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THE POTENTIAL AND LIMITATIONS OF UNIVERSAL BACKGROUND CHECKING FOR GUN PURCHASERS

JAMES B. JACOBS AND ZOE FUHR††

“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

“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, National Rifle Association of America Institute for Legislative Action Executive Director, April 2013

Universal background checking (“UBC”) is gun control advocates’ number one objective and an article of faith for

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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
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 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. The Federal Firearms Act (1938) and Gun Control Act (1968)

The Federal Firearms Act of 1938 (“FFA”) established the regulatory regime that governs firearm acquisition and ownership today. 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, and Firearms (“ATF”). 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. Similarly, it made it a crime for a firearms dealer to knowingly transport or sell a firearm to a prohibited purchaser.

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. The GCA provided for FFL licenses to be issued, upon payment of a fee, to firearms-eligible persons of at least twenty-one years of age. In addition to the categories of firearms-ineligible persons in the FFA, the GCA added the following two categories:

10. Id. §§ 2 (e) – (f) and 5, 52 Stat. at 1252.
11. Id. §§ 2 (d) and 5, 52 Stat. at 1251. See 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. 3, 2017) (describing how the FFA criminalized the act of selling firearms to “prohibited purchasers,” such as convicted felons).
13. The licensing fee was originally $10 annually for a three-year license. GUNS IN AMERICAN SOCIETY: AN ENCYCLOPEDIA OF HISTORY, POLITICS, CULTURE, AND THE LAW, VOL. 1, 202 (Gregg Lee Carter, ed., 2d ed. 2012). The current licensing fee schedule is: $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 (2009), https://www.atf.gov/firearms/docs/form/form-7-application-federal-firearms-license-atf-form-531012/download.
illegal narcotics\footnote{\textsuperscript{15} and (2) anyone “adjudicated as a mental defective”\footnote{\textsuperscript{16} or previously committed to any mental institution.\footnote{\textsuperscript{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 to obtain from the purchaser a signed statement of eligibility. The major weakness of this scheme was that FFLs had no way of verifying a purchaser’s “affirmation of eligibility.”\footnote{\textsuperscript{18}}

B. The Brady Law (1993)

The Brady Handgun Violence Protection Act of 1993 (“Brady Law”) significantly amended the GCA\footnote{\textsuperscript{19}} by adding a background-checking procedure for verifying the purchaser’s claim to be firearms-eligible.\footnote{\textsuperscript{20}}

\footnote{\textsuperscript{15} 18 U.S.C. § 922(d)(3) (2012).}
\footnote{\textsuperscript{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. 3, 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 [had ever 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).}
\footnote{\textsuperscript{17} 18 U.S.C. § 922(d)(4) (2012). 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.

\footnote{\textsuperscript{18} 18 U.S.C. § 922(d)(5)–(7) (2012). 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: persons subject to a court order}
Under the interim Brady Law procedure (1994–1998), an FFL was required to obtain a signed ATF Form 5300.35 “Statement of Intent to Obtain a Handgun(s)” (“Brady form”) from the purchaser, on which the purchaser swore that neither federal nor state law barred him from purchasing or possessing a handgun. 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. If, within that time frame, the CLEO did not instruct the FFL not to make the sale, the FFL was free to complete it. The Brady Law further required that the United States Attorney General, within five years, establish a permanent National Instant Background Check System (“NICS”) that would eliminate the CLEO’s role. It also extended background-checking laws to long guns.

Under “permanent Brady,” the FFL would notify NICS (operated by the

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-ch ecks (last visited Apr. 3, 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).


24. JACOBS, supra note 18, at 79–80.


26. Id.

27. Id.
FBI in Clarksburg, West Virginia) of a pending firearms sale, and NICS would check a several databases to determine whether the prospective purchaser was firearms-ineligible.28

Since NICS became operational in November 1998,29 a prospective purchaser is required to show photo identification and complete ATF Form 4473, attesting to no firearms disqualifications.30 After verifying the purchaser's identity and in-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. NICS provides the vendor, purchaser, and transaction numbers, which must be recorded on the form. The FFL must retain Form 4473 for twenty years and make them available to law enforcement officers upon request. 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 the FFL with a “delayed” response. 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. A purchaser who is rejected may appeal. 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, which includes files 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. 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 1998–2012). The Brady Law is often praised for preventing millions of dangerous persons from acquiring firearms. However, it is likely that

us/cjis/nics/reports/2013-operations-report [hereinafter NICS OPERATIONS REPORT 2013]. Over ninety percent of NICS background checks are completed in a matter of minutes. Id.

