



## Testimony

New York State Rifle & Pistol Association, Inc.

### Testimony

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City Council Hearing  
Public Safety Committee

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10:00 a.m.  
City Hall, New York City

I am pleased to testify today on behalf of the New York State Rifle & Pistol Association, Inc. (“Association”). The New York State Rifle & Pistol Association is the New York State affiliate of the National Rifle Association of America (“NRA”).

### **INTRO BILL 211 and RES. 289 – IMPOSING NEW BACKGROUND DISQUALIFIERS ON RIFLE/SHOTGUN PERMITS and PISTOL LICENSES**

The Association opposes Intro. Bill 211 and Res. 289.

Intro. Bill 211 proposes to add to the Administrative Code specific, enumerated personal background issues that will disqualify a New York City resident from obtaining or keeping a New York City Rifle & Shotgun Permit. Specifically, Intro. Bill 211 would disqualify from obtaining or keeping a New York City Rifle & Shotgun Permit anyone who has *ever* been, *anywhere*, convicted of (or pled guilty to), (1) *any* of the offenses described in Penal Law § 265.00(17)<sup>1</sup>; (2) *one* misdemeanor assault; (2) *any* three

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<sup>1</sup> Penal Law § 265.00(17) includes a variety of felonies but also such dubiously civil but non-violent and/or consensual matters such as “buying or receiving stolen property” (*i.e.*, everyone who ever used Napster), “illegally . . . carrying or possessing a pistol or other dangerous weapon” (which doubtlessly encompasses thousands in the roughest neighborhoods of New York City with nothing but honest self-defense in mind), “unlawful entry of a building” (*i.e.*, thousands of civil rights and Vietnam War protesters at American colleges and universities over the years), “that kind of sodomy . . . which was designated as a misdemeanor” under the pre-1967 New York Penal Law (*e.g.*, consensual gay and lesbian intimate relations and other once politically-unapproved sexual behavior), any conduct that was defined in the pre-

misdemeanors of any kind,<sup>2</sup> or anyone who is the subject of a restraining order. Res. 289 urges the state legislature to amend Penal Law § 400 to insert substantially conforming language into the state law that governs the licensing of pistols.<sup>3</sup>

As set forth in the notes to this testimony (footnote 1), Penal Law § 265.00(17) recites a laundry list of offenses, some of which may have predictive value for future violent crime (most of which are already felonies), and many which do not have any such predictive value. One misdemeanor assault record, especially one to which a person pled guilty because that course was more affordable than fighting an unjust charge, or one that occurred substantially in the person's past, and not repeated, has no fair predictive value for future violent crime. A person could amass three misdemeanors over the course of a lifetime by virtue of being a civil rights activist (trespass), or being too-often unable to make ends meet (writing checks on insufficient funds), or being an over-zealous political supporter (exceeding campaign finance limits), or in any number of other imaginable ways, all with no predictive value for future violent crime. The proposed legislation fails to make any effort whatsoever to distinguish between misdemeanors that may, by virtue of their violent nature (and there are few such misdemeanors, since most violent crimes are felonies), be of predictive value and those that surely are not. The proposed legislation fails to account for the distinctly strong likelihood that a person with a clean record for any period of time has learned from past mistakes and can be trusted not to repeat them.

As for restraining orders, any assistant district attorney in this City may tell you that where assault in the third degree<sup>4</sup> is concerned, a victim was distinguishable from the fellow who got labeled a "perp" only by having been one step faster to the precinct. Orders of protection are given out in the arraignment parts of New York City's criminal courts like lollipops to children at the dentist's office; moreover, in the post-Duckman era, most judges are apparently erring on the side of universal prophylactic prior restraints while just maybe attending to maintaining the appearance of hearing arguments or testimony on the merits.

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1967 New York Penal Law as constituting a narcotic, depressant or stimulant drug related misdemeanor (*e.g.*, the peaceful herb merchants of Washington Square Park and their peaceful customers), "Loitering" as defined in Penal Law § 240.35, including for such purposes as begging, or to sell merchandise or to play or sing music in a transportation facility (have you ever seriously been afraid of a busker?).

<sup>2</sup> Just some of the misdemeanors under New York State law with no obvious predictive value for future violent crime include trespassing in the third degree (*a la* Vieques), Penal Law § 140.10; shoplifting, Penal Law § 155.25; computer hacking, Penal Law § 156.05; and the one that really makes people shake in their boots – fortune telling, Penal Law § 165.35. A few of the misdemeanors under the New York City Administrative Code with no obvious predictive value for future violent crime include failing to file required statements and reports under New York City's lobbying regulations, Admin. Code § 3-223; unlawfully attempting to avoid paying City taxes, *e.g.*, Admin. Code § 11-1015; and our personal favorite, voting for any unauthorized appropriation by any member of this City Council, Admin. Code § 12-112.

