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# NAVAL POSTGRADUATE SCHOOL

MONTEREY, CALIFORNIA

## THESIS

**DENYING THE DANGEROUS: PREVENTING  
FIREARMS FROM ENTERING THE HANDS OF THE  
DANGEROUSLY MENTALLY ILL**

by

David M. Bonk

December 2014

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**DENYING THE DANGEROUS: PREVENTING FIREARMS FROM ENTERING  
THE HANDS OF THE DANGEROUSLY MENTALLY ILL**

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Lieutenant, Philadelphia Police Department, Philadelphia Pennsylvania  
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Submitted in partial fulfillment of the  
requirements for the degree of

**MASTER OF ARTS IN SECURITY STUDIES  
(HOMELAND SECURITY AND DEFENSE)**

from the

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## **ABSTRACT**

Mass shootings in the United States tend to be succeeded by a period of great public attention to gun control laws. Often of particular concern is the National Instant Criminal Background Check System (NICS), which is promulgated by law to prevent statutorily defined individuals, including the dangerously mentally ill, from obtaining firearms.

This thesis analyzed the NICS, particularly its ability or inability to prevent firearm access to the mentally ill. The examination looked at three criteria: (1) the weaknesses in the NICS that inhibit its ability in preventing the dangerously mentally ill from obtaining firearms, (2) how consistently applicable records are submitted to the NICS from the individual states, and (3) the proposed recommendations to change and create a more efficient NICS. Specific high-profile mass shootings in the United States were reviewed to illustrate legislative response to those shootings and the changes to the NICS, if any, that followed them. The goal was to identify any immediate deficiencies in the NICS and determine any corrective actions necessary to enhance it to produce a more reliable system. This research should serve as a roadmap for committees or individuals tasked with gun control legislation in the United States.

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## LIST OF ACRONYMS AND ABBREVIATIONS

ATF	Bureau of Alcohol Tobacco and Firearms
CCRE	Central Criminal Records Exchange
CLEO	Chief Law Enforcement Officer
CMHS	Center for Multicultural Human Services
CSB	Community Services Board
DENI	Denial Enforcement and NICS Intelligence Branch
FBI	Federal Bureau of Investigation
FFL	Federal Firearms License
FOPA	Firearms Owner's Protection Act
GAO	U.S. General Accounting Office
GCA	Gun Control Act of 1968
HIPAA	Health Insurance Portability and Accountability Act
III	Interstate Identification Index
NCHIP	National Criminal History Improvement Program
NCIC	National Crime Information Center
NFA	National Firearms Act of 1934
NIAA	NICS Improvement Amendments Act of 2007
NICS	National Instant Criminal Background Check System
NRA	National Rifle Association
OCD	Obsessive Compulsive Disorder
PDD	Pervasive Development Disorder
POC	Point of Contact
SAFE	New York Secure Ammunition and Firearms Enforcement Act
SHES	Sandy Hook Elementary School
VTPD	Virginia Tech Police Department

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## EXECUTIVE SUMMARY

The United States has seen at least 61 mass murders (defined by the Federal Bureau of Investigation (FBI) as four or more people killed in one event) in the last 30 years. It was not until the murders at Virginia Polytechnic Institute and State University in 2007 that issues combining the dangerously mentally ill, firearms, and mass murder were perceived as national security matters. Several other recent mass shootings in the United States have contributed to this ever-increasing debate on gun control in the nation. Like the 2007 shooting at the university in Virginia, the mass murders committed using guns in Newtown, Connecticut in 2012, Aurora, Colorado in 2012, and Tucson, Arizona in 2011, all involved individuals who showed indications of mental illness and who underwent professional medical treatment for mental illness at some point before or around the time of the shootings. In each case, the perpetrator was able to obtain *legal* firearms successfully, which were then utilized to commit terrible acts of violence that shook the country.

The National Instant Criminal Background Check System (NICS) is designed to prevent statutorily defined dangerous individuals, including the mentally ill, from obtaining firearms.<sup>1</sup> Any individuals who attempt to purchase a firearm through a federally licensed dealer must have their personal information processed through the NICS to determine whether these individuals are, for any reason, prohibited from possessing a firearm. These recent mass shootings by mentally ill individuals have brought the issue of a flawed at best, and utterly ineffective at worst, NICS to light.

This thesis examines the NICS, and in particular, its ability or inability to prevent firearm transfers to the mentally ill. It outlines the factors legislators should consider in adopting changes to create a more efficient NICS. Certain cases of high-profile shootings in the United States are reviewed to illustrate the

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<sup>1</sup> *Brady Handgun Violence Prevention Act*, Pub. L. No. 103-159, 18 U.S.C. §921 (1993).

comparative aspects of legislative response to those shootings and the changes to NICS, if any, that followed them. This paper attempts to identify any immediate deficiencies in the NICS and determine the corrective action necessary to enhance it to produce a more reliable system. The goal is to provide the committees, agencies, and individuals tasked with gun control legislation in the United States a guideline on how to improve the NICS to prevent the dangerous mentally ill from obtaining firearms.

## **ACKNOWLEDGMENTS**

This paper and my time at CHDS has been one of the most challenging yet rewarding experiences of my life. There were many times when quitting seemed like the easiest and simplest of options. The support and motivation of the some of the most brilliant students and professors in the field pushed me to complete this project. I would like to thank Lauren Wollman Ph.D. and Chief Thomas Nestel III for their guidance and patience in completing this work.

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# I. INTRODUCTION

## A. PURPOSE

Since the 18th century, the right of American citizens to own, register, and carry firearms has had some form of federal and/or local regulation. Shootings in 2011 in Tucson, Arizona, 2012 in Aurora, Colorado, 2007 in Blacksburg, Virginia, and 2012 in Newtown, Connecticut, however, have led to an ever-increasing debate regarding gun control measures in the United States' legal system. Each of these shootings involved alleged shooters who, in hindsight, displayed strong prior indication of a mental illness that, based on the current gun control statutes, should have precluded them from being able to obtain firearms.

One major section of the current round of gun control debates by both pro- and anti-gun advocates focuses on mentally ill individuals and the inadequacy of the background check system employed during legal firearm purchases. This thesis examines possible government options with regard to managing the potential problems of the National Instant Criminal Background Check System (NICS) and its inability successfully to prevent a dangerously mentally ill individual from obtaining a firearm. The overall objective is to examine past, present, and proposed changes to the NICS and to recommend policy components that may increase the efficacy of the NICS in preventing the illegal transfer of firearms to the dangerously mentally ill.

## B. BACKGROUND OF FEDERAL GUN CONTROL LEGISLATION

The National Firearms Act of 1934 (NFA)<sup>1</sup> was the first federal statute regulating firearms in the United States. It was originally designed to make it difficult for “gangsters” to obtain what was perceived to be their weapon of choice, namely machine guns, but it did *not* ban them.

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<sup>1</sup> *National Firearms Act of 1934*, 26 U.S.C. §5801 (1934).

The Gun Control Act of 1968 (GCA)<sup>2</sup> regulates domestic commerce of small arms and ammunition. It requires that all persons manufacturing, importing, or selling firearms *as a business* be federally licensed, but does not place stipulations on private sales of firearms between individuals. When it passed, the GCA established specific categories of persons prohibited from possessing firearms. It also established penalties for the use of firearms in drug offenses or violent crimes.

The GCA and the NFA have undergone numerous changes since their enactments. The first major redraft of the NFA was the Firearms Owner's Protection Act (FOPA),<sup>3</sup> which passed after a nearly unparalleled legal battle in Congress. It took seven years to pass the FOPA from its introduction.<sup>4</sup>

The Brady Bill of 1993<sup>5</sup> amended the GCA to require background checks on persons attempting to purchase handguns and establishing the NICS. The Brady Bill also added more classes of persons prohibited from firearm possession, which defined 10 categories of prohibited individuals.<sup>6</sup> These federal laws serve as the minimum standard that regulates the sale and purchase of firearms. Federalism allows for individual states to place more restrictive laws on firearm purchases, and some have, while others have enacted laws that simply mirror the federal code.

The NICS Improvement Amendments Act of 2007 (NIAA) was enacted to, among other things, help states make more records available for NICS background checks.<sup>7</sup> The NIAA provides financial incentives to states based on the percentage of records that each state makes available to the NICS.

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<sup>2</sup> *Gun Control Act of 1968*, Pub. L. No. 90-618, 18 U.S.C. Chapter 44 §921 (1968).

<sup>3</sup> *Firearms Owners' Protection Act*, Pub. L. No. 99-308, 18 U.S.C. §921 (1986).

<sup>4</sup> FOPA was originally introduced in the Senate as the *Federal Firearms Reform Act of 1979*.

<sup>5</sup> *Brady Handgun Violence Prevention Act*, Pub. L. No. 103-159, 18 U.S.C. §921 (1993).

<sup>6</sup> *Ibid.*, §922(g) and (n).

<sup>7</sup> *The NICS Improvement Amendments Act of 2007*, Pub. L. No. 110-180, 18 U.S.C. §921 (2007).

### C. PROBLEM STATEMENT

In the immediate aftermath of any mass shooting in the United States, a common proposal with which many Americans seem to agree is a ban on assault weapons and high-capacity magazines.<sup>8</sup> Since more than 310 million firearms are already in private hands in the United States, however, a more effective approach to gun control might be “people control,” or prohibiting dangerous people from getting their hands on guns.<sup>9</sup>

Since passage of the Brady Handgun Violence Protection Act, individuals who are adjudicated “mentally defective” or who have been involuntarily committed to a mental institution are prohibited from possessing firearms. When an individual who falls under this category attempts to purchase a firearm, the NICS check conducted by the dealer will reject and disapprove the purchase, which thus prevents the dangerous individual from obtaining the gun. However, shortcomings in the NICS when referencing mental health records have been identified.

All mental health records in the databases checked by the NICS originate with individual states. The states are not required to submit records to the NICS; they do so on a voluntary basis for public safety and law enforcement concerns. Since state submission of records to the NICS is voluntary, the majority of records in the NICS currently come from only 12 states. Unless the submission of all disqualifying records into the NICS is made mandatory and universal for the states, instances of prohibited and dangerous individuals obtaining firearms will continue to occur in cases of states that do not submit the records to the NICS database.

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<sup>8</sup> Michael R. Bloomberg, Daniel W. Webster, and Jon S. Vernick, *Reducing Gun Violence in America: Informing Policy with Evidence and Analysis* (Baltimore, MD: JHU Press, 2013).

<sup>9</sup> Jeffrey Swanson, "Mental Illness and New Gun Law Reforms: The Promise and Peril of Crisis-Driven Policy Mental Illness and the New Gun Law Reforms," *JAMA* 309, no. 12 (2013): 1233–1234.

## **D. RESEARCH QUESTION**

### **1. Primary**

What are the weaknesses in the NICS that inhibit its ability in preventing the dangerously mentally ill from obtaining firearms?

### **2. Secondary**

- How consistently are applicable mental health records submitted to the NICS by the individual states so that it can efficiently prevent the dangerously mentally ill from obtaining firearms, and how can those inconsistencies be addressed?
- What changes have been recommended and what changes have been implemented to create a more efficient NICS?

## **E. RESEARCH DESIGN**

This thesis is a policy analysis of the NICS, and in particular, its ability to prevent firearm transfers to the mentally ill. Several recent mass shootings by mentally ill individuals have brought the issue of a flawed NICS to light.

The literature review sets the stage by identifying current firearm laws and regulations, how the NICS came to be, and how those laws are applied. Contextualizing how the NICS functions. Its relationship to the sharing of mental health records is particularly important for this thesis, as many of the issues concerning the dangerously mentally ill and firearm transfers were not perceived as a national security matter prior to 2007.

The second part of this thesis examines implemented and proposed changes to components of the NICS. The evidence used to support this analysis is comprised of proposed changes to legislation that followed several recent high-profile mass shootings by mentally ill individuals in the United States: Virginia Polytechnic Institute and State University (Virginia Tech) in 2007, Tucson, Arizona in 2011, Aurora, Colorado in 2012, and Newtown, Connecticut in 2012.

These cases were selected from at least 22 mass shootings in the last six years (2007–2012) for several reasons. First, they best illustrate the link between firearms, mental illness, and mass murder. Second, they are instances of the most clearly pronounced failures of the NICS to prevent prohibited persons from obtaining firearms. Third, as compared to the other 18 mass shootings, these four were extremely high profile, widely publicized, and are familiar to most people in the United States, and even internationally to some extent. Their notable tragic outcomes and high fatality counts make clear why these shootings in particular would have triggered the greatest call for change from citizens and a corresponding response from lawmakers. Lastly, the motives to kill in these cases still remain largely unknown to authorities, whereas investigations into the other 18 shootings have over time revealed criminal motives, such as murder, revenge, domestic violence, or forms of religious or racial extremism.

Each of these tragedies resulted in a published government report identifying loopholes and weaknesses in the background check system that resulted in statutorily prohibited individuals successfully obtaining a firearm (or firearms). The primary focus of these chapters is to show what is currently being recommended to address the instances of failure of the NICS in preventing the transfer of firearms to the types of individuals who perpetrated these massacres. These resources should provide the necessary background on the overall effectiveness of the NICS, implementation issues related to recommendations for change, and counter-arguments and alternative suggestions to amend the NICS.

This thesis attempts to shed light on some of the issues concerning the NICS and the sharing of records pertaining to the dangerously mentally ill. It does so by identifying “best practices” and making recommendations for legislative changes to increase the efficacy of the NICS in preventing firearm transfers to such persons.

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## **II. LITERATURE REVIEW**

### **A. INTRODUCTION**

The literature regarding gun control legislation in the United States is vast. While much data is available concerning gun violence in general, little published work exists regarding firearm violence by mentally disturbed individuals in particular. To address the issue best, it is necessary to first review the literature concerning the actual firearms laws in existence, and then draw upon other sub-literature to extrapolate information that can be used as a basis for recommendations for changes to those laws.

