



Come and Take It

What Will *and What Will Not* Improve Public Safety in Firearm Violence Prevention

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by Derek M. Cohen, Ph.D.

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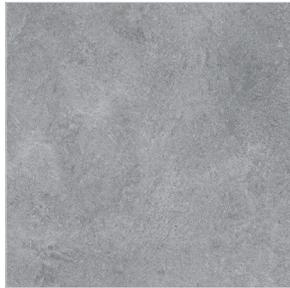


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Executive Summary

Texas is in the midst of a decades-long decline in the rates of all types of crime. Other than a small uptick in violent crimes around 2016 and 2017, this trend has been relatively constant. Firearm homicides and aggravated assaults have continued to match the ambient trend of declining crime rates.

In the wake of recent shootings in Odessa, El Paso, Sutherland Springs, and Plano, many Texas gun control proponents have demanded that state leadership “do something” in the hopes of preventing future tragedies. However, these demands often redound to a clear violation of an explicit right enumerated both in the United States and Texas constitutions—the individual right to keep and bear arms for lawful self-defense—while failing to empirically demonstrate the positive change the proposed policy changes seek to achieve. Nonetheless, some legislative proposals and executive actions floated in the wake of these tragedies may improve public safety and responsible firearm ownership through the explicit targeting of more pervasive types of firearm violence.

This report summarizes the extant scholarship on some of the more commonly discussed firearm policies and provides a research-based analysis of the effectiveness of the policies.

The Scope of Gun Violence in Texas

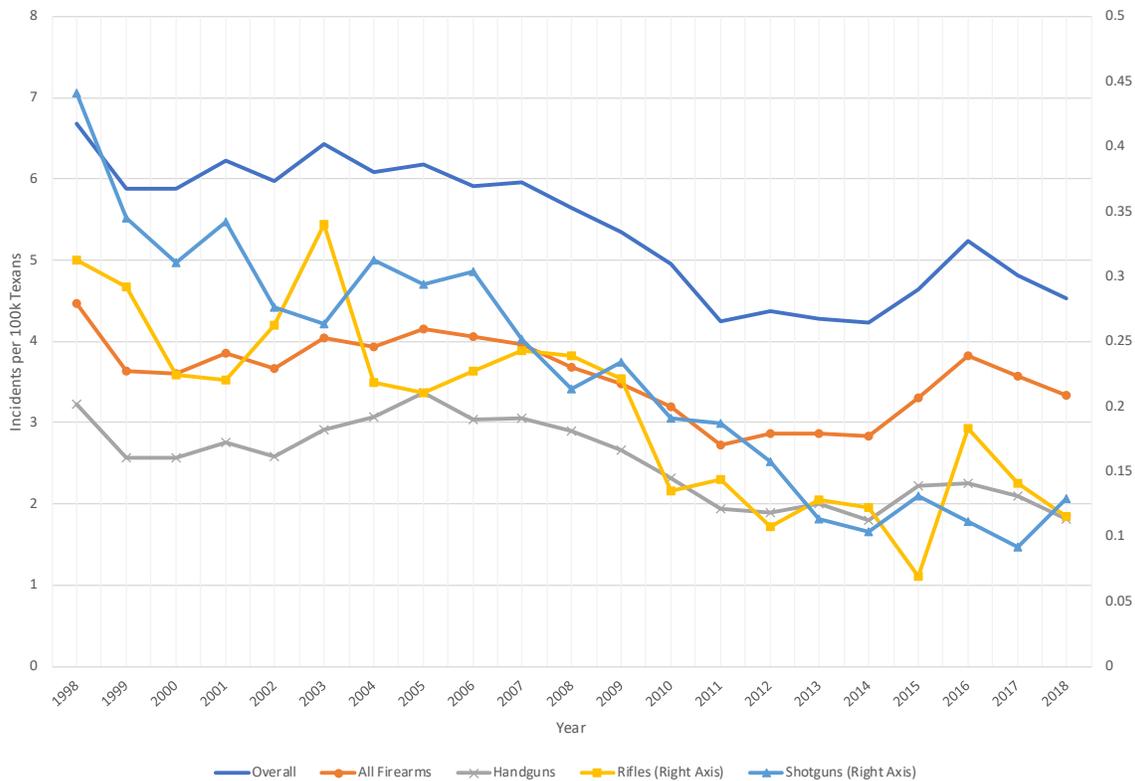
At publication, Texas’ crime rate is the lowest it has been since 1965. Similarly, violent crime in Texas is at a 40-year generational low with 410.8 incidents per 100,000 residents, a rate not seen since 1977. This trend follows a decades-long aggregate decrease in both violent and property crime rates. As illustrated in **Figure 1**, murder—the most heinous crime that can be committed using a firearm—has mimicked the decline as well with the drop in constituent subcategories of homicide. (Note that the rifle and shotgun homicide rates are reflected on the secondary vertical axis on the right in order to display the drop in these rare incidents.)

