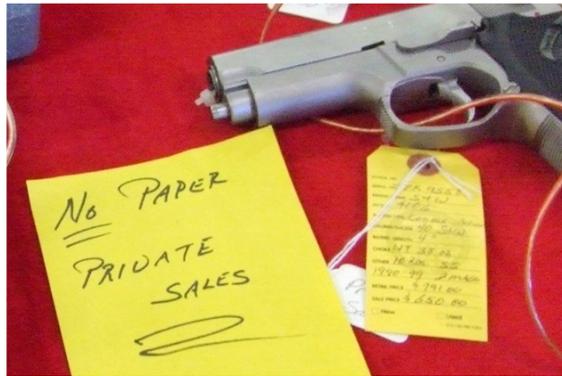


# Background Checks for Firearm Transfers



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# Background Checks for Firearm Transfers

Assessment and  
Recommendations

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## EXECUTIVE SUMMARY

Firearm-related criminal violence remains an important threat to the nation's health and safety. To help prevent firearm violence, federal statute prohibits felons, those convicted of domestic violence misdemeanors, and certain others from acquiring or possessing firearms. Persons who acquire firearms from licensed gun dealers and pawnbrokers must provide identification and undergo a background check to verify that they are not prohibited persons. A permanent record is kept, in case the firearm is later used in a crime. But perhaps 40% of all firearm acquisitions, and at least 80% of those made with criminal intent, are made from private parties. No identification need be shown; no background check is conducted; no record is kept.

Identifying prohibited persons through background checks and denying their firearm acquisitions has been shown to reduce their risk of committing new firearm-related or violent crimes by approximately 25%. Policies that require all firearm transfers to be routed through licensed retailers, so that background checks are completed and records are kept, are in effect in six states. Their feasibility is proved. At gun shows in states where such policies are in effect, direct private-party firearm transfers rarely occur.

Comprehensive background check policies have been shown to disrupt firearm trafficking and to yield more accurate, up-to-date firearm tracing information for law enforcement. The impact of state-level policies, however, is blunted by firearm trafficking from states where such policies are not in effect.

### Recommendations

The United States should adopt a comprehensive background check policy—one that requires all firearm transfers (with certain exceptions) to include a background check on the person acquiring the firearm and the retention of a permanent record. This would establish a simple, single, equitable structure for retail commerce in firearms.

Two pitfalls should be avoided. First, the policy should not be limited to transfers at gun shows (an approach known as closing the “gun show loophole”). Gun shows account for only a small proportion of private-party firearm transfers, and most crime-involved firearms acquired at gun shows are acquired from licensed retailers.

Second, the policy should not exempt holders of concealed weapon permits and other firearm-related licenses. A small but important fraction of such individuals are in fact prohibited persons.

Few policy proposals on any subject have such broad public support. In January 2013, 88.8% of the population overall, 84.3% of firearm owners, and 73.7% of members of the National Rifle Association supported background checks for all firearm transfers.

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This report concerns a comprehensive background check policy for firearm transfers, including sales, trades, and transfers of other types. Such a policy would extend the background check requirement that now applies to transfers by licensed retailers to include transfers by private parties, with certain exceptions. The report reviews the current dual structure of retail firearms markets in the United States and the historical underpinnings of that structure. It then considers the evidence that the private-party market is a particularly important source of firearms used in crime and the evidence that requiring background checks for private-party transfers is an effective violence prevention strategy. It proceeds to recommendations based on that evidence. As used here, forms of the words sales, purchases and buy refer to transfers of all types.

## **BACKGROUND**

Firearm-related criminal violence remains an important threat to the nation's health and safety. There were an estimated 467,321 firearm-related violent crimes in the United States in 2011, a 26% increase since 2008.<sup>1</sup> There were 11,101 firearm homicides that year, and an estimated 55,544 injuries resulting from firearm-related assaults required treatment in hospital emergency departments.<sup>2,3</sup>

As one means of preventing firearm violence, federal statute prohibits the purchase and possession of firearms by persons believed to be at unacceptably high risk of committing violent crimes, among others. Recent Supreme Court decisions have affirmed that an individual right to possess firearms is subject to restriction.<sup>4,5</sup> This report deals with the application and enforcement of those restrictions.

### **Firearm Commerce in the United States**

Modern retail commerce in firearms operates under the terms of the oft-amended Gun Control Act of 1968 (GCA). Congress drew on its authority to regulate interstate commerce in drafting GCA as it had with GCA's predecessor, the Federal Firearms Act of 1938.<sup>6</sup> Persons "engaged in the business" of selling firearms, as the law terms it, were required to obtain federal licenses and to buy and sell firearms following specified procedures. Private parties who sold firearms infrequently and not in the course of business were exempted, however. As a result, the United States has two quite different systems of retail commerce in firearms that operate in parallel.

## *America's Firearms Markets*

In 1995, Philip Cook and colleagues published a study that has done much to shape and clarify our understanding of how firearm commerce operates.<sup>7</sup> Buying and selling by licensed retailers is now referred to as the *primary market* for firearms; both new and used firearms are involved. The *secondary market* consists of transfers by unlicensed private parties such as the individual attendees at gun shows.<sup>7,8</sup>

The secondary market is much larger than is commonly thought. It is widely reported that approximately 40% of all firearms transactions occur directly between private parties. This estimate comes from the National Survey of Private Ownership of Firearms in the United States, for which data were collected in November-December 1994.<sup>9</sup> Respondents reported acquiring 251 firearms in the two years prior to the survey. Of these, 59.8% were obtained at a gun store, pawnshop, or other licensed retailer. Another 29.6% were acquired from a member of the family, a friend, or acquaintance; 3.9% at a gun show or flea market; 2.8% through the mail; and 3.8% from other sources. Some of those obtained at a gun show or through the mail were also likely purchased from a licensed retailer.

These data are old, and the number of observations is small. But there are other similar estimates suggesting that this approximately 60/40 split between the primary and secondary markets is accurate. Cook and colleagues<sup>7</sup> note a *Los Angeles Times* poll from 1992 in which 59% of persons in Southern California who had purchased a firearm recently had done so from a store. They cite other surveys going back to the 1970s that reported similar results. Most recently, in the 2004 National Firearms Survey,<sup>10</sup> 55% of 566 firearm owners reported that their most recent acquisition had been from a store; another 8% reported purchasing their firearm from a licensed seller at a gun show (Unpublished data, National Firearms Survey).

Even in the late 1960s, at the time Congress was debating the Gun Control Act, at least 25% of all firearm acquisitions occurred through the private-party transfers that would be exempted from the terms of the Act.<sup>11</sup>

Cook and colleagues<sup>7</sup> point out that, as for other commodities, there are a *legal market* and an *illegal market* for firearms. The movement of firearms from the legal to the illegal market is the illegal market's chief source of supply. Firearm trafficking is the intentional diversion of firearms from the legal to the illegal market.

Finally, in considering how firearms become available for use in crime, it is useful to consider *point sources* and *diffuse sources* of those firearms.<sup>8</sup> Point sources are the venues linked to many known crime-involved firearms, usually licensed retailers.<sup>12</sup> Private-party sellers are generally among the diffuse sources that supply firearms for criminal use through many small-volume transactions between individuals, dispersed in time and place. Diffuse sources, taken together, are the leading proximate source of crime-involved firearms (more on this below).

## Federal Regulations Relating to Firearm Transfers

Federal statutes prohibit several categories of people from purchasing or otherwise acquiring firearms, whether from a licensed retailer or a private party, and from possessing firearms at any time. The categories include persons convicted of a felony or a misdemeanor domestic violence offense, controlled substance addicts, the most seriously mentally ill, and others.<sup>13</sup> The statutory language describing the prohibited categories is given in Table 1, and definitions of key terms are given in the Appendix.<sup>14</sup>

Most of the prohibitions arise from criminal activity, with convictions for misdemeanor crimes of domestic violence added in 1996. **Convictions for other violent and firearm-related misdemeanors, such as battery and brandishing a firearm, do not prohibit firearm ownership under federal law.** A federal prohibition is permanent unless it arises from a domestic violence restraining order, in which case it exists only while the restraining order remains in effect.