<sup>3</sup> For reasons of economy our testimony today will not specifically address those portions of Intro. Bill 211 and Res. 289 that substantially mirror the federal gun control law known as the Lautenberg Amendment.

<sup>4</sup> A Class A misdemeanor.

Mr. Chairman, in May 2001 then-New York City Councilman Adolfo Carrion Jr., State Assemblyman Jose Rivera and then-Bronx Democratic County leader and former state legislator Roberto Ramirez, were each convicted of misdemeanor trespass charges in Puerto Rico in a conscientious act of civil disobedience, and sentenced to 40 days imprisonment. The Rev. Al Sharpton was likewise convicted, and sentenced to 90 days imprisonment, as this was not his first misdemeanor conviction. At the time, then-Speaker of this Council Peter Vallone Sr. reportedly said: “All civil rights leaders understand they have to pay the penalty in the event that they exercise their civil rights, but this is too severe a penalty.”<sup>5</sup> Speaker Vallone was surely correct about this much – in our pursuit of better governance we cannot lose sight of proportionality. The present proposals do just that, and worse. They lose sight of liberty and individual accountability.

Councilman Yassky’s proposals reflect a dangerous fashionable trend in late-modern liberalism: to control other people by regulating the rights of large groups of people based on generalized behavioral predictions. This approach has been called the “epidemiological” method, as it remarkably purports to apply insights from the struggle to conquer biological infectious disease to the goal of reducing criminal misuse of firearms. In this case, Councilman Yassky and the present co-sponsors of this legislation propose to strip a large group of people of their rights<sup>6</sup> based solely upon their inclusion in a population of persons with one or more misdemeanors in their backgrounds. This is, epidemiologically speaking, analogous to Fidel Castro attempting to diminish the incidence of HIV and AIDS in Cuba by medically screening the population and then subjecting the HIV-positive population to quarantine.<sup>7</sup>

Epidemiologically-enamored gun control advocates ignore the obvious fact that criminal conduct is not a bacterial or viral infection and should not be addressed as such. Swift and certain adverse consequences to bad acts – not far-flung deprivations of individual freedom – are the best deterrent to anti-social behavior. The less obvious fact that they ignore, after the fashion of the enlightened epidemiologist Comrade Castro, is that in this great American Republic we should be moving away from managing people’s rights based on group status, rather than toward embracing such thinking again.

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<sup>5</sup> Eric Lipton, *The New York Times*, May 24, 2001.

<sup>6</sup> There is no longer a genuine debate among scholars that the Second Amendment does anything other than guarantee an individual right to keep and bear arms (“The broad principle that there is an individual right to bear arms is shared by many Americans, including myself. I’m of the view that you can’t take a broad approach to other rights, such as First Amendment rights, and then interpret the Second Amendment so narrowly that it could fit in a thimble.” U.S. Senator Charles Schumer, Press Release, May 8, 2002). There is room for reasonable minds to disagree regarding the extent to which the individual right is subject to forfeiture and regulation. However, the preposterous 1960s-born heresy that the Second Amendment only reserves a guaranteed right of states to exercise martial authority was recently rejected in an extensive, authoritative opinion of the Fifth Circuit U.S. Court of Appeals, *United States v. Emerson*, 270 F.3d 203 (5<sup>th</sup> Cir. 2001) and also by the Bush Administration, rejecting a doctrine first enunciated on behalf of the federal government by Pres. Johnson’s Attorney General Nicholas deBy Katzenbach in 1965, as well as by the overwhelming majority of scholars writing on the subject.

<sup>7</sup> E.g., R. Bayer & C. Heaton, *Controlling AIDS in Cuba. The logic of quarantine*, *N Engl J Med* 1989; 320:1022-1024, Apr 13, 1989.

There is no statistically sound, valid study suggesting that persons with one misdemeanor assault conviction at any point in their personal history, or any three misdemeanor convictions at any time in the past, are likely to commit firearms crimes of any type (whether possession or in the nature of aggravated personal crime or homicide) in the future.<sup>8</sup> However, there are interesting and frightening implications for the disparate impact upon individual liberty and self-defense rights that the proposed legislation would have. Consider:

Rate per 100,000 Population – Homicide Offenders

All White persons (U.S.) <sup>9</sup> .....	5.1
All Black persons (U.S.) <sup>10</sup> .....	32.4

Rate per 100,000 Population – Total Homicides<sup>11</sup>

Within U.S. counties won by George W. Bush on Nov. 7, 2000...	2.1
Within U.S. counties won by Albert Gore on Nov. 7, 2000.....	13.2