Further, the percentage of total homicides committed with a firearm in Texas has been trending downward as well. Similar to **Figure 1**, **Figure 2** shows declines across all major categories of firearm homicide, with rifles and shotguns being displayed on the right-hand vertical axis. During the preceding two decades, a handgun has been used in an average of 46.53 percent of all homicides, while rifles and shotguns were used in 3.57 percent and 4.10 percent, respectively. For handguns, the highest use was 54.55 percent in 2005; the lowest was the most recent year, 2018, at 40.12 percent.

Key Points

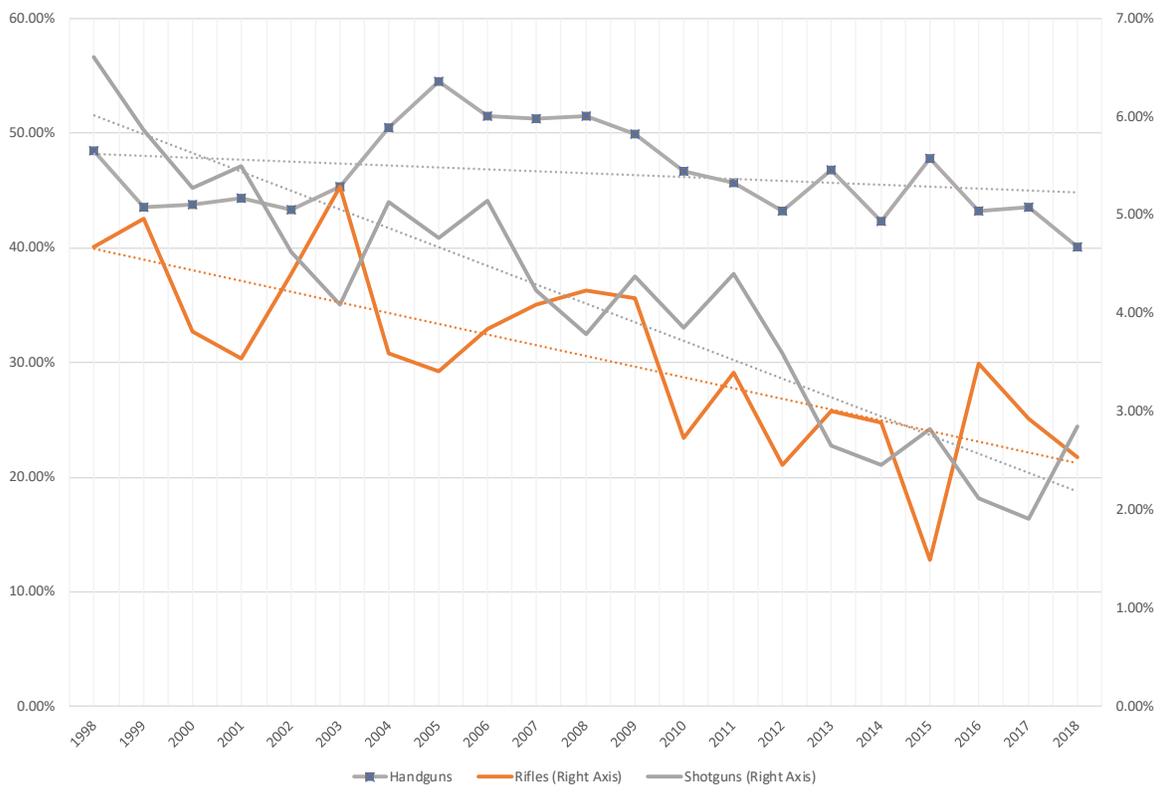
- Texas is the safest it has been in a generation, yet some are calling for stricter gun control.
- Common gun control proposals often penalize law-abiding gun owners while failing to improve public safety.