Eligibility according to age is treated variably. Under federal statute, persons less than 21 years of age may not purchase handguns from a licensed retailer, but they may purchase rifles. Because federal statutes do not regulate private transfers, persons ages 18-20 may legally purchase handguns from private parties. Persons less than 18 years of age may not purchase firearms of any type, whether from a licensed retailer or a private party.<sup>14</sup>

Table 1. Categories of persons who are generally prohibited from purchasing or possessing firearms under federal law

A person is prohibited who:
Is under indictment for, or has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year
Is a fugitive from justice
Is an unlawful user of or addicted to any controlled substance
Has been adjudicated as a mental defective or has been committed to any mental institution
Being an alien, is illegally or unlawfully in the United States or has been admitted to the United States under a nonimmigrant visa
Has been discharged from the Armed Forces under dishonorable conditions
Having been a citizen of the United States, has renounced his citizenship
Is subject to a court order that restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person
Has been convicted in any court of a misdemeanor crime of domestic violence

From 18 USC § 922(d). See the Appendix for definitions.

### *A Double Standard*

In order to sell a firearm, a federally licensed retailer such as a firearm dealer or pawnbroker must see the buyer's identification. The buyer must complete a lengthy Firearms Transaction Record and certify on that form, under penalty of perjury, that he is buying the firearm for himself and is not a member of any of the prohibited groups listed in Table 1. The retailer must submit the seller's identifying information to the National Instant Criminal Background Check System (NICS), administered by the Federal Bureau of Investigation, for a background check. Staff at NICS then check criminal history and other records to verify the buyer's eligibility to purchase firearms. In over 90% of cases this background check is completed within minutes,<sup>15</sup> but if important information is missing the buyer may have to wait up to three business days to acquire the firearm. In so-called Point of Contact states, the retailer's submission is made to a state agency, which contacts NICS and performs additional checks on its own.

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The retailer must keep a permanent record of each purchase; these records include specific identifying information for both the buyer and the firearm. If the same person buys more than one handgun from him within five business days, the retailer must file a special report with ATF. (This requirement does not apply to purchases of rifles or shotguns.)

These procedural safeguards are intended to ensure that the buyer is who he says he is, that he and not someone else will be the actual owner of the firearm, and that he is not prohibited from owning it. They help prevent the large-volume purchasing that otherwise might fuel trafficking operations. They establish a chain of ownership that will help law enforcement authorities link the firearm to the buyer if it is used in a crime later.

But a private party can sell that same firearm—or many firearms—and none of these federal safeguards will be in place. Private-party sellers are not required to ask for identification. They *cannot* initiate a background check, except in Delaware, Nevada, and Oregon, where they may do so voluntarily. There are no forms to fill out, and no records need be kept.

And even if the purchaser is a prohibited person, let alone a non-prohibited person with criminal intent, a private party may sell him a firearm without committing a crime. The key is that while it is always illegal for a prohibited person to buy a firearm, it is only illegal to sell a firearm to a prohibited person if the seller knows or has “reasonable cause to believe” that he is doing so.<sup>13</sup>

How did this come to pass? Recall that GCA’s provisions as to firearm transfers apply only to those who are “engaged in the business” of selling firearms. As originally enacted, GCA did not define that phrase. ATF considered the sale of five or more firearms annually to signify engagement in the business,<sup>8</sup> and federal courts upheld convictions for selling firearms without a license in cases involving as few as six firearms.<sup>16</sup>

Any clear understanding of what “engaged in the business” might mean was abolished by the 1986 Firearm Owners Protection Act (FOPA). The new law ambiguously defined a person as engaged in the business who “devotes 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.”<sup>17</sup> Muddying the waters further, FOIA defined “with the principal objective of livelihood and profit” to mean “that the intent underlying the sale or disposition of firearms is predominantly one of obtaining livelihood and pecuniary gain, as opposed to other intents, such as improving or liquidating a personal firearms collection.”<sup>18</sup> It specifically excluded from the scope of engagement in the business 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.”<sup>17</sup>

The practical result was to make it much more difficult to set an upper limit to the number of firearm transfers that an individual could make without being required to have a license and comply with the procedural safeguards described above. Today, private parties sometimes sell large numbers of new and used firearms while claiming hobbyist status and exemption from the requirements imposed on licensed retailers.<sup>19-21</sup> ATF summarized the situation this way in a 1999 study of gun shows: “Unfortunately, the effect of the 1986 amendments has often been to frustrate the prosecution of unlicensed dealers masquerading as collectors or hobbyists but who are really trafficking firearms to felons or other prohibited persons.”<sup>16</sup>

## The Importance and Limitations of Background Checks

Background checks on persons purchasing firearms from licensed retailers have only been required under federal law since March 1, 1994, when the Brady Handgun Violence Prevention Act took effect. From then through 2009, the most recent year for which full data are available, 107,845,000 background checks were performed; 1,925,000 (1.8%) purchases were denied.<sup>22</sup> In 2009 alone, 10,764,000 background checks were performed, and 150,000 (1.4%) denials resulted.

Prior to the Brady Act, no background check was required in 32 states to verify purchasers’ statements that they were not prohibited persons. The 18 other states had enacted background check requirements of their own, sometimes many years earlier.<sup>23</sup> When the Act first took effect, states where no background checks had previously been required found that as many as 9.4% of persons who sought to purchase firearms from licensed retailers, and who had just certified under penalty of perjury that they were eligible to own firearms, were in fact prohibited persons.<sup>24</sup>

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Today, NICS background checks are run on three FBI databases: the Interstate Identification Index, which contains criminal history information; National Crime Information Center data, which includes persons subject to domestic violence restraining orders and arrest warrants; and the NICS Index, which contains information on persons prohibited for other reasons, such as severe mental illness. The Department of Homeland Security's Immigration and Customs Enforcement (ICE) data are searched as well.<sup>15</sup>

The checks are only as good as the data on which they rely. A 2004 report<sup>25</sup> documented widespread unavailability of mental health records, records for misdemeanor crimes of domestic violence, and protection orders. Many cases have come to light before and since of serious crimes committed by firearm purchasers who were prohibited persons but were not identified during background checks because the data were not available.<sup>26</sup> Russell Weston, who killed 2 police officers at the United States Capitol in 1998, had been committed in Montana with a diagnosis of paranoid schizophrenia. The diagnosis was not reported, and he was able to purchase the firearms he used for the murders at a gun shop in Illinois. Most famously, Seung-Hui Cho was able to purchase handguns, despite an outpatient mental health commitment by a Virginia judge, because the commitment was not reported to NICS. In 2007 he used those firearms to kill 32 students and teachers at Virginia Tech.<sup>26</sup>

The NICS Improvement Act Amendments were adopted shortly after the Virginia Tech incident and in direct response to it. Many states have received grants to make improvements in their recordkeeping and reporting practices. A related program, the National Criminal History Improvement Program, has been in existence since the mid-1990s. Its awards to states have exceeded \$500 million.

Important gaps remain. In the most recent survey by the Bureau of Justice Statistics,<sup>27</sup> only 16 states, representing 26% of persons with criminal histories, reported that 80% or more of recent arrests had final dispositions recorded. Only 37 states maintained central files of protection orders. As of November 2012, the NICS Index contained records for approximately 4,000 people subject to domestic violence restraining orders, 90,000 people convicted of domestic violence misdemeanors, and 18,600 unlawful users of or addicts to controlled substances (Table 2).<sup>28</sup> All of these are gross undercounts.

When incomplete information or other problems arise, background checks cannot be completed immediately and are considered delayed. **Approximately 8% of checks are delayed each year.**<sup>15</sup> The Brady Act allows for a waiting period of up to three days in such circumstances, but after that time the purchaser may take possession of the firearm even though the check is not complete. This occurred 3,166 times in 2011.<sup>15</sup> In such cases, ATF agents must contact the purchasers and recover or arrange other dispositions for the firearms.<sup>29</sup>

Table 2. Active records in the NICS Index as of November 30, 2012

Prohibited Category	Number	Percent
Illegal unlawful alien	5,187,142	62.8
Adjudicated mental health	1,796,058	21.7
Convicted of a crime punishable by more than one year or a misdemeanor punishable by more than two years	723,819	8.8
Fugitive from justice	373,814	4.5
Misdemeanor crime of domestic violence conviction	89,876	1.1
Federally denied persons file	34,779	0.4
Renounced U.S. citizenship	20,654	0.3
Unlawful user/addicted to a controlled substance	18,619	0.2
Dishonorable discharge	10,119	0.1
Protection/restraining order for domestic violence	3,986	0.1
State prohibitor	1,165	0.0
Under indictment/information	849	0.0
Total	8,260,880	100.0

From Federal Bureau of Investigation. NICS Index 2012. Available at: [http://www.fbi.gov/about-us/cjis/nics/reports/20121203\\_nics-index.pdf](http://www.fbi.gov/about-us/cjis/nics/reports/20121203_nics-index.pdf).