Once politically motivated and left- and right-wing writings are excluded, the literature can be divided into three distinct categories. The first is statutory language enacted by Congress regulating firearm transfers, as well as pending and proposed legislation. This category can be sub-divided into individual regulations placed by respective states. The second category is composed of scholarly reports and publications critical of these laws and their effectiveness in preventing gun violence. The third is the various efforts and programs that have been implemented by governing agencies in an attempt to enhance the background check system.

### **B. CURRENT LEGISLATION**

#### **1. Federal Legislation**

The first category of literature is the laws enacted by governing authorities regulating the transfer of firearms. Congress plays an important role in contributing to the initial literature in this field, which typically introduces new legislation following an outcry from constituents, a high-profile firearm incident, or both. The “Roaring Twenties” era of the United States was a period of time fraught with organized crime syndicates, gangland style clashes, and their accompanying murders. As an answer to the street violence being committed

across America, Congress passed the NFA,<sup>10</sup> the first federal statute regulating firearms. It was originally designed to make it difficult for “gangsters” to obtain what was perceived to be their weapon of choice, namely machine guns, but it did *not* ban them.

The later high-profile murders of Martin Luther King Jr. and Senator Robert Kennedy, both at the hands of gunmen, led to changes in the laws regulating the transfer of firearms to individuals. Congress passed the GCA,<sup>11</sup> which regulates domestic commerce in small arms and ammunition. The law requires that all persons manufacturing, importing, or selling firearms as a *business* be federally licensed, but does not place stipulations on private sales between individuals. The GCA was the first legislation to establish specific categories of persons prohibited from possessing firearms. It also was also the first to establish specific increased penalties for the use of firearms in drug offenses or crimes of violence.

Two provisions of the GCA pertained to individuals considered to be dangerously mentally ill. Title VII prohibited a person whom a *court* deemed mentally incompetent from purchasing a firearm. Title IV disqualified individuals who had ever been “adjudicated as a mental defective” or previously “committed to a mental institution” from firearms possession.<sup>12</sup>

The efficacy of these prohibitions by the GCA at the time was dependent upon the purchaser’s honesty. The firearm dealer would present a form to be completed by the applicants to disclose if they fell into one of the categories of ineligible persons. The GCA required the prospective buyers to determine their own eligibility to possess a firearm, with no government control or oversight other than the form itself.

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<sup>10</sup> *National Firearms Act of 1934*, 26 U.S.C. §5801.

<sup>11</sup> *Gun Control Act of 1968*, 18 U.S.C. Chapter 44 §921.a.

<sup>12</sup> *Ibid.*, §922 (g)(4).

Regarding immigration status, the GCA does not distinguish between citizens and legal permanent aliens; both are eligible to ship, transport, receive, and possess firearms, as long as they are not a prohibited person as defined in the legislation.

The GCA has undergone numerous changes since its enactment. The first major redraft of the GCA was the FOPA,<sup>13</sup> which passed in 1986 after a nearly unparalleled legal battle in Congress (it took seven years to pass the FOPA after its introduction in 1979).<sup>14</sup>

The FOPA sought to clarify which mental illness adjudications rendered an individual ineligible to purchase a firearm by repealing Title VII and leaving Title IV's broader definition to govern. The FOPA also established a "relief from disabilities" program, through which denied or disqualified persons could petition the Bureau of Alcohol Tobacco and Firearms (ATF) to have their gun purchasing rights restored. Prior to the FOPA, individuals prohibited from possession or purchase on the grounds of Title VII or Title IV were effectively banned for life.

In response to the 1981 assassination attempt on President Ronald Reagan, and the wounding of White House Press Secretary John Brady, Congress passed the Brady Handgun Violence Prevention Act (the Brady Bill of 1993).<sup>15</sup> The Brady Bill required firearm dealers to check with the Chief Law Enforcement Officer (CLEO), typically a Sheriff or Chief of Police, to determine whether any sale of a firearm should proceed. States did not maintain centralized lists or databases of persons who had ever been adjudicated mentally defective or committed to a mental institution. Therefore, it was not possible for most CLEOs to determine if any prior mental illness adjudication existed to render an applicant ineligible.

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<sup>13</sup> *Firearms Owners' Protection Act*, 18 U.S.C. §921.

<sup>14</sup> FOPA was originally introduced in the Senate as the Federal Firearms Reform Act of 1979.

<sup>15</sup> *Brady Handgun Violence Prevention Act*, 18 U.S.C. §921.

To address this issue, the Brady Bill also required the Attorney General to establish the NICS. The Attorney General in turn assigned this task to the FBI. The NICS became operational in 1998 and made it possible to check a prospective firearm purchaser's background electronically in three Federal Bureau of Investigation (FBI) managed computer databases.

- The Interstate Identification Index (III), which contains individual criminal history records
- The NCIC, a database of individuals subject to arrest warrants, protection orders, and criminal registration
- The NICS index, which contains information submitted by federal and state agencies not included in III or NCIC, such as mental health records.

The Brady Bill also established more classes of persons prohibited from firearm possession, and defined 10 total categories.<sup>16</sup>

- A person who has been or is under indictment or information or has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year or any state offense classified by the state as a misdemeanor and is punishable by a term of imprisonment of more than two years
- A person who is a fugitive of justice
- An unlawful user and/or an addict of any controlled substance
- Any people adjudicated mentally defective or has been involuntarily committed to a mental institution or incompetent to handle their own affairs, including dispositions to criminal charges of found not guilty by reason of insanity or found incompetent to stand trial
- An illegal alien
- A person who has been admitted to the United States under a non-immigrant visa
- A person dishonorably discharged from the United States Armed Forces

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<sup>16</sup> *Brady Handgun Violence Prevention Act*, 18 U.S.C. §922(g) and (n).

- Any individuals who has renounced their United States citizenship
- The subject of a protective order issued after a hearing in which the respondent had notice that restrains them from harassing, stalking, or threatening an intimate partner or child of such partner, not including ex parte orders
- A person convicted in any court of a misdemeanor crime that includes the use or attempted use of physical force or threatened use of a deadly weapon, and the defendant was the spouse, former spouse, parent, 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 in the past with the victim as a spouse, parent, guardian, or similar situation to a spouse, parent or guardian of the victim

The Brady Bill does *not* apply to unlicensed sellers, including private sales between individuals.

The federal response to the shootings at Virginia Tech in 2007 was to pass the NIAA.<sup>17</sup> This act provides states with financial incentives to release to the Attorney General all relevant records on individuals prohibited by federal law from possessing firearms. The records covered by the NIAA include automated information needed by the NICS to identify felony convictions, mental health adjudications and commitments, domestic violence protection orders, and misdemeanor crimes of domestic violence.

## **2. Individual State Legislation**

The Supremacy Clause of the U.S. Constitution establishes that federal law is the prevailing minimum on all state and local governments so long as Congress duly enacted the law.<sup>18</sup> When federal law removes state authority to regulate specific subject matter, it is known as “federal preemption.” Federal preemption of state law is non-existent in the area of firearms regulation.

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<sup>17</sup> *The NICS Improvement Amendments Act of 2007*, 18 U.S.C. §921.

<sup>18</sup> U.S. Const. art. VII, § 2(b).

The federally defined categories prohibiting firearm possession serve as the prevailing minimum in the United States. The U.S. Constitution, however, under the 10th Amendment, permits states to enact tighter restrictions on firearms.<sup>19</sup> Some have done so, while others have enacted laws that simply mirror the federal code. Other states are less restrictive in their own laws, but state law cannot preempt federal law. Tighter restrictions on firearm purchases, specifically applicable to the mentally ill, are reviewed in an attempt to identify promising practices to be shared and possibly incorporated into federal legislation. For example, some states require permits to obtain firearms and impose a mandatory waiting period for firearm transfers.

According to *Regulating Guns in America*, 13 states authorize or require the reporting of mental health information to the NICS.<sup>20</sup> Two states require reporting of all relevant mental health records to the NICS.<sup>21</sup> Six states require the reporting of *some* mental health records, and 14 states authorize or require reporting of mental health records for *in-state* transfers only.<sup>22</sup>

According to the FBI, state background checks are more thorough than those processed through the NICS because states can access their own independent criminal history and mental health databases in addition to those maintained by the FBI.<sup>23</sup> In reviewing the FBI's fact sheet on the NICS, a lack of universality among states is apparent when it comes to conducting background checks for firearm transfers.<sup>24</sup> Three levels of state involvement currently exist. A more detailed breakdown of state participation can be seen in Chapter III.

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<sup>19</sup> U.S. Const. amend. X (a).

<sup>20</sup> Legal Community Against Violence, *Regulating Guns in America* (San Francisco, CA: Legal Community Against Violence, 2008).

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.*

<sup>23</sup> U.S. Government Accounting Office, *Report to the Honorable Craig Thomas U.S. Senate, Gun Control: Implementation of the National Instant Criminal Background Check System* (GAO/GGD/AIMD-00-64) (Washington, DC: U.S. Government Accounting Office, 2000).

<sup>24</sup> Criminal Justice Information Systems of the Federal Bureau of Investigation, *NICS Fact Sheet* (Washington, DC: Department of Justice, 2013).

- A full point-of-contact (POC) requests a NICS check on all firearms transfers originating in the state.
- A partial POC requests a NICS check on all handgun transfers; FFLs in the state are required to contact the FBI for NICS checks for long gun transfers.
- The state does not maintain a POC; Federal Firearms Licenses (FFLs) are required to contact the FBI for NICS checks on all firearm transfers originating in the state.

### **C. EFFICACY OF CURRENT LAWS**

The second category of literature is publications, scholarly papers, and sworn testimony critical of the effectiveness of the background check system, a significant topic in the gun control debate often highly publicized in the period following a mass shooting. In a report published in early 2013 after a school shooting in Newtown, Connecticut, President Barack Obama identified the background check system as “the most efficient and effective way to keep guns out of the hands of dangerous individuals.”<sup>25</sup> In the same report, he identified 17 states that have made fewer than 10 mental health records available total from each.<sup>26</sup>

Federal law prohibits the sale of firearms to individuals with certain mental illness histories and requires a background check prior to transfer. A publication by the Legal Community Against Violence identifying loopholes in the background check system has demonstrated that those same federal laws, however, do not require states to make mental health information available to the federal or state agencies that perform background checks.<sup>27</sup>

A U.S. General Accounting Office (GAO) report stated that between November 1999 and November 2007, the number of disqualifying mental health

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<sup>25</sup> President Obama, *Now is the Time: The President's Plan to Protect our Children and our Communities by Reducing Gun Violence* (Washington, DC: White House, 2013).

<sup>26</sup> Ibid.

<sup>27</sup> Legal Community Against Violence, *Lessons from Virginia Tech: Recommendations for State Law Changes to Close Loopholes in Background Check Systems* (San Francisco, CA: Legal Community Against Violence, 2007).

records in the NICS increased from about 90,000 to about 400,000.<sup>28</sup> In that same report, the GAO estimated that at least 2.7 million records should be in the NICS database.<sup>29</sup> The total number of records currently reported to the NICS is therefore only a small fraction of the number of persons prohibited from purchasing firearms due to a history of mental illness. Another report from the GAO in 2012 showed that Health Insurance Portability and Accountability Act (HIPAA) laws were preventing hospitals or other health care providers in some states from sharing information with the NICS.<sup>30</sup>

Mayors Against Illegal Guns published a report critical of the efficacy of the NICS that analyzed the record checks of all 50 states.<sup>31</sup> Another report issued by the City of New York under Mayor Michael Bloomberg, *Point, Click, Fire*,<sup>32</sup> addressed the issue of online gun sales and the lack of background checks for most. Both attempted to identify deficiencies in the law and focused on reducing firearm violence in their respective cities. Numerous articles from the *American Journal of Psychiatry* have addressed how violence is often portrayed in the media as being related to persons with mental illness, but limited research data supports this theory.<sup>33</sup>

A comprehensive collection of essays and studies with the purpose of providing evidence-based research on how to reduce gun violence in America, *Reducing Gun Violence in America*, was driven by the shootings in an

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<sup>28</sup> Laurie E. Ekstrand and Danny R. Burton, *Gun Controls: Options for Improving the National Instant Criminal Background Check System* (Darby, PA: DIANE Publishing, 2000).

<sup>29</sup> Ibid.

<sup>30</sup> U.S. Government Accountability Office, *Report to Congressional Requesters, Gun Control: Sharing Promising Practices and Assessing Incentives Could Better Position Justice to Assist States in Providing Records for Background Checks* (GAO-12-684) (Washington, DC: U.S. Government Accountability Office, 2012).

<sup>31</sup> Mayors Against Illegal Guns, *Fatal Gaps: How Missing Records in the Federal Background Check System Put Guns in the Hands of Killers* (Washington, DC: Mayors Against Illegal Guns, 2011).

<sup>32</sup> City of New York, *Point, Click, Fire: An Investigation of Illegal Online Gun Sales* (New York, NY: City of New York, 2011).