Figure 1. Texas homicide rates, 1998-2018



Source: [Federal Bureau of Investigation 2019a](#)

Figure 2. Weapon as percentage of total Texas homicides, 1998-2018



Source: [Federal Bureau of Investigation 2019a](#)

Nonlethal malicious firearm use is reported to law enforcement as aggravated assault. This data is reported to the Federal Bureau of Investigation (FBI) by weapon type, unlike the supplementary data on homicides, which is reported by specific firearm type. This data continues to trend downward as well, both in the overall aggravated assault rate and the rate of aggravated assaults using a firearm. In **Figure 3**, the rate of firearm aggravated assaults uses the right-hand axis, as over the 20-year period, less than a quarter of all aggravated assaults (24.31 percent) made use of a firearm.

Both nationally and in Texas, the modal, or predominant, cause of death involving a firearm is suicide. The suicide rate in Texas, both with firearms and other methods, has been increasing. However, the percentage of suicides in which a firearm is used has been slightly decreasing ([Centers for Disease Control](#)).

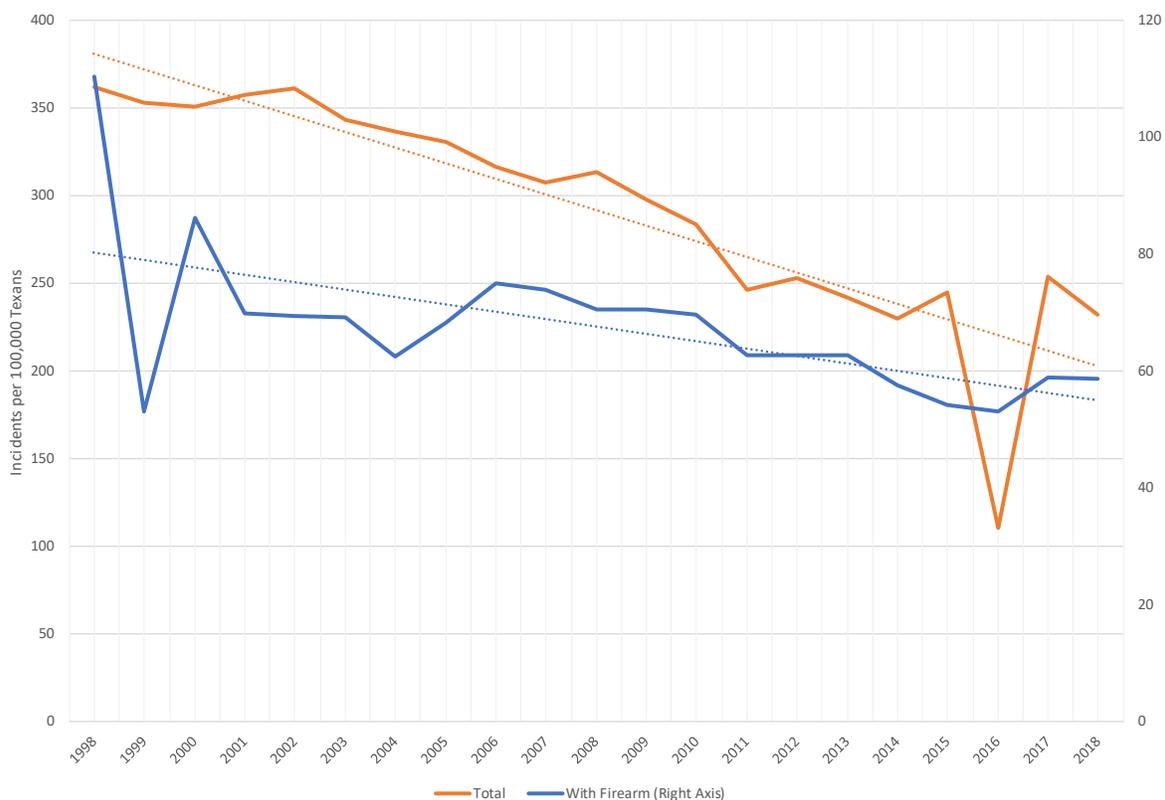
These trends persist in tandem with a proliferation in concealed carry permits being issued. Between 1998 and 2018, the number of concealed handgun licenses issued have increased 568 percent ([Texas Department of Public Safety](#)). The recent trend in concealed carry licensure growth will be discussed in a subsequent publication.

