THE POTENTIAL AND LIMITATIONS OF UNIVERSAL BACKGROUND CHECKING FOR GUN PURCHASERS

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"Requiring a criminal background check for all gun sales is the single most effective policy for keeping guns out of the hands of dangerous people and saving lives."

- Everytown for Gun Safety Support Fund, 2014[1]

"Today, the misguided Manchin-Toomey-Schumer proposal failed in the U.S. Senate. This amendment would have criminalized certain private transfers of firearms between honest citizens, requiring lifelong friends, neighbors and some family members to get federal government permission to exercise a fundamental right or face prosecution. . . . [E]xpanding background checks, at gun shows or elsewhere, will not reduce violent crime or keep our kids safe in their schools."

- Chris W. Cox, Executive Director, National Rifle Association[2]

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1. *Background Checks*, EVERYTOWN FOR GUN SAFETY SUPPORT FUND, http://everytownresearch.org/issue/background-checks (last visited Apr. 26, 2017).

2. *Statement from Chris W. Cox on U.S. Senate Defeat of Manchin-Toomey-Schumer Amendment*, NAT'L RIFLE ASS'N AM. INST. FOR LEGIS. ACTION (Apr. 17, 2013), https://www.nraila.org/articles/20130417/statement-from-chris-w-cox-on-us-senate-defeat-of-manchin-toomey-schumer-amendment.

Universal background checking ("UBC") is gun control advocates' number one objective[3] and an article of faith for political liberals and the liberal media.[4] Public opinion overwhelmingly supports it. According to a January 2016 *CBS News* and *New York Times* poll, almost ninety percent of respondents favor a federal law requiring background checks on all gun buyers.[5] Polls show that even a majority of gun owners favor UBC.[6] UBC proponents believe that if every gun purchaser had to pass a background check before being permitted to take possession of a firearm, dangerous and irresponsible persons would be prevented from acquiring guns and, in turn, committing gun crimes, mass killings, and suicide.[7] This Article takes a close look at the

3. *See* Kelly Terez, *Brady Campaign Calls for Universal Background Check*, ABC NEWS RADIO (Oct. 2, 2015), http://abcnewsradioonline.com/politics-news/brady-campaign-calls-for-universal-background-check-laws.html (statement of Dan Gross, President of the Brady Campaign) ("Our laser focus on expanding background checks on all gun sales is the most effective way of [preventing gun violence] and as a result the most effective way of preventing gun deaths at the hands of people who are dangerously mentally ill."); *see also Solutions*, AM. FOR RESPONSIBLE SOLUTIONS, http://americansforresponsiblesolutions.org/learn/stopping-gun-trafficking (last visited Apr. 26, 2017) ("The federal background check system is an effective mechanism that prevents prohibited purchasers, such as convicted felons, the dangerously mentally ill and domestic abusers from accessing guns. Yet glaring loopholes in our laws allow prohibited individuals to access firearms through unlicensed dealers, or 'private sellers.' By closing these loopholes and requiring background checks at gun shows and online, we can ensure that guns stay out of the hands of those prohibited by federal law."); *Universal Background Checks*, L. CTR. TO PREVENT GUN VIOLENCE, http://smartgunlaws.org/gun-laws/policy-areas/background-checks/universal-background-checks (last visited Apr. 26, 2017).

4. Michael S. Rosenwald, *Most Gun Owners Support Checks and Other Limits. Where Are Their Voices?*, WASH. POST, Oct. 11, 2015, at C1; The Editorial Board, *Despair About Guns Is Not an Option*, N.Y. TIMES, Dec. 13, 2015, at SR10; The Editorial Board, *The Gun Epidemic*, N.Y. TIMES, Dec. 5, 2015, at A1; Larry Buchanan et al., *How They Got Their Guns*, N.Y. TIMES, http://www.nytimes.com/interactive/2015/10/03/us/how-mass-shooters-got-their-guns.html (last updated June 12, 2016).

5. *Guns, Jan. 7–10, 2016*, POLLINGREPORT.COM, http://www.pollingreport.com/guns.htm (last visited Apr. 26, 2017).

6. *Large Majority of Americans—Including Gun Owners—Support Stronger Gun Safety Policies*, JOHNS HOPKINS BLOOMBERG SCH. PUB. HEALTH (June 3, 2015), http://www.jhsph.edu/news/news-releases/2015/large-majority-of-americans-includin-gun-owners-support-stronger-gun-safety-policies.html (finding that eighty-five percent of gun owners surveyed supported universal background-check system for all gun sales); Frank Newport, *Majority Say More Concealed Weapons Would Make U.S. Safer*, GALLUP (Oct. 20, 2015), http://www.gallup.com/poll/186263/majority-say-concealed-weapons-safer.aspx?g_source=guns&g_medium=search&g_campaign=tiles (finding that in October 2015, eighty-six percent of people polled were in favor of a law requiring "universal background checks using a centralized database for all gun purchases in the U.S.").

7. *Universal Background Checks*, COALITION TO STOP GUN VIOLENCE, http://csgv.org/issues/universal-background-checks (last visited Apr. 26, 2017).

potential and limitations of UBC. Part I surveys the evolution of our current background-checking regime. Part II identifies a number of challenges that any UBC scheme must address in order to be successful. Part III examines the empirical data on the violence-depressing impact of various UBC laws.

I. EVOLUTION OF FIREARM BACKGROUND CHECKING

A. Federal Firearms Act (1938) & Gun Control Act (1968)

The Federal Firearms Act of 1938 ("FFA") established the regulatory regime that governs firearm acquisition and ownership today.[8] It required that persons engaged in business as a firearms or ammunition importer, manufacturer, or dealer must obtain a license from the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF").[9] A federal firearms licensee is commonly referred to as an "FFL." The 1938 law made it a federal offense, punishable by a maximum five-year prison term, for a convicted felon or fugitive from justice to ever possess a firearm.[10] Similarly, it made it a crime for a firearms dealer to knowingly transport or sell a firearm to a prohibited purchaser.[11]

In the wake of the national trauma caused by the assassinations of Martin Luther King, Jr., on April 4, 1968, and Robert F. Kennedy on June 5, 1968, Congress passed, and President Lyndon Johnson signed into law, the Gun Control Act of 1968 ("GCA"), which further expanded federal firearm regulation.[12] The GCA provided for FFL licenses to be issued, upon payment of a fee,[13] to firearms-eligible persons of at least

8. *History of Gun-Control Legislation*, WASH. POST (Dec. 22, 2012), https://www.washingtonpost.com/national/history-of-gun-control-legislation/2012/12/22/80c8d624-4ad3-11e2-9a42-d1ce6d0ed278_story.html?utm_term=.738d090cc092.

9. Federal Firearms Act of 1938, Pub. L. No. 785, § 3(b), 52 Stat. 1250, 1251 (1938).

10. *Id.* § 5, 52 Stat. at 1252.

11. *Id.* § 2 (d), 52 Stat. at 1251; s*ee Key Federal Acts Regulating Firearms*, L. CTR. TO PREVENT GUN VIOLENCE, http://smartgunlaws.org/gun-laws/federal-law/background-resources/key-federal-acts-regulating-firearms (last visited Apr. 26, 2017) (describing how the FFA criminalized the act of selling firearms to "prohibited purchasers," such as convicted felons).

12. *History of Gun-Control Legislation*, *supra* note 8.

13. The licensing fee was originally $10 annually for a three-year license. 1 GUNS IN AMERICAN SOCIETY: AN ENCYCLOPEDIA OF HISTORY, POLITICS, CULTURE, AND THE LAW 202 (Gregg Lee Carter, ed., 2d ed. 2012). The current licensing fee schedule is as follows:

twenty-one years of age. In addition to the categories of firearms-ineligible persons in the FFA, the GCA added the following two categories:[14] (1) unlawful users of illegal narcotics[15] and (2) anyone "adjudicated as a mental defective"[16] or previously committed to any mental institution.[17] The GCA specified that purchasers of rifles and shotguns must be over eighteen, while purchasers of all other handguns must be at least twenty-one years old. An FFL was required to verify the purchaser's in-state residency and age by examining photo identification and

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$150 initial application fee and $150 renewal fee for manufacturers and importers of firearms; $200 initial application fee and $90 renewal fee for pawnbrokers and dealers of firearms; $30 initial application fee and $30 renewal fee for collectors of curios and relics, as well as manufacturers of ammunition; and $3000 initial application fee and $3000 renewal fee for manufacturers, importers, and dealers of destructive devices. *See* U.S. DEP'T OF JUSTICE, BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, OMB NO. 1140-0018, APPLICATION FOR FEDERAL FIREARMS (2005), https://www.atf.gov/firearms/docs/form/form-7-application-federal-firearms-license-atf-form-531012/download.

14. *History of Gun-Control Legislation*, *supra* note 8.

15. 18 U.S.C. § 922(d)(3) (2012).

16. *Id.* § 922(d)(4). The Firearm Owners Protection Act of 1986 introduced this wording. *Federal Law on Mental Health Reporting*, L. CTR. TO PREVENT GUN VIOLENCE, http://smartgunlaws.org/gun-laws/federal-law/sales-transfers/mental-health-reporting (last visited Apr. 26, 2017). Previously, the GCA confusingly contained two definitions. David M. Bonk, Denying the Dangerous: Preventing Firearms from Entering the Hands of the Dangerously Mentally Ill (Dec. 2014) (unpublished thesis, Naval Postgraduate School), http://calhoun.nps.edu/bitstream/handle/10945/44524/14Dec_Bonk_David.pdf?sequence=1. Title VII prohibited firearms possession by a person whom a court had ever adjudged *mentally incompetent*, while Title IV disqualified individuals who had ever "been *adjudicated as a mental defective* or ha[d] been *committed to an institution*" due to mental illness. *Id.* (emphasis added). ATF regulations define "adjudicated as a mental defective" to mean a "determination by a court, board, commission, or other lawful authority that a person, as a result of marked subnormal intelligence, or mental illness, incompetency, condition or disease: (1) is a danger to himself or to others; or (2) lacks the mental capacity to contract or manage his own affairs." 27 C.F.R. § 478.11(a)(1)(2) (2016). The term included "a finding of insanity by a court in a criminal case" and "those persons found incompetent to stand trial or found not guilty by reason of lack of mental responsibility. . . ." *Id.* § 478.11(b)(1)–(2).

17. 18 U.S.C. § 922(d)(4). ATF regulations define "committed to a mental institution" as

> [a] formal commitment of a person to a mental institution by a court, board, commission, or other lawful authority. The term includes a commitment to a mental institution involuntarily. The term includes commitment for mental defectiveness or mental illness. It also includes commitments for other reasons, such as for drug use. The term does not include a person in a mental institution for observation or a voluntary admission to a mental institution.

27 C.F.R. § 478.11 (2016).

obtaining a signed statement of ineligibility from the purchaser. The major weakness of this scheme was that FFLs had no way of verifying a purchaser's "affirmation of eligibility."[18]

B. The Brady Law (1993)

The Brady Handgun Violence Protection Act of 1993 ("Brady Law") significantly amended the GCA[19] by adding a background checking procedure for verifying the purchaser's claim to be firearms eligible.[20] Under the interim Brady Law procedure (1994–1998),[21] which applied only to handguns,[22] an FFL was required to obtain a signed ATF Form 5300.35 "Statement of Intent to Obtain a Handgun(s)" ("Brady form")

18. JAMES B. JACOBS, CAN GUN CONTROL WORK? 78 (2002).

19. *Id.* at 62–76 (2002).

20. 18 U.S.C. § 922(d)(5)–(7). The Brady Law added to the categories of firearms ineligibility: (1) an alien who is "illegally or unlawfully in the United States"; (2) a person "discharged from the Armed Forces under dishonorable conditions"; and (3) a person "who, having been a citizen for the United States, has renounced his citizenship." *Id.* It also broadened the definition of "unlawful drug user" to include an unlawful user or addict of any controlled substance (as defined by section 102 of the Controlled Substances Act). *Id.* § 922(d)(3). In 1994, the Violence Against Women Act added a new category of firearms-ineligibility to the Brady Law: persons subject to a court order that restrains them from "harassing, stalking, or threatening an intimate partner . . . or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child." *Id.* § 922(d)(8). According to 18 U.S.C. § 922(g)(8)(C), to trigger firearms ineligibility the restraining court order must include "a finding that such person represents a credible threat to the physical safety of such intimate partner or child," or the order must "by its terms explicitly prohibit[s] the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury." *Id.* § 922(g)(8)(C)(i)–(ii). In 1996, the Lautenberg Amendment (otherwise known as the "Gun Ban for Individuals Convicted of a Misdemeanor Crime of Domestic Violence") added a further category of ineligibility: persons who have been "convicted in any court of a misdemeanor crime of domestic violence." *Id* § 922(g)(9); *see also* JACOBS, *supra* note 18, at 78–79 (providing a discussion of problems in determining the ambit of these categories).

21. JACOBS, *supra* note 18, at 97–98. The FFL was required to transmit the Brady form to its jurisdiction's CLEO within one day after the prospective purchaser filled out the form. *Id.* The CLEO had to make a reasonable effort to check applicable state and local records available to determine the purchaser's eligibility (in practice this amounted to determining whether the purchaser had a disqualifying criminal record). *Id.* The Brady Law exempted states that already had background-checking requirements equivalent to or stricter than the Brady Law. *Federal Law on Background Checks*, L. CTR. TO PREVENT GUN VIOLENCE, http://smartgunlaws.org/gun-laws/federal-law/sales-transfers/background-checks (last visited Apr. 26, 2017).