<sup>33</sup> Paul Appelbaum, "Violence and Mental Disorders: Data and Public Policy," *American Journal of Psychiatry* 163, no. 8 (2006): 1319—1321.

elementary school in Newtown, Connecticut. One of the studies contains partially addresses people with mental illnesses who have a history of criminal offending and involvement with the criminal justice system. It suggests that existing law and policy designed to prevent such persons from having access to firearms through federally licensed gun dealers is likely to be of “limited effectiveness.”<sup>34</sup>

In an opening statement to the House Committee on Oversight and Government Reform, Representative Dennis Kucinich described the NICS database as “woefully incomplete.”<sup>35</sup> In the same hearing, U.S. Department of Justice Assistant Attorney General Rachel Brand testified that “fewer than half of the states provide any mental health records to the NICS,” and from those that do provide records, only a handful provide any significant number.<sup>36</sup> Ronald Honberg, professor of social policy and criminology of the National Alliance on Mental Illness, testified that “a number of states couldn’t even provide you with an unduplicated count of people that they served in their mental health system in a given year” and said that “clearly, the technology has to be improved.”<sup>37</sup>

In testimony before Congress, FBI Assistant Director David Cuthbertson addressed the Subcommittee on Crime and Terrorism of the Committee on the Judiciary of the United States Senate to discuss improvements to the NICS.<sup>38</sup> During his address, Mr. Cuthbertson explained how state law prohibiting firearm ownership might be more restrictive than federal regulations, but that records contained in the NICS index are *voluntarily* submitted by local, state, and federal

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<sup>34</sup> Bloomberg, Webster and Vernick, *Reducing Gun Violence in America: Informing Policy with Evidence and Analysis*.

<sup>35</sup> *Lethal Loopholes: Deficiencies in State and Federal Gun Purchase Laws: Hearing before the Subcommittee on Domestic Policy of the Committee on Oversight and Government Reform, House of Representatives, 110th Cong., 1 (2007)*.

<sup>36</sup> *Ibid.*, 145.

<sup>37</sup> *Ibid.*, 182.

<sup>38</sup> *Statement of David Cuthbertson, Assistant Director, Criminal Justice Information Services Division, Federal Bureau of Investigation, before the Subcommittee on Crime and Terrorism, Committee on the Judiciary, United States Senate at a Hearing Entitled “The Fix Gun Checks Act: Better State and Federal Compliance, Smarter Enforcement” (2011)*.

agencies. He also explained that although records submitted to the NICS have improved, the improvements are not spread equally across the board.<sup>39</sup>

Similarly, in testimony before the United States Senate Committee on Homeland Security and Governmental Affairs, Director of Homeland Security and Justice Eileen Larence provided information that individuals on the terrorist watchlist were involved in firearm or explosives transfers more than 1,200 times between 2004 and 2012.<sup>40</sup> FBI data showed that approximately 91 percent of these transfers were allowed to proceed because no prohibiting factor was found (according to current NICS standards). She suggested that Congress consider legislation that would give the Attorney General authority to deny firearms or explosives based on terrorist watchlist concerns.<sup>41</sup>

#### **D. IMPROVEMENTS AND RECOMMENDATIONS**

The third category of literature is the efforts, programs, and reports that have been put into place or recommended by governing entities in an attempt to enhance the background check system. The majority of these programs and recommendations came in the wake of the shootings at Virginia Tech in 2007 and Sandy Hook Elementary School in Newtown, Connecticut in 2012.

Almost immediately following the incident at Virginia Tech, Washington State, a lead contributor to NICS mental health records, convened a workgroup led by the state Attorney General to perform a comprehensive survey of relevant state and federal laws and regulations focusing on mental health and gun ownership. Of its numerous recommendations, one was better electronic access

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<sup>39</sup> *Statement of David Cuthbertson, Assistant Director, Criminal Justice Information Services Division, Federal Bureau of Investigation, before the Subcommittee on Crime and Terrorism, Committee on the Judiciary, United States Senate at a Hearing Entitled "The Fix Gun Checks Act: Better State and Federal Compliance, Smarter Enforcement,"* 7.

<sup>40</sup> Eileen R. Larence, *Terrorist Watchlist Screening: FBI Has Enhanced Its Use of Information from Firearm and Explosives Background Checks to Support Counterterrorism Efforts: Congressional Testimony* (Darby, PA: DIANE Publishing, 2010).

<sup>41</sup> *Ibid.*, 1.

by law enforcement to records of civil commitment and other disqualifying mental health interventions.<sup>42</sup>

The NIAA was enacted to, among other things, help states make more records available for NICS background checks.<sup>43</sup> A press release by the FBI in April 2007 noted that only 22 states voluntarily contribute mental health records to the NICS with a majority of submitted records coming from eight states.<sup>44</sup> The system contained only 235,000 records of an estimated 2.7 million eligible records across the United States. The NIAA provides financial incentives based on the percentage of records each state makes available to the NICS.

Since each state's registry lists only disqualifying episodes that occurred within that state and imposes no effective restrictions on persons who cross state lines to purchase firearms, an article published by *American Journal of Psychiatry* recommends that only a *national* database would be likely to achieve comprehensive coverage.<sup>45</sup>

A memorandum issued by President Obama in January 2013 stated that greater participation by agencies in identifying relevant records they possess to determine whether an individual is prohibited from possessing a firearm, along with a regularized process for submitting those records to the NICS, would strengthen the accuracy and efficiency of the NICS.<sup>46</sup>

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<sup>42</sup> Rob McKenna, *White Paper: Restricting Access to Firearms by Persons with Mental Health Commitments in Washington State* (Washington, State: Washington State of the Office of the Attorney General, 2007).

<sup>43</sup> *The NICS Improvement Amendments Act of 2007*, 18 U.S.C. §921.

<sup>44</sup> Marilyn Price and Donna M. Norris, "National Instant Criminal Background Check Improvement Act: Implications for Persons with Mental Illness," *Journal of the American Academy of Psychiatry and the Law Online* 36, no. 1 (2008): 123–130.

<sup>45</sup> Paul Appelbaum and Jeffrey Swanson, "Law & Psychiatry: Gun Laws and Mental Illness: How Sensible Are the Current Restrictions?" *Psychiatric Services* 61, no. 7 (2010): 652–654.

<sup>46</sup> U.S. President, "Improving Availability of Relevant Executive Branch Records to the National Instant Criminal Background Check System," *Federal Register* 78, no. 14 (Memorandum of January 16, 2013), 4297.

The *Fix Gun Checks Act of 2011* was introduced by New York Senator Charles Schumer to address the NICS and some of its known shortcomings.<sup>47</sup> It was promptly defeated on the House floor, never reaching the Senate. The same senator introduced the *Fix Gun Checks Act of 2013*, this time in response to the Newtown, Connecticut shooting to ensure that all individuals who should be prohibited from buying a firearm are listed in the NICS.<sup>48</sup> It passed in the House after that introduction but was defeated in the Senate on April 17, 2013.

The *NICS Reporting Improvement Act of 2013* is currently before committee.<sup>49</sup> It is a bill that, if passed, would amend the provisions of the *NICS Improvement Amendments Act of 2007*, and clarify federal reporting requirements related to adjudications of mental incompetency and for other purposes.<sup>50</sup> The bill also seeks to provide a definition within federal firearms statutes for a person who has been adjudicated mentally incompetent or who has been committed to a psychiatric hospital.

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<sup>47</sup> David B. Kopel, *Regarding S. 436 (the Fix Gun Checks Act of 2011)* (Washington, DC: CATO Institute, 2011).

<sup>48</sup> Emma E. McGinty, Daniel W. Webster, and Colleen L. Barry, "Effects of News Media Messages about Mass Shootings on Attitudes Toward Persons with Serious Mental Illness and Public Support for Gun Control Policies," *American Journal of Psychiatry* 170, no. 5 (2013): 494–501.

<sup>49</sup> *NICS Reporting Improvement Act of 2013* (2013), Senate Bill 480, 18 U.S.C. §922.

<sup>50</sup> Jessica Rosenberg, "Mass Shootings and Mental Health Policy," *Journal of Sociology & Social Welfare* 41, no. 1 (2014): 107.

### **III. THE NATIONAL INSTANT CRIMINAL BACKGROUND CHECK SYSTEM**

#### **A. BACKGROUND**

The *Brady Handgun Violence Prevention Act of 1993* (Brady Act) was signed into law by President Bill Clinton on November 30, 1993, and went into effect on February 28, 1994. The act was named for White House Press Secretary James Brady, who was shot during an assassination attempt on President Ronald Reagan March 30, 1981.

The Brady Act initially had interim provisions that required licensed firearm dealers to request a presale check on all potential *handgun* purchasers from the CLEO in the jurisdiction in which the prospective purchaser resides. The CLEO would then make a reasonable effort to determine if the purchaser was prohibited from receiving or possessing a handgun. The FFL was required to wait five business days before transferring the handgun to the buyer unless the CLEO sent earlier approval. These interim procedures were terminated in November 1998.

After November 1998, the Brady Act provided that *instant* background checks would be required for purchasers of *all* firearms. Under this permanent provision, the waiting period of the interim provision was eliminated.

#### **B. NICS**

One of the key permanent provisions of the Brady Act is that it mandated the Attorney General to establish a computerized system facilitating background checks on individuals seeking to acquire firearms from federally licensed dealers. The NICS, the Attorney General's answer to the Brady Act's required computerized background check system, was activated in 1998 and is currently administered by the FBI. Through the NICS, FFLs submit background checks on prospective firearm purchasers to the FBI, which then queries other databases, including the National Crime Information Center (NCIC), the III, the NICS index,

and the Department of Homeland Security's (DHS) United States immigration and customs enforcement databases, to determine if the purchasers are disqualified from receiving firearms.

### **1. National Crime Information Center**

The NCIC is a database of documented criminal justice information made available to law enforcement and authorized agencies with the goal of assisting law enforcement in apprehending fugitives, finding missing persons, locating stolen property, and further protecting law enforcement personnel and the public. Protection and restraining orders are also referenced in the NCIC.

### **2. Interstate Identification Index**

The III is a computerized criminal history index pointer system that the FBI maintains so that records on persons arrested and convicted of felonies and serious misdemeanors at either the federal or state level can be shared nationally.

### **3. NICS Index**

The NICS Index is a database created solely for the use of the NICS that consists of information provided voluntarily by local, state, tribal and federal agencies and contains disqualifying records that may not be available in the NCIC or the III of persons prohibited from possessing firearms under federal or state law. Voluntarily submitted mental health records pertaining to individuals barred from firearm possession would be cataloged in this database.

The Brady Act authorized the Attorney General to “secure from any federal department or agency of the United States” information on persons for whom receipt of a firearm would violate federal or state law.<sup>51</sup> The act does not mandate that federal agencies disclose these records; it mandates that “upon request of the Attorney General, the head of such department or agency shall

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<sup>51</sup> *Brady Handgun Violence Prevention Act*, 18 U.S.C. §921.

furnish such information to the system.”<sup>52</sup> Federal agencies are not required to submit required records automatically; they must do so only upon request. States, which are also not required to submit records to the NICS, are provided grants under the Brady Act to improve their own record systems and the sharing of records and incentivize financially the sharing of those records to the NICS.<sup>53</sup> The act did not have a provision mandating that states turn over any specific records, however, even upon request.

Since the Brady Act did not require by law that states furnish mental-health records that would show whether a person should be disqualified from firearm possession for mental-health reasons, a disparity in what records each state submits, if any, now exists in the system. States that do submit records do so rather arbitrarily, since no clear standard currently is established for an ideal record submission. As this gap provides for a number of important mental-health records to be absent from the database, some dangerously mentally ill people who legally should be prohibited from buying firearms essentially fall through the cracks and obtain them anyway.

### **C. STATE PARTICIPATION IN NICS**

Each state government determines the extent of its involvement in the NICS process. Thirteen states serve as POC states for *all* firearm transfers (Table 1).<sup>54</sup> These POC states conduct background checks for firearm transactions by electronically accessing the NICS directly. The FFL conducting the transaction contacts a designated state agency to initiate a NICS background check in lieu of contacting the FBI’s NICS SECTION.<sup>55</sup>

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<sup>52</sup> *Brady Handgun Violence Prevention Act*, 18 U.S.C. §921.

<sup>53</sup> Gerard F. Ramker, *Improving Criminal History Records for Background Checks, 2005* (U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, 2006).

<sup>54</sup> *Ibid.*

<sup>55</sup> Jill Montgomery, "National Instant Criminal Background Check System," *USA Bulletin* 50, no. 1 (2002): 50–51.

Table 1. States that conduct NICS checks for *all* firearms purchases and/or for alternate permits for handguns and long guns

<b>Full Participants (13)</b>		
California	Hawaii	Oregon
Colorado	Illinois	Pennsylvania
Connecticut	Nevada	Tennessee
Florida	New Jersey	Utah
		Virginia

Eight states use a state or local POC for *handgun checks only* and use the FBI for background checks on “long gun” transfers (Table 2).<sup>56</sup>

Table 2. States that conduct NICS checks for *handgun* purchases

<b>Partial Participants (8)</b>			
Iowa	Maryland	Nebraska	Washington
Michigan	New Hampshire	North Carolina	Wisconsin

The remaining 29 states, District of Columbia, and United States territories process *all* background checks through the FBI (Table 3).<sup>57</sup>

Table 3. States and territories in which the FBI performs all NICS checks

<b>Nonparticipants (35)</b>			
Alabama	Idaho	Missouri	Rhode Island
Alaska	Indiana	Montana	South Carolina

<sup>56</sup> Montgomery, "National Instant Criminal Background Check System," 50–51.

<sup>57</sup> Ibid.

<b>Nonparticipants (35)</b>			
American Samoa	Kansas	New Mexico	South Dakota
Arizona	Kentucky	New York	Texas
Arkansas	Louisiana	North Dakota	Vermont
Delaware	Maine	Northern Mariana Islands	U.S. Virgin Islands
Georgia	Massachusetts	Ohio	West Virginia
Guam	Minnesota	Oklahoma	Wyoming
	Mississippi	Puerto Rico	Washington, DC

**D. NATIONAL CRIMINAL HISTORY IMPROVEMENT PROGRAM**

To ensure the immediate availability of complete and accurate state records, the Brady Act established a grant program authorized at \$200 million annually.<sup>58</sup> The National Criminal History Improvement Program (NCHIP) is intended to assist states in developing criminal history record systems and improve the interface with the NICS. The primary goal of the program is the interstate availability of complete state records when the NICS was implemented.<sup>59</sup> NCHIP program funds have also supported direct technical assistance to states, evaluation, and related research.

