

A close-up, high-angle photograph of a handgun lying on a dark, textured surface, possibly asphalt or concrete. The surface is littered with small, dark fragments of debris. The lighting is dramatic, coming from the upper left, casting long shadows and highlighting the metallic and plastic textures of the firearm. The handgun is a semi-automatic pistol, viewed from a side-top perspective.

# *The Guns Aren't Illegal. But Sometimes the Owners Are.*

Understanding Minnesota's private-transfer exception suggests the best path to reducing gun violence

By AARON EDWARD BROWN

Last October, Kanye West was asked during a meeting with President Trump and former NFL legend Jim Brown how to fix the gun violence problem in Chicago. Kanye responded by saying, “The problem is illegal guns. Illegal guns is the problem, not legal guns. We have the right to bear arms.” Bradley Buckles, the former director of the Bureau of Alcohol, Tobacco, and Firearms (ATF), made a subtly different point almost two decades earlier, when he noted that “[v]irtually every gun [used in a crime] in the United States starts off as a legal firearm.” (Emphasis added.) Essentially all the research over the past three decades supports Buckles’s statement that firearms become illegal because an individual who eventually obtains the firearm is an ineligible possessor of the firearm and not because the firearm itself was *per se* illegal.

But what about Kanye and his “illegal gun”? Is it one that is illegal because the possessor is ineligible under federal, state, or local law? Or is it one that would be illegal for anyone to possess regardless of their status under the law? This distinction is the first step in understanding which policy options have an opportunity to successfully reduce gun violence in Minnesota and the United States.

In the United States we have what some might call a patchwork of firearm laws. Although the federal government has passed firearm laws that apply to the country as a whole, most states also have their own laws regulating firearms. Under federal law, there are several statutes that attach specifically to firearms, as opposed to the possessor of the firearm. For example, firearms manufactured without serial numbers<sup>1</sup> or firearms with altered or obliterated serial numbers are “illegal” firearms regardless of their possessor’s status.<sup>2</sup> It is also illegal to possess or manufacture certain types of weapons, such as fully automatic firearms (commonly referred to as “machine guns”),<sup>3</sup> sawed-off shotguns, and sawed-off rifles, as well as certain accessories such as firearm suppressors, unless you fall under certain limited exceptions.<sup>4</sup> Another example of federal firearm law that applies to the firearm—regardless of the status of the possessor—is the ban on manufacturing, importing, selling, or possessing any firearm not detectable by airport security devices.<sup>5</sup>

But most of the federal firearm crimes committed and charged do not involve machine guns, sawed-off shotguns, or firearms with defaced serial numbers. Instead, at least a bare majority—if not substantially more—of these crimes are committed by guns that are “legal” firearms possessed by an “ineligible person.” There

are many categories of ineligible persons for purposes of our federal firearm laws, and even more categories if individual states’ ineligibility categories are parsed out.<sup>6</sup> Broadly, though, it is illegal for all individuals to sell or transfer<sup>7</sup> a firearm to anyone who

- 1) has been convicted of (or is currently indicted for) a felony;
- 2) is a fugitive from justice;
- 3) is an unlawful user or addict of a controlled substance;<sup>8</sup>
- 4) has been committed to a mental institution or adjudicated mentally defective;
- 5) is an alien;
- 6) has been dishonorably discharged from the Armed Forces;
- 7) has renounced their United States citizenship;
- 8) is subject to a qualified order for protection; or
- 9) has been convicted of a misdemeanor crime of domestic violence.

Minnesota, for example, includes many of the federal firearm prohibitions in its state law dealing with ineligible firearm possessors,<sup>9</sup> but Minnesota has also expanded the prohibitory statuses in many areas, including an expanded category of misdemeanor crimes and certain drug crimes.<sup>10</sup>

### **Access to firearms by ineligible possessors**

As the foregoing suggests, there are many categories of ineligible people for purposes of Minnesota and federal firearm laws. In fact, the number of ineligible persons for purposes of our federal firearm laws is well into the tens of millions.<sup>11</sup> So the question now becomes, how do these ineligible people get access to firearms? The answer is by exploiting loopholes in our laws.