22. *See* JACOBS, *supra* note 18, at 78–79, 94, 103 (noting that "interim Brady," effective February 1994, covered only handguns and the "permanent Brady" law, effective November 30, 1998, covered all firearms).

from the purchaser, on which the purchaser swore that neither federal nor state law barred him from purchasing or possessing a handgun.[23] The FFL would then provide the purchaser's information to the chief law enforcement officer ("CLEO") in that jurisdiction. The CLEO had five business days to block the sale on account of a disqualification, now including illegal alien status, a dishonorable military discharge, and renunciation of American citizenship.[24] If, within that time frame, the CLEO did not instruct the FFL not to make the sale, the FFL was free to complete it.[25] The Brady Law further required that the U.S. Attorney General, within five years, establish a permanent National Instant Background Check System ("NICS") that would eliminate the CLEO's role.[26] It also extended background-checking laws to long guns.[27] Under "permanent Brady," the FFL would notify NICS (operated by the Federal Bureau of Investigation ("FBI") in Clarksburg, West Virginia) of a pending firearms sale, and NICS would check several databases to determine whether the prospective purchaser was firearms-ineligible.[28]

Since NICS became operational in November 1998,[29] a prospective purchaser must show photo identification and complete ATF Form 4473, attesting to no firearms disqualifications.[30] After verifying the purchaser's identity and in-

23. Statement of Intent to Obtain a Handgun(s), 59 Fed. Reg. 2909 (Jan. 19, 1994).

24. JACOBS, *supra* note 18, at 79–80.

25. *Gun Control: Improving the National Instant Criminal Background Check System: Hearing Before the S. Comm. on the Judiciary*, (2000) (statement of Laurie E. Ekstrand, Director, Administration of Justice Issues, General Government Division), https://www.gpo.gov/fdsys/pkg/GAOREPORTS-T-GGD-00-163/pdf/GAOREPORTS-T-GGD-00-163.pdf.

26. *Id.*

27. *Id.*

28. JACOBS, *supra* note 18, at 94–95. The 1998 implementation of NICS was fortunate because the U.S. Supreme Court declared in *Printz v. United States* that the CLEO background checking requirement violates the Tenth Amendment's "dual sovereignty" principle (i.e., commandeering state personnel and resources to carry out a federal program). Printz v. United States, 521 U.S. 898, 933. (1997); *see* JACOBS, *supra* note 18, at 89.

29. U.S. DEP'T OF JUSTICE, FED. BUREAU OF INVESTIGATION, NATIONAL INSTANT CRIMINAL BACKGROUND CHECK SYSTEM (NICS) OPERATIONS iii (2014), https://www.fbi.gov/about-us/cjis/nics/reports/2014-operations-report.

30. *See* U.S. DEP'T OF JUSTICE, BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, OMB NO. 1140-0020, FIREARMS TRANSACTION RECORD (2005) [hereinafter FIREARMS TRANSACTION RECORD], https://www.atf.gov/file/61446/download. If NICS approves the sale, it assigns a Unique Personal Identification Number to the purchaser,

state residence,[31] the FFL must send the prospective purchaser's name and other identifying information to NICS or, in a point-of-contact state, to the state department tasked with carrying out NICS background checking.[32] NICS has three business days to block the sale,[33] but approves most sales within minutes.[34] If the sale is approved, the FFL must add the firearm's manufacturer, model, caliber, and serial number to Form 4473.[35] NICS provides the vendor, purchaser, and transaction numbers, which must also be recorded on the form.[36] The FFL must retain each Form 4473 for twenty years and make the forms available to law enforcement officers upon request.[37] If "the NICS search finds a record that requires more research to determine whether the prospective transferee is disqualified from possessing a firearm," it will provide

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which must be recorded by the FFL on Form 4473. *Id.* at 4. Section B of the form requires the FFL to provide his license number and information about the firearm to be transferred. *Id.* at 2. The FFL must note in Section C the date of NICS's response. *Id.* Section D requires information about the manufacturer or importer of the firearm, the model, serial number, type, and caliber or gauge. *Id.* at 3. A negative NICS response must be retained for at least five years. *Id.*; *see also* JACOBS, *supra* note 18, at 79 (discussing requirements for handgun purchasers).

31. 27 C.F.R. § 478.124(c)(5) (2016) (requiring the licensee to sign and date Form 4473 "if the licensee does not know or have reasonable cause to believe that the transferee is disqualified by law from receiving the firearm and transfer the firearm described on the Form 4473").

32. *See* JACOBS, *supra* note 18, at 94–95. The Brady Law provides states with the option of either (1) serving as a "point of contact" ("POC") and conducting their own background checks using state, and federal, records and databases; or (2) having the checks performed by NICS. *About NICS*, FED. BUREAU INVESTIGATION, https://www.fbi.gov/services/cjis/nics/about-nics (last visited Apr. 26, 2017). POC states have agencies that act on behalf of the NICS and conduct firearm background checks by electronically accessing NICS, as well as their own state databases of firearms-prohibited persons. *Id.* Currently, there are thirteen full POC states: California, Colorado, Connecticut, Florida, Hawaii, Illinois, Nevada, New Jersey, Oregon, Pennsylvania, Tennessee, Utah, and Virginia. *Id.* Seven states are partial POCs, where state agencies conduct checks for handguns and/or hand gun permits, while the FBI handles the processing of state transactions for long gun background checks: Iowa, Michigan, Nebraska, North Carolina, Maryland, Washington, New Hampshire, and Wisconsin. *Id.*

33. *NICS Information Sheet*, FED. BUREAU INVESTIGATION, https://www.fbi.gov/services/cjis/nics/nics-information-sheet (last visited Apr. 26, 2017).

34. FED. BUREAU OF INVESTIGATION, NATIONAL INSTANT CRIMINAL BACKGROUND CHECK SYSTEM (NICS) OPERATIONS REPORT 2013 (2013) [hereinafter NICS OPERATIONS REPORT 2013], https://archives.fbi.gov/archive s/about-us/cjis/nics/reports/2013-operations-report. Over ninety percent of NICS background checks are completed in a matter of minutes while the FBI is still on the phone with the FFL. *Id.*

35. 27 C.F.R. § 478.124(c)(4) (2016).

36. *Id.* § 478.102(b).

37. FIREARMS TRANSACTION RECORD, *supra* note 30.

the FFL with a "delayed" response.[38] A delayed response to the FFL "indicates that the firearm transfer should not proceed pending receipt of a follow-up 'Proceed' response from the NICS or the expiration of three business days (exclusive of the day on which the query is made), whichever occurs first."[39] A rejected purchaser may then appeal.[40]

The NICS background check involves searching three databases: (1) the Interstate Identification Index (the national database of federal and state arrests); (2) the National Crime Information Center (the central database of protection orders, wanted persons, and immigration law violators); and (3) the NICS Index populated with information provided by local, state, tribal, and federal agencies on persons prohibited by federal or state law from possessing firearms.[41] Between 1994 and 2012, the FBI conducted nearly 148 million firearm purchaser background checks (12.7 million during the interim Brady period and 134.9 million from 1998 to 2012).[42]

The Brady Law is often praised for preventing millions of dangerous persons from acquiring firearms. However, it is likely that many rejected firearm purchasers already own one or more guns, as only a minority of gun purchasers are first-time acquirers.[43] We can also assume that some rejected purchasers

38. 28 C.F.R. § 25.6(c)(1)(iv)(B) (2010).

39. *Id.*

40. *NICS Appeals*, FED. BUREAU INVESTIGATION, https://www.fbi.gov/services/cjis/nics/national-instant-criminal-background-check-system-nics-appeals (last visited Apr. 26, 2017). A firearms purchaser must obtain the NICS Transaction Number or State Transaction number from the FFL. *Id.* Individuals must submit an appeal request form (online, by mail, or by fax) attaching a fingerprint card and any other court documentation. *Id.* Individuals may also provide written consent to the FBI to maintain information about them, which can be accessed during a NICS background check. *Id.* Such information is stored to prevent erroneous denials or extended delays. *Id.* Eligible candidates for appeal may include victims of identity theft or persons who have been granted an ATF Relief from Disabilities. *Id.*

41. *NICS Information Sheet*, *supra* note 33; *see* James B. Jacobs & Jennifer Jones, *Keeping Firearms Out of the Hands of the Dangerously Mentally Ill*, 47 CRIM. L. BULL. 388, 393 (2011).

42. JENNIFER C. KARBERG ET AL., U.S. DEP'T OF JUSTICE, BACKGROUND CHECKS FOR FIREARM TRANSFERS, 2012—STATISTICAL TABLES 1 (2014), http://www.bjs.gov/content/pub/pdf/bcft12st.pdf.

43. PHILIP J. COOK & JENS LUDWIG, U.S. DEP'T OF JUSTICE, NAT'L INST. OF JUSTICE, GUNS IN AMERICA: NATIONAL SURVEY ON PRIVATE OWNERSHIP AND USE OF FIREARMS 2 (1997), https://www.ncjrs.gov/pdffiles/165476.pdf (finding that "68% of handgun owners also owned at least one rifle or shotgun" and that most firearms purchasers are already gun owners).

obtain a gun in violation of the Brady Law. Moreover, as we shall see below, some ineligible purchasers are not dangerous or unreliable.

C. Proposed "Brady II" (1994)

As soon as the Brady Law went into effect, gun control advocates sought further federal gun controls. Senators Howard Metzenbaum (D-Ohio), Edward Kennedy (D-Mass.), Bill Bradley (D-N.J.), Frank Lautenberg (D-N.J.), Barbara Boxer (D-Cal.), Claiborne Pell (D-R.I.), and John Chafee (R-R.I.) introduced the Gun Violence Prevention Act of 1994 (popularly called "Brady II").[44] It would have made it illegal "for any person to sell, deliver, or otherwise transfer a handgun to an individual who is not [an FFL] unless the transferor verifies that the transferee possesses a valid state handgun license."[45] Brady II stipulated a number of minimum standards for state handgun licensing schemes, including that licensees be at least twenty-one, firearms-eligible under federal, state and local law, and have completed a firearms safety course.[46] A firearms seller, whether an FFL or private seller, would have to verify that the transferee has a valid state handgun license by examining the handgun license and a valid photo identification.[47] The transferor would then be required to contact the CLEO of the state that issued the handgun license to confirm that the handgun license was still valid.[48] Then, in order for the

44. Gun Violence Prevention Act of 1994, S. 1878, 103d Cong. (1994); Gun Violence Prevention Act of 1994, H. 3932, 103d Cong. (1994).

45. Jamie Fuller, *It's Been 20 Years Since the Brady Bill Passed. Here Are 11 Ways Gun Politics Have Changed.*, WASH. POST (Feb. 28, 2014, 12:30 PM), https://www.washingtonpost.com/news/the-fix/wp/2014/02/28/its-been-20-years-since-the-brady-law-passed-how-have-gun-politics-changed/?utm_term=.8ff2ba0199bf.

46. S. 1878 § 101(a)(4)(C)(i), (iii). The bill also required that the state handgun safety certificate indicate that the license applicant had "completed a course, taught by law enforcement officers . . . of not less than 2 hours of instruction in handgun safety" and "passed an examination . . . testing the applicant's knowledge of gun safety." *Id.* § 101(a)(6)(C)(i)–(ii).

47. *Id.* § 101(a)(1)(A). A state handgun registration form would include identifying information for both the handgun (make, model, caliber and serial number) and the transferee (name, address, date or birth, state handgun license number). *Id.* § (a)(5)(A)–(B). In addition to prescribing state licensing and registration, Brady II contained provisions establishing a seven-day waiting period before a purchaser takes possession of a firearm from an FFL and limiting handgun purchases to one per month. *See id.* §§ 101(a)(1)(C)(i), 301(a)(1)(A); *see also* JACOBS, *supra* note 18, at 138.

48. S. 1878 § 101(a)(u)(1)(C)(iii).

handgun to be transferred, the transferor would provide the a state handgun registration form to the CLEO that jurisdiction.[49] Brady II did not achieve a sufficient floor vote in either the House or Senate.[50]

D. The Gun Show Accountability Bill (1994)

Under the Brady Law, private sellers (non-FFLs) were not required to initiate background checks.[51] On April 20, 1999, the lack of gun control measures in Columbine High School massacre[52] prompted Senator Lautenberg to introduce the Gun Show Accountability Bill, which would have extended purchaser background checking to private firearm transactions, where "any part of a firearm transaction takes place at a gun show."[53] This would have applied to a transaction first discussed at a gun show, but consummated at a different time and location.[54] Lautenberg's bill failed to attain a Senate vote.[55]

E. The Manchin-Toomey Amendment (2013)

In the wake of the December 14, 2012, Sandy Hook Elementary School massacre in Newtown, Connecticut, U.S. Senators Joe Manchin (D-W. Va.) and Pat Toomey (R-Pa.) introduced an amendment to Senate Bill 649 that proposed universal firearms background checking for any firearms transfer that "occurs at a gun show or event, or on the curtilage thereof"[56]

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49. *Id.* § 101(a)(u)(1)(B).

50. *See* H.R. 3932, 103d Cong. (1994).

51. BUREAU OF ALCOHOL, TOBACCO & FIREARMS, DEP'T OF JUSTICE & THE DEP'T OF THE TREASURY, GUN SHOWS: BRADY CHECKS AND CRIME GUN TRACES 10 (1999), https://www.atf.gov/file/57506/download.

52. *See* JACOBS, *supra* note 18, at 129 (noting that straw purchasers provided the perpetrators with three long guns and one handgun purchased from a gun show).

53. Gun Show Accountability Act, S. 443, 106th Cong. § 931(c)(1) (1999).

54. *See id.* § 931(g) (defining a firearm transaction as the "exhibition, sale, [and] offer for sale," as well as the "transfer[] or exchange of a firearm").

55. Melanie Mason, *Attempt to Close Gun Show Loophole Has Failed Before*, L.A. TIMES (Feb. 26, 2013), http://articles.latimes.com/2013/feb/26/nation/la-na-gunshow-loophole-20130226.