Proposals to Prevent and Deter Gun Violence

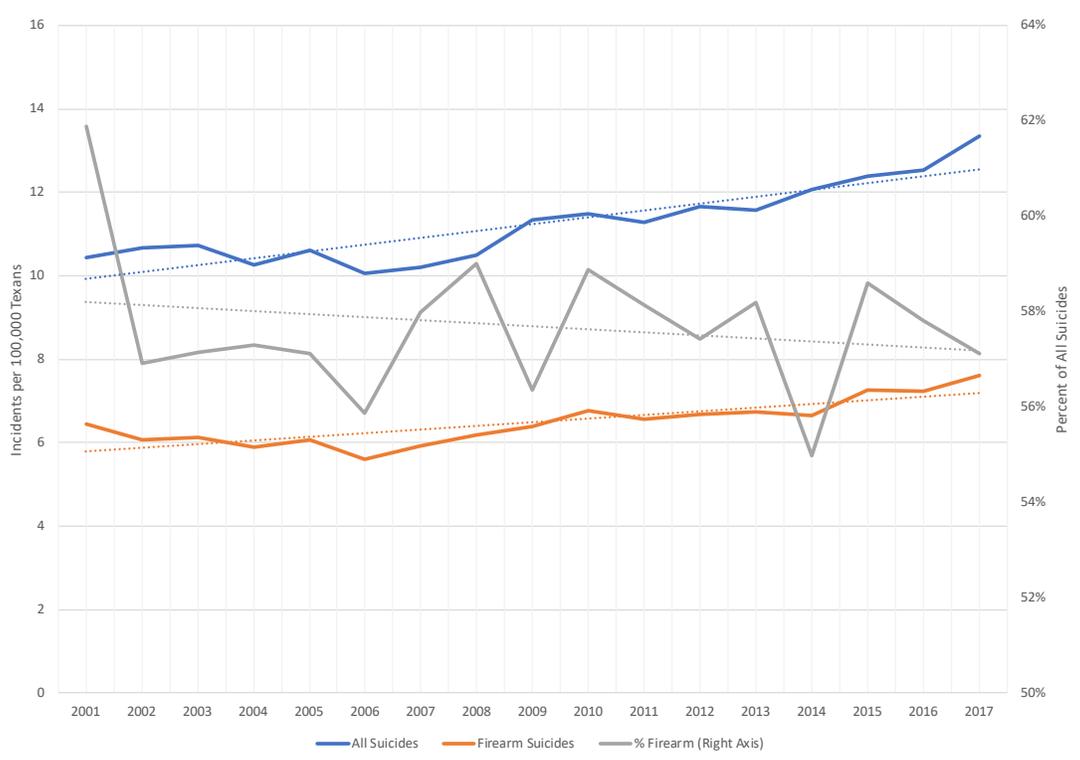
Despite the near-universal trend of waning malicious firearm violence, recent high-profile mass killings have animated calls for stricter firearm control. For instance, on September 4, members of the Texas House Democratic Caucus sent a letter to Gov. Greg Abbott requesting a special session on gun control to be held during the interim. This request was reiterated later that day during a press conference at the state Capitol and various locations across Texas, where speakers outlined a legislative package consisting of five distinct gun control measures ([Pollock and Karacostas](#)).

Next, on September 5, the office of Gov. Greg Abbott ([2019a](#)) issued eight firearm-related executive orders. Then, Lt. Gov. Dan Patrick said on Twitter and in discussions with the media (September 6) that he would entertain a proposal to extend the background check process to cover sales between unassociated private parties who do not hold a federal firearm license (FFL). Finally, Gov. Abbott convened two meetings of the Texas Safety Commission, an assemblage of relevant stakeholders to discuss this issue. The final work product of these discussions is titled the *Texas Safety Action Report* and was released on September 12, 2019 ([Office of Governor Greg Abbott 2019b](#)).