**Intervening events:** Some people buy a firearm while they are eligible and then, during the time they own that firearm, do something that makes them ineligible. Many states have no process in place for requiring firearm relinquishment, which means that the now-ineligible person will keep their firearm indefinitely until they have an interaction with police or voluntarily relinquish the firearm(s). This happens frequently in the state of Minnesota. One common intervening event involves the issuance of an order for protection.<sup>12</sup> One investigative report found that in 2016 alone, there were 2,937 orders for protection cases in Minnesota that required firearm relinquishment as a matter of law. Yet of those nearly 3,000 cases,

there were transfer affidavits in only 119 instances. Although some of these now-prohibited individuals ended up relinquishing or disposing of their now “illegal” firearms without filing the requisite affidavit, many of them simply end up holding on to their firearms until a different intervening event occurs (one that typically involves an arrest after a violent crime).<sup>13</sup>

**Private transfers:** The private-transfer exception (also commonly referred to as the gun-show loophole or the private-sale loophole) allows for a non-licensed individual to transfer (give, sell, lend) firearms to a different individual in the same state without going through the normal requirements that would apply to a federally licensed firearm dealer (formally known as a Federal Firearms Licensee, or FFL)—requiring the transferee to fill out an ATF form 4473 and submit to a background check.<sup>14</sup> A “non-licensed” seller under federal law is someone who does not “engage in the business of selling firearms.”<sup>15</sup>

These sellers will not face criminal repercussions under federal law as long as the seller *does not know*, or *does not have a reasonable basis to know*, that the buyer is prohibited under federal, state, or local law from possessing firearms.<sup>16</sup> Private transfers represent a big problem in affording ineligible individuals access to firearms. Many states have experimented with ways to curb unauthorized transactions via the private-transfer exception, such as enacting statewide universal background checks or, in the case of Minnesota, by establishing criminal penalties for firearm sales when the purchaser later uses the firearm in a violent crime.<sup>17</sup>

**Straw purchases:** A straw buyer is a person who purchases a firearm on behalf of another person. Straw purchases at a federally licensed firearm dealer (FFL) violate federal law because firearm purchases, in general, require the “buyer” to answer—among other things—whether they are “the actual transferee/buyer of the firearm(s) listed on [the] form.”<sup>18</sup> If the “buyer” answers no on this question, then the FFL is precluded from selling to that buyer. Of course, this question—like all of the other questions on the ATF form 4473—is not asked during private transactions because federal law does not require form 4473 or a background check for a private transfer, and many states don’t have a background check or ATF-form 4473-like requirement for private transactions. Straw purchases represent a big problem, with one ATF study from the turn of the century concluding that the most common channel for illegal trafficking of firearms was through straw purchases.<sup>19</sup>

**Stolen firearms:** Firearms are frequently stolen from both private individuals and gun stores, and these weapons make up an estimated 10-15 percent of all guns used in crimes.<sup>20</sup> In fact, from the beginning of 2012 to the end of 2015, it was estimated that approximately 1.2 million firearms (worth nearly half a billion dollars) were stolen.<sup>21</sup> Stolen guns pose a significant risk to society, as they usually end up on the underground market—where they spend years being transferred between people until the web of transfers ends with someone who commits a violent crime with the stolen firearm.<sup>22</sup> One potential problem that muddies the stolen-firearm statistics is that many individuals who have firearms stolen do not report the theft; when they are later contacted by police, after the firearm has been traced, they are unable to identify when or where the firearm was stolen. The frequency with which this happens has caused many experts to infer that after-the-fact claims of theft are a common way for straw buyers to try to avoid criminal liability.<sup>23</sup>