35. 27 C.F.R. § 478.124(c)(4) (2016).
36. Id. § 478.102(b).
37. FIREARMS TRANSACTION RECORD, supra note 30.
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. 3, 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 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. Those eligible candidates for appeal 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).
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 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

\(^{43}\) 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).


\(^{46}\) 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 gun per month. See id. §§ 101(a)(1)(C)(i), 301(a)(1)(A); see also Jacobs, supra note 18, at 138.
that it was still valid.\textsuperscript{48} Then, in order for the handgun to be transferred, the transferor would provide a state handgun registration form to the CLEO in that jurisdiction.\textsuperscript{49} Brady II did not achieve a floor vote in either the House or Senate.\textsuperscript{50}

\textbf{D. The Gun Show Accountability Bill (1994)}

Under the Brady Law, private sellers (non-FFLs) were not required to initiate background checks.\textsuperscript{51} On April 20, 1999 the Columbine High School massacre in Colorado was perpetrated by two high school students, who acquired their guns via an older friend who purchased them at a gun show. The massacre prompted\textsuperscript{52} Senator Lautenberg to introduce the Gun Show Accountability Bill, which would have extended purchaser background checking to private firearm (handguns and long guns) transactions, any part of which takes place at a gun show.\textsuperscript{53} This would have applied to a transaction first discussed at a gun show, but consummated some time later, e.g. at the seller’s home.\textsuperscript{54} Lautenberg’s bill failed to attain a Senate vote.\textsuperscript{55}

\textbf{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”\textsuperscript{56} or “pursuant to an advertisement, posting, display or other

\textsuperscript{48} S. 1878 § 101(a)(u)(i)(C)(iii).

\textsuperscript{49} Id. § 101(a)(u)(B).

\textsuperscript{50} See H.R. 3932, 103d Cong. (1994).


\textsuperscript{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).

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

\textsuperscript{54} See id. § 931(g) (defining a firearm transaction as the “exhibition, sale, [and] offer for sale,” as well as the “transfer[ of] or exchange of a firearm”).


\textsuperscript{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
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.\textsuperscript{57} The amendment applied to firearm “transfers” (i.e. gifts), not just sales,\textsuperscript{58} although it exempted transfers between family members;\textsuperscript{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.”\textsuperscript{60} A gun seller 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 transferring the firearm from the licensee’s business inventory.”\textsuperscript{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. How can the 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. Since, 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,” Jacobs could loan Fuhr the gun because she wanted it for self-protection, but prosecutors would have difficulty proving it.

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. 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 online advertisement. 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. A purchaser would have an incentive to falsely deny that she learned from a website or online advertisement about the availability of the gun she ultimately purchased.

What does it mean to purchase a gun “pursuant to an advertisement”? Suppose that Purchaser Jacobs sees Seller Fuhr’s “gun for sale” advertisement placed on a church or community notice board.

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62. Id.
63. The bill’s definition of gun show includes the show’s “curtilage.” See id. at § 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.
65. Id.
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. Americans for Responsible Solutions launched a petition urging Congress to pass the bill. The Law Center to Prevent Gun Violence hailed the bill as a “significant step forward for background checks in America.”

Both the Brady Campaign to Prevent Gun Violence and the Coalition to Stop Gun Violence tempered support for Manchin-Toomey with criticisms. The Coalition said that there was “no need to water


67. Americans for Responsible Solutions, Congress: Enact Expanded Background Checks, CARE2 PETITIONS, http://www.thepetitionsite.com/takeaction/379/862/853 (last visited Apr. 3, 2017). The petition (with 19,392 signatures) urged Congress to “take immediate action to reduce gun violence in the United States.” Id. It suggested that “[f]or one 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:

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.


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 later to twenty-four hours. Press Release, Coalition 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.
down this legislation and riddle it with loopholes and exemptions.” 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 arranged on armslist.com.”