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## State Regulations Relating to Firearm Transfers

In 33 states, statutes regulating firearm transfers do not go beyond those enacted by Congress. But 17 states regulate at least some private-party transfers, usually by requiring that the seller have the transaction processed by a licensed retailer (Table 3).<sup>14</sup> Such transactions then are subject to the same procedural safeguards that apply to the licensed retailer's own sales: identity is confirmed, a background check is performed, and a record is kept. Six states require background checks for all firearm transfers, regardless of firearm type or place of transfer, and another nine do so for all handgun transfers. Two states require background checks for both handgun and long gun transfers at gun shows, and two states that require checks for all handgun transfers do so for long gun transfers at gun shows.

Not all states rely on the FBI to perform background checks. In 21 states, some or all retailer submissions are made to a state agency, referred to as a Point of Contact, which contacts NICS and performs its own additional checks. These additional checks matter, as we will discuss. In at least 17 states, the background check can be waived for holders of permits to carry concealed weapons and similar permits.<sup>22</sup> This has implications for a comprehensive background check policy that will be reviewed in the recommendations section.

In California, a comprehensive background check and recordkeeping policy has been in place since 1991. All firearm types are covered, but there are exceptions for certain transactions. These include a transfer between spouses or vertically between other immediate family members, such as from a parent to a child or a grandparent to a grandchild. Temporary transfers, such as infrequent and short-term loans between persons who are personally known to each other, are also exempted. There are no exemptions for holders of concealed weapon or other permits. Private parties are still allowed to sell firearms, in small numbers and involving a licensed retailer to satisfy the background check and recordkeeping requirements.

There is no requirement that the seller and buyer be present at the licensed retailer simultaneously. In fact, the most common type of private-party transfer may involve consignment; the seller deposits firearms with the retailer, and the buyer and seller are never known to one another. Some retailers maintain separate display space for consignment firearms. At gun shows, designated retailers serve as transfer stations

to facilitate sales between individual attendees.

The retailer is allowed to charge a fee of up to \$10 per firearm for serving as a transfer agent (the fee is less per firearm for transfers involving multiple firearms). A purchaser may pick up his firearm from the retailer only after the state's regular 10-day waiting period has expired. The increased foot traffic at participating retailers provides opportunities to develop new customers. As one retailer explained, "when they come in to do the paper, everybody needs bullets and cleaning supplies."<sup>30</sup>

The system does not seem to impair the operations of California's legal firearms market. More than 601,000 firearms were sold in the state in 2011.<sup>31</sup> Trends in the California market reflect those occurring nationwide. Firearm sales increased 15.6% per year, on average, over the last five years for which data are available.<sup>31</sup> A leading industry newsletter has described California's market as "lucrative."<sup>32</sup>

Table 3. State regulation of private-party firearm transfers\*

State	Handgun Transfers		Long Gun Transfers	
	All Transfers	Gun Shows Only	All Transfers	Gun Shows Only
California	●		●	
Colorado		●		●
Connecticut	●			●
Hawaii	●		●	
Illinois	●		●	
Iowa	●			
Maryland	●			
Massachusetts	●		●	
Michigan	●			
Missouri	●			
Nebraska	●			
New Jersey	●		●	
New York	●			●
North Carolina	●			
Oregon		●		●
Pennsylvania	●			
Rhode Island	●		●	

\* In the remaining 33 states, private-party firearm transfers are not regulated.

From *Survey of State Procedures Related to Firearm Sales, 2005*. Washington, DC: Bureau of Justice Statistics; 2006. NCJ 214645.

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## EVIDENCE OF NEED

### Prohibited Persons at Increased Risk for Criminal Activity

If the intent behind prohibiting firearm purchases by persons with specific characteristics is to prevent firearm-related violence, then it is reasonable to expect to see evidence that persons with those characteristics are at increased risk for violence. We briefly review the evidence for the most important prohibiting characteristics.

#### *Age*

The demographics of risk for committing firearm-related violent crime have been well described by many authors. Risk is strongly and inversely related to age. In a major review published in 2004, the National Research Council noted that the increases in rates of homicide perpetration occurring during the late 1980s and 1990s were greatest among young people.<sup>33</sup> The significance of the fact that persons ages 18-20 may legally purchase handguns from private parties, though not from retailers, is that risk for committing violent crimes peaks at that same age range (Figure). Risk associated with age is discussed more fully by Vitti and colleagues in the recent report of the John Hopkins firearm policy summit.<sup>34</sup>

Figure. Arrest rates for violent crime (murder, rape, robbery, aggravated assault) by age, United States, 2011



Note that the shape of the curve is distorted by the varying number of years assigned to age groups.

From Federal Bureau of Investigation. Uniform Crime Statistics. Available at [www.fbi.gov](http://www.fbi.gov).

*Prior Criminal History*

Risk for new criminal activity is increased among persons with a prior criminal history. Early studies found repeatedly that, whatever their age, persons who had been arrested had relative risks for a new arrest on the order of four to five as compared to never-arrested persons.<sup>35-37</sup> Absolute risk could be very high; among convicted felons released in 1983, 70% of those less than 25 years of age were arrested at least once (and usually several times) for a subsequent felony or serious misdemeanor within three years.<sup>35</sup>

More recent data confirm and extend these findings. Among more than 270,000 inmates released from prison in 1994, 67.5% were rearrested and 25.4% were returned

to prison with a new sentence within 3 years.<sup>38</sup> The incidence of re-arrest was 40.6% with 1 prior arrest, 47.5% with 2, 55.2% with 3, and rose to 82.1% for those with 16 or more. This dose-response phenomenon—the more extensive the prior criminal record, the greater the risk of subsequent offending—has been found repeatedly.

The aggregate impact of recidivism on violent offending was reviewed recently by the National Academy of Sciences.<sup>33</sup> Several studies have shown that 6% to 10% of offenders commit more than 50% of violent offenses, and 20% of offenders account for some 80% of all offenses.

The most recent work finds again that serious criminal activity in the present is concentrated among those with a history of serious criminal activity in the past. In Illinois, 42.6% of persons arrested for homicide in 2001, but only 3.9% of the general population, had one or more prior felony convictions.<sup>39</sup> Vittes and colleagues, working with the 2004 Survey of Inmates in State Correctional Facilities, found similarly that 40.3% of those incarcerated for firearm-related crimes were prohibited from acquiring firearms when those crimes occurred.<sup>34</sup>

Note that in both cases the majority of offenders were not prohibited persons when their offenses were committed. The policy implications of this are discussed in the chapter on expanding denial criteria in the recent report of the John Hopkins firearm policy summit.<sup>40</sup>

Risk of recidivism following an index offense is known to decline with time. Blumstein and Nakamura found that approximately 20 years were required for risk of a new arrest among 18-year-olds who had been arrested for violent or property crimes to return to the level seen among 18-year-olds who had never been arrested.<sup>41</sup> Using different populations, but again studying only juveniles and young adults, Kurlycheck and colleagues found risk returned to baseline after less than 10 years.<sup>42,43</sup> In the United Kingdom, the time required appears to be between 10 and 15 years.<sup>44</sup>

There appears to be no parallel research on the decline in risk of recidivism among firearm owners. Results for young adults are probably not generalizable to older offenders.

### *Criminal History among Firearm Owners*

Many of the epidemiologic findings for violent and other criminal activity in the general population also apply to persons who have passed a background check and legally purchased firearms.<sup>45-48</sup> Younger purchasers are at greater risk than others. Purchasers with prior misdemeanor convictions, particularly when violence is involved, are at greatly increased risk for violence later. A dose-response relationship exists. This research has recently been reviewed in depth.<sup>40</sup>

One study bears directly on the design of a comprehensive background check policy. That study examined the incidence of criminal activity serious enough to prohibit firearm ownership among people who had previously, and legally, purchased handguns.<sup>48</sup> The study was conducted in California after the state began prohibiting violent misdemeanants from purchasing firearms, and such persons were not part of the study population. A cohort of 7,256 handgun purchasers, 4,495 with no prior criminal record and 2,761 with a non-prohibiting criminal history at the time of purchase in 1991, were followed for up to five years. Criminal activity was uncommon among those with no criminal history, but 4.5% of purchasers with one or more prior nonviolent misdemeanor convictions were subsequently convicted of a crime that prohibited them from owning the firearms they had purchased.

For handgun purchasers with three or more prior misdemeanor convictions, as compared with purchasers with no prior criminal history and after adjustment for age and sex, risk of conviction for any prohibiting offense was greatly increased (hazard ratio, 13.6), as was risk of conviction for the violent Crime Index offenses: murder, rape, robbery, and aggravated assault (hazard ratio, 11.0). Age and prior criminal history acted synergistically; as compared with purchasers ages 35-49 with no prior criminal history, those ages 21-24 with three or more prior misdemeanor convictions had arrest rates for all types of offenses that were increased by a factor of approximately 200.

