern states with lax gun laws.<sup>176</sup> In 2011, for example, of crime guns recovered and traced by police, the largest number came from (in order of high to low) Virginia, Pennsylvania, North Carolina, Florida, Georgia, and South Carolina.<sup>177</sup> In all, of the 8793 crime guns recovered and traced to a source state that year, eighty-two percent came from out of state.<sup>178</sup> In New York City, eighty-five percent of crime guns came from out of state in 2009; in 2010 it was eighty-six percent; in 2011 it was ninety percent.<sup>179</sup> Over the last two decades, between eighty to ninety percent of crime guns throughout the state have been traced to outside of New York,<sup>180</sup> a fact that buttresses a simple proposition about gun laws.

If New York’s tough gun laws (especially applicable to handguns, which compose roughly eighty percent of the guns used in crimes)<sup>181</sup> made no difference, why would most crime guns come from out of state, from places with much more lax laws? The answer is obvious. The problem is not that gun laws do not matter or do not work, but that the nation’s system of federalism, where the vast majority of the nation’s gun laws exist at the state level, encourages such gun trafficking to circumvent tougher laws in states that have them. For states like New York, the strategy is three-fold: (1) suppress

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<sup>174</sup> See Richard Florida, *The Hidden Geography of America’s Surging Suicide Rate*, CITY LAB (May 8, 2013), <http://www.theatlanticcities.com/neighborhoods/2013/05/hidden-geography-americas-surg-ing-suicide-rate/5489/>.

<sup>175</sup> See Anglemyer et. al., *supra* note 172, at 105, 109.

<sup>176</sup> Editorial, *The Iron Pipeline Thrives*, N.Y. TIMES, Aug. 7, 2013, at A22.

<sup>177</sup> *Firearms Trace Data: January 1, 2011–December 31, 2011*, BUREAU ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES (2011), <https://www.atf.gov/files/statistics/download/trace-data/2011/2011-trace-data-new-york.pdf>.

<sup>178</sup> *Id.*

<sup>179</sup> Tina Moore, *Guns From Out-of-State Make Up the Grand Majority of City Crimes, Bloomberg Attempts to Push Back*, N.Y. DAILY NEWS (July 31, 2013), <http://www.nydailynews.com/new-york/out-of-state-guns-ny-gun-crimes-article-1.1414139>.

<sup>180</sup> SPITZER, *supra* note 85, at 184; see also, Andy Newman, *New York Dealers Are Prominent on Court Case’s List of Guns Tied to Crime*, N.Y. TIMES, Apr. 18, 2003, at D3 (describing a study revealing that during 1996 to 2000, ninety percent of guns used in crimes came from outside the state).

<sup>181</sup> SPITZER, *supra* note 85, at 55 (“[Handguns] consistently account for about 80 percent of gun homicides, about 60 percent of all homicides (including homicides from other weapons and instruments), and about 80 percent of robberies involving firearms.”).

illegal sales and trafficking within the state, thereby (2) raising the degree of difficulty or “opportunity costs” for those seeking weapons who should not have them by forcing them to go elsewhere to satisfy criminal demand, and (3) interdicting illicit interstate trafficking.

Former New York City Mayor Michael Bloomberg has become an outspoken advocate for these and other measures, which was a primary reason for his formation, along with Boston Mayor Tom Menino, of Mayors Against Illegal Guns (MAIG) in 2006.<sup>182</sup> MAIG has now become an established pro-gun-control group claiming over 1000 current and former mayor members from forty-two states as of 2015.<sup>183</sup> From the start, much of their effort has focused on gun trafficking patterns, especially as they affect gun crime in large cities.<sup>184</sup> As mayor, Bloomberg relied on city law enforcement resources to mount sting operations against rogue gun dealers in other states found to be the source of many of the illegal guns trafficked into New York and other northeastern cities, including Boston and Philadelphia.<sup>185</sup> Even in the face of a federal law enacted in 2005 that provided special protections from lawsuits to gun manufacturers, dealers, distributors, and importers of firearms and ammunition, Bloomberg was able to reach settlements with a few of the offending gun dealers to get them to agree to strict monitoring of their sales activities.<sup>186</sup> In 2013, the city reported one of its largest gun seizures when it broke up a gun trafficking ring, arresting nineteen people and nabbing 254 guns initially obtained in North Carolina and South Carolina.<sup>187</sup> Studies of licensing and trafficking support the idea that these strategies can be effective in reducing the flow and availability of crime guns, especially in the absence of uniform national regulations.<sup>188</sup>

As noted earlier, gun owners have complained that the SAFE Act and other state laws simply make life harder for law-abiding gun

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<sup>182</sup> *Mayors Against Illegal Guns*, EVERYTOWN FOR GUN SAFETY, <http://everytown.org/mayors/> (last visited Jan. 20, 2015).

<sup>183</sup> *See id.*; see also Barnini Chakraborty, *Bloomberg Gun-Control Group Facing Internal Backlash amid Growing Profile*, FOX NEWS (July 29, 2013), <http://www.foxnews.com/politics/2013/07/29/bloomberg-anti-gun-group-backlash/> (noting that membership was at 950 mayors, however 50 had reportedly left the group, unhappy with some of its recent political efforts).