Any committed utilitarian epidemiologist would have to give serious consideration to legally disarming Gore voters and Black Americans. Even scholars who are inclined to view uncritically the epidemiological approach to criminal firearm misuse acknowledge that such demographic factors *massively* outweigh a personal misdemeanor history as a predictive factor for future armed criminal conduct.<sup>12</sup> I trust that everyone

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<sup>8</sup> G.J. Wintemute, et al., Subsequent Criminal Activity Among Violent Misdemeanants Who Seek to Purchase Handguns: Risk Factors and Effectiveness of Denying Handgun Purchase, JAMA. 2001; 285:1019-1026 (Feb. 28, 2001) is the principal “study” upon which those who advance arguments of the sort that impel the proposed legislation most frequently rely. While that study can fairly be viewed as supporting the intuitive proposition that violent behavior generally has predictive value for evaluating the likelihood of future violent behavior, it cannot be honestly advanced in support of the proposition that a single violent misdemeanor history has any meaningful predictive value over time, or that a history of various non-violent misdemeanors has any such predictive value at all. Among the studies known flaws are that it excluded persons over the age of 34 at the time of actual or attempted handgun purchase between 1989 and 1991; it excluded persons whose misdemeanor histories were over ten years old; its sample size was acknowledged by the authors to be unreliably small in absolute numbers; its study interval necessarily straddled a point in time when California law changed in a manner that gave persons with violent misdemeanor histories an incentive to purchase handguns lawfully while they still could (much as consumers credit card debt-driven bankruptcies spiked in 2001 in anticipation of changes to the Bankruptcy Code). In addition, the California crime data relied on by the authors lacked specificity upon which to base reliable distinctions between crimes involving guns, violence, both or neither. Finally, it mistakenly assumes that lawful retail outlets were both a significant and irreplaceable source of firearms for those with violent criminal intent; neither is the case (*see* C.W. Harlow, Survey of Inmates in State and Federal Correction Facilities, U.S. Dep’t of Justice, Bureau of Justice Statistics, November 2001).

<sup>9</sup> Homicide Trends in the U.S., U.S. Dep’t of Justice, Bureau of Justice Statistics (<http://www.ojp.usdoj.gov/bjs/homicide/hmrt.htm>)(Revised Jan. 4, 2001).

<sup>10</sup> Homicide Trends in the U.S., U.S. Dep’t of Justice, Bureau of Justice Statistics (<http://www.ojp.usdoj.gov/bjs/homicide/hmrt.htm>)(Revised Jan. 4, 2001).

<sup>11</sup> Statistics compiled by Prof. Joseph Olson, Hamline University School of Law, St. Paul, Minnesota (E-mail: [jolson@gw.hamline.edu](mailto:jolson@gw.hamline.edu))

<sup>12</sup> *See*, L.W. Sherman, Reducing Gun Violence: What works, what doesn’t, what’s promising, Criminal Justice, Vol. 1(1): 11—25 (2001) at p. 15.

hearing or reading this testimony understands the utter revulsion with which I and the New York State Rifle & Pistol Association would hold such a suggestion. The Association urges this Committee and this Council to turn away from the sort of over-rationalized social engineering experiments that the proposed legislation represents, and instead turn to solutions that maximize individual liberty while holding individuals accountable for actual criminal violence.

### **INTRO BILL 208 – IMPOSING POLITICAL CONSIDERATIONS ON THE PROCUREMENT PROCESS FOR LIFESAVING POLICE TOOLS**

The Association is proud of its long-standing support for, and support from, the men and women of law enforcement in New York. As the official New York State Affiliate of the NRA, we proudly take this moment to make this Committee and Council aware of some of the recognition and commitment to law enforcement flowing from our members and leaders.

The Association has annually recognized excellence in law enforcement at its annual meeting, and this year was proud to have among its honorees one of New York City's finest, Det. Steven Albanese, whose energetic and creative work has improved the opportunities for advanced firearms training for NYPD officers.

The NRA's Jeanne E. Bray Memorial Scholarship Awards Program, named for the late Columbus, Ohio, police officer, shooting champion, and NRA Director, offers college scholarships of up to \$1,000 per semester (up to \$2,000 per year for a maximum of four years) to dependent children of any public law enforcement officer killed in the line of duty who was an NRA member at the time of death, and to dependent children of any current or retired law enforcement officers who are living and have current NRA membership.

NRA Law Enforcement Officer Felonious Death Benefits provides a \$25,000.00 insurance benefit to the widow or survivors of any NRA-member law enforcement officer who is feloniously killed in the line of duty. Coverage is automatic for all law enforcement officers who are NRA members.