### *Serious Mental Illness*

The relationship between violence and disorders of mental health is complex, as is defining the proper threshold for prohibiting firearm purchase and ownership. Both

are discussed more fully by Swanson and colleagues in the recent report of the John Hopkins firearm policy summit.<sup>49</sup>

Three large and recent general population studies have helped to clarify the basic relationships. The National Epidemiologic Survey on Alcohol and Related Conditions found associations between risk of violence and a wide array of psychiatric disorders that were generally limited to persons who had both a psychiatric disorder and co-morbid substance abuse.<sup>50</sup> The prevalence of violent behavior ranged from 12% to 25% in such groups, depending on the specific disorders involved.

Longitudinal data from the National Epidemiologic Survey on Alcohol and Related Conditions revealed little association between risk for violence and psychiatric disorders when demographics and socioeconomic status were adjusted for and substance abuse was absent.<sup>51</sup> The strongest association was found when substance abuse, psychiatric disorder, and a prior history of violence were considered together. For subjects with all three of these traits, as compared to others with none of them, risk for future violence was increased by a factor of 10.

Finally, the National Comorbidity Survey also found that an association between violent behavior and psychiatric disorder was much attenuated when demographics were accounted for and greatly increased when co-morbid substance abuse was present. Risk for violence was particularly increased among those whose psychiatric diagnosis had recently been made.<sup>52</sup>

Of particular interest here is the risk of violence among recently-discharged patients who were hospitalized for psychiatric emergencies and determined to pose a danger to themselves or others, typically after threats or acts of violence. Two recent reviews of policies relating mental health and firearms possession have noted that the literature here is sparse.<sup>26,53</sup> The incidence of violence in this group may be very high, approaching 50% in some studies.<sup>54,55</sup> Risk of violence to others is high even among those who have threatened or caused harm only to themselves.<sup>56,57</sup>

Assessing risk for violence at the individual level remains difficult, but validated risk stratification instruments have been developed.<sup>58,59</sup>

## Criminal Acquisition of Firearms from Private Parties

Private-party firearm transfers are quick—they can be completed in less than a minute—and convenient. Even a completely law-abiding purchaser might appreciate the absence of paperwork that characterizes private-party transfers. Their anonymity attracts those who put privacy at a premium.

But the same attributes that make private-party transfers convenient also make them the only viable option for prohibited persons, and the principal option for purchasers with criminal intent for whom a record of the transfer would be problematic. Again, it is only illegal to sell a firearm to a prohibited person if the seller knows or has “reasonable cause to believe” that he is doing so.<sup>13</sup> The matter is easily finessed. As one private-party seller said while contemplating a possibly illegal handgun sale at a gun show, “Of course, if I don’t ask, nobody knows.”<sup>21</sup>

As discussed earlier, data from many sources suggest that 40% of all firearm transfers nationwide are private-party transactions. For those who commit crimes with the firearms they acquire, that percentage at least doubles. This is a key point in weighing the merits of a comprehensive background check policy.

Four large-scale surveys of persons incarcerated for firearm-related felonies in the 1990s, all supported by the Department of Justice, asked these inmates where they acquired the firearm they used in the crime for which they were incarcerated. The results fell into a narrow range; between 12% and 21% of these inmates acquired their weapons from licensed retailers.<sup>60-62</sup>

Vittes and colleagues recently reported a parallel analysis of data from the 2004 Survey of Inmates in State Correctional Facilities, the last such survey to be conducted.<sup>34</sup> These investigators improved on the prior work by determining whether the inmates were already prohibited from possessing firearms at the time of acquisition. Overall, 13.4% of respondents obtained their firearms from licensed retailers. For those who were already prohibited persons, purchases from licensed retailers fell to just 3.9%. The majority (69.6%) got their firearms from a friend, family member, or the street; 1.0% stole them; 7.8% named other sources; and 17.7% did not answer the question. (The findings beg the question: How were the prohibited persons able to purchase firearms from licensed retailers? Surrogate or straw purchases and false identification are

both likely possibilities.)

For juveniles (persons less than 18 years of age), direct purchase of any type of firearm from a licensed retailer is illegal, as are handgun purchases for persons ages 18-20. Private-party transfers are essentially their only source of firearms.<sup>63,64</sup> Straw purchases from licensed retailers occur, but appear to be uncommon.<sup>64</sup>

Private-party transfers are also an important component of firearm trafficking operations. Of 1,530 trafficking investigations conducted by ATF during 1996-1998, 314 (20.5%) involved unlicensed sellers.<sup>65</sup> The number of firearms involved was known for 301 investigations. The 22,508 firearms in cases associated with private-party sellers accounted 26.8% of all firearms in the cases studied. A related study evaluated data for trafficking operations involving juveniles and youth.<sup>66</sup> Of 648 such operations, 92 (14.2%) involved private-party sellers.

We do not know, or even have a good estimate, of how many prohibited persons acquire firearms each year through private-party transfers. Recall, however, that when background check requirements for transfers by licensed retailers were first put in place in some states by the Brady Act, as many as 9.4% of prospective purchasers were found to be prohibited persons.<sup>24</sup> These individuals were presumably aware that a background check was going to be performed, as this major policy change was much discussed at the time. It is not unreasonable to speculate that a similar or higher percentage of private-party transfers that do not involve background checks are made to prohibited persons.

Some private-party handgun sellers at gun shows make a point of checking the buyer's driver's license to be sure that they are not making an illegal transfer to an out-of-state resident.<sup>21</sup> Asking questions about the buyer's eligibility to purchase firearms, theoretically something that private-party sellers could do, probably guarantees unpleasantness (or worse) and risks the loss of the sale. In observational research at nearly 80 gun shows, such questioning was never observed.<sup>21</sup> Other private party vendors serve as "hotspots," making repeated transfers that serve criminal purposes.<sup>21,65</sup>

## Criminal Acquisition of Firearms at Gun Shows

Gun shows present a special case, in that large numbers of licensed retailers and private-party sellers are active in the same setting and competing for customers.<sup>16,20,21</sup> Between 25% and 50% of firearm sellers who rent table space at gun shows are private parties.<sup>16,20</sup> Such tables frequently carry “Private Sale” signs conveying the message that purchases require no paperwork, no background check, no waiting period, no record-keeping. Individual attendees who do not rent table space but bring firearms to sell are common. In a study by the author, as many as 31.6% of gun show attendees were armed, and many of these were unambiguously offering their firearms for sale.<sup>20</sup>

There are no data on the number of illegal private-party transfers made at gun shows, but it is clear that some sellers are willing to make them. Investigators working for the city of New York recently conducted “integrity tests” of 30 private-party sellers at seven gun shows in Nevada, Ohio, and Tennessee.<sup>67</sup> The subjects were selected after preliminary observation suggested they were in the business of firearm sales, although they were not licensed. An investigator then approached each seller and negotiated the purchase of a firearm, but during the negotiation said that he “probably could not pass a background check.” Of the 30 sellers, 19 completed the sales despite this clear indication that the buyer was a prohibited person. The other 11 aborted them.

As a highly visible marketplace for private-party transfers, gun shows have received a great deal of attention. Proposals have been made to require background checks for private transfers just at gun shows and not elsewhere, an effort termed closing the “gun show loophole.” But as detailed elsewhere,<sup>21</sup> the following points suggest a more nuanced understanding of the role gun shows play in legal and illegal commerce in firearms.

Gun shows account for a relatively small proportion of firearm transfers. The best published information on this point comes from the National Survey of Private Ownership of Firearms, discussed earlier.<sup>9</sup> In that survey, firearm owners were asked where they had obtained their most recently-acquired firearm. Four percent of the firearms had been acquired at gun shows. Unpublished data from the National Firearms Survey<sup>10</sup> yield a similar result; of 566 firearm owners, 9% acquired their most recent firearms at a gun show. California’s records of handgun sales for 1998 through 2007 indicate that 2.7% of sales occurred at gun shows, but under-reporting is likely.<sup>21</sup>

Most transfers at gun shows probably involve licensed retailers. ATF estimates that 50% to 75% of firearm sellers who rent table space at gun shows are licensed retailers.<sup>16</sup> The author's estimate of only 30% was based on observational data and almost certainly low.<sup>20</sup> The underestimate results from the fact that many licensed retailers at gun shows do not identify themselves as such—at least not until consummating a sale—though they are required to do so. The largest and most active vendors at gun shows are almost always licensed retailers.<sup>21</sup> Again, unpublished data from the National Firearms Survey agree.<sup>10</sup> Of respondents who purchased firearms at gun shows, more than 75% had bought them from licensed retailers.