<sup>184</sup> *See* SPITZER, *supra* note 85, at 118.

<sup>185</sup> *See id.* at 185.

<sup>186</sup> *Id.*

<sup>187</sup> Tom Hays, *Authorities: Men Smuggled Guns to NYC on Buses*, ASSOCIATED PRESS, Aug. 19, 2013, available at <http://bigstory.ap.org/article/authorities-men-smuggled-guns-nyc-buses>.

<sup>188</sup> *See* Philip J. Cook & Jens Ludwig, *Principles for Effective Gun Policy*, 73 FORDHAM L. REV. 589, 609 (2004); Webster et al., *supra* note 167, at 526; D.W. Webster et al., *Relationship Between Licensing, Registration, and Other Gun Sales Laws and the Source State of Crime Guns*, 7 INJ. PREVENTION 184, 188 (2001).

owners. Of course, that is true. Yet many laws in many areas of life do the same thing. For example, an applicant for a driver's license in New York (and most states) must pass a written test of rules-of-the-road knowledge and take a supervised road test to demonstrate some minimal knowledge and competency.<sup>189</sup> Those who already possess the necessary knowledge and competency are inconvenienced and delayed in obtaining their licenses for the sake of those who do not possess those competencies in order to make sure that, before licenses are obtained, all individuals have met a minimal standard. Since laws, by their very nature, establish rules of uniform conduct to help achieve that conduct, it will always be the case that those who would walk the straight and narrow on their own find themselves influenced or "inconvenienced" by the laws aimed to deter or punish those who would otherwise violate the conduct proscribed by, or standards established by, the law. Thus, for example, New York's handgun permitting process takes many months because state officials are required to conduct a detailed background investigation of permit applicants on the notion that the public interest is served if those who should not have permits are weeded out in the process.<sup>190</sup> Yes, it poses a notable inconvenience on those with clean records. But this information cannot be known until the investigation takes place. Thus, the investigative standards must apply to everyone. So, how does the New York system work?

## VI. THE AUTHOR APPLIES FOR A PISTOL PERMIT

In August of 2013, I submitted my application for a pistol permit. Herewith is my account of that experience.

New York is one of nine states in the country, plus the District of Columbia, with a "may issue" pistol permit system, meaning that these states have discretion over whether to issue permits.<sup>191</sup> In

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<sup>189</sup> N.Y. VEH. & TRAF. LAW § 502.4(a)–(b) (McKinney 2014); *see, e.g.*, FLA. STAT. ANN. § 322.12(4) (West 2014); NEV. REV. STAT. ANN. § 483.330(1) (West 2014); 75 PA. CONS. STAT. ANN. § 1508(a) (West 2014).

<sup>190</sup> *See* N.Y. PENAL LAW § 400.00.4 (McKinney 2014) ("Before a license is issued or renewed, there shall be an investigation of all statements required in the application . . ."); *see also* Alexander C. DePalo, Comment, *The Doctor Will See You Now: An Argument for Amending the Licensing Process for Handguns in New York City*, 29 TOURO L. REV. 867, 885 (2013) ("[T]he process in New York State is tedious and time-consuming as compared to other states and it may take three to six months before an application is approved. . . . Time and paperwork are small prices to pay to ensure that those who receive a license . . . are competent law-abiding citizens.").

<sup>191</sup> *Concealed Weapons Permitting Policy Summary*, LAW CENTER TO PREVENT GUN

thirty-seven “shall issue” states, obtaining a permit is merely a matter of applying (subject to rejection if, for example, the applicant has a felony criminal record).<sup>192</sup> Four states have dispensed with permitting entirely.<sup>193</sup> In New York, applicants must offer a justification for wishing to obtain a permit, and applications can be rejected after review based on the validity of the justification.<sup>194</sup> Given the relative strictness of New York’s criteria, it comes as little surprise that New York is one of ten that does not honor pistol permits from other states (twenty-two other states honor the New York permit).<sup>195</sup> While Second Amendment-based challenges have been raised in court against laws with stricter may issue standards, in at least three instances they have, to date, been upheld in federal court as consistent with the Second Amendment (the Supreme Court has declined to hear appeals of these three decisions).<sup>196</sup> This includes New York’s may issue law and that of New Jersey.<sup>197</sup>

The New York Pistol/Revolver License Application offers three types of licenses: those for handgun possession on one’s premises, for concealed carry (i.e., to carry in public places), and related to one’s employment (such as a bank messenger, or certain

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VIOLENCE (Aug. 28, 2013), <http://smartgunlaws.org/concealed-weapons-permitting-policy-summary/>; see Mike DeBonis, *Gun Bill Passes in the District*, WASH. POST, Sept. 24, 2014, at B01.