The NRA called the Manchin-Toomey Amendment a “nightmare.” According to NRA Executive Vice President and CEO Wayne LaPierre, “background checks will never be ‘universal,’ because criminals will never submit to them.” 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. The Amendment itself, however, recognized “the existing prohibition on a national firearms registry,” and explicitly stated that nothing in the Act should be construed to “allow the establishment, directly or indirectly, of a Federal firearms registry.” Apparently having anticipated the NRA’s registration argument, it expressly prohibited the Attorney General from consolidating or centralizing the records of firearm acquisition, disposition,

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/itsallispolitics/2013/01/30/170679024/lapiere-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.
76. 159 CONG. REC. S2613 (daily ed. Apr. 11, 2013).
77. Id.
possession or ownership. Ultimately, the Senate rejected the Manchin-Toomey Amendment by a vote of fifty-four to forty-six.

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. It was identical to the Manchin-Toomey Amendment. In July 2015, Congresswoman Jackie Speier (D-Cal.), with ninety cosponsors, introduced the Fix Gun Checks Act of 2015. While that House bill purported to "extend the Brady Law background check procedures to all sales and transfers of firearms," it actually contained more exemptions than the Manchin-Toomey Amendment. Both bills were referred to, and

78. Id. at S2616.
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). Exceptions included: a transfer to law enforcement agencies or officers; "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,
never made it out of, the Subcommittee on Crime, Terrorism, Homeland Security and Investigations.\textsuperscript{84}

G. President Barack Obama’s January 2016 “Executive Actions”

In the wake of the San Bernardino, California massacre in early December 2015,\textsuperscript{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.”\textsuperscript{86}

\begin{quote}
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.
\end{quote}


\textsuperscript{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
In his post-Bernadino-massacre speech, President Barack Obama accused unlicensed firearms sellers of regularly violating the law by selling firearms at gun shows and by doing business over the internet.\textsuperscript{87} Criticizing Congress’s inaction on gun control, he promised to extend firearms purchaser background checking by executive order.\textsuperscript{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.\textsuperscript{89} Of course, this is exactly what federal law already required. Since the 1938 Federal Firearms Act of 1938, Pub. L. No. 785, § 5, 52 Stat. 85 (1938) shows, to hold a federal firearms license and perform background checks.\textsuperscript{90}

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.


\textsuperscript{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.

\textsuperscript{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. §
The 1968 GCA defined “engaged in the business of selling firearms” as “devot[ing] time, attention, and labor to dealing in 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.” 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. However, the Clinton Administration tightened the standards for issuing FFL licenses. Of particular concern to President Clinton were people, with no business premises, acquiring FFL licenses in order to lawfully purchase firearms from out of state. Thus, in early 1994, the ATF placed regulatory pressure on non-retail 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.” The ATF also relied on local zoning ordinances and a retail premises requirement to deny initial license applications and renewals. These policies drastically reduced the number of FFLs from over 282,000 in 1993 to fewer than 104,000 in 1999.

Under the Obama Administration, ATF released a “guidance” entitled “Do I Need a License to Buy and Sell Firearms?” Unlike a

924(a)(1)(D) (2012); see also 27 C.F.R. 478.11 (2016) (providing definitions related to firearm and ammunition commerce).
91. 27 C.F.R. § 478.11.
94. Id. The ATF lacked sufficient resources to effectively audit the large number of FFLs. Id.
96. Id. at 9–10.
presidential executive order, a federal 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 ATF guidance is meant to inform firearm sellers “whether [they] need to be licensed under federal law.”

The 2016 ATF Guidance more or less restated existing law:

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. 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.” 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.” Moreover, the determination will not depend on the location in which the firearm

99. Id. at ii.
100. Id. at 1.
101. Id. at 1.
102. Id. at 7.
103. Fact Sheet: New Executive Actions to Reduce Gun Violence and Make Our Communities Safer, supra note 88.
transactions are conducted. 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. 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. Table 1 summarizes the firearms purchaser background checking in those states which have laws that extend beyond the federal law.