Licensed retailers are also probably the primary source of firearms acquired at gun shows that are later used in crime. The one peer-reviewed study of gun shows as sources of crime-involved firearms developed data from 314 ATF trafficking investigations involving gun shows.<sup>19</sup> While an unlicensed seller was the main subject in most of the investigations (54.1%), two thirds of the trafficked firearms were linked to investigations in which the main suspect was (or had been) a licensed retailer. These retailer cases involved an average of 452 firearms apiece and 33,445 firearms in total; those centered on unlicensed sellers involved an average of 112 firearms each and 15,551 firearms altogether.

## Private-Party Transfers and Tracing Crime-Involved Firearms

One of the most valuable tools for solving firearm-related crimes and mapping criminal firearm trafficking networks is firearm tracing—reconstructing a firearm's chain of ownership. Traces are conducted by ATF in response to requests from law enforcement agencies all over the world. In 2011, ATF received more than 225,000 firearm trace requests from law enforcement agencies in the United States.<sup>68</sup>

A completed trace ordinarily begins with the firearm's manufacture and ends with its first retail sale. But more than 85% of the crime-involved firearms ATF is asked to trace are in the possession of someone other than their first retail purchaser when those crimes are committed, and the percentage is even higher for firearms recovered from juveniles and youth.<sup>69-71</sup> These firearms have gone through at least one private-party transfer.

Because they are undocumented, private-party transfers create missing links in

the chain of evidence connecting the first retail purchaser and the criminal from whom the firearm has been recovered. Finding those missing links can be impossible, or at best very expensive. The utility of restoring those links for law enforcement purposes, partly through comprehensive background checks, will be discussed later.

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## EVIDENCE OF EFFECTIVENESS

### Effects on Subsequent Criminal Activity

No controlled experimental research has determined the effects of a comprehensive background check policy on population-based rates of violent crime.<sup>72,73</sup> But two controlled studies have found that background checks and denial of purchases by prohibited persons reduce risk of arrest among the individuals who are directly affected. Other studies suggest that comprehensive background check policies interfere with the operations of criminal firearm markets and particularly with firearm trafficking. A third group of studies suggests that the adequacy of background checks performed under current policies is related to firearm homicide rates.

In the first controlled study of individuals, Wright and colleagues estimated the effectiveness of background checks and denial of purchase based on a prior felony conviction.<sup>47</sup> Their study population was made up of persons who sought to purchase handguns in 1977. They compared 177 individuals who failed a background check because of a prior felony conviction to 2,470 persons who passed their background checks but who had records of felony arrests. (These arrests may have resulted in misdemeanor convictions, but the convictions would not have been grounds for denial of purchase.) Subjects were followed for up to three years. In separate analyses adjusting for age and for the nature and extent of the prior criminal history, the felony arrestees whose purchases were approved had statistically significant increases in risk of arrest for offenses involving firearms or violence (relative risk of 1.1 to 1.3) as compared to the felons whose purchases were denied.

The second study evaluated California's 1991 decision to extend its prohibitions on firearm purchase and possession to persons convicted of violent misdemeanors. The prohibition lasts for 10 years following the conviction.<sup>46</sup> This study can be classed as a quasi-experiment. All study subjects were ages 21-34 and had violent misdemeanor convictions within 10 years of seeking to purchase their handguns. The intervention group comprised 927 persons who sought to purchase handguns in 1991 but failed their

background checks and were denied under the terms of the new policy. The control group comprised 727 persons who sought to purchase handguns in 1989 or 1990 and whose purchases were approved. Subjects were followed for up to three years. It is important to note that no selection was involved in the policy change; the intervention was applied to everyone eligible for it (persons attempting a purchase in 1991).

After controlling for age and extent of prior criminal history (important independent risk factors in this study population as always), those whose handgun purchases were approved were more likely than the denied persons to be arrested for new firearm-related or violent crimes (relative hazard of 1.3), but not for other crimes (relative hazard of 1.0). The investigators interpreted the specificity of effect—a decrease in risk was seen only for those crimes the new policy would be likely to affect—as consistent with the hypothesis that the difference was related to the new policy.

Webster and colleagues<sup>74</sup> examined the effect of a comprehensive background check policy on in-state firearm trafficking. They used data on traced firearms recovered by police during 2000-2002 in 54 cities that had participated in the Youth Crime Gun Interdiction Initiative. Their principal outcome measure was the ratio of traced firearms that were classified as likely to have been trafficked relative to other traced firearms. Firearms classified as likely to have been trafficked had first been sold by an in-state retailer, had a time from first sale to recovery following use in crime (called a time to crime) of less than one year, and had a possessor at the time of recovery who was not the firearm's original purchaser. These attributes suggest that a firearm has moved very rapidly into the criminal market and may have been purchased with that intent.<sup>75</sup>

Of the 20 cities with the lowest percentages of likely trafficked firearms, 18 were in states that had comprehensive background check policies. Of the 20 cities with the highest percentages, three were in such states. The mean value of the trafficked-firearm indicator for states without comprehensive background checks (4.4) was 2.4 times the value for states with such policies (1.8). In multivariate modeling, comprehensive background check policies remained associated with a substantial reduction in this indicator of firearm trafficking, even when controlling for other regulatory policies and the prevalence of firearm ownership. The effect was large: a 48% relative reduction without controlling for firearm ownership, which was only moderately attenuated when firearm ownership was added to the model.

A new study<sup>76</sup> provides results consistent with those obtained by Webster and colleagues. This multi-part examination of the effects of background check requirements and retailer regulation on the dynamics of criminal firearms markets compared California, with its comprehensive background checks and a separate regulatory scheme for firearms retailers, to other states. Recovered firearms had a uniquely long time to crime in California. The state's policies appeared to have a specific effect on firearm trafficking; firearms recovered in California were far less likely to have a time to crime of three years or less, another widely-used indicator that a firearm has been trafficked (21.1% versus 65.8%, respectively).

A final study of firearm trafficking based on tracing data<sup>77</sup> took as its primary outcome measure each state's "crime gun export rate": the number of firearms first sold in that state and later traced after use in crime elsewhere, controlling for the size of the state's population. The study also determined the extent to which each state was a net exporter or importer of crime-involved firearms.

The study examined state-level background check requirements and policies in nine other areas. Unfortunately, states were classified only as to whether or not they required background checks for handgun transfers at gun shows, even though six states had comprehensive background check requirements and others went further as well. These six were among the 10 states with the lowest crime gun export rates.<sup>78</sup> The study reported a benefit for policies requiring background checks for handguns at gun shows, but it appeared that the effect was actually attributable to states that had adopted comprehensive background check requirements.<sup>78</sup>

Benefits of a comprehensive background check policy in disrupting criminal firearm markets have also been seen in quantitative observational research. The work has been done at gun shows, where large numbers of firearm transfers can be observed directly in a short period of time.<sup>20,21</sup>

The best evidence comes from a study comparing gun shows in California, which regulates gun shows as well as private-party transfers, to shows in four states without such policies (Arizona, Nevada, Texas, and Florida) that are leading sources of firearms used in crime in California.<sup>20</sup> Events in all states were well attended, and commerce was brisk. Shows in California were smaller than those in the comparison states, whether measured by number of firearm vendors or number of attendees, but the number of attendees per vendor was larger.

No direct private-party transfers between attendees were observed in California. Instead, private-party transfers were completed with the assistance of a licensed retailer who had been designated to serve as a transfer agent.<sup>20</sup> At shows in the comparison states, such transactions occurred very frequently—an appropriately stationed observer could see several occurring at any one time.

Again, it is important to emphasize that such transactions are not necessarily illegal in the states where they occur. The problem is that, without identifying the purchaser and performing a background check, there is no way to know.

One unintended effect of California's policies may have been to displace illegal transfers to nearby and more permissive states. At some shows in Reno, Nevada, which is a short distance across the border, more than 30% of the vehicles in the parking lot were from California.<sup>20</sup> Such undermining of the benefits of more rigorous regulation in one state by lack of regulation in others has long been an argument for more rigorous regulation at the federal level.