Figure 3. Aggravated assaults in Texas, 1998-2018



Source: [Federal Bureau of Investigation 2019a](#)

Figure 4. Texas suicide trends, 2001-2017

Source: [Centers for Disease Control](#)

This section will group and examine the various proposals and discuss the efficacy they have been demonstrated to show.

PROPOSAL 1: Expand the Use of Background Checks

- *Closing Background Check Loopholes on All Gun Sales* ([Texas House Democratic Caucus](#)).
- *Extend the background check process to cover sales between unassociated, non-FFL-holding private parties* (Lt. Gov. Dan Patrick).
- *The Legislature should consider ways to make it easy, affordable, and beneficial for a private seller of firearms to voluntarily use background checks when selling firearms to strangers* (Governor's [Texas Safety Action Report](#)).
- *Memo Circulated in Congress requiring NICS background checks for "all advertised commercial sales, including sales at gun shows."*
- *The Legislature should consider a law that works in conjunction with the proposed federal "Protecting Communities and Preserving the Second Amendment Act" of 2019.* (Governor's [Texas Safety Action Report](#)).

A common refrain from gun control advocates is that by extending the background check requirement to cover all firearm sales and transfers, it is less likely that weaponry will find a way into the hands of the mentally ill or criminally

inclined. While most agree that dangerous weapons should be kept from the hands of the dangerous and mentally ill, in practice, bureaucratic creep has made it difficult to ensure that the individuals included in the system truly should be there.

Nearly every new firearm already enters the market through a FFL holder. Since 1994, each FFL must conduct a background check when a firearm is transferred, if not sooner during the purchasing process. It is illegal for any non-FFL holder "to engage in the business of importing, manufacturing, or dealing in firearms, or in the course of such business to ship, transport, or receive any firearm in interstate or foreign commerce" (18 U.S. Code § 922). One who "engage[s] in the business" is statutorily defined as "a person who devotes time, attention, and labor to dealing in firearms as a regular course of trade or business with the principal objective of livelihood and profit through the repetitive purchase and resale of firearms, but such term shall not include a person who makes occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby, or who sells all or part of his personal collection of firearms" (18 U.S. Code § 921). The language following the "but" represents the private sale exemption and is colloquially referred to as the "gun show loophole," even though many gun show traders possess an FFL and comply with federal law.

To understand how the expansion of background checks would work in practice, one must first understand how the background check process currently functions. In 1993, Congress passed the Brady Handgun Violence Prevention Act, named for President Reagan's press secretary Jim Brady, who became paralyzed following a gunshot received during an assassination attempt on the president. Among other measures, the Brady Bill mandated that all firearm sales through FFL holders be subject to passing a background check as a bare minimum condition for purchase. States were free to add conditions for purchase beyond what was specified by the legislation.

To facilitate this background check requirement, the FBI launched the National Instant Criminal Background Check System (NICS) in 1998. Relevant information is voluntarily reported to the NICS system by state and local law enforcement. The NICS system contains three separate databases:

1. National Crime Information Center (NCIC)—Though the NCIC preexists NICS by three decades, this database was integrated into the system post-Brady. Any NICS check includes a search of the NCIC. The NCIC contains information on pending warrants, protective orders, missing persons, and other key factors relevant to one's fitness to purchase and possess firearms.
2. The NICS Index—This database exists exclusively for firearm background checks and contains information relevant to firearm possession that is not included in the other two databases. This includes disqualifying mental health history, immigration status, and exclusion factors codified in state law.
3. The Interstate Identification Index (I3)—Also existing pre-Brady, the I3 contains arrest and indictment information for felonies and serious misdemeanors. This database is commonly accessed by licensing agencies, as the data contained therein is most useful to informing licensing decisions across state lines.

A NICS check will include querying all three databases.

When an individual seeks to purchase a firearm from an FFL holder, the individual must complete a Bureau of Alcohol, Tobacco, and Firearms (ATF) Form 4473. When fully completed, this form functions as an affidavit that the applicant is not a prohibited possessor under state or federal law. Once complete, the FFL holder contacts the NICS Operation Center online or over the telephone to begin the background check process.