56. 159 CONG. REC. S2615 (daily ed. Apr. 11, 2013). A "Gun Show or Event" was defined as "any event at which 75 or more firearms are offered or exhibited for sale, exchange, or transfer, if 1 or more of the firearms has been shipped or transported in, or otherwise affects, interstate or foreign commerce" and "does not include an offer or exhibit of firearms for sale, exchange, or transfer by an individual from the personal

or "pursuant to an advertisement, posting, display or other listing on the Internet or in a publication by the transferor of his intent to transfer, or the transferee of his intent to acquire, the firearm."[57] The amendment applied to firearm "transfers," such as gifts, and not just sales,[58] although it exempted transfers between family members,[59] temporary transfers "for purposes including lawful hunting or sporting," and "temporary possession of a firearm for purposes of examination or evaluation by a prospective transferee."[60] The seller of a gun covered by that definition would have been required to conduct the transfer through a licensed dealer, who first took possession of the firearm and undertook the usual background checking procedure "as if the licensee were

collection of that individual, at the private residence of that individual, if the individual is not required to be licensed. . . ." *Id.* at S2615–16.

57. *Id.* at S2615.

58. *Id.* A person who knowingly sells or gives a firearm to a prohibited person commits a felony subject to a maximum five-year prison term. *Id.* at S2616. The amendment provided that an FFL would not be subject to a "license revocation or license denial based solely upon" such a violation unless the FFL "knows or has reasonable cause to believe that the information provided for purposes of identifying the transferor, transferee, or the firearm is false" or "knows or has reasonable cause to believe that the transferee is prohibited from purchasing, receiving, or possessing a firearm by Federal or State law, or published ordinance." *Id.* at S2615.

59. *Id.* The family exception includes transfers when

> the transfer is made between spouses, between parents or spouses of parents and their children or spouses of their children, between siblings or spouses of siblings, or between grandparents or spouses of grandparents and their grandchildren or spouses of their grandchildren, or between aunts or uncles or their spouses and their nieces or nephews or their spouses, or between first cousins, if the transferor does not know or have reasonable cause to believe that the transferee is prohibited from receiving or possessing a firearm under Federal, State, or local law. . . .

Id. In a press release, Senator Manchin said that this exception also applied to firearms transfers between neighbors and coworkers:

> [T]ransfers between family, friends, and neighbors do not require background checks. You can give or sell a gun to your brother, your neighbor, your coworker without a background check. You can post a gun for sale on the cork bulletin board at your church or your job without a background check.

Information About the Public Safety and Second Amendment Rights Protection Act, JOE MANCHIN: U.S. SENATOR W.VA. (Apr. 30, 2013), http://www.manchin.senate.gov/public/index.cfm/2013/4/information-about-the-public-safety-and-second-amendment-rights-protection-act.

60. 159 CONG. REC. S2617 (daily ed. Apr. 11, 2013).

transferring the firearm from the licensee's business inventory to the unlicensed transferee."[61]

The amendment left important regulatory gaps, which would have required ATF rulemaking and judicial interpretation. For example, courts would have had to decide what constitutes a "temporary transfer." Suppose Jacobs "lends" Fuhr a firearm for a year or even for an unspecified period of time. How can police, prosecutors, and courts determine whether Fuhr possesses a firearm in perpetuity or whether she holds it temporarily? Obviously, if prosecuted, Jacobs and Fuhr will claim that Fuhr holds the gun on temporary loan. However, the permissible reasons for temporarily loaning a gun include "lawful hunting or sporting" and "temporary possession of a firearm for purposes of examination or evaluation by a prospective transferee."[62] Jacobs could loan Fuhr the gun because she wanted it for self-protection, but prosecutors would have difficulty proving such.

The Manchin-Toomey Amendment meant to close the "gun-show loophole" with respect to firearm purchaser background checking. However, it could be circumvented by a purchaser who knows he could not pass a background check.[63] Suppose Purchaser Jacobs, admiring a firearm that Private Seller Fuhr is offering for sale at a gun show, asks Fuhr for her contact information and, a few days later, telephones Fuhr to say that he is now ready to purchase the firearm. When Jacobs and Fuhr complete the transaction at one of their homes, at a restaurant, or at a highway rest stop, that sale obviously did not "occur at a gun show."

The Manchin-Toomey Amendment also extended background checking to sales that occur pursuant to newspaper or

61. *Id.* at S2615. The bill provided that when an FFL ran a check on a gun show or internet sale transferee, they could accept "in lieu of conducting a background check a valid permit issued within the previous 5 years by a State, or a political subdivision of a State, that allows the transferee to possess, acquire, or carry a firearm, if the law of the State, or political subdivision of a State, that issued the permit requires that such permit is issued only after an authorized government official has verified that the information available to such official does not indicate that possession of a firearm by the unlicensed transferee would be in violation of Federal, State, or local law." *Id.*

62. *Id.*

63. The bill's definition of gun show includes the show's "curtilage." *See id.* § 122(a). But where does the curtilage end? Sellers and purchasers who want to avoid the purchaser background check could consummate the sale just beyond the curtilage.

online advertisement.[64] However, according to Senator Manchin, a gun sold pursuant to a "gun for sale" advertisement placed on a church or community notice board would not trigger background checking.[65]

The amendment was ambiguous as to what a gun advertisement meant. Suppose that Purchaser Jacobs sees Seller Fuhr's "gun for sale" advertisement in the local newspaper and arranges to have a look at the gun next week. Once a gun is advertised even once, is its owner required to initiate a purchaser background check? What if Fuhr also posted her gun-for-sale notice at the town general store? What if Fuhr's gun-for-sale advertisement mentions one gun model, but she ultimately sells Jacobs a different gun?

Some gun-control advocacy groups offered unequivocal support for the Manchin-Toomey Amendment, while others voiced reservations. Mayors Against Illegal Guns (which later became Everytown For Gun Safety) ran a supportive advertising campaign.[66] Americans for Responsible Solutions launched a petition urging Congress to pass the bill.[67] The Law Center to Prevent Gun Violence hailed the bill as a "significant step forward for background checks in America."[68]

Both the Brady Campaign to Prevent Gun Violence[69] and the Coalition to Stop Gun Violence tempered support for

64. *See* Molly Moorhead, *A Summary of the Manchin-Toomey Gun Proposal*, POLITIFACT (Apr. 30, 2013, 2:26 PM), http://www.politifact.com/truth-o-meter/article/2013/apr/30/summary-manchin-toomey-gun-proposal (noting an exception to the advertisement proposal for friends and family members of sellers).

65. *Id.*

66. *New Gun Violence Prevention Group "Everytown for Gun Safety" Unites Mayors, Moms, and Millions of Americans on New Paths to Victory: State Capitols, Corporate Responsibility, Voter Activation*, EVERYTOWN FOR GUN SAFETY ACTION FUND (Apr. 16, 2014), http://everytown.org/press/new-gun-violence-prevention-group-everytown-for-gun-safety-unites-mayors-moms-and-millions-of-americans-on-new-paths-to-victory-state-capitols-corporate-responsibility-voter-activation.

67. Ams. for Responsible Sols., *Congress: Enact Expanded Background Checks*, CARE2 PETITIONS, http://www.thepetitionsite.com/takeaction/379/862/853 (last visited Apr. 26, 2017). The petition (with 19,592 signatures) urged Congress to "take immediate action to reduce gun violence in the United States." *Id.* It suggested that "[o]ne reasonable solution you could pass that would reduce violence, while protecting responsible ownership, would be expanding background checks for gun purchases." *Id.*

68. *This Is Just the Beginning*, L. CTR. TO PREVENT GUN VIOLENCE (Apr. 17, 2013), http://smartgunlaws.org/this-is-just-the-beginning.

69. The Brady Campaign to Prevent Gun Violence issued the following statement:

Manchin-Toomey with criticisms.[70] The Coalition said that there was "no need to water down this legislation and riddle it with loopholes and exemptions."[71] It complained that the bill "regulates private sales of firearms at gun shows and through websites, but simultaneously permits such sales to go unchecked everywhere else," and argued that "an unregulated gun sale made through a classified ad in a newspaper, on a street corner, or across a kitchen table is just as serious a threat to public safety as one arrangement on armslist.com."[72]

The National Rifle Association ("NRA") called the Manchin-Toomey Amendment a "nightmare."[73] According to NRA Executive Vice President and CEO Wayne LaPierre, "background checks will never be 'universal,' because criminals

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> While we continue to review the draft bill, we believe a majority of the components are a good step forward to reducing gun violence. It continues the work that began more than 20 years ago when the Brady background check system was first created. Since that time, two million prohibited purchasers have been prevented from buying a gun, so we know that background checks work.

Dan Gross, *Brady Campaign Statement on Compromise Legislation*, BRADY CAMPAIGN TO PREVENT GUN VIOLENCE (Apr. 10, 2013), http://www.bradycampaign.org/brady-campaign-statement-on-compromise-legislation.

70. Gavin Aronsen, *"Shame on You!" Senate Rejects Gun Background Check Compromise*, MOTHER JONES (Apr. 17, 2013), http://www.motherjones.com/politics/2013/04/senate-rejects-gun-background-check-compromise. The Coalition also highlighted that the bill would reduce the amount of time that the FBI had to process a background check from seventy-two hours to forty-eight hours and, after four years, to twenty-four hours. Press Release, Coal. to Stop Gun Violence, CSGV Concerned about Manchin-Toomey Amendment on Background Checks (Apr. 10, 2013), http://csgv.org/releases/2013/csgv-concerned-about-manchin-toomey-amendment-on-background-checks.

71. *Universal Background Checks*, *supra* note 7.

72. *Id.*

73. Liz Halloran, *LaPierre Fights to Stop the "Nightmare" of Background Checks*, NPR (Jan. 30, 2013, 5:44 PM), http://www.npr.org/sections/itsallpolitics/2013/01/30/170679024/lapierre-fights-to-stop-the-nightmare-of-background-checks. The NRA has changed its position on background checks. On May 27, 1999, Wayne LaPierre testified before the House Judiciary Subcommittee on Crime in the wake of the Columbine High School massacre, stating, "We think it's reasonable to provide mandatory instant criminal background checks for every sale at every gun show. No loopholes anywhere for anyone." Molly Moorhead, *Michael Bloomberg: NRA Used to Support More Background Checks*, POLITIFACT (Mar. 26, 2013, 1:49 PM), http://www.politifact.com/truth-o-meter/statements/2013/mar/26/michael-bloomberg/michael-bloomberg-nra-used-support-more-background. The NRA subsequently argued that it would be counterproductive to extend the existing background check system, which is not being effectively enforced. *Id.*

will never submit to them."[74] Criminals would find sellers willing to ignore the requirement that the sale be processed by an FFL. Moreover, the NRA claimed that the Manchin-Toomey Amendment would establish what amounted to a "decentralized" registry because it would require FFLs to record and retain information about the transfer of every gun.[75] The Amendment itself, however, recognized "the existing prohibition on a national firearms registry,"[76] and explicitly stated that nothing in the Act should be construed to "allow the establishment, directly or indirectly, of a Federal firearms registry."[77] Apparently having anticipated the NRA's registration argument, it expressly prohibited the Attorney General from consolidating or centralizing the records of firearm acquisition, disposition, possession or ownership.[78] Ultimately, the Senate rejected the Manchin-Toomey Amendment by a vote of fifty-four to forty-six.[79]

F. Post Manchin-Toomey Bills

In March 2015, Congressmen Mike Thompson (D-Cal.) and Peter King (R-N.Y.), with 185 cosponsors, introduced into the House of Representatives the Public Safety and Second Amendment Rights Protection Act.[80] It was identical to the Manchin-Toomey Amendment.[81] In July 2015, Congresswoman Jackie Speier (D-Cal.), with ninety co-sponsors, introduced the Fix

74. *NRA's LaPierre: "Let's Be Honest, Background Checks Will Never Be Universal,"* CBS DC (Jan. 30, 2013, 11:46 AM), http://washington.cbslocal.com/2013/01/30/nras-lapierre -background-checks-will-never-be-universal.

75. Dan Freeman, *NRA Fans Fears of Gun Registration Database*, TIMES UNION (Mar. 30, 2013, 8:34 PM), http://www.timesunion.com/news/article/NRA-fans-fears-of-gun-registration-database-4397381.php.

76. 159 CONG. REC. S2613 (daily ed. Apr. 11, 2013).

77. *Id.*

78. *Id.* at S2616.

79. *U.S. Senate Roll Call Votes 113th Congress—1st Session*, U.S. SENATE (April 17, 2013, 4:04 PM), https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=113&session=1&vote=00097 (noting that four Republicans voted in favor of the bill, while four Democrats and Senate Democratic Majority Leader Harry Reid (D-Nev.) voted against it); *see also* Aaron Blake, *Manchin-Toomey Gun Amendment Fails*, WASH. POST (Apr. 17, 2013), https://www.washingtonpost.com/news/post-politics/wp/2013/04/17/manchin-toomey-gun-amendment-fails/?utm_term=.1835c84de740.

80. Press Release, Mike Thompson, Reps. Introduce Bipartisan King-Thompson Background Check Bill (Mar. 4, 2015), https://mikethompson.house.gov/newsroom/press-releases/reps-introduce-bipartisan-king-thompson-background-check-bill.

81. Public Safety and Second Amendment Rights Protection Act of 2015, H.R. 1217, 114th Cong. (2015).

Gun Checks Act of 2015.[82] While that House bill purported to "extend the Brady Law background check procedures to all sales and transfers of firearms," it instead contained more exemptions than the Manchin-Toomey Amendment.[83] Both bills were referred

82. Fix Gun Check Act of 2015, H.R. 3411, 114th Cong. (2015). The Bill provided:

> It shall be unlawful for any person who is not a licensed importer, licensed manufacturer, or licensed dealer to transfer a firearm to any other person who is not so licensed, unless a licensed importer, licensed manufacturer, or licensed dealer has first taken possession of the firearm. . . . Upon taking possession of the firearm, the licensee shall comply with all requirements of this chapter as if the licensee were transferring the firearm from the inventory of the licensee or the unlicensed transferee.