<sup>192</sup> *Concealed Weapons Permitting Policy Summary*, *supra* note 191. Twenty of those “shall issue” states provide some limited discretion to issuing authorities, allowing them to deny the permit under certain circumstances, such as where “there is reasonable suspicion to believe that the application is a danger to self or others.” *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *New York Concealed Carry Permit Information*, USA CARRY, [http://www.usacarry.com/new\\_york\\_concealed\\_carry\\_permit\\_information.html](http://www.usacarry.com/new_york_concealed_carry_permit_information.html) (last visited Jan. 20, 2015).

<sup>195</sup> See *Concealed Carry Permit Reciprocity Maps*, USA CARRY, [http://www.usacarry.com/concealed\\_carry\\_permit\\_reciprocity\\_maps.html](http://www.usacarry.com/concealed_carry_permit_reciprocity_maps.html) (last visited Jan. 20, 2015).

<sup>196</sup> See *Drake v. Filko*, 724 F.3d 426, 434 (3d Cir. 2013) (upholding New Jersey’s justifiable need standard for handgun permitting and affording it presumptive constitutionality), *cert. denied*, 134 S. Ct. 2134 (2014); *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 100–01 (2d Cir. 2012) (upholding New York’s requirement that an individual demonstrate a “special need for self-protection” on their application for a carry license); *Woollard v. Gallagher*, 712 F.3d 865, 880–82 (4th Cir.) (upholding Maryland’s “good-and-substantial-reason requirement,” adopting the reasoning enounced in *Kachalsky*), *cert. denied*, 134 S. Ct. 422 (2013).

<sup>197</sup> See *supra* note 196; see also Greg Stohr, *Top Court Refuses to Ease Tough N.J. Gun-Carry Law Justices Won’t Hear 2nd Amendment Challenge to ‘Justifiable Need’ Rule for Permits*, STAR-LEDGER (Newark, N.J.), May 6, 2014, at 1 (“The U.S. Supreme Court yesterday left intact a New Jersey law that requires a ‘justifiable need’ to carry a handgun in public.”); *U.S. Supreme Court Rejects NJ Man’s Appeal of Gun-Carry Suit*, N.J.COM (May 6, 2014), [http://www.nj.com/sussex-county/index.ssf/2014/05/us\\_supreme\\_court\\_rejects\\_nj\\_mans\\_appeal\\_on\\_carrying\\_a\\_gun\\_in\\_public.html](http://www.nj.com/sussex-county/index.ssf/2014/05/us_supreme_court_rejects_nj_mans_appeal_on_carrying_a_gun_in_public.html) (“The U.S. Supreme Court today let stand New Jersey’s requirement that gun owners demonstrate a justifiable need in order to carry firearms in public . . .”).

government professions).<sup>198</sup> These are defined in the state Penal Law.<sup>199</sup> Note also that the overall review process to merely possess a handgun is basically the same as the process to legally carry a handgun.<sup>200</sup> For an applicant like me, who is not claiming a business-based justification, the critical wording in the law says that: “A license for a pistol or revolver . . . shall be issued to (a) have and possess in his dwelling by a householder . . . (f) have and carry concealed . . . by any person when proper cause exists for the issuance thereof . . .”<sup>201</sup> The determination of “proper cause,” and therefore whether permits are issued, is made by a licensing officer.<sup>202</sup> And there are variations in county standards.<sup>203</sup>

In the five boroughs of New York City, for example, permitting is subject to greater scrutiny and higher standards as compared with the other counties in the state.<sup>204</sup> In fact, permits obtained in any of the state’s fifty-seven non-New York City counties are not valid in the five boroughs of the Big Apple because of the city’s stricter standards.<sup>205</sup> As of the end of 2012, the city of eight million had issued a total of about 37,000 permits.<sup>206</sup> Statewide, 1.28 million permits were listed with the state as of the end of 2011, out of a total population of about 19.5 million people.<sup>207</sup> The actual number of valid, current permits, however, is significantly smaller because

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<sup>198</sup> N.Y. PENAL LAW § 400.00.2 (McKinney 2014); N.Y. STATE, Pistol/Revolver License Application, available at <http://troopers.ny.gov/Firearms/PPB-3.pdf> (last visited Jan. 20, 2015).

<sup>199</sup> PENAL § 400.00.2 (listing the types of licenses available in New York State). While there are three types of licenses available on the Pistol/Revolver License Application, the Penal Law also provides a licensing provision related to antique pistols. *Id.*

<sup>200</sup> *See, e.g., id.* § 400.00.3–4 (describing the review process for obtaining a license which applies equally to both an application to carry and one to merely possess).

<sup>201</sup> *Id.* § 400.00.2(a), (f).

<sup>202</sup> *Id.* § 400.00.1 (“No license shall be issued or renewed . . . except by the licensing officer, and then only after investigation and finding that all statements in a proper application for a license are true.”).

<sup>203</sup> *See, e.g., id.* § 400.00.1(l) (providing eligibility requirements specific to Westchester).