On the other hand, an unexpected finding suggests diffusion of benefit. Though surrogate or straw purchases are illegal nationwide under federal law, they were more than six times as common in the comparison states as in California.<sup>20</sup>

Commenting on this study, *Shooting Sports Retailer*, a firearm industry trade magazine, agreed that “There is some evidence that gun shows with restrictive regulations mandating background checks have less illegal activity than shows in states or jurisdictions without this requirement.”<sup>30</sup>

It is important to consider the results of an evaluation of the Brady Handgun Violence Prevention Act, which at first seem counter to those of the work discussed so far.<sup>23</sup> As a new comprehensive background check policy would do, that legislation extended a background check requirement to a group of firearm transactions that previously had proceeded without one. In Brady's case, those transactions were sales by licensed retailers in states that did not have their own pre-existing background check requirements. Even in those states, however, purchasers were already required to show identification and certify in writing under penalty of perjury that they were not prohibited persons, and records were kept. With Brady, these certifications made by purchasers were for the first time subject to external verification.

The Act was found to have no effect on rates of firearm homicide, which decreased similarly in treatment states (states where the background check requirement was new) and in control states (those with a pre-existing state requirement, where no change in procedures occurred when the Act was adopted).<sup>23</sup> However, both the authors and others have noted that this lack of effect may have occurred precisely because some 40% of all firearm transfers—those made by private parties—were not subject to the provisions of the Act. Moreover, to the extent that the Act selectively created inefficiencies in the criminal firearm market in treatment states, it might have diminished their importance as a source of firearms used in crime in the more rigorously-regulated control states. This could plausibly have led to a reduction in homicides in both treatment and control states and a finding of no difference.<sup>23</sup> Finally, since the federal denial criteria are narrow, a relatively small population would have been affected. Effects on population-based rates would predictably have been difficult to observe.<sup>79</sup>

Two ecological studies have compared the thoroughness of background checks with firearm-related mortality rates. In the first, a state-level comparison was made between the nature of the agency (federal, state, or local) that performed background checks and the state's firearm homicide rate for 2002-2004.<sup>80</sup> At the time, as is true to a lesser but still important extent today, state and local agencies had access to information that was not available to federal agencies. In a multivariate analysis, and as compared to states in which background checks were done by federal agencies, firearm homicide rates were lower in states where background checks were done at the state level (rate ratio 0.8) or locally (rate ratio 0.8). The differences were not statistically significant by the conventional standard.

The more recent study addressed the data quality question more specifically. It categorized states as to whether they checked only criminal history records or also checked databases of restraining orders, mental health events, fugitive status, and misdemeanor records.<sup>81</sup> The outcome of interest was firearm homicide for 1996-2005. More extensive background checks were associated with lower rates of firearm homicide (rate ratio 0.9 per additional data source examined).

Neither study examined non-firearm homicide or included important covariates such as the prevalence of firearm ownership. As in all ecological studies, correlation does not imply causation. It cannot be said that the differences in background checks were responsible for the observed variation in homicide.

Finally, we consider three studies specific to domestic violence that have yielded mixed results. Using state-level data, **Vigdor and Mercy** found a 7% decrease in female intimate partner homicide rates following enactment of restraining order prohibitions on firearm possession.<sup>82,83</sup> There was no comparable effect, however, from prohibitions related to domestic violence misdemeanor convictions. More recently, **Zeoli and Webster** measured the impact of restraining order enforcement with data from 46 cities in 26 states.<sup>84</sup> **Prohibitions on firearm possession were associated with approximately 20% reductions in rates of intimate partner homicide, including firearm homicide.** These studies did not measure results for individuals who were directly affected by the prohibitions or determine whether or how those prohibitions were implemented and enforced.

The existing literature, then, supports an interim interpretation that background check and denial policies reduce risk of firearm-related or violent crime among those directly affected, but without a parallel effect on crimes not involving violence or firearms. They disrupt the operations of criminal firearm markets. These findings make intuitive sense and are consistent with the theory-driven hypothesis that such policies exert their effect by incapacitation through means reduction.

## Effects on Utility of Firearm Trace Data for Law Enforcement

Other studies have examined the effect of California's comprehensive background check requirement, in conjunction with its computerized archive of handgun purchase records, on the quality of data available to law enforcement for use in solving individual crimes and mapping trafficking networks. Again, a standard ATF firearm trace terminates with the first retail purchaser, but in 85% of cases the firearm has been recovered from someone else.<sup>69,85</sup> In California, tracing can efficiently proceed to the most recent known purchaser and not stop with the first.

This technique was applied to 2,121 firearms recovered from persons less than 25 years of age in California and traced in 1999.<sup>71</sup> California sales records were available for 186 (11.5%) of 1620 handguns. In 91 cases, these records provided important new information, including the only seller information in 41 and the only time to crime estimate in 61. For the 30 handguns for which a time to crime could be calculated from the ATF trace, the median time to crime was reduced from 5.5 years to 1.7 years. Examples are in Table 4.

Subsequent studies adopted this technique to help develop a profile of retailers who are important point sources of firearms that are later used in crime.<sup>12,86,87</sup> In these studies, 10% to 20% of traced firearms were assigned to a retailer other than the one identified in the ATF trace—a retailer who had sold the firearm more recently.

A newly-released study of traced firearms in California during 2003-2006 developed and applied an improved algorithm for matching ATF trace data to California sales records. It included 10,273 firearms for which the first retail purchaser identified by an ATF trace was matched by a record in California's sales archive.<sup>76</sup> For 1,978 of these firearms (19.3%) the archive also identified a subsequent transaction. For all 10,273 firearms, median time to crime decreased from 4.3 years using ATF data to 3.5 years when data from California records were added. The average distance from the recovery location to the retailer selling the firearm decreased from 81 miles to 34 miles.

There were also important changes in identification of persons associated with a firearm. The proportion of recovered firearms for which the purchaser was the same person as the possessor increased from 23.8% based on ATF data to 31.3% when California data were incorporated. It appears from ongoing analysis that increasing social proximity to the firearm's possessor by extending traces to the most recent purchaser will also help delineate trafficking networks.

Table 4. Results of standard ATF traces and traces incorporating additional California sales records for handguns recovered from young people in California and traced in 1999

Gun	Date of Recovery by Law Enforcement	ATF Sale Date	ATF Time from Sale to Recovery	California Sale Date	California Time from Sale to Recovery
GLC 23, .40	03/06/99	Unknown	Unknown	06/08/96	2.7 y
				05/22/98	288 d
				06/13/98	266 d
SW 910, 9mm	02/01/99	02/28/96	2.9 y	02/28/96	2.9 y
				09/20/98	135 d
SW Sigma,	09/28/99	04/28/95	4.4 y	03/19/97	2.5 y
				06/25/99	95 d
GLC 19, 9mm	12/22/98	04/21/98	245 d	12/01/98	22 d
CLT .25	02/17/99	Unknown	Unknown	12/19/98	62 d

Summary of example cases:

In case 1, a Glock Model 23, .40 caliber semiautomatic pistol was recovered on March 6, 1999 in Los Angeles. The standard trace identified the retailer who first sold the firearm, but the date of purchase and time from sale to recovery were unknown. California sales records identified three transactions, two of which occurred less than a year before the firearm's recovery.

In Case 2, a Smith and Wesson Model 910, 9mm semiautomatic pistol was recovered February 1, 1999. Both the standard trace and the sales records identified a first sale in February, 1996, but the sales records included a subsequent transfer just over four months prior to the firearm's recovery.

(Y denotes years; d denotes days.)

From Wintemute GJ. The life cycle of crime guns: a description based on guns recovered from young people in California. *Annals of Emergency Medicine* 2004;43:733-742.

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## RECOMMENDATIONS

The dual system of firearm commerce in the United States, in which perhaps 40% of all transfers are anonymous and undocumented, facilitates firearm acquisition by prohibited persons and purchasers with criminal intent. It is an important contributor to the prevalence of firearm violence in the United States. Comprehensive background check requirements apply the safeguards that have long been in place for firearm sales by licensed retailers to transfers by private parties. They restore a simple, single, equitable structure to retail commerce in firearms. They have been shown to be feasible, and the best available evidence is that they provide many concrete benefits. The United States should adopt a comprehensive background check requirement for firearm transfers.

The primary direct effect of such a requirement would be to prevent, or make substantially more difficult, the criminal acquisition of firearms. This is likely to have a substantial effect on firearm-related violence, since at least 80% of criminal acquisitions now occur through private-party transactions.