Id. § 202(a)(t)(1). The exceptions included a transfer to law enforcement; "a transfer that is a loan or bona fide gift" between immediate family members; temporary transfers for use of a firearm at a shooting range of while "hunting, trapping, or fishing"; and a "temporary transfer that is necessary to prevent imminent death or great bodily harm." *Id.* § 202 (a)(t)(2)(A)–(F). Press Release, Brady Campaign to Prevent Gun Violence, New Bill to Expand Brady Background Checks "Greatest Opportunity to Save Lives" (Mar. 4, 2015), http://www.bradycampaign.org/press-room/new-bill-to-expand-brady-background-checks-%E2%80%98greatest-opportunity-to-save-lives%E2%80%99 (noting that the bill had strong support from Brady Everytown for Gun Safety, the Violence Policy Center, and the Million Mom March).

83. The bill exempts from the background-checking requirement:

> (A) a transfer of a firearm by or to any law enforcement agency or any law enforcement officer . . . acting within the course and scope of employment and official duties; (B) a transfer that is a loan or bona fide gift between spouses, between domestic partners, between parents and their children, between siblings or between grandparents and their grandchildren; (C) a transfer to an executor, administrator, trustee or personal representative of an estate or a trust that occurs by operation of law upon the death of another person; (D) a temporary transfer that is necessary to prevent imminent death or great bodily harm, if the possession by the transferee lasts only as long as immediately necessary to prevent the imminent death or great bodily harm; (E) a transfer that is approved by the Attorney General under section 5812 of the Internal Revenue Code of 1986; (F) a temporary transfer is the transferor has no reason to believe that the transferee will use or intends to use the firearm in a crime or is prohibited from possessing firearms under State or Federal law, and the transfer takes place and the transferee's possession of the firearm is exclusively—(i) at a shooting range or in a shooting gallery or other area designated and built for the purpose of target shooting; (ii) while hunting, trapping, or fishing, if the hunting, trapping or fishing is legal in all places where the transferee possesses the firearm and the transferee holds all licenses or permits required for such hunting, trapping, or fishing; or (iii) while in the presence of the transferor.

H.R. 3411 § 202 (a)(t)(2)(A)–(F).

to, and never made it out of, the House Committee on the Judiciary's Subcommittee on Crime, Terrorism, Homeland Security, and Investigations.[84]

G. President Barack Obama's January 2016 "Executive Actions"

In the wake of the San Bernardino, California, massacre in early December 2015,[85] President Obama said that "stronger background checks" were among "steps we could take not to eliminate every one of these mass shootings, but to improve the odds that they don't happen as frequently."[86] In his post-

84. *H.R.1217—Public Safety and Second Amendment Rights Protection Act of 2015*, CONGRESS.GOV, https://www.congress.gov/bill/114th-congress/house-bill/1217/actions (last visited Apr. 27, 2017); *H.R.3411—Fix Gun Checks Act of 2015*, CONGRESS.GOV, https://www.congress.gov/bill/114th-congress/house-bill/3411/actions (last visited Apr. 27, 2017).

85. On December 2, 2015, fourteen people were killed and twenty-two others seriously injured after Syed Rizwan Farook and Tashfeen Malik targeted a San Bernardino County Department of Public Health training event. Mike McIntire, *Attack Showed That Legally Bought Firearms Do Not Always Remain Legal*, N.Y. TIMES, Dec. 4, 2015, at A23. The perpetrators used two legally purchased (but illegally transferred and modified) .223-caliber semi-automatic rifles, two 9-mm caliber semi-automatic pistols, and an explosive device. *Id.* The shooters were radicalized and inspired by foreign terrorist groups. Larry Buchanan et al., *How They Got Their Guns*, N.Y. TIMES, https://www.nytimes.com/interactive/2015/10/03/us/how-mass-shooters-got-their-guns.html (last updated June 12, 2016). However, neither had a criminal record. Rory Carroll et al., *San Bernardino Shooting Suspects Raised Few Red Flags Before "Horrendous" Crime*, THE GUARDIAN (Dec. 3, 2015), https://www.theguardian.com/us-news/2015/dec/03/san-bernadin o-shooting-suspects-syed-rizwan-farook-tashfeen-malik.

86. Tanya Somanader, *President Obama on the Shooting in San Bernardino*, THE WHITE HOUSE: PRESIDENT BARACK OBAMA (Dec. 5, 2015, 2:34 PM), https://obamawhitehouse.archives.gov/blog/2015/12/02/president-obama-shooting-san-bernardino. President Obama spoke in favor of more rigorous background-checking requirements after the Sandy Hook massacre:

> It's time for Congress to require a universal background check for anyone trying to buy a gun . . . The law already requires licensed gun dealers to run background checks, and over the last 14 years that's kept 1.5 million of the wrong people from getting their hands on a gun. But it's hard to enforce that law when as many as 40 percent of all gun purchases are conducted without a background check. That's not safe. That's not smart. It's not fair to responsible gun buyers or sellers. If you want to buy a gun—whether it's from a licensed dealer or a private seller—you should at least have to show you are not a felon or somebody legally prohibited from buying one. This is common sense.

Bernardino massacre speech, President Obama accused unlicensed firearms sellers of regularly violating the law by selling firearms at gun shows and by selling over the internet.[87] Criticizing Congress's inaction on gun control, he promised to extend firearms background checking by executive order.[88]

President Obama claimed authority to require "anybody in the business of selling firearms," including those selling online and at gun shows, to hold a federal firearms license and perform background checks.[89] Of course, this is exactly what federal law already required. Since the 1938 FFA, persons "*who are engaged in the business of selling* firearms" must obtain an FFL license from the ATF.[90] The 1968 GCA defined "engaged in the business of selling firearms" as "devot[ing] time, attention, and labor to dealing in

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Remarks by the President and the Vice President on Gun Violence, WHITE HOUSE (Jan. 16, 2013, 11:52 AM), https://www.whitehouse.gov/the-press-office/2013/01/16/remarks-president-and-vice-president-gun-violence.

87. Lauren Carroll, *Obama: Violent Felons Can Buy Guns Online Without Background Checks*, POLITIFACT (Jan. 5, 2016, 6:43 PM), http://www.politifact.com/truth-o-meter/statements/2016/jan/05/barack-obama/obama-violent-felons-can-buy-guns-online-without-b. Gun sale websites, like armslist.com and gunbroker.com, are efficient and popular vehicles for sellers and buyers to make contact. *See* ARMSLIST FIREARMS MARKETPLACE, https://www.armslist.com (last visited Apr. 26, 2017); GUNBROKER.COM, http://www.gunbroker.com (last visited Apr. 26, 2017). These websites, which make money through commercial advertising, do not participate in any firearm transaction that results from "gun-for-sale" or "gun-wanted" posts; instead, the buyer and seller locate each other via the website. *See Frequently Asked Questions*, ARMSLIST FIREARMS MARKETPLACE, https://www.armslist.com/info/faqs (last visited Apr. 26, 2017).

88. Press Release, White House Office of the Press Sec'y, Fact Sheet: New Executive Actions to Reduce Gun Violence and Make Our Communities Safer (Jan. 4, 2016), https://obamawhitehouse.archives.gov/the-press-office/2016/01/04/fact-sheet-new-executive-actions-reduce-gun-violence-and-make-our.

89. *Remarks by the President on Common-Sense Gun Safety Reform*, WHITE HOUSE (Jan. 5, 2016, 11:43 AM), https://obamawhitehouse.archives.gov/the-press-office/2016/01/05/remarks-president-common-sense-gun-safety-reform. President Obama also announced that the Department of Justice would hire two hundred more ATF agents to enforce the gun laws, remove barriers that keep states from reporting to NICS information about persons barred from owning guns, and upgrade NICS to operate more efficiently. *Id.* Some of these initiatives require Congressional action. The President also urged that more work be done by the firearm manufacturing industry, and others, to develop "smart gun" technology, which would prevent a firearm from being fired by anyone other than its owner. Sarah Wheaton, *Obama to Make "Smart Guns" Push*, POLITICO (Apr. 28, 2016, 10:48 AM), http://www.politico.com/story/2016/04/obama-smart-gun-technology-222574.

90. Federal Firearms Act of 1938, Pub. L. No. 785, § 5, 52 Stat. 85 (1938) (emphasis added). A person who knowingly engages in the business of dealing in firearms without a license commits a federal crime punishable by up to five years in prison, a fine of up to $250,000, or both. 18 U.S.C. § 924(a)(1)(D) (2012); *see also* 27 C.F.R. § 478.11 (2016) (providing definitions related to firearm and ammunition commerce).

firearms as a regular course of trade or business with the principal objective of livelihood and profit through the repetitive purchase and resale of firearms."[91] It also stated that a person "who makes occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby, or who sells all or part of his personal collection of firearms" is not in the business of selling firearms.[92] However, the Clinton administration tightened the standards for issuing FFL licenses.[93] Of particular concern to President Clinton were people, with no business premises, acquiring FFL licenses in order to lawfully purchase firearms via mail from out of state.[94] Thus, in early 1994, the ATF placed regulatory pressure on casual dealers by requiring license applicants "to submit fingerprints and photographs of themselves, . . . furnish a diagram of the business premises where their firearms inventories were located, . . . and provide a description of their security system for safeguarding firearm inventories."[95] The ATF also relied on local zoning ordinances and its own requirements for a formal storefront to deny license applications and renewals.[96] These policies drastically reduced the number of FFLs from over 282,000 in 1993 to fewer than 104,000 by 1999.[97]

Under the Obama administration, ATF released a "guidance" entitled "Do I Need a License to Buy and Sell Firearms?"[98] Unlike a presidential executive order, a federal

91. 27 C.F.R. § 478.11.

92. 18 U.S.C. § 921(a)(21)(C).

93. *See Federal Law on Dealer Regulations*, L. CTR. TO PREVENT GUN VIOLENCE, http://smartgunlaws.org/gun-laws/federal-law/gun-dealers-other-sellers/dealer-regulations (last visited Apr. 26, 2017) (noting that the Brady Law increased the licensing fee from $10 per year to $200 for three years).

94. *Id.* The ATF lacked sufficient resources to effectively audit the large number of FFLs. *Id.*

95. *Issues Related to Use of Force, Dealer Licensing, and Data Restrictions: Hearing Before the Subcomm. on Treasury, Postal Serv. & Gen. Gov't of the H. Comm. On Appropriations*, 104th Cong. 9 (1996) (statement of Norman J. Rabkin, Director, Admin. of Justice Issues), http://www.gao.gov/assets/110/106454.pdf.

96. *Id.* at 9–10.

97. Dave Boyer, *Obama to Reverse Bill Clinton Strategy, Increase Number of Licensed Gun Dealers*, WASH. TIMES (Dec. 31, 2015), http://www.washingtontimes.com/news/2015/dec/31/obama-to-reverse-bill-clinton-gun-control-strategy.

98. U.S. DEP'T OF JUSTICE, BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, ATF PUB. 5310.2, DO I NEED A LICENSE TO BUY AND SELL FIREARMS? (2016) [hereinafter ATF FFL GUIDANCE], https://www.atf.gov/file/100871/download; *see* Robert A. Anthony, *Unlegislated Compulsion: How Federal Agency Guidelines Threaten Your Liberty*, CATO INST.

agency guidance document is not enforceable law. Its purpose is to explain to the public how the agency understands the law it is authorized to enforce, and how it intends to exercise its enforcement discretion. This particular ATF's guidance is meant to inform firearm sellers "whether [they] need to be licensed under federal law."[99]

The 2016 ATF Guidance more or less restated existing law:[100]

> As a general rule, you will need a license if you repetitively buy and sell firearms with the principal motive of making a profit. In contrast, if you only make occasional sales of firearms from your personal collection, you do not need to be licensed.
>
> Courts have identified several factors relevant to determining on which side of that line your activities may fall, including: whether you represent yourself as a dealer in firearms; whether you are repetitively buying and selling firearms; the circumstances under which you are selling firearms; and whether you are looking to make a profit. Note that while quantity and frequency of sales are relevant indicators, courts have upheld convictions for dealing without a license when as few as two firearms were sold, or when only one or two transactions took place, when other factors were also present.

Notably, the ATF Guidance does not call for more gun sellers to obtain an FFL license.[101] Indeed, it provides little clarification of what it means to be in the business of selling firearms. It states that the determination of whether you are in the business of selling firearms is "highly fact-specific."[102] "While quantity and frequency of sales are relevant indicators, courts have upheld convictions for dealing without a license when as few as

(Aug. 11, 1998), https://www.cato.org/publications/policy-analysis/unlegislated-compulsion-how-federal-agency-guidelines-threaten-liberty.

99. ATF FFL GUIDANCE, *supra* note 98, at ii.

100. *Id.* at 1.

101. *Id.*

102. *Id.* at 7.

two firearms were sold, or when only one or two transactions took place."[103] The White House issued a fact sheet, which states that to be "engaged in business," an individual can sell "as few as two" firearms "when other factors are present," meaning that the dealer "will be required to run background checks."[104] Moreover, the determination will not depend on the location in which the firearm transactions are conducted.[105] While this clarification may persuade some occasional sellers to apply for an FFL license, many will be left wondering whether they are in the business of selling firearms and whether ATF will even issue them a license.

H. State Initiatives

Under federal law, an FFL must submit a firearm purchaser's name and other identifying information to NICS for background checking.[106] This is not "universal" firearms purchaser background checking because there is no requirement or procedure for a private seller to initiate a background check on a purchaser. However, twenty states and the District of Columbia provide for background checks, at least in some instances, on individuals who purchase guns from private sellers. All states that require a license to carry a firearm in public require background checking as part of the licensing process. Table 1 summarizes the firearms purchaser background checking in those states which have laws that extend beyond the federal law.[107]

103. *Id.* at 1.