<sup>204</sup> *See, e.g., id.* § 400.00.9 (allowing a license holder to apply to amend his or her license to include a new weapon at any time, however this right to amend does not apply to those within New York City); *id.* § 400.00.10 (providing that a license to carry or possess a pistol in New York City expires no later than three years after it is issued); *id.* § 400.00.11(a) (“[A] license may be revoked and cancelled at any time in the city of New York . . . by the licensing officer, and elsewhere than in the city of New York by any judge or justice of a court of record.”).

<sup>205</sup> *Id.* § 400.00.6 (providing that a license to carry or possess a pistol is effective throughout the state if not otherwise limited in time or space, except in New York City, where a special permit is often required).

<sup>206</sup> Monique Garcia, *On Concealed Carry Issue, Illinois May Look to N.Y. Laws*, CHI. TRIB., Dec. 30, 2012, at 14.

<sup>207</sup> *Id.*; *State & County QuickFacts: New York*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/36000.html> (last updated Dec. 4, 2014).

that count includes every pistol permit issued since 1936, as there has been no purging of these records since that date<sup>208</sup> (that will change with the SAFE Act, which now imposes a five year time limit on the permit, and cancels permits that are not renewed).<sup>209</sup> Whatever the number of permits, it may not equal the number of handguns, as a single permit can cover many handguns,<sup>210</sup> and not all permit holders may currently own handguns. In my home county of Cortland (population 49,000), where I applied for a permit, the County Clerk's office reports about 7200 permits, although this total too includes unpurged permits.<sup>211</sup> By way of comparison, the upstate but more urban and suburban county of Onondaga (which includes the city of Syracuse), has a total population of about 470,000,<sup>212</sup> and it reports 40,000 to 50,000 pistol permits.<sup>213</sup>

Aside from selecting permit type, the application also requires the statement of the applicant's "reason" for the permit, asks for the names and addresses of four character references "who by their signature attest to your good moral character" (indeed, they must sign the application).<sup>214</sup> The application poses a series of questions to root out those who would otherwise be disqualified from obtaining a permit in order to exclude (e.g., those with a felony or other serious conviction, a history of mental illness, or those who have been convicted of domestic violence or are subject to a protective court order) and identify if there is good cause to deny the application.<sup>215</sup> The applicant must also be twenty-one, except for honorably discharged military personnel.<sup>216</sup>

Unquestionably, New York's process is more demanding and discretionary than most other states. In fact, it was challenged in federal court on these and also Second Amendment grounds, but in a 2012 decision by the U.S. Court of Appeals for the Second Circuit, the law was upheld and the Supreme Court refused to hear an

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<sup>208</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-717, GUN CONTROL: STATES' LAWS AND REQUIREMENTS FOR CONCEALED CARRY PERMITS VARY ACROSS THE NATION app. V at 76 n.d (2012); Garcia, *supra* note 206, at 14.

<sup>209</sup> N.Y. STATE POLICE, *supra* note 15, at 4.

<sup>210</sup> See PENAL § 400.00.9.

<sup>211</sup> *C.f.* Viccaro, *supra* note 45 (reporting 7000 permits in Cortland County).

<sup>212</sup> *State & County QuickFacts: Onondaga County, New York*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/36/36067.html> (last updated Dec. 4, 2014).

<sup>213</sup> Glenn Coin, *NY Safe Act Requires Onondaga County to Release Many Pistol Permit Holders' Names*, *State Official Says*, SYRACUSE.COM (Aug. 13, 2013), [http://www.syracuse.com/news/index.ssf/2013/08/onondaga\\_county\\_must\\_release\\_pistol\\_permit\\_holders\\_names\\_addresses\\_says\\_state\\_op.html](http://www.syracuse.com/news/index.ssf/2013/08/onondaga_county_must_release_pistol_permit_holders_names_addresses_says_state_op.html).

<sup>214</sup> See Pistol/Revolver License Application, *supra* note 198.

<sup>215</sup> *Id.*

<sup>216</sup> N.Y. PENAL LAW § 400.00.1(a) (McKinney 2014).

appeal of the ruling.<sup>217</sup> Still, one of the state's leading advocates of gun rights, New York State Rifle and Pistol Association President Tom King, said this about the state system: "It's an involved process, it's not an easy process, but it's certainly not an impossible process."<sup>218</sup> (King's organization brought the lawsuit challenging the constitutionality of the SAFE Act.)<sup>219</sup> King's sentiments are similar to those of other gun enthusiasts. A member of the Westside Rifle and Pistol Range, the only public shooting range in Manhattan, said that "[w]hen it comes to gun laws, there's the whole country, and then there's New York."<sup>220</sup> Yet Westside Rifle and Pistol Range owner Darren Leung finds that tough laws make some sense because "you want people to realize [that a gun] is not a toy. If you make a mistake with a firearm, there is no coming back from that."<sup>221</sup>

To obtain the application from the clerk's office, along with a separate form that also had to be signed by my four character references, I paid a fee of ten dollars.<sup>222</sup> I needed to obtain two passport photos to accompany my completed application, taken within thirty days prior to filing it, and I needed to get fingerprinted, also within thirty days of submitting the application. I had the photos taken at the local post office for fifteen dollars and received the two pictures then and there. The fingerprinting was done at the local hospital by a private company for a fee of \$102.25, where I needed to bring two forms of identification. (I expected to have my hands inked, Eliot Ness-style, but was pleased to find out that inking of hands went the way of the Ness's Untouchables—my prints were electronically scanned.) My prints were then sent to the State Division of Criminal Justice Services, the Federal Bureau of Investigation, and to the local County Clerk's Office.<sup>223</sup>

I returned the completed forms and photos to the Clerk's office within a week of picking up the application, signed an authorization

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<sup>217</sup> *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 100–01 (2d Cir. 2012).