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

| State | 1. Firearm purchasers must obtain license or permit | 2. Private seller must initiate background check on purchaser | 3. Private non-monetary transferor must initiate background check on transferee |

---

104. ATF FFL GUIDANCE, supra note 98, at 3.
<table>
<thead>
<tr>
<th>Location</th>
<th>Permit to Purchase (duration: five years)</th>
<th>Yes</th>
<th>Yes</th>
<th>Subject to exceptions. 108</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>California</strong> 107</td>
<td>Permit to purchase (duration: five years)</td>
<td>Yes</td>
<td>Yes</td>
<td>Subject to exceptions. 108</td>
</tr>
<tr>
<td><strong>Colorado</strong> 109</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
<td>Subject to exceptions. 108</td>
</tr>
<tr>
<td><strong>Connecticut</strong> 110</td>
<td>Permit to purchase (duration: five years)</td>
<td>License to own.</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td><strong>Delaware</strong> 111</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
<td></td>
</tr>
</tbody>
</table>


108. Exceptions include certain government-sponsored transfers, including gun buybacks; 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).


"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
<table>
<thead>
<tr>
<th>State</th>
<th>Type of Permitted Purchase</th>
<th>Duration</th>
<th>Subject to Exceptions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hawaii</td>
<td>Permit to purchase</td>
<td>(duration: ten</td>
<td>No</td>
</tr>
<tr>
<td></td>
<td>(duration: ten days for</td>
<td>days for</td>
<td></td>
</tr>
<tr>
<td></td>
<td>handguns, one year for</td>
<td>long guns)</td>
<td></td>
</tr>
<tr>
<td>Illinois</td>
<td>License to purchase and</td>
<td>(duration: ten</td>
<td>No</td>
</tr>
<tr>
<td></td>
<td>own (duration: ten years)</td>
<td>years)</td>
<td></td>
</tr>
<tr>
<td>Iowa</td>
<td>Permit to purchase</td>
<td>(duration: one</td>
<td>No</td>
</tr>
<tr>
<td></td>
<td>handguns only</td>
<td>year)</td>
<td></td>
</tr>
<tr>
<td>Maryland</td>
<td>Permit to purchase</td>
<td>(duration: ten</td>
<td>Yes (handguns only)</td>
</tr>
<tr>
<td></td>
<td>handguns only</td>
<td>years)</td>
<td></td>
</tr>
</tbody>
</table>

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 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).


<table>
<thead>
<tr>
<th>State</th>
<th>License to own (duration)</th>
<th>Permit to purchase handguns only (duration)</th>
<th>Optional permit to purchase handguns and semiautomatic military-style assault weapons (exempts holder from undergoing background check prior to purchase from an FFL).</th>
</tr>
</thead>
<tbody>
<tr>
<td>Massachusetts</td>
<td>No</td>
<td>No</td>
<td>Non-FFL who transfers handgun or semiautomatic 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.</td>
</tr>
<tr>
<td>Michigan</td>
<td>No</td>
<td>No</td>
<td>Non-FFL who transfers handgun or semiautomatic 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.</td>
</tr>
<tr>
<td>Minnesota</td>
<td>No</td>
<td>No</td>
<td>Non-FFL who transfers handgun or semiautomatic 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.</td>
</tr>
</tbody>
</table>


<table>
<thead>
<tr>
<th>State</th>
<th>Permit to purchase handgun(s) only</th>
<th>Duration</th>
<th>Preconditions</th>
<th>BC may be conducted for transfer between private parties at private seller’s request</th>
</tr>
</thead>
<tbody>
<tr>
<td>Nebraska</td>
<td>Yes</td>
<td>Ninety days</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Nevada</td>
<td>No</td>
<td>Three years</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>New Jersey</td>
<td>Yes</td>
<td>Unlimited</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>New York</td>
<td>Yes</td>
<td>Five years</td>
<td>Yes</td>
<td>Yes</td>
</tr>
</tbody>
</table>


<table>
<thead>
<tr>
<th>State</th>
<th>Permit to Purchase Handguns Only</th>
<th>No</th>
<th>Yes</th>
<th>Yes</th>
</tr>
</thead>
<tbody>
<tr>
<td>North Carolina</td>
<td>Permit to purchase handguns only (duration: five years)</td>
<td>No</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Oregon</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes (Subject to exceptions).</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Rhode Island</td>
<td>No (But application required for handguns only).</td>
<td>Yes</td>
<td>No</td>
<td></td>
</tr>
<tr>
<td>Washington</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes (Subject to exceptions).</td>
</tr>
<tr>
<td>District of Columbia</td>
<td>Registration (three years)</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes (private sellers can only sell firearms to licensed).</td>
</tr>
</tbody>
</table>

124. 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.
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.¹²⁹

Private Seller-Initiated Background Checks. The Brady Law requires all FFLs to submit the names of prospective purchasers to NICS (or the state equivalent) for background checking.¹³⁰ 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), which conducts the background check and instructs the private seller whether or not to complete the sale.¹³¹

New York is the most recent state to implement a UBC scheme.¹³² Pursuant to its 2013 SAFE Act, before transferring possession of a firearm,

¹²⁹. 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. 3, 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 applicants who meet statutory eligibility criteria. Id.