**E. NICS IMPROVEMENT AMENDMENTS ACTS OF 2007**

In 2007, Congress passed the NIAA, which authorizes the Attorney General to award additional grants to states to improve electronic access to records, as well as incentivize states to turn over records of persons who would be prohibited from possessing or receiving firearms under the GCA, with an

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<sup>58</sup> Don Manson and Gene Lauver, *Presale Firearm Checks* (Washington, DC: Bureau of Justice Statistics, 1997).

<sup>59</sup> *Ibid.*

emphasis on providing accurate records relating to those who are prohibited under 18 U.S.C. §922(g)(4) “adjudicated as a mental defective” or (g)(9) “convicted in any court of a misdemeanor crime of domestic violence.”<sup>60</sup> It also mandates that the DHS make available to the Attorney General any records related to being a prohibited possessor under federal law.

With respect to federal agencies, the NIAA clarifies the standard for adjudication and commitments related to mental health, but it does not require states to submit these records or establish an across the board standard for submission. It provides that no department may provide any such record if the record has been set aside or the individual has been released from treatment, the person has been found by the court or board to no longer suffer from the condition that was the basis of the adjudication or commitment, or the adjudication or commitment is based solely on a medical finding of disability, without an opportunity to be heard by a court or board.<sup>61</sup> It also requires that agencies make determinations to establish a program that permits a person to apply for relief from the disabilities imposed under 18 U.S.C. §922(g)(4).

The NIAA allows any state to be eligible for a two-year waiver of the matching requirement in the NCHIP, established under the Brady Act, if the state provides at least 90% of the records relevant to determining whether a person is disqualified from possessing a firearm under applicable state law due to mental health issues. To be eligible for such a waiver, states must adhere to other requirements including provisions that they provide updates to the NICS regarding any record that should be modified or removed from the system, and supply more detailed information regarding those convicted of a misdemeanor crime of domestic violence or adjudicated as a mental defective under federal law.

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<sup>60</sup> *NICS Improvement Amendments Act of 2007*, 18 U.S.C. §921.

<sup>61</sup> *Ibid.*

## 1. National Instant Criminal Background Check System Act Record Improvement Program

The NIAA also authorizes the Attorney General discretion to award additional grants for purposes of assisting states with upgrading information identification technologies for firearms disability determinations as long as they have implemented a relief from disabilities program that meets certain requirements.<sup>62</sup> This grant program is known as the NICS Act Record Improvement Program (NARIP) and is administered by the Department of Justice.<sup>63</sup>

Each state must satisfy two specific conditions before being eligible to receive grants.

- First, the state must provide to the Attorney General a “reasonable estimate,” based on a methodology established by the Attorney General, of records subject to the NIAA’s completeness requirements.
- Second, a state must certify to the satisfaction of the Attorney General that the state has implemented a program permitting persons who have been adjudicated a mental defective or committed to a mental institution to obtain relief from the firearms disabilities imposed by law as a result of such adjudication or commitment. The NIAA also specifies that not less than 3%, and no more than 10% of each grant provided to a state, shall be used for the purpose of maintaining the required relief from disabilities program.

Prospective firearm applicants undergo a NICS background check that has been requested by a dealer, or the applicant must present a state permit that the ATF has qualified as an alternative to the point-of-transfer check.

ATF approved alternative permits are those that:

- Allow an applicant to possess, acquire, or carry a firearm

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<sup>62</sup> *NICS Improvement Amendments Act of 2007*, 18 U.S.C. §921.

<sup>63</sup> Peter M. Brien, *Improving Access to and Integrity of Criminal History Records* (Washington, DC: U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, 2005).

- Were issued not more than five years earlier by the state in which the transfer is to occur, after an authorized government official verified that possession of a firearm by the applicant would not be a violation of law.

A FFL initiates a NICS check by contacting either the FBI or the state POC. Most inquiries are initiated by telephone, but in 2002, the FBI added E-Check to allow FFLs to request a check electronically via the Internet. The FBI or POC queries available federal, state, and local systems and notifies the FFL that the transfer may proceed, may not proceed, or must be delayed pending further review of the applicant's record.

An applicant who is denied may appeal to the FBI or POC. A denied person who submitted a false application or has an outstanding warrant may be subject to arrest and prosecution under federal or state laws.

## **IV. VIRGINIA TECH**

### **A. INTRODUCTION**

The mass shooting at Virginia Polytechnic Institute and State University (Virginia Tech) in 2007 is among the worst in the United States in the last decade. The massacre, perpetrated by a severely mentally ill student, left nearly 50 students and faculty members dead or wounded. A study of the Virginia Tech shooting reveals that numerous signs indicated that the shooter posed a legitimate threat that those with whom he had close contact overlooked in the months leading up to the shooting. It also serves as a grave example of how the shooter, although he had a diagnosis of mental illness, was able to slip through the cracks in the NICS background check system and obtain the guns he used to kill his fellow students and professors. Virginia Tech was the first of several mass shootings in the last decade to ignite a national conversation around gun control, and the mass shooting gave way to a number of laws—and recommendations that never became law—both nationally and locally.

### **B. INCIDENT DETAILS**

Around 7 o'clock on the morning of April 16, 2007, Seung-Hui Cho, a 23 year-old senior English major at Virginia Tech, left his dormitory armed with two handguns, almost 400 rounds of ammunition—most of which were in rapid loading magazines—a knife, heavy chains, and a hammer. Cho took a two-minute walk to another residence hall, where his student mailbox was located.

Rather than retrieve his mail, the armed student proceeded to the fourth floor, to the room of a freshman student (to whom investigators could not find any connection), where he shot her and a male resident assistant who responded to the noise. Cho then fled the building. He would not be seen again until nearly two hours later, when he would resurface at the campus post office to mail a package to *NBC News*.

After leaving the post office, Cho proceeded to a classroom building, where he chained shut the pair of doors at each of the three main entrances used by students. After peering into several classrooms, some more than once, he walked into an engineering class, shot the instructor, and continued shooting, wounding 11 out of 13 students, nine fatally.

The shooter then walked across the hall to another classroom and shot the professor and several students near the door. He then started down the aisle of the classroom, shooting others. Four students and the professor died in this room, while another six were wounded.

Methodically, Cho walked to the next classroom, in which the occupants had attempted to barricade the door with a table, and forced his way inside. He then shot the professor and walked down the aisle shooting students without saying a word. He proceeded to the next classroom and, when he was unable to gain entry, fired several times through the door.

Upon trying to enter the next classroom, the gunman again could not enter because a professor had braced his body against the door as the students escaped by jumping out of the window. Only after fatally shooting that professor was the shooter able to enter. He shot two students in that room as they tried to exit through the window.

Cho returned to most of the classrooms more than once, reloading his guns as he walked through the hallway. He fired from inside the doorways of the classrooms, and sometimes entered to walk around inside them. He returned to the second and third classrooms, and fired into the doors when he could not enter.

After the rampage, Cho committed suicide by turning one of his guns to his own head and fired. Within 12 minutes, he had killed 25 students, and five faculty members, in addition to the male and female student he had killed earlier in the morning, and wounded 17 others. That day left 32 people dead at Cho's hands.

### C. SOCIAL/MENTAL HISTORY

The investigation following the Virginia Tech shooting was extensive, which scrutinized Cho's personal history as far back as to when he was diagnosed with a heart condition at the age of nine months. A cardiac test to examine the inside of his heart at the age of three caused Cho emotional trauma, the investigation found, and from that point on, he had an aversion to physical touching.<sup>64</sup>

Cho's early development was characterized by constant physical illness and inordinate shyness. Even as a young boy, the shooter preferred not to speak. Although he did not have disciplinary problems, he was poor at communicating with his family, an issue that worried and frustrated his parents. His parents worked long hours, had financial difficulties, and as South Korean immigrants, they were English-limited. They were concerned about the effect these factors had on him as a child because of the lack of time they had to devote to attentive parenting.

The summer before he started seventh grade, Cho's parents followed a recommendation from his school that they seek therapy for him. His teachers reported that he failed to interact socially, communicate verbally, or participate in group activities. In July 1997, Cho's parents took him to the Center for Multicultural Human Services (CMHS), a mental health facility for low income, English limited immigrants and refugees. He was initially diagnosed at that point as having social anxiety disorder.

In June 1999, a psychiatrist at CMHS evaluated Cho again. This time, he was diagnosed with selective mutism and major depression. Selective mutism is a type of anxiety disorder characterized by a consistent failure to verbalize in social situations in which speaking is expected. Major depression is a predominant mood of sadness or irritability that lasts for a significant period of

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<sup>64</sup> Virginia Tech Review Panel, *Mass Shootings at Virginia Tech April 16, 2007: Report of the Review Panel* (Blacksburg, VA: Virginia Tech Review Panel, 2007).

time and is accompanied by sleep and appetite disturbances, concentration problems, suicidal ideations, and pervasive lack of pleasure and energy.<sup>65</sup>

That same year, a new high school opened where Cho's family lived, and Cho was transferred to this school for his remaining three years of schooling. One month after Cho started classes at the new school, one of his teachers reported to the guidance office that his speech was barely audible and he did not respond in complete sentences. The teacher reported that he was not verbally interactive at all and was shy, and that he made virtually no attempts at engagement with his teachers or peers. Those failings aside, Cho achieved excellent grades and was diligent in submitting assignments. Other than his failure to speak, he did not exhibit any other unusual behaviors.

In 11th grade, Cho's weekly sessions at the mental health center ceased because he showed a gradual improvement over the years and he resisted continuing. He complained to his parents "There is nothing wrong with me," often asking "Why do I have to go?" Even though his parents disagreed with his decision to discontinue treatment, Cho was turning 18 soon, and legally, the decision whether to continue his sessions fell to him.

Cho began college in August 2003 as a business information technology major at Virginia Tech. He lived for his first semester in a college dormitory with a roommate with whom he did not particularly get along. Since he was obsessively hygienic and the roommate was not, he requested a change in roommates, which was granted by his second semester. By the beginning of that semester, he seemed to be adjusting to college life.

During Cho's sophomore year, he shared a condominium with a senior at the school who worked long hours and was rarely home. For his junior year, he returned to the dormitories. At the beginning of the school year, his roommate and suitemates took him to several parties, but he would always end up sitting in

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<sup>65</sup> Virginia Tech Review Panel, *Mass Shootings at Virginia Tech April 16, 2007: Report of the Review Panel*.

a corner alone rather than interacting socially with his peers. In one instance, they all went to a female student's room. While there, Cho took out a knife and began stabbing the carpet. His suitemates stopped taking him out to social events after that incident.

Cho's suitemates continued to invite him to eat dinner with them, but he would never speak, so they eventually stopped inviting him to meals as well. He was observed always eating alone in the dining hall or lounge. When another classmate asked with whom he hung out, his response was "nobody." When Cho was seen in the gym, he was either working out alone or playing basketball by himself.

In December 2005, the female student in whose room Cho had stabbed the carpet filed a complaint with the Virginia Tech Police Department (VTPD). Although she had not seen the young man socially since that incident, she was receiving messages via Facebook that she believed were from him. The messages were not threatening but self-deprecating and bizarre, saying things like, "I do not know who I am," and, "My name is hateful to myself."<sup>66</sup> A campus police officer met with Cho after her report and instructed him to have no further contact with the woman. This run-in with police would become one of the first significant events in a downward spiral in Cho's mental state that ultimately led to his shooting massacre. During the next several months, Cho would display numerous signs that arguably should have set off alarms to law enforcement officers and mental health professionals with whom he came into contact, but nobody put the picture together and flagged Cho as imminently dangerous. It was about two years *after* this contact with police, and just prior to the shooting, that Cho would eventually manage to purchase two handguns he used during the massacre.

After the visit from the police, Cho sent an instant message to one of his suitemates stating, "I might as well kill myself." The suitemate immediately

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<sup>66</sup> Virginia Tech Review Panel, *Mass Shootings at Virginia Tech April 16, 2007: Report of the Review Panel*.

notified the VTPD, who took him to their headquarters for assessment. A pre-screen evaluation was conducted by a licensed clinical social worker for New River Valley Community Services Board (CSB). The pre-screener interviewed Cho, the police officer, and the suitemate, and recorded that he was mentally ill, *an imminent danger to himself or others*, and that he was not willing to be treated voluntarily. She recommended involuntary hospitalization and initiated proceedings with the local magistrate.

Police officers transported Cho to St. Albans Behavioral Health Center. He did not speak at all with the officers during the trip. He was noted to be cooperative with the admitting process. On the screening form for potential violence, it was noted that Cho denied any prior history of violent behavior but confirmed that he did have access to firearms. After an approximately 15-minute evaluation, the independent evaluator—contrary to what the initial mental health professional who met with Cho ruled—concluded that the young man was “mentally ill; that he does not present an imminent danger, or is not substantially unable to care for himself, as a result of mental illness; and that he does not require involuntary hospitalization.”<sup>67</sup> The attending psychiatrist recommended that he be treated on an outpatient basis with counseling.

Cho’s commitment hearing was held the next day in front of a special justice. Nobody involved in Cho’s initial evaluation, including his suitemates and roommate, the police officer who made contact with him, his pre-screener, his independent evaluator, and the attending psychiatrist who oversaw his evaluation, attended the hearing to testify to Cho posing an imminent danger to himself or others. The justice ruled that Cho was indeed an imminent threat to himself as a result of mental illness but ordered *outpatient* treatment rather than commitment to an institution.