<sup>218</sup> Garcia, *supra* note 206, at 14.

<sup>219</sup> *Legal Action Against Cuomo Gun Law*, N.Y. ST. RIFLE & PISTOL ASS'N, [http://www.nysrpa.org/index.php?option=com\\_content&view=article&id=860&Itemid=215](http://www.nysrpa.org/index.php?option=com_content&view=article&id=860&Itemid=215) (last visited Jan. 20, 2015).

<sup>220</sup> Daniel Krieger, *Home on the Range—in New York City*, SALON (June 23, 2013), [http://www.salon.com/2013/06/23/home\\_on\\_the\\_range\\_in\\_new\\_york\\_city\\_partner/](http://www.salon.com/2013/06/23/home_on_the_range_in_new_york_city_partner/).

<sup>221</sup> *Id.*

<sup>222</sup> Cortland County Clerk, *Pistol Permits*, CORTLAND COUNTY, <http://www.cortland-co.org/c/index.htm> (last updated Sept. 17, 2014).

<sup>223</sup> See N.Y. PENAL LAW § 400.00.4 (McKinney 2014) (requiring fingerprints to be sent to both the Federal Bureau of Investigation and the New York State Division of Criminal Justice Services).

to give my permission for “all duly authorized agen(cies) to furnish members of the,” state police, county sheriff’s department, city police, and county judges with records “regarding my criminal history” (of which there is none, as far as I know).<sup>224</sup> In addition, the background check process extends to the office of mental health, the probation department, and the county district attorney’s office.<sup>225</sup> I was told that the process would take at least six months, and perhaps longer—in part, at least, because of a recent glut of such applications.

My four references were sent a detailed, three-page questionnaire to complete and return, which asked their relationship to me, whether they had known me to engage in any illegal activities, and whether I had any psychological problems or demonstrated any erratic behavior.<sup>226</sup> The form also asked if they knew me to associate with “persons of undesirable character,” if I was of “good moral character,” used controlled substances, committed any acts of violence, or had any physical conditions that would “interfere with the safe and proper use of a handgun.”<sup>227</sup> The form also asked my references to describe my reputation in the local community and to describe my “demeanor or behavior.”<sup>228</sup> Finally, it asked, “[f]rom the standpoint of the safety and welfare of the community,” whether they thought I should be granted the permit, following up with whether they could think of any reason why I should not be granted the permit.<sup>229</sup>

One may think of these questions as subjective, to a degree, and the responses obviously based on my recommenders’ perceptions, which could or could not be accurate. But the larger purpose is to send up flags to local authorities to at least make further inquiries about the applicant. Think, for example, of the case of Seung Hui Cho, a Virginia graduate student who legally purchased two handguns in his home state, despite a long history of behavioral and emotional problems well known to his relatives, friends, and those with whom he had interacted at Virginia Tech.<sup>230</sup> Absent any

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<sup>224</sup> City of Cortland Police Dep’t, Authorization for Criminal Record Check (on file with author).

<sup>225</sup> See PENAL § 400.00.4 (“[T]he records of the appropriate office of the department of mental hygiene concerning previous or present mental illness of the applicant shall be available for inspection by the investigating officer of the police authority.”).

<sup>226</sup> City of Cortland Police Dep’t, Character Reference Questionnaire (on file with author).

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

<sup>229</sup> *Id.*

<sup>230</sup> SPITZER, *supra* note 85, at xiv.

required inquiry by state or local authorities, Cho was able to use his two legally acquired guns to kill thirty-three people (including himself) and wound twenty-five others in 2007 on the campus of Virginia Tech.<sup>231</sup> Arizona resident Jared Lee Loughner was able to legally obtain a handgun two months before shooting Congresswoman Gabrielle Giffords and eighteen other people, killing six, in 2011.<sup>232</sup> The previous year, Loughner had been suspended from college for his bizarre and threatening behavior and had been rejected for military service, in part for flunking a drug test.<sup>233</sup> James Holmes legally purchased four guns to shoot up a movie theater in Colorado in 2012, killing twelve and injuring fifty-eight.<sup>234</sup> Yet people who knew him reported that, in the previous year, he began to change.<sup>235</sup> He dropped out of school and had what some labeled a “psychotic break.”<sup>236</sup>

Critics of gun laws argue that people determined to commit mayhem (which Cho, Loughner, and Holmes surely were) will not be prevented by tougher laws and will simply find another way to get a gun. But how, and from where, exactly? Yes, guns are trafficked illegally, but such acquisitions involve greater planning, cost, trouble, risk, and concealment, any of which could result in blocking gun acquisition. But more to the point, our entire legal system is predicated on the presumption that the law matters. Every law, of every description, is violated. That does not mean that laws do not matter or that they should simply be repealed. Laws exist to deter adverse conduct, facilitate information gathering and prosecution, and express societal standards of behavior. Had Virginia, Arizona, and Colorado had the kind of extensive background check process in place in New York, there is no guarantee that the three shooters would have been thwarted, but it is equally clear that any sort of meaningful inquiry would have set off alarm bells to stop these future mass murderers.