The three aforementioned databases are then queried. Shortly thereafter, the FFL holder is given one of three instructions: (1) proceed, (2) deny, or (3) delay. If instructed

to proceed, the sale or transfer is completed as no disqualifying history was discovered. If denied, the transfer is halted, and the case is flagged. Finding a match in one of the databases with an inconclusive outcome results in a delay, while further investigation is conducted. What happens during these delays varies by state.

These databases are populated through voluntary reporting from relevant entities. This includes direct reporting of final convictions, mental health records, drug abuse records, and domestic violence records. The federal government cannot compel states or subordinate agencies to report relevant information, although states may compel state and local agencies to do so. Under Government Code § 411.052, Texas mandates that court clerks report to DPS narrowly defined disqualifying information, which is then relayed to NICS. In Texas, disqualifying information is:

1. a person ordered by a court to receive inpatient mental health services under Chapter 574, Health and Safety Code;
2. a person acquitted in a criminal case by reason of insanity or lack of mental responsibility, regardless of whether the person is ordered by a court to receive inpatient treatment or residential care under Chapter 46C, Code of Criminal Procedure;
3. a person determined to have mental retardation and committed by a court for long-term placement in a residential care facility under Chapter 593, Health and Safety Code;
4. an incapacitated adult individual for whom a court has appointed a guardian under Title 3, Estates Code, based on the determination that the person lacks the mental capacity to manage the person's affairs; or
5. a person determined to be incompetent to stand trial under Chapter 46B, Code of Criminal Procedure.

Texas is known as a "non-point-of-contact" (non-POC) state, meaning that the background check is conducted via the NICS system as opposed to state or local law enforcement. A minority of states (21) have passed some form of POC check. In those states, state or local law enforcement is responsible for the relevant queries and ostensibly has access to additional state and local databases that may contain relevant disqualifying information.

Since 1998, there have been 1,662,655 denials arising from a NICS background check ([Federal Bureau of Investigation 2019b](#)). Nearly two-thirds of all denials are from those with a disqualifying criminal history or a fugitive from justice designation. Should an individual fail the NICS check, the FBI refers the application to the ATF for investigation into

an individual lying on Form 4473. If the allegation is found to have merit, it is referred to the relevant United States attorney for prosecution. However, the lack of prosecution relating to failed background checks by federal and local officials indicates that there may be little danger from most of those who improperly seek to purchase a firearm. “Officials from the Executive Office for United States Attorneys said that prosecuting denial cases can require significant effort and may offer little value to public safety compared to other cases involving gun violence. Selected state officials said that denial investigations can take law enforcement officials away from their core duties” ([GAO](#)).

These highlight some of the challenges from increasing reliance on NICS. First, the overly broad nature of denial criteria and the growing list of prohibited possessors may increasingly ensnare law-abiding, safe possessors who statutorily qualify for NICS reporting. For example, through executive order, President Barack Obama mandated that the Social Security Administration report that disability and supplemental security insurance (SSI) recipients who have a “designated payee” be characterized as “mentally defective.” This population includes individuals with single diagnoses of autism or depression, two common issues in society ([Congressional Research Service, 11](#)).

Secondly, background checks have proven ineffective in stopping mass shooters. The “vast majority” of weapons used in mass shootings have been legally acquired after the to-be murderers passed a NICS-processed investigation ([Edmonson](#)). The only way to truly stop mass shooters from acquiring their weaponry through legal means would be a system so intrusive and cumbersome that nearly all law-abiding citizens—those who haven’t had so much as a parking ticket—be ensnared as well. This illustrates the concern with measures that broaden the scope of the NICS system, such as increasing reporting requirements from state databases to the NICS system.

Currently, 21 states have enacted state-specific background check requirements for private sales of handguns, 19 of which extend the requirement to cover all private firearm purchases, i.e., enact mandatory universal background checks, which is what the Texas House Democratic Caucus’ proposal calls for. Some studies into the efficacy of laws closing the private sale exemption have shown weak correlation with reductions in violent crime and suicide while others have shown none ([Rand Corporation 2018c](#)). Systemic reviews of the literature have deemed evidences supporting these reductions insufficient (Hahn et al.).