Cho kept his scheduled appointment for outpatient treatment. It was the policy of the Cook Counseling Center to allow patients to decide whether to make

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<sup>67</sup> Gordon Davies, "Connecting the Dots: Lessons from the Virginia Tech Shootings," *Change: The Magazine of Higher Learning*, 2008, 8–15.

follow-up appointments. According to existing records, Cho never scheduled any follow-up appointments. Since he was technically accepted as a voluntary patient, no notice was ever given to the court, the hospital, or school officials that he had never returned to the counseling center.

## **D. LEGISLATIVE RESPONSE**

### **1. Federal**

On January 8, 2008, in response to Cho's massacre, President George W. Bush signed into law the NIAA. This law required all states to submit mental health records to the NICS. To gain support of the National Rifle Association (NRA), however, Congress agreed to two major concessions in the law.

- To define more narrowly who could be *considered adjudicated as mentally defective* or *committed to a mental institution*. Such adjudications or commitments are "deemed not to have occurred" for purposes of the federal prohibition against possession of firearms if:
  - The adjudication or commitment has been set aside or expunged
  - The person has been fully released or discharged from all mandatory treatment, supervision, or monitoring
  - A court, board, commission, or other lawful authority has found the person no longer suffers from the mental health condition that was the basis of the adjudication or commitment
  - The person has been found to be rehabilitated through any procedure available under law
  - The adjudication or commitment was based solely on the medical finding of disability without a hearing before a court, board, commission, or other lawful authority, and the person has not otherwise been adjudicated a mental defective
- To establish the "Relief from Disabilities" program. This program is the mechanism by which people who had been previously adjudicated *mentally defective* can re-establish their mental health bona-fides to purchase firearms again.

## **2. State**

### **a. Virginia**

Two weeks after the shooting, on April 30, 2007, then Governor Tim Kaine signed Executive Order 50 to require that the names of all people involuntarily committed to mental health facilities be provided to the NICS. He also assigned a blue-ribbon task force to examine gun policies in the state. The task force made dozens of recommendations, including that the state intensify background checks and ban firearm possession on college campuses. None of the recommendations was ever introduced by state legislators to become law.

It must be noted that Virginia is particularly open to restoring peoples' gun rights.

- The restoration process in Virginia has allowed some people to regain access to guns simply by writing a letter to the state
- Others have been permitted to carry guns just weeks or months after being hospitalized for psychiatric treatment
- In 2013, the Virginia state legislature repealed a previously enacted law that barred people from buying more than one handgun a month, which the Virginia Tech shooter did

### **b. Other States**

Since the Virginia Tech shooting, about half the states have enacted laws authorizing and requiring the submission of mental health records to the NICS. States that have enacted such laws have subsequently shown an increase in the number of disqualifying mental health records they submit to the NICS, compared to before the legislation was enacted.

## **E. CONCLUSION**

Cho's peculiar behavior of pathological shyness and isolation continued to manifest itself throughout his college years. His roommates and suitemates noted frequent signs of his aberrant behavior and eventually reported them to authorities. The inability to share information among the academic,

administrative, and public safety organizations of the school contributed to the systemic failure to see the red flags that were present. Although these signs may not have necessarily raised red flags to any one person who came into contact with Cho in the months leading up to the shooting, the totality of the circumstances should have set off alarms.

Cho's was his own greatest impediment to receiving proper care. The way he acted when he was dealing with mental health professionals was by passive cooperation and denying his previous mental issues. He denied having previously received mental health services when he was evaluated in 2005; thus, medical personnel believed that their interactions with him on that occasion were the first time he displayed signs of mental illness.

According to current federal firearms law, namely the Gun Control Act, Cho was not legally authorized to purchase firearms because he was committed by adjudication to a mental institution. In Virginia, the Central Criminal Records Exchange (CCRE), a division of the state police, is tasked with gathering criminal records and other court documents used for background checks. Information for involuntary admission to a facility is supposed to be sent by court clerks to the CCRE. At the time Cho purchased his weapons, court clerks were only sending involuntary *inpatient* orders to CCRE, even though outpatient orders qualified if they were court ordered like Cho's. Federal law does not differentiate between *inpatient* or *outpatient* treatment, only *voluntary* versus *involuntary*. Virginia law did not clearly require that persons who had been ordered into outpatient treatment but not committed to an institution be reported to the NICS. Since he was ordered outpatient treatment, the shooter was not in the database and the purchase was allowed to proceed. The executive order signed by the governor after the shooting required that any involuntary treatment order, whether inpatient or outpatient, be reported to the NICS.

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## **V. TUCSON, ARIZONA**

### **A. INTRODUCTION**

The 2011 mass shooting outside a Tucson, Arizona supermarket was a high-profile spree by an unstable gunman not only because six people died and 13 were injured, but also because a United States representative, Gabrielle Giffords, was nearly killed in the shooting. The Tucson mass shooting incident is particularly notable for its legislative response; or lack thereof. Not a single change proposed at the federal level in response to the shooting, including a law essentially reinstating a ban on high-capacity magazines that had already been in effect for 10 years until its expiration in 2004, were ever signed into law. Unlike in the case of the Virginia Tech shooting four years prior, state lawmakers proposed no changes in response to the shooting that wounded Giffords and numerous others.

Perhaps more jarring is the fact that, much like the shooter in the Virginia Tech massacre, the shooter in Tucson had numerous police contacts as a result of his bizarre behavior in the months leading up to the shooting, yet none had set off the alarms necessary to prevent the shooting. Despite his contacts with the police and the issues that eventually got him thrown out of school, the shooter was still able to purchase a handgun, possibly due, in part, to the fact that his parents failed to heed police advice and seek mental health support for him. Unlike the Virginia Tech shooter, the Tucson shooter did not have any kind of involuntary contact with the mental health system at all. He fell through the cracks and was able to get his hands on a firearm not because existing mental health records never made it into the NICS, but because he was never properly referred to the mental health interventions he obviously needed prior to the shooting, despite a pattern of bizarre and delinquent behavior.

Even on the morning of the shooting, the gunman was denied an ammunition purchase at a local store and even stopped by a law-enforcement

officer for a traffic violation, but he still made it to his destination and carried out his plot.

## **B. INCIDENT DETAILS**

On January 8, 2011, a Sunday morning, around 6 o'clock, 22-year-old Jared Lee Loughner left his Arizona home to go to a local Walmart to buy ammunition for his Glock semi-automatic pistol. The clerk at the store, for reasons not specified, "did not feel comfortable" selling him ammunition, and he left the store empty handed. A second trip to another Walmart, however, proved to be more fruitful.

The same day, around 9 o'clock, United States Congresswoman Gabrielle Giffords was holding a meet-and-greet for constituents at a Safeway supermarket at the La Toscana Village Mall in Tucson. Also present was Chief United States District judge for Arizona, John M. Roll, as well as several of Giffords' staffers. About 30 people had gathered and lined up to meet the congresswoman at a table set up for the event.

At approximately 10 o'clock, Loughner, wearing sneakers and navy blue sweatpants, walked up to Giffords and shot her in the head at close range. He then turned and started firing into the small crowd of people who had gathered for the event, and emptied a 30-round magazine in about 19 seconds.

As he attempted to reload with another 30-round magazine, a 74-year-old retired Army colonel whom he had shot in the back of the head moments before tackled Loughner. Another bystander struck the shooter in the head with a folding chair as a 61-year-old woman wrestled the magazine away. Additional bystanders jumped into the melee, tore the gun from his hands, and held him down until police officers secured him.

While many of the victims were still being treated at the scene, Loughner calmly told police, "I just want you to know that I'm the only person that knew

about this.”<sup>68</sup> He refused to answer any questions from investigators and invoked his Fifth Amendment right. During a search of his person, officers discovered that he was wearing earplugs and had two fully loaded 15-round magazines in his pockets.

By the time the scene at the shopping center was stabilized, 18 people had been shot and five had died; a sixth later died at the hospital. Some of the dead included the federal judge and Giffords’ community outreach director. Also killed that day was 9-year-old old Christina Taylor Green, who was born on September 11, 2001, and had gone to the event with a neighbor.

### **C. SOCIAL/MENTAL HISTORY**

As a young man, Loughner lived an ordinary life. He was occasionally withdrawn, but no more than any other teenager. He enjoyed music and played the saxophone well. He was intelligent and excelled at math, so much so that he helped tutor his peers.

His troubles seemed to start just before his senior year at Mountain View High School in Tucson, when he dropped out. Near the end of his junior year, he was hospitalized for alcohol poisoning. Allegedly, he drank a third of a liter of vodka in that incident because he was angry with his father. He started drinking a lot after that and used hallucinogens like LSD. His mother said he smoked marijuana and tried cocaine.

For reasons unknown to his parents or peers, Loughner then changed how he lived his life. He worked out for months so he could join the Army. At the military processing station in Phoenix, he took and passed a drug test, which indicated that he had not been using marijuana for several weeks. However, he told the Army recruiter that he smoked marijuana excessively, an admission that precluded him from ever being accepted into the Army.

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<sup>68</sup> Aimee Houser, *Tragedy in Tucson: Arizona Shooting Rampage* (Minnesota: ABDO, 2012).

Loughner's behavior became increasingly erratic after being rejected by the Army. He would speak in random strings of words that did not make sense. He had run-ins with police over drugs and for vandalizing a street sign. He became paranoid that the government was trying to control him. He could not keep jobs at Quiznos Subs or an animal shelter because he either could not or would not follow instructions. His parents supported him with small amounts of cash at Christmas and occasionally some money for gas so he could search for another job.

When he began classes at Aztec Middle College, a partnership between Tucson schools and Pima Community College that helps dropouts transition to community colleges, Loughner's behavior concerned fellow students from the first day. He reportedly was paranoid and continued the jumbled, senseless speech. He would sometimes burst out in laughter randomly and loudly at nothing, which frightened other students. He would often speak out of turn and ask questions unrelated to the class topic that led one of his professors to assume he had Tourette syndrome. Other times he would just stare into space. He made a comment about abortion that his fellow classmates and faculty found so disturbing that the campus police were called.

Several classmates stated they were scared of him. With the Virginia Tech shooting not far in the country's rear view, one even sent an e-mail to a friend saying she was afraid he would bring a gun to class. A teacher was worried that every time his back was turned to Loughner that the unstable student would pull a gun on him. Unbeknownst to his classmates or parents, Loughner purchased a 9mm handgun sometime before Christmas 2010.

Eventually, and because he displayed regular indications of a possible mental illness, the college asked Loughner to withdraw from school and not return to campus until he passed a mental health evaluation. At that point, his parents took away his shotgun, tested him for drugs, and prohibited him from using the family car after dusk. The college police urged his parents after

Loughner had five separate contacts with them to have him evaluated, but they never followed up on that advice.

The morning of the shooting, Loughner had a confrontation with his father in the front yard. His father inquired about a black bag he was carrying. The soon-to-be mass shooter mumbled something and then ran off. His father tried to follow in his vehicle but could not locate his son.

A few hours before the shooting, Loughner was pulled over by an Arizona Game and Fish officer for running a red light. He broke down into tears when the officer told him he was not going to issue a citation. When the officer asked if he was OK, he said he was “just having a real rough time lately.” When asked if he was OK to drive home, he responded that he was not too far away and he would be OK. Two and a half hours later, he fired that first shot into Gifford’s skull.

#### **D. LEGISLATIVE RESPONSE**

##### **1. Federal**

Representative Peter King, a New York Republican, planned to introduce legislation that would make it illegal to bring a gun within 1,000 feet of a government official holding a public event, carrying out official duties, or campaigning for elective office.

Representative Carolyn McCarthy, a New York Democrat, announced that she would introduce legislation to ban the sale of high-capacity ammunition magazines to civilians. A similar prohibition on the sale of ammunition magazines containing more than 10 rounds was part of the federal assault weapons ban that expired in 2004.

Senator Barbara Boxer, a California Democrat, introduced legislation to establish minimum standards for states that allow the carrying of concealed firearms.

None of these proposed changes to legislation in response to the massacre in Tucson ever left committee.

## 2. State

No notable changes to local firearm regulations in response to this incident ever occurred.

## E. CONCLUSION

It is clear that the Loughner was displaying signs of mental illness in the time leading up to the shooting. Pima Community College could have responded more directly to the shooter's behavior. Under the legal concept of *In Loco Parentis*,<sup>69</sup> the college had a legal responsibility to refer the shooter to authorities for possible commitment to an institution if school officials thought he had a substantial probability of causing harm to himself or others.<sup>70</sup> Instead, when he displayed persistent behavioral problems that indicated a possible psychotic illness, the school asked him to withdraw until he received outside help.

The shooter was able to purchase guns legally with which to perpetrate his violent act. He was never committed to a mental institution, involuntarily or otherwise. His parents, despite being urged to do so by law enforcement, never made him undergo mental health evaluation or intervention. Neither his school peers nor school officials referred him to the school's counseling center although it was clear they all were afraid of him to some extent. They simply wanted him away from themselves and the campus.

The correct systems were not in place, and existing prevention measures were not utilized to prevent this tragedy. Police and other first responders were not involved in all of the interactions with the shooter. If they had been, the warning signs may have been recognized, especially on the heels of the Virginia Tech massacre. If those involved were crisis-intervention trained, an opportunity

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<sup>69</sup> M. O. B. Mohammed, J. P. Gbenu and R.O. Lawal, "Planning the Teacher as in Loco Parentis for an Effective School System," *Mediterranean Journal of Social Sciences* 5, no. 16 (2014): 318.

<sup>70</sup> Brian Jackson, "The Lingering Legacy of in Loco Parentis: An Historical Survey and Proposal for Reform," *Vand. L. Rev.* 44 (1991): 1135.

potentially would have presented itself to refer Loughner properly into the mental health sector before he had the chance to orchestrate his massacre.