104. Press Release, White House Office of the Press Sec'y, *supra* note 88.

105. ATF FFL GUIDANCE, *supra* note 98, at 3.

106. *See* 27 C.F.R. § 478.124(c)(1) (2016).

107. *Background Check Procedures*, L. CTR. TO PREVENT GUN VIOLENCE, http://smartgunlaws.org/gun-laws/policy-areas/gun-dealer-sales/background-check-procedures (last visited Apr. 26, 2017).

Table 1: State-level Firearm Permit and Background Checking Laws

State	Firearm purchasers must obtain license or permit	Private seller must initiate background check on purchaser	Private non-monetary transferor must initiate background check on transferee
California[108]	Permit to purchase (duration: five years)	Yes	Yes, subject to exceptions.[109]

108. *See, e.g.*, CAL. PENAL CODE §§ 26710, 31615 (Deering Supp. 2016); *Private Sales in California*, L. CTR. TO PREVENT GUN VIOLENCE, http://smartgunlaws.org/private-sales-in-california (last updated Nov. 14, 2016).

109. Exceptions include certain government-sponsored transfers, including gun buybacks; certain transfers to nonprofit historical societies, museums, or institutional collections; transfers to licensed firearms manufacturers and importers; infrequent transfers between immediate family members; certain loans involving firearms; donations made to non-profit auctions; and transfers pursuant to operation of law. *See* CAL. PENAL CODE §§ 27850–27966 (Deering 2012).

Colorado[110]	No	Yes	Yes Subject to exceptions.
Connecticut[111]	Permit to purchase (duration: five years) License to own.	Yes	Yes
Delaware[112]	No	Yes	Yes

110. COLO. REV. STAT. § 18-12-112(6) (2016).

> [B]ona fide gift or loan between immediate family members . . . ; [a] transfer that occurs by operation of law . . . ; a transfer[s] that is temporary and occur[s] while in the home of the unlicensed transferee . . . ; temporary transfer[s] of possession without power of ownership or a title to ownership, which take place . . . at a shooting range[s] . . . a target firearm shooting competitions [or] while hunting, fishing . . . or trapping . . . ; transfer[s] of a firearm that is made to facilitate the repair or maintenance of the firearm . . . ; [a] temporary transfer that occurs while in the continuous presence of the owner of the firearm . . . ; a temporary transfer for not more than seventy-two hours . . . ; [a] transfer from a [member of the armed services] who will be deployed outside of the United States within the next thirty days to any immediate family member.

Id.

111. *See, e.g.*, CONN. GEN. STAT. §§ 29-28, 33 (West Supp. 2016); *Private Sales in Connecticut*, L. CTR. TO PREVENT GUN VIOLENCE, http://smartgunlaws.org/private-sales-in-connecticut (last updated Oct. 19, 2016).

112. DEL. CODE ANN. tit. 11, § 1448B(b)(2) (1974).

> "Transfer" . . . does not include: . . . [t]he loan of a firearm for any lawful purpose, for a period of 14 days or less . . . to a person known personally to [the owners]; . . . temporary transfer for any lawful purpose that occurs while in the continuous presence of the owner . . . , provided that such temporary transfer shall not exceed 24 hours in duration; . . . transfer . . . for repair, service or modification to a licensed gunsmith or other [lawful business engaged in that trade]; . . . or transfer that occurs by operation of law or [required for certain transfers at death].

Id. The background check requirement for private transactions also does not apply to transfers of firearms between extended family members or legal guardians; to firearms manufactured in or before 1898; certain replica firearms; certain firearms made for hunting or competitive shooting; transfers to an active or retired law enforcement officer; transfers to a person who has a valid concealed carry permit; transactions involving a curio or relic to a licensed collector and transactions involving a transfer to an authorized state

			Subject to exceptions.
Hawaii[113]	Permit to purchase (duration: ten days for handguns, one year for long guns)	No	No
Illinois[114]	License to purchase and own (duration: ten years)	No	No
Iowa[115]	Permit to purchase handguns only (duration: one year)	No	No
Maryland[116]	Permit to purchase handguns only (duration: ten years)	Yes (handguns only)	Yes (handguns only)
Massachusetts[117]	License to own (duration: six	No	No

or local representative as part of a voluntary gun-buyback program. *Id.* § 1448B(c). Further, the requirement does not apply to transactions in which the buyer is a valid member of an organized church or religious group, the beliefs of which prohibit photographic identification. *Id.* § 1448B(c)(7).

113. *See, e.g.*, HAW. REV. STAT. § 134-9 (2011); *Private Sales in Hawaii*, L. CTR. TO PREVENT GUN VIOLENCE, http://smartgunlaws.org/private-sales-in-hawaii (last updated Sept. 28, 2016).

114. *See, e.g.*, 430 ILL. COMP. STAT. ANN. 66/1 to 66/10 (West 2014); *Private Sales in Illinois*, L. CTR. TO PREVENT GUN VIOLENCE, http://smartgunlaws.org/private-sales-in-illinois (last updated Oct. 6, 2016).

115. *See, e.g.*, IOWA CODE ANN. §§ 724.4, 724.4B, 724.7–724.13 (West 2013); *Private Sales in Iowa,* L. CTR. TO PREVENT GUN VIOLENCE, http://smartgunlaws.org/private-sales-in-iowa (last updated Oct. 17, 2016).

116. *See, e.g.*, MD. CODE ANN. CRIM. LAW §§ 5-301–310 (LexisNexis 2012); *Private Sales in Maryland*, L. CTR. TO PREVENT GUN VIOLENCE, http://smartgunlaws.org/private-sales-in-maryland (last updated Sept. 28, 2016).

117. *See, e.g.*, MASS. GEN. LAWS ch. 140, §§ 131, 131C, 131P (LexisNexis 2016); *id.* ch. 269, § 10 (LexisNexis 2010); *Private Sales in Massachusetts*, L. CTR. TO PREVENT GUN VIOLENCE, http://s martgunlaws.org/private-sales-in-massachusetts (last updated Nov. 15, 2016).

	years) Permit to purchase handguns only (duration: ten days)		
Michigan[118]	Permit to purchase handguns only (duration: thirty days)	No	No
Minnesota[119]	Optional permit to purchase handguns and semiautomatic military-style assault weapons (exempts holder from undergoing background check prior to purchase from an FFL).	Non-FFL who transfers handgun or semi-automatic military-style assault weapon criminally liable for not carrying out a background check only if transferee uses firearm within one year of transfer in furtherance of a felony crime of violence subject to certain preconditions.	Non-FFL who transfers handgun or semi-automatic military-style assault weapon criminally liable for not carrying out a backgroun d check only if transferee uses firearm within one year of transfer in furtherance of a felony

118. *See, e.g.*, MICH. COMP. LAWS SERV. §§ 28.421a–28.429c (LexisNexis 2015); *Private Sales in Michigan*, L. CTR. TO PREVENT GUN VIOLENCE, http://smartgunlaws.org/private-sales-in-michigan (last updated Oct. 17, 2016).

119. *See, e.g.*, MINN. STAT. ANN. § 624.714 (West 2009); *Private Sales in Minnesota*, L. CTR. TO PREVENT GUN VIOLENCE, http://smartgunlaws.org/private-sales-in-minnesota (last updated Sept. 30, 2016).

			crime of violence subject to certain preconditions.
Nebraska[120]	Permit to purchase handguns only (duration: three years) (limited exceptions such as transfer between immediate family members or if handgun is antique)	No	No
Nevada[121]	No	BC may be conducted for transfer between private parties at private seller's request	No
New Jersey[122]	Permit to purchase (duration: ninety days for handguns) (unlimited for	No	No

120. *See, e.g.*, NEB. REV. STAT. ANN. § 28-1202 (2016); *id.* § 69-2427 (2009); *Private Sales in Nebraska*, L. CTR. TO PREVENT GUN VIOLENCE, http://smartgunlaws.org/private-sales-in-nebraska (last updated Sept. 30, 2016).

121. *See, e.g.*, NEV. REV. STAT. ANN. § 202.3657 (LexisNexis Supp. 2012); *Private Sales in Nevada*, L. CTR. TO PREVENT GUN VIOLENCE, http://smartgunlaws.org/private-sales-in-nevada (last updated Dec. 6, 2016).

122. *See, e.g.*, N.J. STAT. ANN. § 2C:58-3 (West 2016); *Private Sales in New Jersey*, L. CTR. TO PREVENT GUN VIOLENCE, http://smartgunlaws.org/private-sales-in-new-jersey (last updated Mar. 13, 2017).

	long gun purchases)		
New York[123]	License to own handguns only (duration: five years)	Yes	Yes
North Carolina[124]	Permit to purchase handguns only (duration: five years)	No	No
Oregon[125]	No	Yes	Yes Subject to exceptions
Pennsylvania[126]	No	Yes (exception for transfers between immediate family)	No
Rhode Island[127]	No (but application required for handguns only)	Yes	No

123. *See, e.g.*, N.Y. PENAL LAW §§ 265.01, 265.20, 400.00 (McKinney 2008 & Supp. 2017); *Private Sales in New York*, L. CTR. TO PREVENT GUN VIOLENCE, http://smartgunlaws.org/private-sales-in-new-york (last updated Oct. 25, 2016).

124. *See, e.g.*, N.C. GEN. STAT. ANN. §§ 14-269.2 to -269.3, 14-277.2, 14-415.10 to -415.27 (West 2014); *Private Sales in North Carolina*, L. CTR. TO PREVENT GUN VIOLENCE, http://smartgunlaws.org/private-sales-in-north-carolina (last updated Oct. 18, 2016).

125. OR. REV. STAT. § 166.435 (2015). Exceptions include transfers by or to law enforcement; transfers between immediate family members; temporary transfers for self-defense, hunting, and target-shooting; and temporary transfers that occur exclusively while in the presence of the owner. *Id.*

126. *Private Sales in Pennsylvania*, L. CTR. TO PREVENT GUN VIOLENCE, http://smartgunlaws.org/private-sales-in-pennsylvania (last updated Sept. 30, 2016).

127. *Private Sales in Rhode Island*, L. CTR. TO PREVENT GUN VIOLENCE, http://smartgunlaws.org/private-sales-in-rhode-island (last updated Oct. 25, 2016).

Washington[128]	No	Yes	Yes, subject to exceptions
District of Columbia[129]	Registration (three years)	Yes (private sellers can only sell firearms to licensed dealers)	Yes (private sellers can only transfer lawful firearms to licensed dealers)

Permits to Purchase. Permit and licensing schemes place responsibility for initiating a background check on the prospective purchaser, who must submit an application to the relevant state licensing authority. Eleven states seek to prevent dangerous persons from possessing firearms by requiring that prospective purchasers obtain a permit or license; passing a background check is a prerequisite for a *purchase* permit. Four states require a license to *possess*. The key difference between a permit to purchase and a license to possess is that the former certifies the permit holder's firearms eligibility for a short window of time, while the latter grants permission to possess for an extended, renewable period.[130]

Private Seller-Initiated Background Checks. The Brady Law requires all FFLs nationwide to submit the names or prospective purchasers to NICS (or the state equivalent) for background

128. *Private Sales in Washington*, L. CTR. TO PREVENT GUN VIOLENCE, http://smartgunlaws.org/private-sales-in-washington (last updated Nov. 1, 2016).

129. *Private Sales in the District of Columbia*, L. CTR. TO PREVENT GUN VIOLENCE, http://smartgunlaws.org/private-sales-in-the-washington-d-c (last updated Nov. 8, 2016).

130. *See Concealed Weapons Permitting*, L. CTR. TO PREVENT GUN VIOLENCE, http://smartgunlaws.org/gun-laws/policy-areas/firearms-in-public-places/concealed-weapons-permitting (last visited Apr. 26, 2017). Forty-two states generally require a state-issued permit in order to carry concealed weapons in public. *Id.* Alaska, Arizona, Kansas, Maine, Vermont, and Wyoming allow individuals to carry concealed weapons in public without a permit. *Id.* Mississippi allows individuals to carry concealed loaded handguns in public without a permit only if the handgun is kept in a purse, satchel, briefcase, or similar item, or in a fully enclosed case. *Id.* Idaho allows concealed carry of loaded handguns without a permit only in rural areas outside the limits or confines of any city. *Id.* Nine states have "may issue" laws which give the issuing authority wide discretion to deny a permit to an applicant. *Id.* Thirty-five states have "shall issue" laws which require the issuing authority to grant carry permits to applications who meet the statutory eligibility requirements. *Id.*

checking.[131] Column 2 indicates those states that require *private, non-licensed sellers* to initiate background checks on firearms purchasers. These are the most comprehensive background checking jurisdictions. They differ with respect to how the private seller initiates the background check. In Connecticut and Rhode Island, private sellers must electronically transmit the purchaser's name to the relevant state agency (Connecticut Department of Emergency Services and the Rhode Island State Police, respectively). Both agencies conduct the background check and instruct the private seller whether or not to complete the sale.[132]

New York is the most recent state to implement a UBC scheme.[133] Pursuant to its 2013 SAFE Act, before transferring possession of a firearm, a non-FFL transferor and prospective transferee must take the gun to an FFL willing to process the transaction, including initiation of a transferee background check; the FFL, who is limited to charging a ten-dollar fee for his services, must retain a record of the transaction for twenty years.[134] In California, any prospective purchaser must submit, via a licensed dealer, an application to the California Department of Justice ("California DOJ").[135] The California DOJ checks the prospective purchaser against state and federal databases and notifies the licensed dealers whether the sale may proceed.[136]

131. *Background Checks in Rhode Island*, L. CTR. TO PREVENT GUN VIOLENCE, http://smartgunlaws.org/background-checks-in-rhode-island (last updated Oct. 25, 2016); *Private Sales in Connecticut*, *supra* note 111.