After the reference letters are completed, they are returned to the local police and, along with the original application and information received from other agencies, are sent to one of the two Cortland County judges, who then make a determination on the

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<sup>231</sup> *Id.* at xiii.

<sup>232</sup> *Id.* at xvi.

<sup>233</sup> *Id.*

<sup>234</sup> *Id.* at xvii.

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

application.<sup>237</sup> If the local magistrate has any further questions, the judge can interview the applicant directly. While this process was traditionally handled by the county sheriff's office, the greater number of applications prompted their office to ask the city police to handle the applications of city residents. Here in Cortland County, according to local officials, the biggest uptick in pistol permit applications occurred between 2003 and 2009. An additional applications surge occurred at the start of 2009.<sup>238</sup> Since enactment of the SAFE Act at the start of 2013, however, the local application volume has changed relatively little, I was told. According to county court officials, the processing of permit applications represents a fairly small proportion of the office's time and overall workload.

On Christmas Eve day, I received a letter from the county clerk's office, informing me that my permit application had been approved. I was asked to come to the clerk's office to be photographed (the picture appears on the permit) and receive my license on the spot. From application to approval, the process took almost exactly four months. The only other stipulation was that I needed to take and provide proof of successful completion of a ten-hour handgun safety course taught by an NRA-certified instructor (I need not own my own gun to complete the class) within a year of license approval.<sup>239</sup> Failure to complete the course and notify the clerk's office within twelve months results in revocation of the license.<sup>240</sup>

I was passed a list of several instructors in the area by the clerk's office. I called one in early January, reserved a class spot, for which the fee was sixty-five dollars (active military personnel and law enforcement officers are exempt from the training class). The ten-hour class I attended was held on the last two Sundays in February in two five-hour blocks at the McGraw Sportsmen's Club. The fee included twenty dollars for a one-year membership in the club. The two instructors received no pay for their efforts.

The two began by noting that they had been giving training classes for over a decade. In our particular group, while roughly a dozen people had signed up, only six showed. This seemed odd to

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<sup>237</sup> See Cortland County Clerk, *supra* note 222 (describing the role of the Cortland County judges, who have complete discretion to determine who to issue a pistol permit to).

<sup>238</sup> *State Gun Sales Sky Rocket; Applications Up 50%*, ITHACA J. (Ithaca, N.Y.), Oct. 12, 2009, at A7 ("After the election last year of President Barack Obama, a Democrat, gun sales and pistol-permit applications have increased dramatically in New York and across the country . . .").

<sup>239</sup> Emmett Neno, *Dryden Gun Dealer Proposes Pistol Safety Course*, CORTLAND STANDARD (July 17, 2014), <http://www.cortlandstandard.net/articles/07172014n.html>.

<sup>240</sup> See *id.*

the instructors, they noted, as the demand for pistol safety classes had been high in recent months, and the class enrollments had been high. All of us were white males ranging in age, I figured, from twenty to seventy.

The course curriculum was organized around a single, 150-page book, *NRA Guide to the Basics of Pistol Shooting*.<sup>241</sup> Class instruction, and the fifty-question test we all took at the end, hewed pretty closely to the book. Among the first points made by the instructors, in response to a question, was the funding for gun safety classes. They pointed out that a federal law enacted in 1937 (with subsequent amendments), the Pittman-Robinson Act,<sup>242</sup> provided funding, through excise taxes, for hunter safety courses in all fifty states.<sup>243</sup> Ironically, states can decide for themselves whether to provide or require handgun safety coursework as a prerequisite for handgun ownership or the granting of carry permits,<sup>244</sup> and many have no such training requirements.<sup>245</sup> Among the states that do require courses, their length and content vary.<sup>246</sup>

Our instruction began with some political content (this was not in our text), as the first 45 minutes consisted of criticism of the SAFE Act, of what was described as biased portrayals of gun owners in the media, but also the exhortations to become involved in politics and to “check things out even when they agree with your side” of the issue—certainly good advice. The rest of the first class day, and much of the second, focused on the basics of handgun safety; the operation and mechanisms of handguns, including information on the nature and types of ammunition; the elements of good shooting skills; and handgun maintenance. In the latter part of the second class, we inspected, handled, and “dry fired” several handguns, including two revolvers and one semiautomatic handgun. Thereafter, we each took turns on the firing range, firing fifteen rounds at a paper target from three shooting positions: five from a sitting position, five standing but holding the gun with two hands,

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<sup>241</sup> See generally NAT'L RIFLE ASS'N OF AM., *NRA GUIDE TO THE BASICS OF PISTOL SHOOTING* (2d ed. 2009) (outlining the basics of pistol use, safety, and maintenance).