¹³². 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 the state suspended implementation indefinitely. See Thomas Kaplan, Plan
a non-FFL transferor and prospective transferee must take the gun to an FFL willing to process the transaction, initiating a background check on the transferee; the FFL, who is limited to charging a ten-dollar fee, must retain a record of the transaction for twenty years. In California, any prospective purchaser must submit, via a licensed dealer, an application to the California Department of Justice ("California DOJ"). The California DOJ checks the prospective purchaser against state and federal databases and notifies the licensed dealer whether the sale may proceed.

Private Transferor-Initiated Background Checks. Column 3 shows those states that extend background checking to non-monetary firearm transfers, i.e. gifts. All those states 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 via a gift or loan is less dangerous to self 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, a UBC scheme that applies to

133. 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). 134. Background Checks in California, L. CTR. TO PREVENT GUN VIOLENCE, http://smartgunlaws.org/background-checks-in-california (last updated Nov. 14, 2016). 135. CAL. PENAL CODE § 28220(a) (Deering 2012).
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 (although the straw purchasing family member commits a federal crime if she knows that the transferee is firearms-ineligible).

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.\(^\text{136}\) 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.\(^\text{137}\) Requiring background checks for handgun and not long-gun purchasers might “nudge” some people toward long guns.\(^\text{138}\) 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 leave most hunters and target shooters unaffected. However, shotguns and rifles can, of course, also be used to perpetrate 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.\textsuperscript{139}

\textbf{B. Who are 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.\textsuperscript{140}

As of December 13, 2013, there were 11,166,690 individuals named in the NICS Index of firearms-ineligible persons.\textsuperscript{141} The Index is made up of records submitted by local, state, tribal, and federal agencies.\textsuperscript{142} Table 2 shows the number of names in each of these databases.

\textit{Table 2: Total Active Records in the NICS Index (as of Dec. 31, 2013)}\textsuperscript{143}

<table>
<thead>
<tr>
<th>Category of Ineligibility</th>
<th>No. of Records</th>
</tr>
</thead>
<tbody>
<tr>
<td>Illegal / unlawful alien</td>
<td>5,621,440</td>
</tr>
<tr>
<td>Involuntary civil commitment / Adjudicated mentally defective</td>
<td>3,260,730</td>
</tr>
<tr>
<td>Convicted of a crime punishable by at least one years’ imprisonment or a misdemeanor punishable by more than two years’ imprisonment</td>
<td>1,647,906</td>
</tr>
<tr>
<td>Fugitive from justice</td>
<td>392,138</td>
</tr>
<tr>
<td>Misdemeanor conviction for domestic violence</td>
<td>93,812</td>
</tr>
<tr>
<td>Under indictment / information</td>
<td>34,222</td>
</tr>
<tr>
<td>User of / addicted to controlled substance</td>
<td>33,909</td>
</tr>
</tbody>
</table>


\textsuperscript{141} NICS OPERATIONS REPORT 2013, supra note 34.

\textsuperscript{142} Id.

\textsuperscript{143} Id.
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.\footnote{\textit{JAMES B. JACOBS, THE ETERNAL CRIMINAL RECORD}, x (2015).} About 20 million Americans have a felony conviction.\footnote{Sarah Shannon, Christopher Uggen et al. \textit{Growth in the U.S. Ex-Felon and Ex-Prisoner Population, 1948 to 2010}, \textit{DEMOGRAPHY} (forthcoming 2016).} Probably millions more have a misdemeanor domestic violence conviction. Disarming persons convicted of misdemeanor domestic violence offenses is frustrated by the fact that many state criminal codes do not contain specific domestic violence assault offenses. The Triple I might show that John Doe was convicted of misdemeanor assault, but it will not have information about Doe’s relationship to the assault victim. Therefore, background checking for domestic violence misdemeanor convictions will rarely result in a blocked firearms sale.\footnote{Before an amendment passed in 2011, persons convicted at the state level of a misdemeanor crime of domestic violence were not identified in NICS because New York did not convey two elements of the federal criteria: (i) the relationship between the victim and the defendant; and (ii) clarify that the offense involved the use of, attempted use of physical force or the threatened use of a deadly weapon. See \textit{N.Y. CRIM. PROC. LAW} §§ 370.15 and 380.97 (2016). Therefore, prosecutors and court clerks were encouraged to make clear when an assault conviction involves domestic violence.}