Many prohibited persons attempting to purchase firearms from private parties would be detected by the background checks, and their purchases would be denied. Background checks and denials reduce risk of violent and firearm-related crime among prohibited persons.<sup>46,47</sup> Today, more than 95% of prohibited persons who commit firearm-related crimes obtain those firearms through private-party transactions.<sup>34</sup> More than 40% of homicide offenders and inmates incarcerated for firearm-related offenses were prohibited persons when they acquired their firearms.<sup>39</sup>

Other buyers with criminal intent would be deterred by the new requirements for purchaser identification and record keeping. Recall in this context that 80% of felons incarcerated for firearm-related crimes who were *not* prohibited persons when they acquired their firearms nonetheless did so from private parties.<sup>34</sup>

To be sure, some prohibited persons and others with criminal intent will continue to seek firearms from private-party sellers, and some will succeed. There will still be individuals willing to sell firearms to prohibited persons. Even under current conditions,

however, acquiring firearms in the criminal market is not as easy as it is often thought to be.<sup>88</sup> It will become still more difficult, because a comprehensive background check policy changes the rules for sellers as well. Private parties will no longer be able to sell firearms—legally, at least—without determining whether buyers can legally purchase them. While some will continue to make direct transfers, these will now be crimes themselves and could be made prohibiting offenses.

These effects at the individual level, taken together, would interfere with the operation of criminal firearm markets and disrupt firearm trafficking operations.<sup>74,76</sup> It would likely become more difficult to move firearms in bulk along the Iron Pipeline from the Southeast to the Middle Atlantic and New England, from Mississippi to the upper Midwest, and from the United States to Mexico and Canada.

Mapping trafficking networks and investigating individual crimes would be aided by more complete records of firearm transfers. Increasingly, it would be possible for law enforcement agencies to identify the most recent purchaser of a crime-involved firearm, not the first.

California's policies, described earlier, provide a suitable model. Reasonable exemptions from the background check are allowed, such as for inter-generational transfers within a family and transfers between spouses. Private parties are still allowed to sell firearms, in small numbers, involving a licensed retailer so that a background check is conducted and a record is retained.

In order to avoid a massive increase in delayed denials, the current three-day limit to the waiting period for firearm purchases should be lifted. Firearm acquisition should be allowed once the buyer has passed the background check.

## Pitfalls to Avoid

### *Closing the "Gun Show Loophole"*

There has been much discussion of requiring background checks for private-party transfers only at gun shows, an approach known as closing the "gun show loophole." Opponents note that there is no such thing as a gun show loophole in federal law. They are correct, in the limited sense that the law does not exempt private-party

transfers at gun shows from regulation that is required elsewhere. As discussed in the section on criminal acquisition of firearms at gun shows, the fundamental flaw in gun show loophole proposal is its failure to address the great majority of private-party transfers, which occur at flea markets and swap meets, through classified ads in newspapers and publications for firearm enthusiasts, in homes, on the street, and increasingly over the Internet. Web sites such as Armslist.com, Gunbroker.com, and Gunsamerica.com contain thousands of online classifieds, and any non-prohibited person can list firearms for sale. Buyers can selectively search for private-party sellers.

Moreover, regulating private-party transfers at gun shows will not render those events unimportant as sources of trafficked firearms. Most trafficked firearms in investigations that involve gun shows are sold by licensed retailers.<sup>19,65</sup>

### *Creating an Exemption for Permit Holders*

The "Fix Gun Checks Act," introduced in the 112<sup>th</sup> Congress as S. 436 and H.R. 1781 and expected to be reintroduced in 2013, is likely to be a starting point for any Congressional consideration of comprehensive background checks. Much of the proposal concerns efforts to improve the registries of prohibited persons on which background checks rely. Such improvements are sorely needed.

But while the Act is described as requiring a background check for all firearm purchases, it does not. The problem lies in the fact that a prospective purchaser in at least 17 states may avoid a background check by presenting an unexpired firearm-related permit, such as a permit to carry a concealed weapon, for which a background check was required at the time of issuance. Such permits remain valid for as long as five years after issuance. As we have discussed, an important fraction of permit holders are likely to become prohibited persons during that time.<sup>48</sup> Their new prohibitions will most often result from new convictions for serious crimes, and risk for re-offending is highest shortly after a crime has been committed.

No state routinely recovers firearm permits that have not reached their nominal expiration dates from people who are no longer eligible to have them. Thus, under the current terms of the proposal, those permits will allow newly-prohibited individuals who are at high risk for committing new crimes in the near future to avoid background checks and acquire firearms.

Two other considerations apply here. By reducing the number of private-party transfers that generate permanent records, a permit exemption would limit the utility of firearm tracing data for solving individual crimes and mapping firearm trafficking networks. As noted previously, the exemption is unnecessary. States already operate comprehensive background check systems without it.

## Drawbacks, Costs, and Uncertainties

Subjecting private-party firearm transfers to background check and recordkeeping requirements would make them less convenient. Perhaps airport security screening provides a useful analogy. All of us, regardless of our individual risk of committing violence in the air, are subjected to this inconvenience in one form or another. We tolerate it, perhaps with some grim determination, knowing that it is one of the ways terrorists do get caught.

There would be a financial cost to those who buy firearms. In California, retailers may charge \$10 per firearm for processing private-party transactions, in addition to other fees required by the state. This is a small fraction of the purchase price of all but the least expensive firearms, however.

Some private-party sellers will object, finding the new requirements burdensome. But the great majority of individuals who sell firearms have no interest whatever in providing weapons for use by criminals. They will see the value of involving retailers for background checks and recordkeeping as a means to prevent violent crime. It is unreasonable to expect private-party sellers to question potential buyers themselves about firearms prohibitions, initiate background checks, deny sales, and retain records.

Private parties who sell firearms infrequently, who are hobbyists or collectors, will encounter the new requirements infrequently. Those who sell more often are in the business and should obtain licenses.

Retailers will object if the fee they are allowed to charge is too low to cover their costs for processing the transactions. In California, \$10 per firearm has proved satisfactory. Retailers will see a potential offsetting benefit in increased opportunities to develop new customers.

There will be costs to federal and state governments as they conduct background checks for nearly all firearm transfers, rather than for some 60% as currently, and issue an increasing number of denials. As mentioned, the concerning delayed denials can be addressed by lifting the limit on the waiting period, so that background checks can be completed before firearms are transferred.

Otherwise, this will be more a matter of scaling up than of developing qualitatively new programs or procedures, which would be more expensive. Feasibility is proven. In 11 states, including populous California, New York, and Pennsylvania, many or essentially all private-party transfers are subject to background checks now. Still, the increase would be substantial. No formal cost estimate or cost-benefit analysis has been prepared.

The background checks will only be as good as the data on which they rely. Efforts to improve the quality and completeness of these data must continue.

For the trace of a crime-involved firearm to extend beyond its first retail sale, some data on subsequent transactions would need to be archived and available to law enforcement. This could give rise to privacy concerns. However, the archived data could be limited to identifiers for the retailer and the firearm and the date of the transaction. The identity of the buyer and seller could be retained by the retailer and released to law enforcement agencies only, and only if needed for a criminal investigation. The archive would be updated only when the firearm changed hands.

Finally, we cannot say with certainty whether a comprehensive background check policy would be found constitutional by the Supreme Court. In the majority opinion in *Heller*, Justice Scalia included "conditions and qualifications on the commercial sale of arms" among reasonable limitations to an individual right to keep and bear arms under the Second Amendment and added that the list of limitations given in the decision was not all-inclusive.<sup>89</sup> A recent analysis finds that background checks further a compelling governmental interest—the prevention of violence—and impose a minor burden on persons acquiring firearms.<sup>90</sup> The authors conclude that such a policy would "almost certainly" be found constitutional.

## Support for a Comprehensive Background Check Policy

Support for comprehensive background checks is widespread, including among firearm owners. Most recently, a survey conducted in January 2013 found that 88.8% of the population overall, 84.3% of firearm owners, and 73.7% of NRA members supported “requiring a background check system for all gun sales to make sure a purchaser is not legally prohibited from having a gun.”<sup>91</sup> In a 2012 poll of firearm owners, 74% of NRA members and 87% of non-NRA firearm owners supported “requiring criminal background checks of anyone purchasing a gun.”<sup>92</sup> Two years earlier, in a nationwide poll of registered voters, 86% overall and 81% of those with a firearm at home endorsed a requirement for “all gun buyers to pass a criminal background check, no matter where they buy the gun and no matter who they buy it from.”<sup>93</sup>

In a 2008 nationwide survey, 83% of self-reported firearm owners and 87% of the general public supported a requirement that “all people who sell guns, including at gun shows, ...conduct criminal background checks of the people buying guns.”<sup>94</sup> The 2006 iteration of the General Social Survey, one of the most respected public opinion surveys in the country, found 80% of the public to be in favor of “a law that required private gun sales to be subject to the same background check requirements as sales by licensed dealers.”<sup>95</sup>

If anything, support for comprehensive background checks has increased over time. In 1996, only 72% of firearm owners and 77% of the general public supported a “background check for private handgun sales.”<sup>96</sup>

Professionals with a direct stake in preventing firearm violence also support such a policy. The International Association of Chiefs of Police, for example, has taken the position that Congress “should enact laws requiring that all gun sales and transfers proceed through a Federal Firearms License (FFL), thus ensuring that a mandatory background check will be conducted on the transferee.”<sup>97</sup>

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## APPENDIX

Definitions of Key Terms Relating to Commerce in Firearms.