This case is a clear example of a breakdown of the mental health, law enforcement, and higher education communication system. On their own, the incidents prompted as much action as school officials or law enforcement deemed necessary, given that each was handled as an isolated occurrence. If officials had tallied the totality of the incidents, however, enough evidence arguably would have been available for school authorities to have the shooter involuntarily committed to a mental hospital. In theory at least, if the shooter had been committed, he would have not passed a NICS background check and obtained a firearm.

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## **VI. AURORA, COLORADO**

### **A. INTRODUCTION**

The 2012 mass shooting inside an Aurora, Colorado movie theater left 12 people dead and nearly 60 wounded by a heavily armed, mentally disturbed young man who donned body armor and planned his attack so well that he also took the time to install a sophisticated series of booby traps in his apartment before the shooting. These details, however, although they make Aurora's mass shooting stand out among many others in recent memory, are not what makes Aurora so significant for the purposes of this paper. What makes Aurora particularly of interest is the fact that the shooter, although in hindsight and upon investigation, was clearly suffering a mental break in the months leading up to the massacre, obtained firearms, ammunition, and other reinforcement he used through completely legal means. The shooter did not have contact with the health care system for mental issues extensive enough to land him in the NICS, even though he purchased his guns in Colorado, a state that is a full participant in mental health record submission.

The fact that the Aurora, Colorado shooter—clearly exactly the type of dangerously mentally ill individual that authorities seek to keep guns away from—was able to easily get his hands on several firearms despite Colorado's extensive participation in NICS record submission suggests that perhaps the NICS system was never set up in a way that would absolutely ensure that firearms do not reach the hands of the dangerously mentally ill. The Aurora movie theater massacre could serve as a teaching moment to show that, even when what are thought to be the best practices in the current legal system for gun control are in place, guns continue to too easily find their way into the hands of people who will use them to carry out violent plots aimed solely at causing mass casualties.

## **B. INCIDENT DETAILS**

Just before midnight on Friday, July 20, 2012 24-year-old James Holmes wearing a long black coat, walked into the front of the Century 16 multiplex movie theater in Aurora, Colorado, outside of Denver, and purchased a ticket. After the movie began, he went out a rear parking lot exit door to his vehicle, and propped the door open. He dressed himself head to toe in protective ballistic gear, including a throat protector and leggings, donned a gas mask, and armed himself with a semiautomatic rifle, a 12-gauge shotgun, and two handguns.

Twenty minutes of the movie *The Dark Knight Rises* had been shown inside of theater 9 when the heavily armed Holmes casually walked into the crowded theater through the same rear exit door. He set off two smoke devices, and in the ensuing confusion and panic, opened fire on the audience as he walked up the theater's steps. Some of the rounds penetrated the walls of the adjoining theater 8, striking at least one of its audience members. After stopping at least once to reload, Holmes walked out the same exit door into the parking lot toward his white Hyundai.

Within minutes, the first responding police officers arrived and found Holmes standing by his white coupe, still dressed in tactical gear. After he was arrested, the shooter told police that he had booby-trapped his apartment with explosives. By the end of the night, 10 people had lost their lives in the theater, two more died at the hospital, and 58 were injured but survived.

At the shooter's apartment, investigators found 30 homemade grenades and 10 gallons of gasoline filled with homemade napalm, which the shooter had prepared in anticipation of police entering. Other residents in the area were evacuated as police bomb squads arrived to dismantle the elaborate system of trip wires, and chemical and incendiary devices.

## **C. SOCIAL/MENTAL HISTORY**

The investigation that followed the shooting included interviews with more than a dozen people. Holmes was a Ph.D. student at the University of Colorado,

Denver studying neuroscience. The neuroscience program admits six or seven students each year out of more than 60 applicants. Many of those interviewed were classmates who either knew or had contact with Holmes in the months prior to the attack. As the investigation progressed, a clearer picture of the shooter began to form. He was a young man struggling with a severe mental illness who, on more than one occasion, hinted to others that he was losing the battle.

Those who worked with Holmes described him as intensely shy with a quick smile and a quirky sense of humor. During class presentations, he was known for his goofy jokes and one-liner quips. He remained, however, locked inside a private world that no one could share or penetrate.

Even in an academic world in which students can spend hours in solitary research, Holmes seemed especially alone. He confided little information about himself or his outside life to his classmates. He had trouble making eye contact with others, and their attempts to engage in small talk with him were often met with one-word answers. Several times he texted a female classmate to ask her out on dates, but then ignored her completely when walking past her in person. Sometime in the spring, he stopped smiling and no longer made jokes during class presentations. In May, he showed another student a Glock pistol, which he said he had bought “for protection.”

The shooter had been seeing a psychiatrist at the university before the shooting. That psychiatrist told a member of the university’s campus police threat assessment team that Holmes might be dangerous and that he had threatened and intimidated her about a month before. Colorado law specifies that mental health professionals have a duty to warn in cases of a *specific* threat of imminent physical violence against a specific third party, which consists of reasonable and timely efforts to notify the appropriate law enforcement agency, or by taking other action, including hospitalization.<sup>71</sup> Whatever occurred between Holmes and the

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<sup>71</sup> John J. Maxey, Hal S. Wortzel, and Richard Martinez, "Duty to Warn Or Protect," *Journal of the American Academy of Psychiatry and the Law Online* 39, no. 3 (2011): 430–432.

psychiatrist when he allegedly threatened and intimidated her apparently did not rise to the Colorado threshold to hospitalize him involuntarily.

In early June 2012, Holmes did poorly on his oral exams. Professors told him that he should find another career. Soon after, he withdrew from the university via an e-mail and left campus. Not long after his withdrawal, another student asked if he had left town yet, and he responded “no” and asked if she had heard of *dysphoric mania*, a form of bipolar disorder that combines the frenetic energy of mania with the agitation, dark thoughts, and in some cases, paranoid delusions of major depression combined with suicidal ideation.<sup>72</sup> When she asked if it was treatable, he responded that it was and advised her that she should stay away from him “because I am bad news.”<sup>73</sup> Less than a month later, he carried out his attack.

## **D. LEGISLATIVE RESPONSE**

### **1. Federal**

In March 2013, New York Representative Carolyn Maloney and seven co-sponsors proposed the *Firearm Risk Protection Act of 2013*. This controversial measure was a national push that would force gun owners to buy liability insurance or face a \$10,000 fine. Several states proposed their own gun liability insurance legislation over the months prior to the introduction of the national bill.

- California, Connecticut, Massachusetts, New York, and Pennsylvania all introduced gun liability insurance to their respective governing bodies; none has produced any results.
- In Illinois, the House rejected a measure that would require people carrying concealed firearms also to carry \$1 million in liability insurance.

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<sup>72</sup> Susan L. McElroy et al., "Clinical and Research Implications of the Diagnosis of Dysphoric or Mixed Mania or Hypomania," *American Journal of Psychiatry* 149 (1992): 1633–1633.

<sup>73</sup> Erica Goode et al., "Before Gunfire, Hints of 'Bad News'," *New York Times*, August 26, 2012, [http://www.nytimes.com/2012/08/27/us/before-gunfire-in-colorado-theater-hints-of-bad-news-about-james-holmes.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2012/08/27/us/before-gunfire-in-colorado-theater-hints-of-bad-news-about-james-holmes.html?pagewanted=all&_r=0).

- A similar measure in Connecticut was withdrawn following a two-hour hearing on the issue. Connecticut's proposal would have required firearm owners to maintain excess personal liability insurance and self-defense insurance.
- In Maryland, a bill that sought mandatory firearm liability insurance was completely withdrawn.

Since so many setbacks had occurred at state levels, it could only be assumed that trying to pass a liability insurance mandate on a national level would be near impossible. The bill died in committee.

Representative McCarthy and New Jersey Senator Frank Lautenberg both introduced separate legislation after the shooting that would have banned online ammunition sales (the shooter had purchased 6,000 rounds of ammunition online in preparation for his attack), but both versions also died in committee.

## **2. State—Colorado**

Days after the shooting, Governor John Hickenlooper and Colorado officials planned on revamping the previously underfunded state mental health system. In May 2013, the governor signed into law an expansion of mental health services. The new law established walk-in crisis centers around the state, a 24-hour mental health hotline, and mobile units for traveling to rural areas where such services are limited to non-existent. Lawmakers budgeted nearly \$20 million for the improvements.

Colorado lawmakers also responded to the theater shootings by passing limits on ammunition capacity of magazines and broadening background checks to include online and private firearm purchases.

## **E. CONCLUSION**

In the days following the shooting, professors and classmates compared notes on what they knew about Holmes and what they might have done or missed that could have prevented the attack. Some wished they had tried harder to break through his wall of isolation.

Holmes had been planning the attack for months. In the 60 days preceding the shooting, he purchased four guns at local gun shops. In the same time period, he stockpiled more than 6,000 rounds of ammunition that he purchased online: 3,000 for the assault rifle, another 3,000 for the two Glocks, and 300 for the shotgun. He also purchased multiple magazines for the assault rifle, including one 100-round drum magazine, online. The guns and ammunition were all purchased legally. He also purchased body armor, and laced his apartment with booby traps.

It may seem surprising to some, but according to current federal laws, none of these circumstances amounted to prohibition of the shooter from access to or ownership of firearms. Even in the totality of his behaviors, the shooter could still legally purchase and possess every item he had accumulated for his attack. An NICS check was conducted at the point of sale as required, and the sale was permitted to proceed because he did not meet the criteria for disqualification by either federal or Colorado law.

Although it is unknown whether Holmes was clinically diagnosed with a disqualifying mental illness at the time that he purchased the weapons, he clearly suffered from an ailment that should have precluded him from purchasing firearms and ammunition. A change to federal law would have disqualified the shooter from possessing firearms based upon the psychiatric treatment he was receiving at the university. The NICS is strictly governed by the Gun Control Act and its applicable amendments. Currently, federal statutes state that an individual must be involuntarily committed to a treatment facility to be legally banned from purchasing a firearm. If only a few words were changed in the Gun Control Act to add “receiving treatment by a qualified clinician who deems the person unfit at this time” or something of a similar nature, the sale of the weapons to Holmes could have been denied and possibly prevented the attack in its entirety.

## **VII. NEWTOWN, CONNECTICUT**

### **A. INTRODUCTION**

During the December 2012 elementary school massacre in Newtown, Connecticut, the worst nightmare of parents across the United States played out on a national stage. An apparent madman shot his way into the small-town New England school armed with a semiautomatic rifle and two handguns, and inside, murdered dozens of children in their classrooms. The Newtown elementary school mass shooting, perhaps more than most of the mass-casualty shooting incidents before it, propelled the issue of gun control into the national consciousness in a way permanent enough that the president convened a specialized task force to address the issue.

Newtown raised unique problems in terms of gun control. How is it possible to keep guns away from the dangerously mentally ill while not hindering the constitutional rights of those who may live in close quarters, sharing a house with them, who are able to legally own guns? Is it even possible to keep guns out of the hands of the dangerously mentally ill, so as long as they have close contact with people who can and do exercise their right to legally purchase and own firearms? If not, then who is to be held responsible when the guns find their way into the wrong hands and things go terrible? The conversation around gun control spurred by the school shooting in Newtown continues two years later, with the gun-control and anti-gun lobbies still pressing hard to have each side of the argument recognized and represented in law as lawmakers walk a tightrope in search of some solution to ensure that nothing like the Newtown school shooting ever happens in the United States again.

### **B. INCIDENT DETAILS**

On the morning of December 14, 2012, 20-year-old Adam Lanza, wearing a hat and sunglasses, parked his 2010 Honda Civic next to a no parking zone outside of Sandy Hook Elementary School (SHES) in Newtown, Connecticut. At

approximately 9:30 a.m., he approached the main entrance to the school armed with a semiautomatic rifle, two handguns, and a supply of ammunition.

Finding the main doors locked, Lanza shot through a plate glass window with the rifle and entered the building. He then shot and killed the principal and school psychologist in a hallway as they were responding to the noise of the gunfire and shattering glass. He also shot and injured two other staff members who were in the same hallway.

Lanza then went into the main office, apparently did not see the staff members who were hiding in the office, and returned to the hallway. He proceeded down the hallway and entered two first-grade classrooms, the order of which is not known, and killed two adults in each room, 15 children in one and five in another. Within just more than five minutes, the shooter killed a total of six adults, wounded two others, and killed 20 children inside of the school; all with the same semiautomatic rifle. He then took his own life with one of two semiautomatic handguns he was carrying.

Prior to going to the school, Lanza used a different rifle to shoot and kill his mother in her bed at the home they shared, which brought his total death count to 28 (including the gunman, after he turned a gun on himself). All of the firearms Lanza used were legally owned by his mother, registered in compliance with both federal law and Connecticut state law, and stored in the home where both the mother and Lanza lived.

### **C. SOCIAL/MENTAL HISTORY**

The investigation following the shooting includes hundreds of interviews of friends, neighbors, co-workers, and family members conducted by authorities. The majority of those persons interviewed had no explanation for Lanza's actions on that day. However, vast evidence identified Lanza's preoccupation with mass shootings, particularly the Columbine High School shooting of April 1999, his obsession with firearms, and his serious mental health issues.

Over the years from the late 1990s and into the 2000s, Lanza had medical and mental evaluations of various types. In the late 1990s, he was described as having speech and language needs. At that time, he was also being monitored medically for seizures. In preschool, his conduct included repetitive behaviors, temper tantrums, smelling things that were not there, excessive hand washing, and eating idiosyncrasies.

In 2005, the shooter was diagnosed with Asperger syndrome and was described as presenting with significant social impairments and extreme anxiety. It was also noted that he lacked empathy and had a very rigid thought process. In the school environment, he had extreme anxiety and discomfort with changes, noise, and physical contact with others.