In any event, it is not realistic 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 and coalitions seeking to abolish, or

\begin{tabular}{|l|c|}
\hline
Federally denied persons file\footnote{The Federally Denied Persons File consists of the names of individuals predetermined to have firearm prohibitions without listing the specific prohibition. Included in this file are persons who may not possess guns in the case of conviction, which the court withheld entering as a judgment so that the defendant can fulfill probation-type conditions resulting in a dismissal (a deferred judgment).} & 33,005 \\
Renounced U.S. citizenship & 23,807 \\
Dishonorable discharge & 10,328 \\
State prohibitor & 10,072 \\
Subject to permanent domestic violence protection order & 5,321 \\
\hline
TOTAL: & 11,166,690 \\
\end{tabular}
at least reduce, the vast range of collateral consequences that make it difficult for “ex-offenders” to reintegrate into society.\textsuperscript{148}

The large majority of people with a prior felony conviction were not convicted of a gun crime.\textsuperscript{149} 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 and gun suicide.

Federal law prohibits a person who is “an unlawful user of or addicted\textsuperscript{150} to any controlled substance” from possessing a firearm.\textsuperscript{151} This category of ineligibility is patently overbroad.\textsuperscript{152} It is not true, for example, that persons who use marijuana (no matter how much and under whatever circumstances) pose a significantly greater risk of gun violence than non-marijuana users.\textsuperscript{153}

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’ controlled substance-user database; thirty-
three had not submitted any names.\textsuperscript{154} Even the Veterans' Administration does not submit the names of illegal drug users known to its physicians and administrators to NICS.\textsuperscript{155} Incredibly, as of 2011, the Drug Enforcement Administration had not submitted a single drug user's name to NICS.\textsuperscript{156}

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.\textsuperscript{157} As indicators of dangerousness due to mental illness, these categories are both over and under-inclusive. Involuntary mental hospital commitments have decreased precipitously over the past several decades. The inpatient population decreased from 550,000 in the mid 1950s to 30,000 in 1990.\textsuperscript{158} Adjudications of persons as mentally defective are rare, mostly triggered by a family's desire to establish a guardianship over a (usually elderly) person who might otherwise dissipate his or her resources.\textsuperscript{159} Moreover, states have been very reluctant to submit even


\textsuperscript{155} 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 12,023 federal controlled substance records in NICS, all but 1391 came from CSOSA. Id. at 8.

\textsuperscript{156} Id.

\textsuperscript{157} 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.

\textsuperscript{158} 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.

\textsuperscript{159} 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_1bf157b-155f-50ea-a9e-152692ef290b.html. In February 2017, the House struck down Obama-era regulations, which required the Social Security Administration to report people receiving disability benefits, who have been found mentally incapable of managing
these names to NICS, citing state privacy laws.\(^{160}\) Despite the George W. Bush Administration’s attempt to encourage states to submit to NICS the names of persons who have been civilly committed or adjudicated mentally defective,\(^{161}\) in 2011 twenty-three states and the District of Columbia submitted fewer than one hundred names to NICS.\(^{162}\) Seventeen states submitted fewer than ten names; four states submitted none.\(^{163}\)

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.\(^{164}\) They charge that such record keeping violates patient privacy, stigmatizes mental illness, and discourages people from seeking treatment.\(^{165}\)

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.”\(^{166}\) Mental health treatment professionals and advocates for the mentally ill vigorously oppose this law on the ground that there is no correlation between suffering from mental illness and engaging in violent behavior, much less gun violence.\(^{167}\) Research consistently shows that, as a group, people treated for mental health problems are not more dangerous than those in the general population.\(^{168}\) Further, when a person suffering

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\(^{160}\) Federal Law on Mental Health Reporting, supra note 16.