132. *Id.*

133. The SAFE Act established New York as the only state to require that licensed and unlicensed ammunition sellers initiate background checks on ammunition purchasers; however, after encountering difficulties in implementing this provision, it suspended the effort indefinitely. *See* Thomas Kaplan, *Plan to Require Background Checks for Ammunition Is Suspended*, N.Y. TIMES, July 11, 2015, at A16. In the wake of the Sandy Hook Elementary School massacre in Newtown, Connecticut, the 2013 SAFE Act required an NICS background check for "*any sale[s], exchange[s] or disposal[s] of firearms, rifles or shotguns*" except those which occur between "immediate" family members. N.Y. Secure Ammunition and Firearms Enforcement Act of 2013, S. 2230, § 898, art. 39-DDD(1)–(2) (2013), http://legislation.nysenate.gov/pdf/bills/2013/S2230 (emphasis added).

134. *See* 18 U.S.C. § 923(g)(1)(A) (2012). Such records are not subject to public disclosure under New York's Freedom of Information Law, but can be inspected by a police officer. FFLs are required to maintain Acquisition and Disposition Records, including information about the acquisition and disposition of all firearm transactions they participate in or facilitate. *See* N.Y. GEN. BUS. LAW §§ 898(3)–(5) (McKinney 2013).

135. *Background Checks in California*, L. CTR. TO PREVENT GUN VIOLENCE, http://smartgunlaws.org/background-checks-in-california (last updated Nov. 14, 2016).

136. CAL. PENAL CODE § 28220(a) (Deering 2012).

Private Transferor-Initiated Background Checks. Column 3 shows those states that extend background checking to non-monetary firearm transfers, i.e. gifts. However, states that extend background checking to non-monetary transfers provide for exceptions, most commonly for transfers between immediate family members. However, to pile on complexities, states differ with respect to which intra-family transfers are exempted.

II. Design, Implementation, and Enforcement Challenges

A. Design

i. All Transfers or Only Sales for Money?

Should UBC apply to all transactions or just to firearms transfers involving money? There is no reason to assume that a person who acquires a firearm from a gift or loan is less dangerous to him or herself or others than one who obtains a firearm in exchange for money. On the one hand, exempting persons who obtain a gun without paying money for it undermines the purpose of UBC. Not only might those who acquire a gun by gift or loan be dangerous, the existence of the exemption provides an easy opportunity to avoid background checks. On the other hand, an UBC scheme that applies to *every* permanent and temporary firearms transfer would be impossible to enforce effectively.

Many UBC states exempt gun transfers between family members from background-checking requirements. We have not seen an articulated rationale for this exemption. Should it be assumed that a relative (even one who is estranged) is less dangerous and irresponsible with a firearm than an unrelated neighbor, friend, colleague, or stranger? Wherever the line is drawn it will always be arbitrary. Furthermore, the existence of the family member exemption provides opportunity for firearms-ineligible persons to obtain a gun by recruiting a family member with a clean record to purchase one and gift it to him or her.

ii. All Guns or Just Handguns?

If a gun control scheme is aimed primarily at preventing gun crime and firearm-related suicide, it should be most concerned about preventing dangerous and irresponsible people

from obtaining *handguns*. While there are four times as many shotguns and rifles in private hands as handguns, handguns account for almost ninety percent of gun crimes.[137] While the Brady Law applies to long guns as well as handguns, some states require a license or permit to possess or carry a handgun, but not for shotguns and rifles.[138] Requiring background checks for handgun and not long-gun purchasers might "nudge" some people toward long guns.[139] However, a handgun-purchaser-only background-checking scheme would be easier to administer and enforce because it would apply to a minority of firearms purchasers. It might also attract less political opposition because it would essentially leave most hunters and target shooters unaffected. However, shotguns and rifles can, of course, also be used to inflict great injury. Indeed, even though a minority of mass shootings have been perpetrated with rifles, assault rifles are widely thought to be the firearms of choice for these horrific events.[140]

B. Who Is Disarmed by Background-Checking Requirements?

Background checking will not prevent dangerous persons from acquiring firearms if their names are not found in databases of firearms-ineligible persons. At present, the relevant federal databases are vastly under populated, undermining the potential effectiveness of NICS and UBC regimes.[141]

137. MICHAEL PLANTY & JENNIFER L. TRUMAN, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NCJ 241730, SPECIAL REPORT: FIREARM VIOLENCE, 1993–2001 (2013), https://www.bjs.gov/content/pub/pdf/fv9311.pdf.

138. *Background Check Procedures*, *supra* note 107 (listing Iowa, Maryland, Michigan, Nebraska, and North Carolina as states that require licenses for handguns, but not for shotguns or rifles). Australia's firearms "buy back" program applied only to semi-automatic (and pump-action) rifles and shotguns. David Hemenway & Mary Vriniotis, *The Australian Gun Buyback*, HARV. BULLS., Spring 2011, at 1, https://cdn1.sph.harvard.edu/wp-content/uploads/sites/1264/2012/10/bulletins_australia_spring_2011.pdf.

139. RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE 243 (2008).

140. James B. Jacobs, *Why Ban "Assault Weapons"?*, 37 CARDOZO L. REV. 681, 711 (2015).

141. Sarah Ferris, *Lack of Data Makes It Hard for Background Checks System to Work Properly*, WASH. POST (Aug. 28, 2014), https://www.washingtonpost.com/world/national-security/lack-of-data-makes-it-hard-for-background-checks-system-to-work-properly/2014/08/28/d166c1b4-2ed8-11e4-be9e-60cc44c01e7f_story.html?utm_term=.2f4d444896ce.

As of December 13, 2013, there were 11,166,690 individuals named in the NICS Index of firearms-ineligible persons.[142] The Index is made up of records submitted by local, state, tribal, and federal agencies.[143] Table 2 shows the number of names in each of these databases.

Table 2: Total Active Records in the NICS Index (as of Dec. 31, 2013)[144]

Category of Ineligibility	**No. of Records**
Illegal / unlawful alien	5,621,440
Involuntary civil commitment / Adjudicated mentally defective	3,260,730
Convicted of a crime punishable by at least one years' imprisonment or a misdemeanor punishable by more than two years' imprisonment	1,647,906
Fugitive from justice	392,138
Misdemeanor conviction for domestic violence	93,812
Under indictment / information	34,222
User of / addicted to controlled substance	33,909
Federally denied persons file[145]	33,005
Renounced U.S. citizenship	23,807
Dishonorable discharge	10,328
State prohibitor	10,072
Subject to permanent domestic violence protection order	5321
TOTAL:	11,166,690

142. NICS OPERATIONS REPORT 2013, *supra* note 34.

143. *Id.*

144. *Id.*

145. The Federally Denied Persons File is compiled of individuals that are predetermined to have firearm prohibitions without listing the specific category. This is a catch-all category which includes various people whom the FBI deem ineligible to possess a firearm though the relevant state records may not be entered into NICS or the NCIC. Included in this file are persons who may not possess guns as a result of a deferred judgment.

By far, the most important and more reliable database that a NICS background check searches is the Triple I, which is the nationally integrated "rap sheet" system that stores information about every local, state, and federal arrest and arrestee.[146] According to the Sentencing Project, 6.1 million people are subject to felony disenfranchisement.[147] That figure must constitute only a fraction of the total number of people who have ever been convicted because many states reinstate felon rights; some states never disenfranchise convicted felons at all.[148] However, it is highly unrealistic to consider all persons ever convicted of a felony or a domestic violence misdemeanor at any point in their life as forever posing a significant risk of misusing a firearm. Indeed, the view that "once a criminal, always a criminal" is contested by the "Ban the Box" movement and other groups seeking to abolish, or at least reduce, the vast range of collateral consequences that make it difficult for "ex-offenders" to reintegrate into society.[149]

The large majority of people with a prior felony conviction were not convicted of a gun crime.[150] This is not to say that preventing all persons ever convicted of any felony offense from ever acquiring a gun would not reduce the number of gun crimes. Undoubtedly, it would—but so would disqualifying from firearms possession all males age twenty-one to twenty-five. Indeed, preventing any segment of the population from possessing guns would diminish total gun crime.

Federal law prohibits a person who is "an unlawful user of or addicted[151] to any controlled substance" from possessing a

146. JAMES B. JACOBS, THE ETERNAL CRIMINAL RECORD, at x (2015).

147. Christopher Uggen et al., *6 Million Lost Voters: State-Level Estimates of Felony Disenfranchisement, 2016*, SENT'G PROJECT (Oct. 6, 2016), http://www.sentencingproject.org/publications/6-million-lost-voters-state-level-estimates-felony-disenfranchisement-2016.

148. *Felon Voting Rights*, NAT'L CONF. ST. LEGISLATURES (Sept. 29, 2016), http://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx.

149. *Id.* at xii; *Remarks by the President and the Vice President on Gun Violence*, *supra* note 86.

150. CAROLINE WOLF HARLOW, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NCJ 189569, FIREARM USE BY OFFENDERS 6 (2001), https://bjs.gov/content/pub/pdf/fuo.pdf.

151. "Addict" is defined as "any individual who habitually uses any narcotic drug so as to endanger the public morals, health, safety, or welfare, or who is so far addicted to the use of narcotic drugs as to have lost the power of self-control with reference to his addiction." 21 U.S.C. § 802(1) (2012).

firearm.[152] This category of ineligibility is patently overbroad.[153] It is not true, for example, that persons who use marijuana pose a significantly greater risk of gun violence than non-marijuana users.[154]

Even if people who use drugs are more likely to commit gun crimes than similarly situated non-drug users, there is no reliable system that reports drug addicts, much less drug users, to NICS. According to a 2011 report by Mayors Against Illegal Guns, forty-four states have submitted *fewer than ten names* to NICS's controlled substance-user database; thirty-three had not submitted any names.[155] Even the Department of Veterans Affairs does not submit the names of illegal drug users known to its physicians and administrators to NICS.[156] Incredibly, as of 2011, the Drug Enforcement Administration had not submitted a single drug abuser's name to NICS.[157]

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152. 18 U.S.C. § 922(g)(3) (2012). "Controlled substance" is defined as "a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter [of the Controlled Substances Act]. The term does not include distilled spirits, wine, malt beverages, or tobacco. . . ." 21 U.S.C. § 802(6).

153. *See* 27 C.F.R. § 478.11 (2016). According to DOJ regulations implementing the Brady Law, the drug user category applies to any

> person who uses a controlled substance and has lost the power of self-control with reference to the use of the controlled substance; *and any person who is a current user of a controlled substance in a manner other than as prescribed by a licensed physician*. . . . An inference of current use may be drawn from evidence of a recent use or possession of a controlled substance or a pattern of use or possession that reasonably covers the present time, e.g., a conviction for use or possession of a controlled substance within the past year; multiple arrests for such offenses within the past 5 years if the most recent arrest occurred within the past year; or persons found through a drug test to use a controlled substance unlawfully, provided that the test was administered within the past year.

Id. (emphasis added).

154. *See* Shima Baradaran, *Drugs and Violence*, 88 S. CAL. L. REV. 227, 271–88 (2015).

155. MAYORS AGAINST ILLEGAL GUNS, FATAL GAPS: HOW MISSING RECORDS IN THE FEDERAL BACKGROUND CHECK SYSTEM PUT GUNS IN THE HANDS OF KILLERS 3 (2011), http://everytownresearch.org/documents/2015/04/fatal-gaps.pdf.

156. *Id.* at 8, 23. At the time of the 2011 report, only three federal agencies (the FBI, the U.S. Coast Guard, and the Court Services and Offenders Supervision Agency ("CSOSA"), the probation and parole services agency for the District of Columbia) had submitted names. *Id.* at 3. Of a total of 12,023 federal controlled substance records in NICS, all but 1391 came from CSOSA. *Id.* at 8.

157. *Id.*

NICS background checking is not effective in identifying persons too dangerous to possess a firearm due to mental illness. The Brady Law prohibits purchase of firearms by a person who has ever been civilly committed to a mental hospital or been adjudicated as mentally defective.[158] As indicators of dangerousness due to mental illness, these categories are both over- and underinclusive. Involuntary mental hospital commitments have decreased precipitously over the past several decades, as shown by a decrease in inpatient population from 550,000 in the mid-1950s to 30,000 in 1990.[159] Adjudications of persons who are mentally defective are rare and are mostly triggered by a family's desire to establish a guardianship over a person who might otherwise dissipate his or her resources.[160] Moreover, states have been very reluctant to submit even these names to NICS, citing state privacy laws.[161] Despite the George W. Bush administration's attempt to encourage states to submit to

158. 18 U.S.C. § 922(d)(4) (2012). The term "adjudicated as a mental defective" means:

> (a) A determination by a court, board, commission, or other lawful authority that a person, as a result of marked subnormal intelligence, or mental illness, incompetency, condition or disease: (1) is a danger to himself or to others; or (2) lacks the mental capacity to contract or manage his own affairs. (b) The term shall include – (1) A finding of insanity by a court in a criminal case; and (2) Those persons found incompetent to stand trial or found not guilty by reason of lack of mental responsibility pursuant to articles 50a and 72b of the Uniform Code of Military Justice, 10 U.S.C. 850a, 876b.

27 C.F.R. § 478.11 (2016).

159. *See* RICHARD G. FRANK & SHERRY A. GLIED, BETTER BUT NOT WELL: MENTAL HEALTH POLICY IN THE UNITED STATES SINCE 1950, at 55 (2008). During the last half of the twentieth century, the state hospital population in the United States declined to five percent of its 1955 peak. William H. Fisher et al., *The Changing Role of the State Psychiatric Hospital*, 28 HEALTH AFF. 676, 677–78 (2009). The number of state and county psychiatric beds declined seventy percent between 1972 and 1990. *Id.* at 678.