Also worth mentioning are black-market sales and illegally imported or manufactured firearms. The prevailing thought is that both of these occurrences are customary ways for criminals to obtain firearms—but they aren't. Illegally imported or manufactured firearms are not that common; a vast majority of firearms begin their life being sold legally from an FFL, including almost all of the firearms that will eventually end up in a criminal's hand.<sup>24</sup> So too with black-market sales, which is defined as a sale that the seller *knows* is illegal under federal law.<sup>25</sup>

Although the vast majority of firearms originally enter the stream of commerce with an FFL selling it to an individual after a background check and paperwork, these firearms are simply too easy to divert out of the legal stream through straw purchases, private transfers, or theft. Although any firearm being transferred to a prohibited person is deeply concerning, perhaps the most worrisome method employed is the private-transfer exception because of the volume of firearms and lack of regulation at the federal level. A 2012 study published in the peer-reviewed journal *Injury Prevention* found that 96 percent of inmates who were convicted of firearm-related offenses obtained their firearms through an unlicensed private seller.<sup>26</sup> This should come as little surprise: Private firearms purchases are fairly common amongst all gun owners, with one 2017 study concluding that 22 percent of current U.S. gun owners who acquired a firearm within the past two years did so without a background check, and a



recent survey of 1,613 gun owners found that 42 percent had acquired their most recent firearm without a background check.<sup>27</sup> Suffice it to say a large number of people—people with good intentions and people with bad intentions—use the private-transfer exception to acquire firearms.

Almost three years ago, Eitan Benjamin Feldman was indicted by the United States Attorney for the District of Minnesota.<sup>28</sup> His crime, one that had been charged only twice in the preceding decade by all of the United States Attorney's Offices combined, was illegally selling firearms without a license. Feldman committed this crime by purchasing firearms through online-licensed auction sites. He would then have those firearms

sent to a local FFL—in compliance with federal law—where he would fill out the required paperwork and take possession of the firearms. Within days he would then turn around and sell those firearms on Armslist.com without a background check or evidence of a permit from the transferee. Feldman engaged in over 40 separate transactions during the three years preceding his indictment, and at least three of the firearms he sold were used in violent crimes—some just days after being transferred. If Feldman had just sold a few guns over the same time period, he would likely not have been charged under federal law.

In Minnesota, unlike many other states that allow the private-transfer exception, certain private transfers can be a little

more difficult when the purchaser wishes to find a handgun or semiautomatic military-style assault weapon. This is because the transferor will risk some backend criminal liability<sup>29</sup> if a handgun or assault weapon is transferred privately without verification that the transferee was legally able to purchase the handgun or assault weapon.<sup>30</sup> As a consequence, finding people in Minnesota willing to sell a handgun or assault weapon without verifying the transferee's permit to purchase or permit to carry can be somewhat burdensome.<sup>31</sup>

### Policy options

With federal inaction leaving the private-transfer exception firmly in place,<sup>32</sup> it is up to states to decide for themselves how to modify the private-transfer exception to ensure the exception is not being abused by ineligible persons. The following are several ideas on how the state of Minnesota could proceed in shoring up the private-transfer exception.

**Armslist and gun show background checks:** Minnesota has the option of taking key provisions from the almost successful federal legislation known as the Manchin-Toomey Public Safety & 2nd Amendment Rights Protection Act—which, in relevant part, mandated that sales at gun shows and through online platforms like Armslist would require a background check.<sup>33</sup> But the bill continues to exempt friends, family members, neighbors, etc. from a background check. This approach represents a compromise that tried to recognize the importance of stopping the abuse of the private-transfer exception while allowing people to retain the right to transfer firearms to their friends and acquaintances—which is infinitely more reasonable than transferring a firearm to some random person you just met on the internet.

**Universal background check:** Minnesota also has the option to pass a universal background check, like those already enacted in New Jersey, Connecticut, and a few other states.<sup>34</sup> This type of legislation would require a background check for all transfers involving firearms, regardless of the type of firearm or the terms of the transfer.