The following text is from Title 27, Code of Federal Regulations, §478.11.

*Adjudicated as a mental defective.* (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.

*Alien illegally or unlawfully in the United States.* Aliens who are unlawfully in the United States are not in valid immigrant, nonimmigrant or parole status. The term includes any alien—

- (a) Who unlawfully entered the United States without inspection and authorization by an immigration officer and who has not been paroled into the United States under section 212(d)(5) of the Immigration and Nationality Act (INA);
- (b) Who is a nonimmigrant and whose authorized period of stay has expired or who has violated the terms of the nonimmigrant category in which he or she was admitted;
- (c) Paroled under INA section 212(d)(5) whose authorized period of parole has expired or whose parole status has been terminated; or
- (d) Under an order of deportation, exclusion, or removal, or under an order to depart the United States voluntarily, whether or not he or she has left the United States.

*Committed to a mental institution.* 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.

*Controlled substance.* A drug or other substance, or immediate precursor, as defined in section 102 of the Controlled Substances Act, 21 U.S.C. 802. The term includes, but is not limited to, marijuana, depressants, stimulants, and narcotic drugs. The term does not include distilled spirits, wine, malt beverages, or tobacco, as those terms are defined or used in Subtitle E of the Internal Revenue Code of 1986, as amended.

*Crime punishable by imprisonment for a term exceeding 1 year.* Any Federal, State or foreign offense for which the maximum penalty, whether or not imposed, is capital punishment or imprisonment in excess of 1 year. The term shall not include (a) any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices or (b) any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of 2 years or less. What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for the purposes of the Act or this part, unless such pardon, expunction, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms, or unless the person is prohibited by the law of the jurisdiction in which the proceedings were held from receiving or possessing any firearms.

*Discharged under dishonorable conditions.* Separation from the U.S. Armed Forces resulting from a dishonorable discharge or dismissal adjudged by a general court-martial. The term does not include any separation from the Armed Forces resulting from any other discharge, e.g., a bad conduct discharge.

*Engaged in the business —(a) Manufacturer of firearms.* A person who devotes time, attention, and labor to manufacturing firearms as a regular course of trade or business with the principal objective of livelihood and profit through the sale or distribution of the firearms manufactured;

(b) Manufacturer of ammunition. A person who devotes time, attention, and labor to manufacturing ammunition as a regular course of trade or business with the principal

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objective of livelihood and profit through the sale or distribution of the ammunition manufactured;

(c) Dealer in firearms other than a gunsmith or a pawnbroker. A person who devotes 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, but such a term shall not include 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;

(d) Gunsmith. A person who devotes time, attention, and labor to engaging in such activity as a regular course of trade or business with the principal objective of livelihood and profit, but such a term shall not include a person who makes occasional repairs of firearms or who occasionally fits special barrels, stocks, or trigger mechanisms to firearms;

(e) Importer of firearms. A person who devotes time, attention, and labor to importing firearms as a regular course of trade or business with the principal objective of livelihood and profit through the sale or distribution of the firearms imported; and,

(f) Importer of ammunition. A person who devotes time, attention, and labor to importing ammunition as a regular course of trade or business with the principal objective of livelihood and profit through the sale or distribution of the ammunition imported.

*Fugitive from justice.* Any person who has fled from any State to avoid prosecution for a felony or a misdemeanor; or any person who leaves the State to avoid giving testimony in any criminal proceeding. The term also includes any person who knows that misdemeanor or felony charges are pending against such person and who leaves the State of prosecution.

*Indictment.* Includes an indictment or information in any court, under which a crime punishable by imprisonment for a term exceeding 1 year (as defined in this section) may be prosecuted, or in military cases to any offense punishable by imprisonment for a term exceeding 1 year which has been referred to a general court-martial. An information is a formal accusation of a crime, differing from an indictment in that it is made by a prosecuting attorney and not a grand jury.

*Intimate partner.* With respect to a person, the spouse of the person, a former spouse of the person, an individual who is a parent of a child of the person, and an individual who cohabitates or has cohabitated with the person.

*Mental institution.* Includes mental health facilities, mental hospitals, sanitariums, psychiatric facilities, and other facilities that provide diagnoses by licensed professionals of mental retardation or mental illness, including a psychiatric ward in a general hospital.

*Misdemeanor crime of domestic violence.* (a) Is a Federal, State or local offense that:

(1) Is a misdemeanor under Federal or State law or, in States which do not classify offenses as misdemeanors, is an offense punishable by imprisonment for a term of one year or less, and includes offenses that are punishable only by a fine. (This is true whether or not the State statute specifically defines the offense as a “misdemeanor” or as a “misdemeanor crime of domestic violence.” The term includes all such misdemeanor convictions in Indian Courts established pursuant to 25 CFR part 11.);

(2) Has, as an element, the use or attempted use of physical force (e.g., assault and battery), or the threatened use of a deadly weapon; and

(3) Was committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, (e.g., the equivalent of a “common law” marriage even if such relationship is not recognized under the law), or a person similarly situated to a spouse, parent, or guardian of the victim (e.g., two persons who are residing at the same location in an intimate relationship with the intent to make that place their home would be similarly situated to a spouse).

(b) A person shall not be considered to have been convicted of such an offense for purposes of this part unless:

(1) The person is considered to have been convicted by the jurisdiction in which the proceedings were held.

(2) The person was represented by counsel in the case, or knowingly and intelligently waived the right to counsel in the case; and

(3) In the case of a prosecution for which a person was entitled to a jury trial in the jurisdiction in which the case was tried, either

(i) The case was tried by a jury, or

(ii) The person knowingly and intelligently waived the right to have the case tried by a jury, by guilty plea or otherwise.

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(c) A person shall not be considered to have been convicted of such an offense for purposes of this part if the conviction has been expunged or set aside, or is an offense for which the person has been pardoned or has had civil rights restored (if the law of the jurisdiction in which the proceedings were held provides for the loss of civil rights upon conviction for such an offense) unless the pardon, expunction, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms, and the person is not otherwise prohibited by the law of the jurisdiction in which the proceedings were held from receiving or possessing any firearms.

*Nonimmigrant alien.* An alien in the United States in a nonimmigrant classification as defined by section 101(a)(15) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)).

*Principal objective of livelihood and profit.* The intent underlying the sale or disposition of firearms is predominantly one of obtaining livelihood and pecuniary gain, as opposed to other intents such as improving or liquidating a personal firearms collection: *Provided*, That proof of profit shall not be required as to a person who engages in the regular and repetitive purchase and disposition of firearms for criminal purposes or terrorism. For purposes of this part, the term “terrorism” means activity, directed against United States persons, which—

(a) Is committed by an individual who is not a national or permanent resident alien of the United States;

(b) Involves violent acts or acts dangerous to human life which would be a criminal violation if committed within the jurisdiction of the United States; and

(c) Is intended—

(1) To intimidate or coerce a civilian population;

(2) To influence the policy of a government by intimidation or coercion; or

(3) To affect the conduct of a government by assassination or kidnapping.

*Renounced U.S. citizenship.* (a) A person has renounced his U.S. citizenship if the person, having been a citizen of the United States, has renounced citizenship either—

(1) Before a diplomatic or consular officer of the United States in a foreign state pursuant to 8 U.S.C. 1481(a)(5); or

(2) Before an officer designated by the Attorney General when the United States is in a state of war pursuant to 8 U.S.C. 1481(a)(6).

(b) The term shall not include any renunciation of citizenship that has been reversed as a result of administrative or judicial appeal.

*Unlawful user of or addicted to any controlled substance.* A person who uses a controlled substance and has lost the power of self-control with reference to the use of 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. Such use is not limited to the use of drugs on a particular day, or within a matter of days or weeks before, but rather that the unlawful use has occurred recently enough to indicate that the individual is actively engaged in such conduct. A person may be an unlawful current user of a controlled substance even though the substance is not being used at the precise time the person seeks to acquire a firearm or receives or possesses a firearm. 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. For a current or former member of the Armed Forces, an inference of current use may be drawn from recent disciplinary or other administrative action based on confirmed drug use, e.g., court-martial conviction, nonjudicial punishment, or an administrative discharge based on drug use or drug rehabilitation failure.