<sup>242</sup> 16 U.S.C. §§ 669–669i (2014).

<sup>243</sup> *Id.* § 669h–1(a)(1)(A)(i).

<sup>244</sup> See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 208, at 1–2 (“State and local authorities control the issuance of concealed carry permits. Applicants who wish to obtain such permits are required to meet certain state eligibility requirements.”).

<sup>245</sup> NAT'L PHYSICIANS ALLIANCE & LAW CTR. TO PREVENT GUN VIOLENCE, *GUN SAFETY AND PUBLIC HEALTH 12* (2013), available at <http://smartgunlaws.org/gun-safety-public-health-policy-recommendations-for-a-more-secure-america/>.

<sup>246</sup> See *id.*

and five one-handed shots. We concluded with our fifty-question test (it was untimed and open book, consisting of half multiple choice and half true-false); a score of ninety percent was required to pass the course, as all six of us did.<sup>247</sup> In all, the process cost me \$192.50, and took four months from application to license receipt. Adding on the time to book and complete the safety course, the total length was six months.

## VII. CONCLUSION

Any time the government—any government—imposes new regulations, rules, or laws, some resentment, consternation, confusion, and adjustment is an inevitable consequence.<sup>248</sup> Some such efforts are, of course, met with greater initial acceptance than others. For example, new, tougher laws to address the problem of drunken driving were met with general popular approval, thanks in large part to a concerted effort by Mothers Against Drunk Driving (MADD), a pressure group formed in 1980 to toughen anti-drunk driving laws and educate the public.<sup>249</sup> And who, after all, was anxious to speak up on behalf of inebriation behind the wheel?

In the early 1960s, states moved to require that all automobiles have safety belts as a standard feature.<sup>250</sup> New York enacted such a law for all new cars in 1968;<sup>251</sup> a similar federal law was also enacted in 1968.<sup>252</sup> These measures met with widespread approval, although the auto industry was successful for a while in delaying and weakening new laws.<sup>253</sup> As an early, critical article noted at the time, “Detroit sells the pleasure of driving and the utility of the car, not the dangers of it.”<sup>254</sup> For decades, in fact, auto makers insisted that safety features did not sell cars.<sup>255</sup> History eventually proved them wrong.

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<sup>247</sup> For the record, I scored 100% on my exam.

<sup>248</sup> See SPITZER, *supra* note 85, at 3–4. Among the many types of government policies, regulatory policies are invariably the most controversial, and social regulatory policies (of which gun control is an exemplar) even more controversial. *Id.*

<sup>249</sup> *Mission Statement*, MOTHERS AGAINST DRUNK DRIVING, <http://www.madd.org/about-us/mission> (last visited Jan. 20, 2015).

<sup>250</sup> See Maggie Wittlin, Note, *Buckling Under Pressure: An Empirical Test of the Expressive Effects of Laws*, 28 YALE J. ON REG. 419, 429 (2011).

<sup>251</sup> N.Y. VEH. & TRAF. LAW § 383 (McKinney 2014).

<sup>252</sup> See NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEP'T OF TRANSP., DOT HS 810 962, HOW STATES ACHIEVE HIGH SEAT BELT USE RATES 3 (2008).

<sup>253</sup> See Wittlin, *supra* note 250, at 429.

<sup>254</sup> Charles Leedham, *Vision of a Crashproof Car*, N.Y. TIMES MAG., Oct. 25, 1964, at 34.

<sup>255</sup> Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: A Response to Market Manipulation*, 6 ROGER WILLIAMS U. L. REV. 259, 346–47 (2000).

New York took the next step, becoming the first state to require occupants to wear belts in 1984.<sup>256</sup> As of 2014, only one state, New Hampshire, had no state requirement for seat belt use by adults.<sup>257</sup> In thirty-three states, police may stop and ticket drivers solely for this offense; in the other states, the police may ticket only if the vehicle is stopped for some other offense.<sup>258</sup> While required seat belt installation met with general approval, ticketing for failing to “buckle up” met with significant public support but also considerable resistance at the start, partly because roughly three-quarters of drivers reportedly did not regularly wear seat belts and because of questions about how monitoring and compliance would be achieved.<sup>259</sup> That opposition faded, however, and actual seat belt use increased dramatically, along with major reductions in automobile deaths and injuries.<sup>260</sup> This was a case where behavior followed the law. Studies have consistently shown that seat belt use rose from two car occupants in ten at the time of the enactment of such laws to over eighty percent in the years after the laws’ enactment.<sup>261</sup>

To take a different example, in 1995, California became the first state to ban smoking in public places, based on a growing scientific and medical consensus of the harm caused by secondhand smoke.<sup>262</sup> New York became the third state to enact such a law in 2003.<sup>263</sup> Today, most states have some kind of public place smoking restrictions; only ten states impose no uniform restrictions.<sup>264</sup> In

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<sup>256</sup> Suzette Morelock et al., *Mandatory Seatbelt Law Support and Opposition in New England—A Survey*, 100 PUB. HEALTH REP. 357, 357 (1985).