**Universal permit to purchase:** Minnesota might also consider requiring permits to purchase instead of background checks. A permit-to-purchase regime would operate in essentially the same fashion, because in order to receive a permit to purchase, the licensing authority would perform a background check on the individual.<sup>35</sup> In Minnesota, we already have this requirement to a certain degree.<sup>36</sup> To buy either a handgun or assault weapon from an FFL, the individual must have either a permit to purchase or a permit to carry (which acts as a *de facto* permit to purchase as long as it is active). But no permit is required for a private sale, even if the firearm is a handgun or assault weapon.<sup>37</sup>

**Mandatory FFL facilitation:** Finally, perhaps the most stringent option Minnesota could consider is a mandatory FFL facilitation bill. Such a law would require all transfers (including private transfers) to proceed through an FFL, which would then require the transaction to comply with all of the federal laws for FFL transfers, including a background check, completion of ATF form 4473, and having the FFL keep certain records regarding the transaction.<sup>38</sup>

In assessing these options, Minnesota could decide to include and exclude certain weapon classes (e.g., rifles or shotguns) and certain relationships (parent-child, grandparent-grandchild, sibling, etc.) from any permit or

background option. So while legal guns may not be the problem, the ease with which anyone, including those with the worst of intentions, can obtain a “legal firearm” certainly is. It is long past time that we require, at the very least, that a seller who does not know their potential buyer perform, or ask a governmental entity to perform, a cursory due diligence check to ensure the transferee is not prohibited before transferring them a lethal weapon. Transferors may not feel responsible to protect society, but forgoing any sort of verification of status is a stunning example of gross negligence, which will likely continue to contribute to increasing fatalities (and injuries) due to gun violence—a statistical category that now accounts for more deaths in Minnesota than either traffic crashes or opioid overdoses.<sup>39</sup> ▲