The Association opposes Intro. Bill 208. Quite simply, political considerations have no place in the procurement process for lifesaving tools, whether those tools are firearms, firefighter's gear, or anything that an emergency responder would call upon to protect life and health.

New Jersey made the mistake of allowing political considerations to enter its State police firearms procurement process. Pistols that the politicians chose for their agency demonstrated about a 10 percent malfunction rate, thankfully rather immediately during training. Hundreds of them had to be replaced by ones made by an outstanding manufacturer that abides by all federal, state and local rules in the distribution of its products, but which would not meet the proposed legislation's definition of

“responsible.” At this point in time, it may well be that no manufacturer meets the proposed definition.<sup>13</sup>

In addition, the operating conditions the legislation proposes to impose on federally licensed retail merchants in order for them and their federally licensed wholesalers, manufacturers and importers to be considered politically “reliable” are variously unworkable, unsound, unconstitutional and/or redundant. For example, who is going to tell merchants that the BATF traced any number of firearms to their stores? More importantly, there is no compelling reason to regard the conducting of a BATF trace with any trepidation, since most guns on which BATF runs traces were not subjected to the procedure because of use in any violent crime.<sup>14</sup> Under New York State law, all gun show sales in New York, whether by federally licensed dealers (who must do background checks wherever they do business in any state) or private sellers, must be preceded by a background check. The attempt to dictate laws to the rest of the nation from City Hall in Manhattan is arrogant and unconstitutional. This is not an exhaustive list of the problems.

We respectfully urge the Council to keep politics out of the procurement process for law enforcement. We further respectfully urge the Council to respect, rather than attempt to arm-twist, the great majority of states whose citizens generally enjoy greater personal safety from crime than do New Yorkers because their lawmakers recognize that serious tools of deterrence in the hands of responsible citizens deter crime and save lives.

### **RES. 288 – UNCONSTITUTIONALLY STRANGLING FREEDOM**

The Association opposes Res. 288.

Resolution 288 urges the Congress to pass legislation to “close the gun show loophole.” As a general proposition, we submit that whenever one reads about politicians crying to close a loophole, the people had better closely guard their freedom.

The infamous bogeyman known as “the gun show loophole” is a lie. It was manufactured by Handgun Control, Inc. and propagated with tart slogans<sup>15</sup> like: “Your Friendly Unregulated Arms Bazaar.”<sup>16</sup>

Actually the gun show loophole constitutes two related lies. The first is that most firearms sales at such events are unregulated; the second bit of verbal slight-of-hand is that “FFL’s (sic) make up only 50 to 75 percent of the vendors at most gun shows.” The facts are different. Federally licensed dealers are the overwhelming majority of firearms

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<sup>13</sup> See, [http://www.njsp.org/news/newsitem03\\_14a\\_01.htm](http://www.njsp.org/news/newsitem03_14a_01.htm) (website of the New Jersey State Police).

<sup>14</sup> See, D.B. Kopel, *Clueless: The Misuse of BATF Firearms Tracing Data*, 1999 L. Rev. Mich. St. U. Det. C.L. 171, 175 at n. 25 (actually, only about one of seven traces is on account of a violent crime).

<sup>15</sup> Tart slogans seem to come in handy when facts and logic are in short supply.

<sup>16</sup> <http://www.bradycampaign.org/facts/issuebriefs/gunshows.asp>

sellers at gun shows, and they are as stringently regulated in their sales at gun shows as they are in their own stores. The only way that Handgun Control, Inc. (now known as the Brady Campaign to Prevent Gun Violence) and the Clinton-era BATF (which originated the deceptive statistic)<sup>17</sup> can arrive at 25-50% of vendors at guns shows being “unlicensed” is to count as “unlicensed vendors” those who are selling only books, food, clothing, etc. *but not firearms!*

The federal government has no Constitutional authority to infringe on the freedom of intrastate commerce, which is what the small number of truly private sales at gun shows are. In 1998, according to the United States Department of Justice’s best research on the subject, only 0.7% of inmates in state prisons for gun crimes got their guns at gun shows.<sup>18</sup> Some arms bazaar.

### Conclusion

The NYSRPA respectfully opposes Intro. Bills 208 and 211, and Resolutions 288 and 289. Again, I appreciate the opportunity to present testimony on behalf of the NYSRPA, and will be happy to answer any questions you may have.

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<sup>17</sup> Gun Shows: Brady Checks and Crime Gun Traces, U.S. Dep’t of the Treasury, Bureau of Alcohol, Tobacco and Firearms, January 1999, p. 5.

<sup>18</sup> C.W. Harlow, Survey of Inmates in State and Federal Correction Facilities, U.S. Dep’t of Justice, Bureau of Justice Statistics, November 2001).