<sup>257</sup> *Safety Belts*, INS. INST. FOR HIGHWAY SAFETY & HIGHWAY LOSS DATA INST. (Nov. 2014), <http://www.iihs.org/iihs/topics/laws/safetybeltuse?topicName=safety-belts>.

<sup>258</sup> *Id.*

<sup>259</sup> See Morelock et al., *supra* note 256, at 359, 362–63.

<sup>260</sup> See NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., *supra* note 252, at 3; Morelock et al., *supra* note 256, at 359, 362.

<sup>261</sup> Compare Ins. Inst. for Highway Safety, *A Special Issue: Seat Belt Use Laws: What to Expect*, STATUS REPORT, Sept. 8, 1984, at 1 (finding that fewer than two in ten used seatbelts in 1984), with Ins. Inst. for Highway Safety, *High Belt Use Rates? For Four Automakers It’s Just Automatic*, STATUS REPORT, Nov. 21, 1987, at 1 (finding increased seatbelt use depending on the type of seatbelt installed in the vehicle).

<sup>262</sup> Mark J. Horvick, Note, *Examining the Underlying Purposes of Municipal and Statewide Smoking Bans*, 80 IND. L.J. 923, 923 & n.4, 925 (2005).

<sup>263</sup> See, Robert J. Spitzer, Op-Ed., *Clearing the Air: Fury over New York’s One-Year-Old Smoking Ban Misplaced*, POST-STANDARD (Syracuse, N.Y.), Aug. 4, 2004, at A-15.

<sup>264</sup> See AM. NONSMOKERS’ RIGHTS FOUND., OVERVIEW LIST: HOW MANY SMOKEFREE LAWS? (2014), available at <http://www.no-smoke.org/pdf/mediaordlist.pdf> (noting that the District of Columbia and thirty-nine states have local laws that require bars, restaurants, or places of work to be smokefree); Chris Weller, *New York’s Indoor Smoking Ban Hits 10-Year Mark: Where Do Other States Stand On The Issue?*, MEDICAL DAILY (July 22, 2012), <http://www.medicaldaily.com/new-yorks-indoor-smoking-ban-hits-10-year-mark-where-do-oth>

New York, the public registered support for the new law, but it also engendered fierce opposition, especially from restaurant and tavern owners who feared crippling drop-offs in business.<sup>265</sup> After an initial adjustment period, including some initial business drop-off, fortunes revived, business boomed and prospered, and public health improved.<sup>266</sup>

These and many other cases of government regulation address two related sets of complaints about government. One is the expected resentment and criticism generated any time new regulations are imposed. Such sentiments are as predictable as they are readily understandable, yet they are fundamentally an implementation problem attendant to such change.

The second and related set of complaints questions the decision or policy itself. Is the policy itself fatally flawed, unwise, or defective in concept? These two sets of complaints are analytically distinct but in practice nearly inseparable.

When we apply this framework to gun regulation in New York, the intermingling of these two sets of concerns is evident. While some critics continue to argue that the new regulations are flawed in concept, the equal if not louder set of criticisms described in this article center on the implementation problem—the inconvenience, the complexity, the confusion, the uncertainty of parts of the SAFE Act. Part of the generalized frustration expressed by the gun community arises from comparisons with other states, most of which have significantly more lax gun laws. And despite the gun community's protestations to the contrary, most national media focus is on places with lax laws, giving rise to the impression (especially among non-Americans) that lax laws are found pretty much everywhere. But none of this takes us to the key questions: are New York's tougher laws, including the SAFE Act, feasible to implement? And are they, in policy terms, justifiable as public policy?

As to the first question, this analysis, including my own ground-level experiences, leads me to conclude that they are indeed feasible—not because the new law is not in need of amendment or change, but because its basic tenets are both relatively clear and feasible. Compliance is unlikely to be either uniform or immediate, but that is not a mark of failure; it is, rather, the frictional

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<sup>265</sup> See Spitzer, *supra* note 263, at A-15.

<sup>266</sup> See *id.*

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adjustment between new legal standards and actual behavior. Is a seat belt compliance rate of over eighty percent a success or is it a failure because it is not 100%? Was the high rate of non-compliance with seat belt requirements when such laws were first enacted an indicator that the new law was doomed to failure?

As to the second question, are these measures good or justifiable public policy? Each one of the measures that compose New York law examined here has been subject to intense, protracted, and heated analysis and debate. It is hard to claim a definitive answer to the policy question (And for what policy questions do definitive conclusions exist?) but there is plenty of evidence in that debate to support New York's enactments as public policy. That does not mean that other states can or should rush to embrace the New York model (and that will not happen in any case), but it does mean that the model works.