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## Notes

- <sup>1</sup> There remains an exception for registering and placing a serial number on a firearm that you manufactured under federal law.
- <sup>2</sup> See 18 U.S.C. §922(k); 26 U.S.C. §5861(i).
- <sup>3</sup> 26 U.S.C. §5861(d).
- <sup>4</sup> To be owned by an individual, that individual must apply for approval from the ATF, pass several fairly involved background checks, register the weapon in the National Firearms Registration and Transfer Act, and pay for the corresponding tax stamp.
- <sup>5</sup> 18 U.S.C. §922(p).
- <sup>6</sup> For example, Minnesota generally prohibits many of the same categories as the federal law but also includes additional categories like being on the “gang list.”
- <sup>7</sup> It is also a crime for a buyer to purchase a firearm when they are ineligible to possess or receive the firearm under a similar version of these categories. 18 U.S.C. §922(g)(1)-(9).
- <sup>8</sup> And unfortunately for Minnesotans—and residents of 29 other states—that means anyone who uses medical marijuana.
- <sup>9</sup> Minn. Stat. §624.713, subd. 1(10)(i)-(viii).
- <sup>10</sup> See Minn. Stat. §624.713, subd. 1(11) (those convicted of gross-misdemeanor level crimes that were crimes committed for the benefit of a gang, assaults motivated by bias, false imprisonment, neglect or endangerment of a child, burglary in the fourth degree, setting a spring gun, riot, and stalking—but they are eligible again if it has been more than three years since the conviction and they have not been convicted of any of these crimes again. See Minn. Stat. §624.713, subd. 1 (someone convicted of a misdemeanor or gross misdemeanor drug crime under Minn. Stat. §152.01-.37, unless three years has elapsed without an additional conviction under Minn. Stat. §152.01-.37).
- <sup>11</sup> In 2010, it was estimated that at least 19 million Americans had a felony record. Sarah K. S. Shannon, et al., “The Growth, Scope, and Spatial Distribution of People with Felony Records in the United States, 1948-2010,” 54:5 *Demography* 1795 (9/11/2017), <https://link.springer.com/article/10.1007%2Fs13524-017-0611-1>. The felony numbers (added together with all of the people who have been convicted of a misdemeanor crime of domestic violence, are subject to a current order for protection, use medical cannabis, or are an alien) would yield a substantially higher total than simply focusing on the at least 19 million felons in the United States.
- <sup>12</sup> As discussed above, federal and Minnesota law both make it illegal for someone subject to a qualifying order for protection to possess a firearm while the order is active. Under Minnesota law, unlike federal law, those under an order for protection are required to turn over their firearms within days of the order issuing.
- <sup>13</sup> Sometimes the new intervening event will have deathly consequences. See, e.g., *Man Gets 35 Years For Girlfriend’s Shooting Death Outside Aurora Legion*, WCCO 4 CBS Minnesota (1/30/2017) <https://minnesota.cbslocal.com/2017/01/30/aurora-legion-shooting-sentencing/>.
- <sup>14</sup> 18 U.S.C. §922(s).
- <sup>15</sup> 18 U.S.C. §923(a).
- <sup>16</sup> See 18 U.S.C. §922(d) (“It shall be unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person [is prohibited].”)
- <sup>17</sup> In Minnesota, when someone other than a federally licensed firearm dealer transfers a pistol or semiautomatic military-style assault weapon to another without complying with the transfer requirements of Minn. Stat. §624.7132, they are guilty of a gross misdemeanor if the transferee possess or uses the weapon within one year after the transfer in furtherance of a felony crime of violence, as long as the transferee was prohibited from possessing the weapon under Minn. Stat. §624.713 at the time of the transfer, or it was reasonably foreseeable at the time of the transfer that the transferee was likely to use or possess the weapon in furtherance of a felony crime of violence. Minn. Stat. §609.66.
- <sup>18</sup> For an example of Form 4473 see <https://www.google.com/search?q=form+4473&sourceid=ie7&rls=com.microsoft:en-US:IE-Address&ie=&oe=>.
- <sup>19</sup> Department of Justice Bureau of Alcohol, Tobacco, Firearms and Explosives, *A Progress Report: Gun Dealer Licensing and Illegal Gun Trafficking* (1997).
- <sup>20</sup> Dan Noyes, “How Criminals Get Guns,” Center for Investigative Reporting, PBS.com, <https://www.pbs.org/ugbh/pages/frontline/shows/guns/procon/guns.html>.
- <sup>21</sup> Chelsea Parsons & Eugenio Weigend Vargas, *Stolen Guns in America*, Center for American Progress (7/25/2017), <https://www.americanprogress.org/issues/guns-crime/reports/2017/07/25/436533/stolen-guns-america/>.