In 2006, Lanza underwent an IQ evaluation that placed him in the “average” range. He had no detectable learning disability. Depending on the psychological test taken, he could be average, below average, or above average. It was reported that his school issues related to his identified emotional and/or pervasive developmental disorder (PDD) spectrum behaviors. His high level of anxiety, Asperger syndromes characteristics, obsessive compulsive disorder (OCD) concerns and sensory issues all impacted his academic performance to a significant degree, which limited his participation in a general education curriculum. Tutoring, desensitization, and medication were recommended. It was suggested that Lanza would benefit from being eased into more regular classroom time and having his exposure to routine events at school be increased. Lanza, however, refused to take any medication and did not engage in the suggested behavior therapies.

Some of the evidence located in the gunman’s home after the massacre included a quantity of video games characterized by graphically violent content that included, such titles as *Grand Theft Auto*, *Call of Duty*, *Vice City* and many

others. These particular titles, along with others found in his home, are believed to have a connection contributing to antisocial behavior.<sup>74</sup>

Lanza's mother consistently described him as having Asperger syndrome. She described her son as being unable to make eye contact, having a sensitivity to light, and displaying resistance to being touched by anyone. Over time, he presented with multiple daily rituals, an inability to touch door knobs, repeated hand washing, and obsessive clothing changing.

In 2006, around the time when Lanza was in seventh grade, marked changes occurred in his behavior. Prior to that, he would ride his bike and do adventurous activities like hiking and climbing. Those activities stopped. He also stopped playing the saxophone. He was in a school band but dropped out. He withdrew from playing soccer or baseball, which he said he did not enjoy.

#### **D. LEGISLATIVE RESPONSE**

##### **1. Federal**

Days after the tragedy, President Barack Obama appointed Vice President Joe Biden to chair a new task force that would develop "specific proposals" for policy reform legislation due no later than January.<sup>75</sup> Known as the gun violence prevention task force, the goal of this working group was to reach a set of proposals that both respect the Second Amendment rights of law-abiding citizens without a history of mental illness and keep schools, streets, and communities safe from gun violence.

On January 16, 2013, the White House released a document entitled *Now is the Time: The President's Plan To Protect our Children and our Communities by Reducing Gun Violence*.<sup>76</sup> The first priority in the plan is to close background

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<sup>74</sup> Christopher J. Ferguson et al., "Violent Video Games, Catharsis Seeking, Bullying, and Delinquency: A Multivariate Analysis of Effects," *Crime & Delinquency* (2010).

<sup>75</sup> Garen J. Wintemute, "Tragedy's Legacy," *New England Journal of Medicine* 368, no. 5 (2013): 397–399.

<sup>76</sup> Obama, *Now Is the Time: The President's Plan to Protect Our Children and Our Communities by Reducing Gun Violence*.

check loopholes and strengthen the background check system via four executive actions.

- Address unnecessary legal barriers that prevent states from reporting information about those prohibited from having guns
- Improve incentives for states to share information with the background check system
- Hold federal agencies accountable for sharing reliable information with the background check system
- Make sure dangerous people are prohibited from having guns

To date, none of the changes proposed by the task force in the plan has been implemented in federal laws.

## **2. State**

### **a. *New York State***

One month after the Sandy Hook shooting, New York Governor Andrew Cuomo proposed the New York Secure Ammunition and Firearms Enforcement (SAFE) Act of 2013; two days later, this sweeping gun control measure passed both houses of the New York State Legislature by a wide margin.

Many of the law's provisions are steps to improve gun safety, better regulate sales and licensing, and enhance enforcement by providing stricter penalties for violators. The law also requires mental health professionals—including psychiatrists, psychologists, social workers, and nurses—to report to local authorities the names of all patients deemed likely to harm themselves or others seriously. Reported persons' names are then checked against the state database of gun licensees; if a match is found, the license is suspended and the police are authorized to retrieve and confiscate the firearm.

**b. Maryland**

Two weeks after Sandy Hook, a state task force to study access of mentally ill individuals to regulated firearms submitted its report to Maryland Governor Martin O'Malley.

Among its recommendations was a reporting provision even more sweeping than the one that New York would enact. "All verbal or physical actions threatening suicide or serious violence toward a reasonably identifiable victim or victims should be reported to local law enforcement. Mandated reporting should apply to psychiatrists, psychologists, physicians, social workers, addiction treatment counselors, educators, case managers, and probation agents."<sup>77</sup> Governor O'Malley rejected the task force's recommendation for these broad reporting requirements.

**E. CONCLUSION**

Shooter Adam Lanza had significant mental health issues that affected his ability to live a normal life and interact with others, even those with whom he should have been close. Whether these issues contributed in any way to the shooter's motive that day is and will forever be unknown. Lanza did not recognize or attempt to seek help to mitigate any of his mental health issues. He had familiarity with and access to firearms and ammunition and an obsession with mass murders.

The totality of these circumstances should have prohibited Lanza from having access to any firearm, even those legally owned by his mother. Although the shooter did not meet the statutory definition of someone prohibited from possessing firearms, he clearly should have been. The shooter did not purchase any of the firearms on his own, but if he had, the NICS would not have disallowed the sale. A policy change to the NICS could require that the check system note if someone with mental health issues resides at the same home as the purchaser

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<sup>77</sup> Patrick Dooley and Jack McCauley, *Report of the Task Force to Study Access of Mentally Ill Individuals to Regulated Firearms* (Annapolis, MD: Governor's Office, 2013).

of a firearm. This action alone would not have had to deny the sale, but could have, if something similar had been in place prior to Sandy Hook, notified authorities to conduct a follow-up investigation on the shooter's mother and the method in which she stored the firearms. A simple procedural notification could have been the solution that effectively prevented Lanza's access to firearms, and thus, prevent the massacre at Sandy Hook.

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## VIII. CONCLUSION

Federal law has prohibited the sale of firearms to certain individuals with histories of dangerous mental illnesses for almost 50 years. Despite this longstanding law, several mass shooting incidents—especially over the last decade—have illustrated a serious gap in the law aimed at preventing guns from ending up in the hands of people prohibited from possessing them due to mental illness. Current rules require licensed dealers, but not private sellers, to request background checks through the NICS prior to the transfer of a firearm to screen out dangerously mentally ill individuals and other prohibited purchasers. The lack in regulation that has led to many mass shootings, however, is a result of federal law's inability to mandate that states make information that identifies individuals who should be prohibited from firearm ownership available to the NICS background check system. Since this gap in the system is aimed at keeping firearms from being sold to prohibited individuals, the mental health records that states submit to the NICS—if any—lack consistency across the nation. As illustrated in the examination of the circumstances surrounding several mass casualty shootings across the United States in recent years, several states fail to report records that are an integral part of keeping guns out of the wrong hands to the NICS.

Due to the lack of consistent mental health record reporting standards among the states and the non-mandatory reporting standards, the NICS database, which is maintained by the FBI, is dangerously incomplete. In particular, mass shooting incidents in recent years have shown that, with respect to people prohibited from possessing firearms for mental health adjudications and involuntary commitment orders, the NICS has failed on more than one occasion to do what it was intended to do. Thus, individuals with dangerous mental illness diagnoses were allowed to slip through the cracks, pass background checks, and obtain firearms that they later used to commit horrendous acts of violence.

Inevitably, following each mass shooting incident over the last several years, a period of public outcry and scrutiny of gun-control measures, as well as political grandstanding on the issue, has occurred. While some laws have been passed, mostly at the state level, in response to mass shooting incidents, numerous other measures introduced in their wake have fallen by the wayside and never became law. The facts and legislative responses related to the shootings discussed in this thesis—Virginia Tech in 2007, Tucson, Arizona in 2011, Aurora, Colorado in 2012, and Newtown, Connecticut in 2012—illustrate that despite the public outcry and attempts to change the law following each shooting, without major changes, the problem of gun violence rearing its head in the form of mass casualty shootings has continued to plague the nation.

Arguably, one of the first mass shooting incidents in recent American history to bring gun control into the national consciousness was the shooting at Virginia Tech 2007. The Virginia Tech massacre put a microscope on the existing gun control laws and made 32 faces and names, the victims in the shooting, emblematic of the horrific violence that can be inflicted when a state fails to report crucial information on mental health to the NICS background check system. While Virginia law at that time required that some mental health records be submitted to the databases used for background checks, it did not mandate the reporting of all people prohibited from possessing firearms for mental health reasons, a grave oversight that allowed the shooter, who was clearly dangerously mentally ill, to obtain the firearms he used in his rampage. Despite a strong call for change following the Virginia Tech tragedy, a number of other mass shootings, including those in Tucson, Aurora, and Newtown, all share the strikingly similar narrative of a mentally ill individual who should have been banned from firearm possession, in one way or another, falling through the troublesome gaps in the system and obtaining guns anyway. Each shooting has led to renewed calls for better legislation addressing firearms and mental illness.

In comparison to the years leading up to the Virginia Tech massacre, and following the other mass shootings in the years after it, the response has included the following.

- Between November 1999 and November 2007, less than a year after the Virginia Tech shooting, the number of disqualifying mental health records in the NICS increased from less than 90,000 to about 400,000.<sup>78</sup>
- The number of mental health records in the NICS increased more than 700% between the Virginia Tech shooting and January 31, 2014, with mass shootings in Tucson, Aurora, and Newtown all occurring in the intervening time and continually pressing the issues of gun control to the political forefront.<sup>79</sup>
- As of January 31, 2014, more than 3 million mental health records were in the NICS, with more than 1 million records added in 2013 alone, on the heels of the Newtown, Connecticut massacre.<sup>80</sup>
- Of the states that had submitted the top 15 highest numbers of records as of May 2013, 14 (93% of submitted records) states had enacted laws requiring the submission of mental health records to the NICS, while only two of the 15 poorest performing states (13% of submitted records) had enacted such laws.<sup>81</sup>

Despite the substantial improvement in the number of mentally ill individuals identified in the NICS, records of many individuals prohibited from possessing firearms are still missing from the database. It would be impossible to attempt to estimate how many records are actually missing from the NICS, but it is clear by reviewing the numbers of records entered by states per capita, that a substantial number are missing. The greatest gain in the numbers of state

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<sup>78</sup> Ekstrand and Burton, *Gun Controls: Options for Improving the National Instant Criminal Background Check System*.

<sup>79</sup> Criminal Justice Information Systems of the Federal Bureau of Investigation, *Active Records in the NICS Index as of January 31, 2014* (Washington, DC: U.S. Department of Justice, 2014).

<sup>80</sup> Criminal Justice Information Systems of the Federal Bureau of Investigation, *National Instant Criminal Background Check System (NICS) Operations* (Washington, DC: U.S. Department of Justice, 2012).

<sup>81</sup> Everytown for Gun Safety, *Closing the Gaps: Strengthening the Background Check System to Keep Guns Away from the Dangerously Mentally Ill* (Maryland: Everytown, 2014).

records submitted to the NICS largely reflects the efforts of a small minority of states. As of November 2013, 10 states each had made fewer than 10 records available and 12 more states had submitted less than 100 disqualifying mental health records each to NICS.<sup>82</sup> In other words, 22 states, almost half of the country, have submitted virtually nothing into the NICS database to protect the public from dangerously mentally ill individuals obtaining firearms.

Table 4. Number of mental health records provided to NICS.<sup>83</sup>

<b>Rank Per Capita</b>	<b>State</b>	<b>Records Submitted</b>	<b>Rank by Records</b>
1	Pennsylvania	676,968	1
2	New Jersey	411,879	3
3	Virginia	201,365	6
4	Delaware	19,573	16
5	California	563,458	2
6	Washington	97,755	9
7	Michigan	117,215	7
8	New York	218,487	5
9	Texas	229,692	4
10	Colorado	41,947	11
11	Oregon	29,659	15
12	West Virginia	12,276	20

<sup>82</sup> Mayors Against Illegal Guns, *Twenty Years After US Requires Gun Background Checks, New FBI Data shows Information Gaps Still Allow Criminals to Get Firearms* (Washington, DC: Mayors Against Illegal Guns, 2013).

<sup>83</sup> Criminal Justice Information Systems of the Federal Bureau of Investigation, *NICS Fact Sheet*.

<b>Rank Per Capita</b>	<b>State</b>	<b>Records Submitted</b>	<b>Rank by Records</b>
13	Missouri	38,197	13
14	Florida	107,385	8
15	Connecticut	15,898	17
16	Nebraska	7,581	26
17	North Carolina	37,773	14
18	Ohio	42,544	10
19	Illinois	39,859	12
20	New Mexico	6,289	29
21	Utah	7,259	27
22	Iowa	8,889	24
23	Idaho	4,002	32
24	Wisconsin	14,595	18
25	Arizona	14,482	19
26	Minnesota	12,129	21
27	South Carolina	9,116	23
28	Kentucky	7,788	25
29	Maine	2,357	34
30	Tennessee	10,780	22
31	Kansas	4,554	31
32	Nevada	3,079	33
33	Indiana	5,435	30
34	Arkansas	2,156	35

<b>Rank Per Capita</b>	<b>State</b>	<b>Records Submitted</b>	<b>Rank by Records</b>
35	Georgia	6,800	28
36	Mississippi	771	36
37	Alabama	280	38
38	Maryland	285	37
39	Vermont	24	40
40	Wyoming	4	42
41	Oklahoma	25	39
42	South Dakota	3	44
43	Montana	3	43
44	New Hampshire	2	45
45	North Dakota	1	49
46	Alaska	1	46
47	Louisiana	4	41
48	Hawaii	1	47
49	Massachusetts	1	48
50	Rhode Island	0	50

Some states have cited a concern for privacy as a reason that records have not been submitted to the NICS, even though the mental health records that are entered into the database only identify the individual through name, birth

date, social security number, and similar data and include no other clinical information.<sup>84</sup>

States that do not submit mental health records to the NICS that identify prohibited people because of their mental health histories may still require a check of their own state maintained mental health records prior to a firearm transfer. Thus, a person attempting to purchase a firearm in one state may have a disqualifying mental health history in another state, but that information may never have been entered into the NICS. A search of in-state mental health records will ensure that a prohibited person is not allowed to purchase a firearm from a licensed dealer only in that state in which the mental health record exists. Since this record is not shared universally through the NICS, it will not prevent the prohibited person from purchasing a firearm in another state. When mental health information is submitted to the NICS, it can be effective at preventing the dangerously mentally ill from obtaining firearms through licensed dealers. The failure of states to submit prohibiting records is unacceptable and limits the effectiveness of the NICS.