\(^{162}\) MAYORS AGAINST ILLEGAL GUNS, supra note 155, at 3.

\(^{163}\) Id.


\(^{165}\) Id.

\(^{166}\) 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).

\(^{167}\) Jacobs & Fuhr, supra note 165, at 89–90.

\(^{168}\) JOHN HOPKINS BLOOMBERG SCH. PUB. HEALTH, CONSORTIUM FOR RISK-BASED FIREARM POLICY, GUNS, PUBLIC HEALTH AND MENTAL ILLNESS: AN EVIDENCE-BASED APPROACH FOR STATE
from mental illness does engage in violence, it is more likely to be self-inflicted. The NCIC only holds records of “criminal aliens whom immigration authorities have deported and aliens with outstanding administrative warrants of removal.” 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. There is no available information about the gun crime proclivities of persons dishonorably discharged from the armed forces. It seems


173. See id.


175. See id.

176. See id.
unlikely that they pose an elevated risk of gun violence for the rest of their lives.

At the same time, NICS does not search databases of some people whom the FBI has designates as potentially dangerous,177 for example, those in the Terrorist Screening Database.178

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 blocked individual could recruit a straw purchaser to buy a gun or, instead, purchase one on the black market. He could also borrow, steal, or make a gun.179

C. Implementation

i. FFL Initiated Background Checking

Under the Brady Law, FFLs have to submit name and identification information of firearms purchasers to NICS.180 Failure to comply is punishable by a fine and up to ten years’ imprisonment and constitutes grounds for forfeiting the FFL’s license.181 It is the FFL’s responsibility to verify that the purchaser is the same person as the person on the identification document.182 Thus, a firearms-ineligible person could present a 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.183 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 State 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.\(^{184}\) 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.

\(\text{ii. Background Checking via Licensing System}\)

Under a permit or licensing model, the prospective gun owner initiates the background check by submitting a firearms license application to a state agency.\(^{185}\) 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.\(^{186}\) 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.\(^{187}\) This is a more effective screening model, as long as the FFL or private seller is scrupulous in requiring the

\(^{184}\) 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). From January 2014, private transferors and transferees may request an FFL to contact the DESPP on their behalf. Id. § 29-37a(f).


\(^{186}\) Background Check Procedures, supra note 107.

purchaser to provide photo identification. Even then, a firearms-ineligible purchaser could present false documentation. An FFL could overlook or purposefully ignore 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 4473s for all gun sales. This could be an inadvertent mistake, or a scheme to supply firearms to criminals. Because ATF audits each FFL no more than once every few years, undocumented transfers can easily be hidden. A corrupt FFL will not have retained, or even recorded, information documenting unlawful sales. Thus, if a corrupt FFL is identified, it will be due to an informant or defendant looking to obtain a favorable plea bargain will identify a rogue FFL.

Proactive policing requires time and resources. A prosecutable case will likely require an undercover operation or “sting.” 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. 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.

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188. 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. Admin. of William J. Clinton, Memorandum on Importation of Assault Pistols (Aug. 11, 1993), https://www.gpo.gov/fdsys/pkg/WCPD-1993-08-16/pdf/WCPD-1993-08-16-Pg1605-2.pdf.


190. NYC 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.

191. Id.
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, certainly will 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 the every transfer of every firearm. Such a registry would enable the police to determine, and 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. Federal law prohibits the ATF from maintaining a firearms registry or anything that could be converted to a registry.\footnote{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 REGISTRATION AND TRANSFER RECORD (2007), https://oig.justice.gov/reports/ATF/e0706.final.pdf.}

\section*{III. The Impact of Universal Background-Checking Policies}

It is difficult to measure the impact of background-checking laws on gun-related fatalities and crime.\footnote{Richard Rosenfield, Tracing the Brady Act’s Connection with Homicide and Suicide Trends, 284 J. AM. MED. ASS’N. 616, 616–17 (2000).} To date, the empirical research is equivocal. Economists Ludwig and Cook produced the leading empirical study of the impact of the Brady Law’s background-checking requirements.\footnote{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).} 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. 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. This is puzzling, as one would not expect that many persons contemplating suicide would be firearms-prohibited under the narrow federal disqualification for people who were previously civilly committed or adjudicated mentally defective; nor are they particularly likely to be disqualified for any other reason.