160. *See* Luanne Rife, *Families Tread Carefully Through Maze of Guardianship*, ROANOKE TIMES (July 10, 2016, 12:00 AM), http://www.roanoke.com/news/families-tread-carefully-through-maze-of-guardianship/article_c1bf157b-155f-50ea-ae9e-152692ef290b.html. In February 2017, the House struck down Obama-era regulations, which required the Social Security Administration to report people who receive disability benefits and have been found mentally incapable of managing their financial affairs to NICS. Jessica Taylor, *House Votes to Overturn Obama Rule Restricting Gun Sales to the Severely Mentally Ill*, NPR (Feb. 2, 2017), http://www.npr.org/2017/02/02/513126985/house-votes-to-overturn-obama-rule-restricting-gun-sales-to-mentally-ill.

161. *Federal Law on Mental Health Reporting*, *supra* note 16.

NICS the names of persons who have been civilly committed or adjudicated mentally defective,[162] in 2011 twenty-three states and the District of Columbia submitted fewer than one hundred names to NICS.[163] Seventeen states submitted fewer than ten names; four states submitted none.[164]

Advocates and treatment providers for the mentally ill have been highly critical of proposals to collect, and store in databases, information about people suffering from mental illnesses, even for purposes of firearms disqualification.[165] They criticize that such record keeping violates patient privacy, stigmatizes mental illness, and discourages people from seeking treatment.[166]

The recent spate of mass killings by apparently severely mentally ill persons has generated proposals to disqualify from firearms possession a much larger pool of persons predicted to be dangerous on account of mental illness. The best example is New York's SAFE Act, which renders firearms-ineligible any person whom "a mental health professional" deems "likely to engage in conduct that would result in serious harm to self or others."[167] Mental health treatment professionals and advocates for the mentally ill vigorously oppose this law on the ground that that there is no correlation between suffering from mental illness and engaging in violent behavior, much less gun violence.[168] Research consistently shows that, as a group, people treated for mental health problems are not more dangerous than those in the general population.[169] Further, when a person suffering from

162. Allen Rostron, *Incrementalism, Comprehensive Rationality, and the Future of Gun Control*, 67 MD. L. REV. 511, 553–55 (2008).

163. MAYORS AGAINST ILLEGAL GUNS, *supra* note 155.

164. *Id.*

165. James B. Jacobs & Zoe Fuhr, *New York Disarms the "Mentally Ill,"* MARSHALL PROJECT (Dec. 2, 2015, 7:15 AM), https://www.themarshallproject.org/2015/12/02/new-york-disarms-the-mentally-ill#.36djDkcHb.

166. *Id.*

167. N.Y. MENTAL HYG. LAW § 9.46(a)–(b) (McKinney Supp. 2017) ("'A mental health professional' shall include a physician, psychologist, registered nurse or licensed clinical social worker."); *see* James B. Jacobs & Zoe Fuhr, *Preventing Dangerous Mentally Ill Individuals from Obtaining and Retaining Guns: New York's SAFE Act*, 14 GEO. J.L. & PUB. POL'Y 77, 79 (2016).

168. Jacobs & Fuhr, *supra* note 165.

169. JOHNS HOPKINS BLOOMBERG SCH. PUB. HEALTH, CONSORTIUM FOR RISK-BASED FIREARM POLICY, GUNS, PUBLIC HEALTH AND MENTAL ILLNESS: AN EVIDENCE-BASED APPROACH FOR STATE POLICY 5–7 (2013), http://www.jhsph.edu/research/centers-and-institutes/johns-hopkins-center-for-gun-policy-and-research/publications/GPHMI-State.pdf; Jennifer L. Skeem & John Monahan, *A Jurisprudence of Risk Assessment: Forecasting Harm*

mental illness does engage in violence, it is more likely to be self-inflicted rather than inflicted on others.[170]

Screening firearms purchasers against other databases of federally defined categories of firearms-prohibited persons is also unlikely to prevent gun crime, suicide, or mass killings. Consider the prohibition on gun possession by persons who renounce American citizenship. Renunciation of citizenship is a time-consuming process.[171] Only a small number of people renounce citizenship, mostly for tax purposes.[172] In 2014, for example, 3145 individuals renounced their citizenship.[173] Forfeiting their Second Amendment rights is probably intended as some kind of punishment. However, there is no reason that these tax avoiders would be dangerous if armed.

Nor is there any evidence that indicates "illegal aliens" pose a heightened risk of firearms violence.[174] The NCIC only holds records of "criminal aliens whom immigration authorities have deported and aliens with outstanding administrative warrants of removal."[175] However, while this category is the most populated in the NICS Index, many of these people have already been deported and are no longer in the country.[176] There is no available information about the gun crime proclivities of those dishonorably discharged from the armed forces in an NCIC

Among Prisoners, Predators, and Patients, 92 VA. L. REV. 391, 406–07 (2006); John Monahan, *Current Directions in Violence Risk Assessment*, 20 CURRENT DIRECTIONS IN PSYCHOL. SCI. 38, 40 (2011); Jeffrey W. Swanson et al., *Mental Illness and Reduction of Gun Violence and Suicide: Bringing Epidemiologic Research to Policy*, 25 ANNALS EPIDEMIOLOGY 366, 368 (2015).

170. Heather Stuart, *Violence and Mental Illness: An Overview*, 2 WORLD PSYCHIATRY 121, 123 (June 2003).

171. *See Renunciation of U.S. Nationality Abroad*, U.S. DEP'T ST. BUREAU CONSULAR AFF., https://travel.state.gov/content/travel/en/legal-considerations/us-citizenship-laws-policies/renunciation-of-citizenship.html (last visited Apr. 27, 2017) (noting that a person wishing to renounce citizenship must first appear in person before a U.S. consular in a foreign country and then sign an oath of renunciation).

172. Ylan Q. Mui, *Why Americans Are Giving Up Citizenship in Record Numbers*, WASH. POST (June 1, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/06/01/why-americans-are-giving-up-citizenship-in-record-numbers/?utm_term=.4e01187e53a3.

173. Robert Wood, *New Un-American Record: Renouncing U.S. Citizenship*, FORBES (May 8, 2015, 1:23 AM), http://www.forbes.com/sites/robertwood/2015/05/08/new-un-american-record-renouncing-u-s-citizenship/#2b41607571da.

174. Mike Males, *You Can't Blame Immigrants for Gun Violence*, REUTERS (July 24, 2014), http://blogs.reuters.com/great-debate/2014/07/24/you-cant-blame-immigrants-for-gun-violence.

175. *National Crime Information Center (NCIC)*, FED. BUREAU INVESTIGATIONS, https://www.fbi.gov/services/cjis/ncic (last visited Apr. 26, 2017).

176. *See id.*

database.[177] It seems unlikely that those who are dishonorably discharged are at an elevated risk for committing gun violence *for the rest of their lives.*

At the same time, NICS does not search databases of people whom the FBI has designates as potentially dangerous.[178] An example of a database not searched by NICS is the Terrorist Screening Database, which is the central terrorist watch list consolidated by the FBI's Terrorist Screening Center.[179]

Even if firearms-ineligible databases were populated with the names of people who present a substantially greater likelihood of committing gun violence than other people, it should not be assumed that background checking prevents acquisition of a firearm. If an attempted purchase is blocked, the purchaser could recruit a straw purchaser to buy a gun or, instead, purchase one on the black market. The purchaser could also borrow, steal, or make a gun.[180]

C. Implementation

i. FFL-Initiated Background Checking

Under the Brady Law, FFLs have to submit name and identification information of firearms purchasers to NICS.[181] Failure to comply is punishable by a fine and up to ten years' imprisonment and constitutes grounds for forfeiting the FFL's license.[182] It is the FFL's responsibility to verify that the purchaser is the same person as the person on the identification document.[183] Thus, a firearms-ineligible person could present a

177. *See id.*

178. LAW CTR. TO PREVENT GUN VIOLENCE, FOR THE RECORD: NICS AND PUBLIC SAFETY 7 (Dec. 2016), http://smartgunlaws.org/wp-content/uploads/2016/12/NICS-and-Public-Safety.pdf.

179. *Terrorist Screening Center*, FED. BUREAU INVESTIGATIONS, https://www.fbi.gov/about/leadership-and-structure/national-security-branch/tsc (last visited Apr. 26, 2017).

180. *See* James B. Jacobs & Alex Haberman, *3D Printed Firearms, Do-It Yourself Guns & the Second Amendment,* L. & CONTEMP. PROBS. (forthcoming 2017).

181. 27 C.F.R. § 478.102(a)(1) (2016).

182. 18 U.S.C. §§ 922(d), 924 (2012).

183. FIREARMS TRANSACTION RECORD, *supra* note 30, at 5. ATF Regulations require a purchaser to provide a valid government-issued photo identification to the seller which contains the buyer's name, residence address, and date of birth. *Id.* A driver's license or an identification card issued by a state in place of a license is acceptable. *Id.* A combination of government-issued documents may also be provided in order to establish the purchaser's required details. *Id.*

forged identification document or someone else's identification to the FFL, who is probably not adept at scrutinizing identity documents. The FFL's obligation is satisfied when he or she sends the identification information to NICS and abides by NICS's response.[184] FFLs cannot be expected to be as careful or competent in scrutinizing identity documents as government officials. FFLs are retailers, not government employees; their primary motivation is to make gun sales, not to identify false documents.

Requiring private (non-FFL) sellers to verify firearms licenses is more problematic. It is unrealistic to expect a non-FFL, who may only sell a few guns each year, to be as competent at scrutinizing identity documents and permits as an FFL. Moreover, the private seller is likely to be even more hesitant to challenge questionable documents than an FFL. New York addresses this potential problem by requiring private firearms sellers to bring the firearm to an FFL to whom the prospective purchaser must present his identification documents.[185] While this scheme sensibly relieves private sellers from identity verification responsibilities, it does not guarantee that private sellers and purchasers will locate and process their transaction through an FFL. Many firearms sellers and purchasers will comply with UBC because they are generally law-abiding citizens, but some will not comply because of inconvenience, hostility toward gun regulation, or desire to make a sale regardless of whether the purchaser can pass a background check.

ii. Background Checking via Licensing System

Under a permit or licensing model, the purchaser initiates the background check by submitting a firearms license application

184. 27 C.F.R. § 478.102(a)(2)–(3) (2016).

185. N.Y. GEN. BUS. LAW § 898(2) (McKinney 2017). California has a similar requirement. CAL. PENAL CODE § 27545 (Deering 2012). Connecticut permits an FFL to verify the purchaser's identity documents. *See* CONN. GEN. STAT. § 29-37a(e)–(f) (2016). The private transferor must document the firearm transaction with the Connecticut Department of Emergency Services and Public Protection ("DESPP") and obtain authorization for the sale or transfer. *Id.* § 29-37a(d). Since January 2014, private transferors and transferees may request an FFL to contact the DESPP on their behalf. *Id.* § 29-37a(f).

to a state agency.[186] That agency conducts the background check indirectly through NICS or directly through the state's criminal records repository and if there is no impediment, issues a license.[187] This model requires the seller to verify that the purchaser has a valid license, and may require that the seller submit the license number to the state for yet another round of verification.[188] This is a more effective screening model, as long as the FFL or private seller is scrupulous in requiring the purchaser to provide photo identification. Even then, a firearms-ineligible purchaser could submit somebody else's license or false documentation. In turn, an FFL could ignore obvious discrepancies between the person and his photo identification.

D. Enforcement

For UBC to be successful, it must be enforced. If violators are practically never identified, prosecuted, and punished, prospective violators will not be deterred and compliance will erode. It will be easier to enforce UBC against FFLs, who are already subject to federal (and sometimes state) regulation. Possibly, a routine ATF audit will find that a dealer has not systematically retained and filed ATF Form 4473 for all gun sales.[189] This could be an inadvertent mistake, or it could be evidence of a scheme to supply firearms to criminals. However, because ATF audits FFLs no more than once every few years,[190] and because undocumented transfers can easily be hidden, it is more likely that an informant or defendant looking to obtain a favorable plea bargain will identify a rogue FFL.

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186. *See, e.g.*, *Licensing of Gun Owners & Purchasers in North Carolina*, L. CTR. TO PREVENT GUN VIOLENCE, http://smartgunlaws.org/licensing-of-gun-owners-or-purchasers-in-north-carolina (last updated Oct. 18, 2016).

187. *Background Check Procedures*, *supra* note 107.

188. *See, e.g.*, *Licensing of Gun Owners & Purchasers in Illinois*, L. CTR. TO PREVENT GUN VIOLENCE, http://smartgunlaws.org/licensing-of-gun-owners-or-purchasers-in-illinois (last updated Oct. 6, 2016).

189. President Clinton's initiative sought to reduce ATF's auditing workload. President Obama's initiative would, to some extent, increase the number of FFLs and thus ATF's auditing workload. Memorandum on Importation of Assault Pistols, Admin. of William J. Clinton (Aug. 11, 1993), https://www.gpo.gov/fdsys/pkg/WCPD-1993-08-16/pdf/ WCPD-1993-08-16-Pg1605-2.pdf.

190. *See* U.S. DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GEN., REVIEW OF ATF'S FEDERAL FIREARMS LICENSEE INSPECTION PROGRAM, at ii (2013), https://oig.justice.gov/reports/2013/e1305.pdf.

Proactive policing requires time and resources. Presumably, a rogue FFL will not have retained, or even recorded, information documenting unlawful sales. Thus, a prosecutable case will likely require an undercover operation or "sting."[191] Two undercover agents might enter a gun store and make clear to the proprietor that because one member of the pair is firearms-ineligible, his friend will be the nominal purchaser. The seller commits a federal offense by completing this obvious straw purchase.[192] Alternatively, undercover agents conducting a sting might offer the proprietor a premium to forego a purchaser background check. The possibility that a customer might be an undercover agent provides a modicum of deterrence for FFLs concerned about keeping their licenses and avoiding arrest, prosecution, and punishment.