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<sup>84</sup> Edward C. Liu et al., *Submission of Mental Health Records to NICS and the HIPAA Privacy Rule* (CRS Report No. R43040) (Washington, DC: Congressional Research Service, 2013).

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## IX. RECOMMENDATIONS

Effective background checks on prospective firearm purchasers depend on the existence of complete, accurate, and current information in the NICS database. The background check system is only as effective as the data submitted to it by the individual states. To capture all records fully that would disqualify someone under federal law from purchasing or possessing firearms due to mental illness or disability, amendments need to be made to federal firearms rules and/or laws. Additional actions that could be taken by authorities to improve the federal government's ability to prevent dangerous individuals from acquiring or possessing guns include the following.

### A. BACKGROUND CHECKS FOR ALL GUN SALES

Under current federal law, gun transfers by people other than licensed FFL gun dealers are exempt from background checks. For private sales or transfers by an individual other than a licensed FFL dealer, the individual transferring the firearm is not required to conduct any background check on the firearm purchaser at all. It is estimated that 40% of the firearm transfers that occur each year in the United States are through private sellers, and therefore, are not subject to the same background check requirements as those completed through FFLs.<sup>85</sup> As a result, more than six million gun transfers occur mostly at gun shows or online that are not processed at any point through the NICS.<sup>86</sup> Although none of the guns used examined in this report fell specifically into this category, the lack of background checks in certain firearm transfers undoubtedly creates a convenient opportunity for individuals ineligible to possess firearms, including felons, the dangerous mentally ill, and other prohibited persons, to circumvent the background check system and acquire a weapon.

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<sup>85</sup> Philip J. Cook and Jens Ludwig, *Guns in America: Results of a Comprehensive National Survey on Firearms Ownership and Use* (Washington, DC: Police Foundation 1996).

<sup>86</sup> Neera Tanden et al., *Preventing Gun Violence in Our Nation* (Washington, DC: Center for American Progress, 2013).

Requiring that all gun transfers, regardless of who is making them, be predicated on criminal background checks processed through the NICS, is an effective way to keep guns out of the hands of dangerous individuals.

Similarly, any individual purchasing a high volume of ammunition should be required to undergo screening to make the purchase. No reason exists for individuals to purchase ammunition if they do not own a firearm or have access to one. Therefore, regulating and recording ammunition purchases could serve as an added layer of protection from potential mass shooting incidents. Any purchase of a high volume of ammunition should be flagged for a follow-up investigation. Excessive purchasing of bullets and other firearm equipment, especially in a short amount of time, whether online or in a store, should raise a red flag for law enforcement. In the case of the Aurora, Colorado shooting, gunman James Holmes stockpiled a veritable arsenal supply of ammunition and other equipment—largely purchased online—in a rather short time before the shooting. Any purchases that seem suspicious, such as those Holmes made, should be tracked and investigated. If such a provision had been in place at the time of the Aurora shooting, the gunman's purchases before the massacre would have alerted the proper authorities, and they may have been able to detect his plan and prevent the mass shooting.

## **B. ESTABLISH A WARNING SYSTEM FOR LAW ENFORCEMENT IDENTIFYING DENIED FIREARM PURCHASERS**

Very little is known about the more than two million times, since the NICS was established in 1998, in which individuals were successfully prevented from purchasing guns because of a federal prohibition. The investigations into people prevented from obtaining guns are not informed by a comprehensive review of which NICS denials are most associated with individuals who do acquire guns via private sales and commit crimes with them.<sup>87</sup> The ATF has a specialized unit

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<sup>87</sup> Ronald J. Frandsen, *Enforcement of the Brady Act, 2008: Federal and State Investigations and Prosecutions of Firearm Applicants Denied by a NICS Check in 2008 Final Report* (St. Louis, MO: Regional Justice Information Service, 2010).

devoted to investigating these denied transfers, the denial enforcement and NICS intelligence branch (DENI). The DENI investigates each case, confirms the denial if necessary, and refers the case to federal prosecutors for possible criminal charges, although that happens only in rare cases.<sup>88</sup>

The information about these blocked sales and the prohibited persons who attempted to purchase guns should be of great interest to local authorities. These individuals pose a clear risk to public safety and could be identified as possible perpetrators of future violence. Mayors Against Illegal Guns in 2009 recommended an alert process for background check denials.<sup>89</sup> In response, the FBI implemented a procedure for alerting state and local authorities only when a *fugitive* attempts to purchase a firearm. The FBI should build upon that process to develop an electronic system within the NICS and NCIC to advise local law enforcement authorities when *any* individual within their jurisdictions who is prohibited attempts to purchase a firearm, and further, to keep a record of that person's attempt to purchase.

The purchase of ammunition should also be regulated and tracked. In this case, if denied ammunition purchases were also tracked and recorded like denied gun purchases, the shooter in the Tucson massacre potentially could have been prevented from purchasing ammunition, and maybe even stopped before he perpetrated the shooting. Before the Tucson shooting, a clerk at a local Walmart denied gunman Jared Loughner an ammunition purchase, apparently because the clerk, for some unspecified reason, felt uncomfortable selling him the ammunition. The clerk's suspicions had been founded, and although that clerk took preventive action by not selling him the ammunition, the denied sale was rendered meaningless when Loughner simply drove up the road to the next store and purchased it there instead. Had some type of notification system been in place that could alert all ammunition sellers in the area to the declined—and

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<sup>88</sup> Frandsen, *Enforcement of the Brady Act, 2008: Federal and State Investigations and Prosecutions of Firearm Applicants Denied by a NICS Check in 2008 Final Report*.

<sup>89</sup> Mayors Against Illegal Guns, *A Blueprint for Federal Action on Illegal Guns* (Washington, DC: Mayors Against Illegal Guns, 2009).

more importantly, to alert law enforcement of the clerk's discomfort with the purchaser—the massacre may have been thwarted.

**C. SCREEN HOUSEHOLDS OF GUN PURCHASERS FOR PRESENCE OF DANGEROUSLY MENTALLY ILL INDIVIDUALS**

A system should also be developed to screen gun purchasers' households to determine whether any members have mental health issues and should be prohibited from firearm access. In the case of the Newtown shooting, gunman Adam Lanza, a clearly dangerously mentally ill individual who should have been barred from ever possessing a firearm, accessed his mother's firearms. Similar to the protections in place aimed at curbing straw purchases of guns, steps should be taken to ensure that guns will not wind up unsecured in close proximity to any dangerously mentally ill individuals who would not otherwise be allowed access to them. Such a provision would not necessarily bar a prospective firearm buyer from owning a gun, but, in the best possible scenario, could flag that purchaser's household for follow-up investigation by law enforcement for gun security if a dangerously mentally ill individual is found to reside in that house.

**D. CREATE A NOTIFICATION SYSTEM FOR NON-LAW ENFORCEMENT AGENCIES AND INDIVIDUALS**

The FBI should develop a computerized system for reporting purchases of firearms to other authorities and responsible parties other than law enforcement agencies. State mental-health authorities, for example, should be notified when an individual purchases or attempts to purchase a firearm. Whether or not this individual is prohibited, a notification should be made so that additional action, if necessary, is taken. If the individual is receiving treatment from a licensed physician or clinician, that service provider would in turn be notified by mental health authorities, and in an ideal situation, would raise red flags if deemed necessary.

College campus agencies, including law enforcement, security, health, and human services, should be notified of any student's firearm transactions that

take place or are denied. Criteria could be established as easily as requiring this notification if applicants list their occupation as “student” or provide a college campus as a mailing address. A provision notifying the appropriate on-campus authorities if and when college students purchase a firearm could potentially have alerted authorities at their university to the fact that they did possess firearms. Virginia Tech gunman Seung-Hui Cho purchased the firearms he used in his 2007 massacre while he was a student living at Virginia Tech. If that fact had been added to Cho’s mental health run-ins with law enforcement, perhaps it would have helped the proper authorities to recognize the serious riskiness of his mental state in the time leading up to the shooting.

Pharmacy databases, in a method similar to those used to prevent adverse reactions, should be cross-referenced. Hospitals and pharmacies for two decades have cross-referenced databases to prevent adverse reactions in patients, especially allergy-related, to medications.<sup>90</sup> Additionally, recent epidemics involving illicitly manufactured methamphetamine have lead many states to develop statewide registers listing purchasers of products containing ephedrine and pseudoephedrine.<sup>91</sup> States could enhance such computerized registers to include any patient with a prescription for a habit-forming or mental status-altering medication, which firearm purchasers could then be checked against as an added database protection. This action would not only ensure that the individual is truthful on the application for transfer, but also automatically generate a flag to law-enforcement for a follow-up investigation in the event that a firearm purchaser is found in the database. The ultimate goal remains the same, to prevent persons who potentially pose a risk to themselves or others from obtaining a firearm.

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<sup>90</sup> R. Scott Evans et al., "Prevention of Adverse Drug Events through Computerized Surveillance," in *Proceedings in the ...Annual Symposium on Computer Application [Sic] in Medical Care, Symposium on Computer Applications in Medical Care* (Salt Lake City, UT: Department of Medical Informatics, LDS Hospital, 1992), 437–441.

<sup>91</sup> Samantha S. McKinley and Joseph L. Fink III, "Speed Limits: States' Approaches to Regulating Access to Methamphetamine Chemical Precursors with Statutes and Regulations Limiting Pseudoephedrine Availability," 82 *NDL Rev.* 1217 (2006).

## **E. AUTOMATE MULTIPLE-SALE PURCHASE NOTIFICATIONS**

Federal laws require that the ATF be notified when an individual purchases two or more *handguns*. This notification is based on the notion that multiple gun buys are possibly indicative of “straw” purchases, surrogate purchases made by individuals purchasing the firearm for someone else while falsely representing themselves as the intended possessor of a firearm.<sup>92</sup> Identical reporting is not required, however, for multiple sales of *long-guns*, despite the fact that they are also used in crimes and are often a choice of mass shooters.<sup>93</sup> In three of the shootings examined in this thesis, the shooters purchased more than one gun in a rather short time period leading up to the shootings. Had those purchases been flagged and investigated further, law enforcement may have caught wind of the shooters’ intentions and been equipped to thwart their plots. An ideal amendment to the current reporting requirements would require all dealers to report multiple purchases of *any* type of gun to the ATF, which would prompt an investigation.

## **F. PENALIZE STATES THAT DO NOT PROVIDE TIMELY RECORDS TO THE NICS**

Historically, most states have been slow to submit all required relevant records for inclusion in the NICS, which is especially true for records pertaining to prohibition due to mental illness. The NIAA provides financial incentives for states to submit these records. Since the enactment of the NIAA, the number of mental-health records submitted to the NICS has increased. Funding for these states has been increased as provided in the NIAA.

However, penalties have not been imposed on states that have not improved their submissions. For those states, the only pseudo-penalty is that no additional funds are provided. The NIAA allows the Attorney General the

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<sup>92</sup> Garen J. Wintemute, "Gun Shows Across a Multistate American Gun Market: Observational Evidence of the Effects of Regulatory Policies," *Injury Prevention: Journal of the International Society for Child and Adolescent Injury Prevention* 13, no. 3 (June 2007): 150–155.

<sup>93</sup> Mark Follman, Gavin Aronsen, and Deanna Pan, "A Guide to Mass Shootings in America," *Mother Jones* 15 (2012): 119.

discretion to withhold grant funding for states that have failed to submit the required records. The Attorney General should exercise this authority.

This recommendation is particularly relevant in a state that saw one of the worst mass shootings in recent history dissected in this thesis, Arizona. Arizona ranks 25th among all the states in its number of records it has submitted per capita to the NICS. Although gunman Jared Loughner managed to purchase the firearms legally that he used to perpetrate his massacre by slipping through other cracks in the system, Arizona stands out as a state that has not shown particular interest in rectifying its NICS submissions, even in the wake of its mass shooting. Federal law should require all states to submit relevant mental health records to the NICS and be held to strict standards in doing so. If the standards had been stricter in Arizona, and an overarching requirement of record submission had been created, Loughner's mental health record would have made it into the system before he was able to carry out his devastating act. Similarly, if federal standards were in place for record submission, the mental health records of the other shooters who purchased their own firearms—Cho at Virginia Tech and Holmes in Aurora, Colorado—would likely have also made it into the system before the shooters were able to obtain firearms legally that they desperately needed to be prevented from obtaining.

The tragedies perpetrated at the hands of these mentally ill gunmen were easily avoidable had several extra protective measures been in place. Yet, historically, dozens of states, and the federal government alike, have lacked the political will to place measures on gun control that may be perceived too strict or too limiting of people's constitutional right to keep and bear arms. That right, however, need not continue to be granted as easily as it historically has in the United States, especially when it comes to the issue of dangerous individuals obtaining firearms.

Without both added protections to ensure that guns never make it into the wrong hands, and states' cooperation and support in submitting records to the NICS, individuals who are dangerously mentally ill and of substantial threat, such

as the shooters at Virginia Tech, in Tucson, and Aurora, and at Sandy Hook Elementary, will continue to be able to acquire guns on their own. Mass shootings therefore will remain a major problem in the United States.

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