- <sup>22</sup> See, e.g., Keith Allen, Jessica Suerth, and Eric Levenson, “New York Police Officer Fatally Shot in ‘Unprovoked Attack,’” CNN 7/5/2017 <https://www.cnn.com/2017/07/05/us/nypd-officer-shooting/index.html>. (Detailing how a police officer was executed with a revolver that was stolen four years prior in West Virginia.)
- <sup>23</sup> Max Siegelbaum, *Only 11 States Require Gun Owners to Report Stolen Weapons to Police*, The Trace (11/20/2017), <https://www.thetrace.org/2017/11/stolen-guns-reporting-requirements/>
- <sup>24</sup> Phillip Cook, *How dangerous people get their guns in America*, CBSNews.com (10/3/2017), <https://www.cbsnews.com/news/gun-sales-how-dangerous-people-get-weapons/>
- <sup>25</sup> For example, an FFL selling a firearm “under the table” without any sort of paperwork or background check.
- <sup>26</sup> Katherine Vittes et al., “Legal status and source of offenders’ firearms in states with the least stringent criteria for gun ownership,” 19 *INJURY PREV.* 26-31 (2013).
- <sup>27</sup> Matthew Miller, et al., *Firearm Acquisition Without Background Checks*, 166 *Annals of Internal Medicine* 233, 233 (2/21/2017), <http://annals.org/aim/fullarticle/2595892/firearm-acquisition-without-background-checks-results-national-survey>; “What works to reduce gun deaths,” *The Economist* (3/22/2018), <https://www.economist.com/news/united-states/21739193-washington-dithers-and-argues-some-states-show-way-what-works-reduce-gun-deaths>.
- <sup>28</sup> Stephen Montemayor, “Federal charges brought against St. Paul man accused of illegally selling guns online” (2/18/2016) <http://www.startribune.com/federal-charges-brought-against-st-paul-man-accused-of-illegally-selling-guns-online/369301451/>.
- <sup>29</sup> See infra note 17. It is possible that Feldman could have been charged under this statute, if the following conditions were met: 1) The transferee was prohibited at the time of transfer; 2) the transferee committed a qualifying violent crime within a year of the transfer; and 3) the weapon transferred was a handgun or assault weapon.
- <sup>30</sup> This verification process will commonly consist of either a permit to purchase or a permit to carry because either one of these verify that the transferee is able to purchase a handgun or assault weapon at the time of the transfer. Minnesota law also requires that the transferor verify the identity of the transferee. Minn. Stat. §624.7132.
- <sup>31</sup> The author of this article reached out to around eight people on Armslist.com before he found someone willing to sell him a handgun without evidence of a permit to purchase, carry, or a background check and within 24 hours after initial contact was made. The transfer was for a Springfield XD 45 pistol and 150 rounds of ammunition for the very reasonable price of \$345.
- <sup>32</sup> The last meaningful attempt was made in the shadows of the Sandy Hook Massacre, and the bill was six votes short of getting the required 60 votes to beat a filibuster. Aaron Blake, “Manchin-Toomey gun amendment fails,” *Washington Post* (4/17/2013) <https://www.washingtonpost.com/news/post-politics/wp/2013/04/17/manchin-toomey-gun-amendment-fails/>.
- <sup>33</sup> Molly Moorhead, “A summary of the Manchin-Toomey gun proposal,” *PolitiFact* (4/30/2013) <https://www.politifact.com/truth-o-meter/article/2013/apr/30/summary-manchin-toomey-gun-proposal/>.
- <sup>34</sup> See, e.g., 37.R.I. Gen. Laws §§11-47-35 – 11-47-35.2; 28.Conn. Gen. Stat. §§29-33(c), 29-361(f), 29-37a(e)-(j). 2013 Ct. ALS 3; 35.Or. Rev. Stat. §166.435; Or. Rev. Stat. §166.436 (At gun shows, Oregon law allows a transferor who is not a licensed dealer to contact the Department of State Police directly to conduct the background check).
- <sup>35</sup> See, e.g., 41.Haw. Rev. Stat. Ann. §§134-2, 134-13; 47.N.J. Stat. Ann. §2C:58-3; 46.Neb. Rev. Stat. Ann. §§69-2404, 69-2407, 69-2409 (applying to handguns only).
- <sup>36</sup> Minn. Stat. §624.7131.
- <sup>37</sup> Minn. Stat. §624.7131, subd. 12 (noting that a permit is not required for private sales, but that an individual can still be criminally prosecuted if a handgun or assault weapon was transferred to a prohibited person without evidence of a permit who then goes on to commit a violent felony within one year of the transfer).
- <sup>38</sup> See, e.g., 26.Cal. Penal Code §§27545, 27850-28070;
- <sup>39</sup> Pat Kessler, “Reality Check: Gun Deaths in Minnesota,” *CBS Minnesota* (2/28/2018) <https://minnesota.cbslocal.com/2018/02/28/reality-check-gun-deaths/>.