Enforcing a UBC regime against private sellers is much more difficult. A private seller, especially one who has bought and sold guns on the black market for many years prior to passage of an UBC regime, will likely continue selling guns in the same way. In transacting a gun sale with a stranger, a private seller might not give his real name and, of course, not provide a receipt. If he is ever questioned, he can deny that the sale ever happened. A successful prosecution will usually require an informant or undercover agent. Because of limited time, money and personnel, such operations will be directed at suspected high volume black market sellers, not occasional sellers.

Enforcement would be greatly facilitated by a comprehensive firearms registry that tracks the owner of every firearm and monitors every transfer of every firearm. Currently, federal law prohibits the ATF from maintaining a firearms registry or anything that could be converted to a registry.[193] Such a registry

191. New York City Mayor Michael Bloomberg launched a sting operation to expose rogue FFLs in other states and, thus, to embarrass ATF into cracking down on such dealers. David B. Caruso, *Gun Shops Under Closer Scrutiny*, WASH. POST (July 13, 2007), http://www.washingtonpost.com/wp-dyn/content/article/2007/07/12/AR2007071201093_pf.html.

192. *Id.*

193. *See* 18 U.S.C. § 926 (2012). The federal government maintains a registry of machine guns and other "gangster weapons" that require an ATF license. *See* U.S. DEP'T OF JUSTICE, BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, E-PUB. 5320.8, ATF: NATIONAL FIREARMS ACT HANDBOOK 24 (2009), https://www.atf.gov/file/58251/download; U.S. DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GEN., REPORT NO. I-2007-006, THE BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES' NATIONAL FIREARMS

would enable the police to determine, and the prosecutors to prove, that the gun used by a cooperating witness previously belonged to a particular person, whether an FFL or private seller. Unfortunately for the police, and for gun control proponents, a federal firearms registry is a third rail for gun owners, who fear that registration is the first step towards confiscation.

III. THE IMPACT OF UNIVERSAL BACKGROUND CHECKING POLICIES

It is difficult to measure the causal impact of background-checking laws on gun-related fatalities and crime.[194] To date, the empirical research is equivocal. Economists Jens Ludwig and Philip Cook produced the leading empirical study of the Brady Law's impact on background-checking requirements.[195] They found no relationship between background checks and firearm homicides, but found a negative correlation between background checks, combined with waiting periods, and suicide rates for persons over fifty-five years old.[196] Clinical psychologists Michael and Joyce Anestis, studying the impact of changes in background checking laws in Connecticut and Missouri, confirmed Ludwig's and Cook's findings regarding the suicide-reducing effect of background checking.[197] This is puzzling, as one would not expect that many persons contemplating suicide would be firearms-prohibited under the very narrow federal disqualification for people who were previously civilly committed or adjudicated mentally defective; nor are they particularly likely to be disqualified for another reason.

In a 2001 study, public health researchers found that a 1991 California law, which made a larger number of convicted misdemeanants firearms-ineligible, had a "moderate impact" on

REGISTRATION AND TRANSFER RECORD (2007), https://oig.justice.gov/reports/ATF/e0706/final.pdf.

194. Richard Rosenfield, *Tracing the Brady Act's Connection with Homicide and Suicide Trends*, 284 J. AM. MED. ASS'N 616, 616–17 (2000).

195. Jens Ludwig & Philip J. Cook, *Homicide and Suicide Rates Associated with Implementation of the Brady Handgun Violence Prevention Act*, 284 J. AM. MED. ASS'N 585 (2000).

196. *Id.* at 585 (emphasis added).

197. Michael D. Anestis & Joye C. Anestis, *Suicide Rates and State Laws Regulating Access and Exposure to Handguns*, 105 AM. J. PUB. HEALTH 2049, 2049 (2015).

reducing gun crime.[198] They compared two groups of people, all with at least one prior violent misdemeanor conviction in the ten years prior to applying for a gun purchase permit. People in the "purchaser" group acquired a gun before passage of the 1991 law.[199] People in the "denied" group were unable to get a permit because of the 1991 law.[200] The researchers found that within three years of the actual or attempted gun purchase, those in the purchaser group were slightly more likely than those in the denied group to be arrested for a "new gun and/or violent crime," but not a "new non-gun and/or non-violent crime" (23.9% versus 20.1%).[201] Unfortunately, the data did not allow the author to distinguish between violent crimes committed with a gun and violent crimes committed without a gun, hence the somewhat confusing "new gun and/or violent crime" dependent variable.[202] It is therefore not clear whether the 1991 law had any effect on gun crime. Moreover, since the purchasers and the denieds were not randomly assigned, it is possible that even if there was a statistically significant difference in gun crime arrest rates between the two groups, it might be attributable to some other uncontrolled variable. This possibility is suggested by the fact that the purchaser group included a slightly higher percentage of people who had committed two or more violent misdemeanors prior to a firearm purchase. Additionally, the author was unable to control for prior gun crimes.

Professor of Public Health Daniel Webster and his colleagues examined the impact of Missouri's 2007 repeal of its firearms permit-to-purchase law.[203] Prior to the repeal, the licensing authority conducted background checks on permit-to-purchase applicants.[204] Since repeal, permits are no longer required, but gun purchasers who buy a gun from an FFL are still subject to a NICS background check.[205] The authors claim that the repeal of this law is largely responsible for the thirty-four percent

198. Garen J. Wintemute et al., *Subsequent Criminal Activity Among Violent Misdemeanants Who Seek to Purchase Handguns*, 285 J. AM. MED. ASS'N 1019, 1025 (2001).

199. *Id.* at 1019.

200. *Id.* at 1019–20.

201. *Id.* at 1022.

202. *Id.* at 1019–22.

203. Daniel Webster et al., *Effects of the Repeal of Missouri's Handgun Purchaser Licensing Law on Homicides*, 91 J. URB. HEALTH 293, 293 (2014).

204. *Id.* at 294.

205. *Id.* at 293–94.

increase in firearm Missouri homicides from 2007 to 2008.[206] It seems implausible that repeal could have had such a dramatic effect, especially in just one year. Could it be that, prior to repeal, so many potentially homicidal people did not have, and could not get, a gun?

In any event, looking at Missouri's monthly homicide data after repeal, Clayton Cramer points out that there was a gap of eight months between repeal and the spike in firearm homicides.[207] This delay, Cramer argues, casts doubt on a causal relationship between repeal and the spike in firearm homicides.[208] He further observes that the spike in homicides during the spring and summer of 2008 coincided with increased gang violence in the St. Louis area.[209] It seems likely that, before repeal, gang members would have had little difficulty acquiring a gun on the secondary market or on the black market.[210]

Daniel Webster supports his interpretation of the spike in homicides by pointing to a "relatively stable" Missouri firearm homicide rate from 1999 to 2007.[211] In other words, the 2008 spike could only, or at least most plausibly, be explained by repeal of the licensing law.[212] The data does not support this hypothesis. The firearm homicide rate in Missouri increased by 32.2% from 2003 to 2005. If repeal caused the 2007–2008 spike in firearm homicides, what explains the 2003–2005 spike? Moreover, Webster

206. *Id.* at 296.

207. Clayton E. Cramer, Background Checks and Murder Rate 7 (Apr. 11, 2013) (working paper), http://ssrn.com/abstract=2249317.

208. *Id.*

209. *Id.*; *see also St. Louis Gangs Series*, ST. LOUIS PUB. RADIO (Aug. 18–20, 2008), http://stlpublicradio.org/news/gangs. Homicide rates have been attributed to the conflict between local gangs and Mexican drug cartels for control of the drug market. *See* Timothy Williams, *Crime Spike in St. Louis Traced to Cheap Heroin and Mexican Cartels*, N.Y. TIMES (Apr. 2, 2016), https://www.nytimes.com/2016/04/03/us/cri me-spike-in-st-louis-traced-to-cheap-heroin-and-mexican-cartels.html?_r=0. Indeed, St. Louis has the highest homicide rate of any U.S. city. *See* Francesca Mirabile, *Chicago Still Isn't the Murder Capitol of America*, THE TRACE (Jan. 18, 2017), https://www.thetrace.org/2 017/01/chicago-not-most-dangerous-city-america.

210. JAMES D. WRIGHT & PETER H. ROSSI, ARMED AND CONSIDERED DANGEROUS 184 (2d ed. 2008); Philip J. Cook et al., *Sources of Guns to Dangerous People: What We Learn by Asking Them*, 78 PREVENTATIVE MED. J. 28, 31 (2015).

211. Webster et al., *supra* note 203, at 296.

212. *Id.* at 298.

does not present any data on firearm suicides. In fact, the firearms suicide rate *decreased* by eight percent from 2007 to 2008.[213]

Cramer examined homicide rates in states with UBC laws, comparing the average murder rate in the five years before to the average murder rate for the five years after[214]:

State	First full year	Murder rate before	Std. Dev.	After	Std. Dev.	Change	Stat. Significant ?	Type
Cal.	1991	11.0	0.60	12.3	0.78	11.6%	Y	All
Ill.	1968	6.0	1.02	8.9	0.65	49.0%	Y	All
Iowa	1978	2.2	0.22	2.4	0.20	6.3%	N	Pistols
Md.	1997	12.0	0.46	9.1	0.88	-24.2%	Y	Pistols
Mass.	1969	2.6	0.57	3.8	0.37	44.3%	Y	All
Neb.	1992	3.1	0.49	3.4	0.61	9.0%	N	Pistols
Pa.	1998	6.1	0.44	5.1	0.20	-16.7%	Y	Pistols
R.I.	1991	4.2	0.68	3.7	0.30	-10.6%	N	Long guns

Cramer's data showed that there were statistically significant declines in murder rates for two of the eight states; six states experienced increased murder rates after the adoption of background-checking laws.[215] Murder in two of the three statistically insignificant states experienced an increase in murder rates; the other experienced a decline.[216]

On the basis of these studies, it cannot be said that empirical research supports the proposition that background checking reduces firearm homicides, suicides, or other gun crimes. Of course, the negative has not been proven either. It is possible that background checking does have a depressing impact on firearm-violence, but that the impact is masked by other variables that have not so far been controlled for.

213. *But see* Cassandra K. Crifasi et al., *Effects of Changes in Permit-to-Purchase Handgun Laws in Connecticut and Missouri on Suicide Rates*, 79 PREVENTATIVE MED. J. 43, 43 (2015) (noting a "16.1% increase in firearm suicide rates" after Missouri's PTP repeal).

214. *See* Cramer, *supra* note 207.

215. *Id.* at 5–6.

216. *Id.*

IV. CONCLUSION

Universal firearms background-checking laws are often cited as the best example of sensible gun control measures. Nevertheless, proponents of this policy have given little attention to explaining what UBC means, how it should be implemented and enforced, and what kind of firearm violence reductions should be attributable to UBC laws.

Since 1993, every person who purchases a firearm from an FFL must pass an NICS background check.[217] However, the Brady Law did not require background checks for purchasers of firearms from private sellers, whether at gun shows or anywhere else.[218] Given the ease with which a firearms-ineligible person can circumvent a Brady background check, it is unsurprising that Ludwig and Cook found that the Brady Law had no discernible impact on gun homicides.

After the December 2012 Sandy Hook Elementary School massacre, gun control proponents, including President Obama, supported the Manchin-Toomey Amendment, which would have required background checks to all secondary firearms sales at gun shows and for sales resulting from online and print advertising.[219] The Manchin-Toomey Amendment did not go as far as state laws like those in New York and California, which require all private gun sellers to process their sales through an FFL who initiates a background check on the purchaser.[220]

Proponents of UBC assume the existence of databases that can be searched to block the sale of firearms to dangerous persons. This assumption should not go unquestioned. For some firearms-prohibited categories (e.g. unlawful drug users) there is no database worthy of the name.

The database of persons convicted of felonies and domestic violence misdemeanors is problematic for the opposite reason. It is by far the most comprehensive database which NICS searches, and it accounts for the large majority of people blocked from

217. 18 U.S.C. § 922 (2012).

218. *Universal Background Checks*, *supra* note 3.

219. Jonathan Weisman, *Gun Control Drive Blocked in Senate; Obama, in Defeat, Sees "Shameful Day,"* N.Y. TIMES, Apr. 18, 2013, at A1.

220. *Universal Background Checks*, *supra* note 3.

acquiring a firearm.[221] It is often claimed that every such blocked sale to people in this database constitutes a net gain to members of public safety.[222] However, a felony conviction, no matter for what offense and no matter how long ago, is not a conclusive indicator of future dangerousness.

Even more deflating to the hypothesis that UBC significantly reduces gun violence is the ease with which such laws can be circumvented via straw purchasing and non-compliant gun sellers. It is worth remembering that significant proportions of the general population obtain illegal drugs despite a thick web of criminal laws that are vigorously enforced. It will be difficult and expensive to mount a major enforcement offensive against sellers who do not initiate background checks on their purchasers. In the event that the seller is prosecuted, juries might nullify such prosecutions, at least in counties where gun ownership is popular and considered a fundamental right.

This sober analysis of universal firearms background checking does not and cannot prove the negative. Better designed and more comprehensive UBC schemes might be more successful than current schemes, which have not been successful in reducing firearm-related violence. Nonetheless, the expected benefits of UBC must be tempered by a realistic assessment of the implementation and enforcement difficulties and the ease of circumvention.

221. NICS OPERATIONS REPORT 2013, *supra* note 34, at 18.

222. *Background Checks Prevent Gun Violence and Save Lives*, EVERYTOWN FOR GUN SAFETY SUPPORT FUND, https://everytownresearch.org/infographic-background- checks-save- lives/ (last visited Apr. 26, 2017).