In a 2001 study, public health researcher Garen Wintemute found that a 1991 California law, which made a larger number of convicted misdemeanants firearms-ineligible, had a “moderate impact” on reducing gun crime. Wintemute 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. People in the “denied” group were barred under the 1991 from obtaining a permit. Wintemute 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,” (23.9% versus 20.1%) but not a “new non-gun and/or non-violent crime” (21.3% versus 22.8%). 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. 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 firearm purchase. In addition, the author was unable to control for prior gun crimes.

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195. Id. at 585 (emphasis added).
198. Id. at 1019.
199. Id. at 1019–20.
200. Id. at 1022.
201. Id. at 1019–22.
Public health professor Daniel Webster and his colleagues examined the impact of Missouri’s 2007 repeal of its permit-to-purchase law. Prior to the repeal, the licensing authority conducted background checks on permit-to-purchase applicants. 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. The authors claim that the repeal of this law is largely responsible for the thirty-four percent increase in firearm Missouri homicides from 2007 to 2008. 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. This delay, Cramer argues, casts doubt on a causal relationship between repeal and the spike in firearm homicides. 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. 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.

Webster supports his interpretation of the spike in homicides by pointing to a “relatively stable” Missouri firearm homicide rate from 1999–2007. In other words, the 2008 spike could only, or at least most


203. Id. at 294.

204. Id. at 293–94.

205. Id. at 296.


207. Id.


210. Webster et al., supra note 203, at 296.
plausibly, be explained by repeal of the licensing law.²¹¹ The data do not support this hypothesis. The firearm homicide rate in Missouri increased by 32.2 percent from 2003–2005. If repeal caused the 2007–2008 spike in firearm homicides, what explains the 2003–2005 spike? Moreover, Webster does not present any data on firearm suicides. In fact, the firearms suicide rate decreased by eight percent from 2007–2008.²¹²

Cramer examined homicide rates in states with some version of UBC, comparing the average murder rate for the five years before and after UBC.²¹³

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

Cramer’s data show that there were statistically significant declines in murder rates for two of the eight states; six states experienced increased murder rates after adopting background-checking laws.²¹⁴ Murder rates in two of the three statistically insignificant states increased; the other experienced a decline.²¹⁵

On the basis of these studies, it cannot be said that empirical research supports the hypothesis that purchaser background checking reduces gun homicides, gun crime or gun suicides. Of course, the negative is not proven either. It is possible that background checking does have a

²¹¹. Id. at 298.
²¹³. See Cramer, supra note 207.
²¹⁴. Id. at 5–6.
²¹⁵. Id.
depressing impact on firearm-violence, but that the impact is masked by other variables that have not so far been controlled for.

IV. CONCLUSION

Universal firearms background checking is often cited as the best example of sensible gun control measures. Nevertheless, proponents have given little attention to explaining what UBC means, how it should be implemented and enforced, and what reductions in firearm violence should be expected.

Since 1993, every person who purchases a firearm from an FFL must pass an NICS background check. However, the Brady Law did not require background checks for purchasers of firearms from private sellers, whether at gun shows or anywhere else. 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 checking for all secondary firearms sales at gun shows and for sales resulting from online and print advertising. The Manchin-Toomey Amendment did not go as far as New York’s and California’s laws, which require all private gun sellers to process their sales through an FFL who initiates a purchaser background check.

UBC proponents 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 is by far the most comprehensive database NICS searches, and it accounts for the large majority of people blocked from acquiring a firearm. It is often claimed that every such blocked sale constitutes a net

217. Universal Background Checks, supra note 3.
219. Universal Background Checks, supra note 3.
220. NICS OPERATIONS REPORT 2013, supra note 34, at 18.
A felony conviction, no matter for what offense and no matter how long ago, is not a strong indicator of future dangerousness.

Even more deflating to the hypothesis that UBC significantly reduces gun violence is the ease with which UBC can be circumvented, via straw purchasing and non-compliant gun sellers. 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 a seller is prosecuted, juries might nullify, at least in counties where gun ownership is popular.

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. Nonetheless, the expected benefits of UBC must be tempered by a realistic assessment of implementation and enforcement difficulties and the ease of circumvention.

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