None of the 21 states that have further restricted private party transfers exempt family transfers, as would be the case under Lt. Gov. Patrick’s proposal. Similarly, no states currently have

anything in place like that proposed in the memo, supposedly circulated by Attorney General Bob Barr, requiring NICS background checks for “all advertised commercial sales, including sales at gun shows.” As mentioned above, the vast majority of sales taking place at a gun show are processed in accordance with federal law, as nearly 75 percent of gun show exhibitors possess an FFL. This proposal would affect non-FFL holders by requiring private transfers be conducted through an FFL or a “transfer agent.” The newly created transfer agents would not possess an FFL but would be authorized by the ATF to conduct the NICS background checks. This would also mandate certain recordkeeping standards for the transfer agent. While the agent and seller would enjoy civil indemnification similar to that featured in Gov. Greg Abbott’s proposal, this proposal punishes non-compliance through civil penalties. Both proposals have yet to be evaluated through research. However, the efficacy of the transfer agent suffers from the same scarcity of evidence supporting expanded use of background checks.

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In addition to the mandatory expansion of background checks, the proposal in the governor’s *Texas Safety Action Report* takes an incentive-based approach. This recommendation suggests the Legislature incentivizes private party transfers to be facilitated through FFL holders with a nominal fee authorized for the background check. Specifically, it calls on the Legislature to “include legal protection for the seller, should the buyer later commit a crime that involves the weapon,” if the seller utilizes FFL holders ([10](#)).

However, it is not clear that a seller today faces significant legal liability if a gun (or ammunition) sold is used later to commit a crime. A number of Texas courts have held the opposite, in fact, often through summary judgment. For instance, the 285th District Court of Bexar County, Texas, “ordered summary judgment in favor of defendant sporting goods company in a wrongful death action filed by plaintiffs that alleged defendant negligently sold a handgun in violation of 18 U.S.C.S. § 922(d) to the person who shot and killed the decedent” (*Peek v. Oshman’s Sporting Goods, Inc.*). It is unclear whether providing immunity for gun sellers

would in fact provide an incentive to voluntarily utilize background checks.

Whether or not there is any liability for gun sellers, the bigger issue remains the problems with the expansion of background checks, whether through mandate or incentives. The research shows that background checks have proven ineffective in stopping mass shooters. And we have noted as well that the overly broad nature of denial criteria and the growing list of prohibited possessors may increasingly ensnare law-abiding, safe possessors who statutorily qualify for NICS reporting.

The proposal that Texas adopt “a law that works in conjunction with the proposed federal *Protecting Communities and Preserving the Second Amendment Act of 2019*” has multiple aspects, but much of it focuses on the increased use of criminal background checks ([Office of Governor Greg Abbott 2019b](#)). As a non-POC state, any NICS denial is directly referred by the FBI to the ATF for investigation. The ATF, in turn, refers inappropriate purchase attempts to the relevant U.S. attorney’s office for prosecution. This proposal would seek to improve this process but still faces the limitations on the usefulness of background checks.

PROPOSAL 2: Reporting of Stolen Guns to Law Enforcement

Require Stolen Guns be Reported to Law Enforcement ([Texas House Democratic Caucus](#))

The Legislature could consider requiring that any stolen firearms be reported to the county sheriff within 10 days of when the owner becomes aware of the theft ([Governor’s Texas Safety Action Report](#))

Each year, nearly 380,000 firearms are stolen from individual owners, and roughly two-thirds of those thefts are reported to the police. Some of these weapons are used in subsequent violent criminal activity. For example, an analysis of handguns recovered from crime scenes in Pittsburgh, Pennsylvania, stated that nearly one-third were previously stolen. These statistics are widely accepted.

Currently, FFL holders must report lost or stolen firearms to the United States attorney general or local law enforcement within 48 hours of discovering the incident. Eleven states have passed reporting requirements, ranging in mandated time from “immediately” to seven days for a report to be filed with relevant authorities. These are enforced with sanctions ranging from civil fines to loss of ownership permits to criminal penalties. Additionally, New Jersey and Washington have additional statutes that attach civil liability to the original

owner of lost or stolen weapons for subsequent criminal action should the owner fail to report the incident.

However, despite the persistence of firearm theft and the weapon’s potential for future criminal use, not one study has shown an aggregate effect on gun crime pursuant to a mandatory reporting law ([Rand Corporation 2018d](#)). When a firearm is reported lost or stolen, law enforcement is no closer to intercepting the weapon before it is fenced, sold for parts, or used in subsequent criminal activity from the report alone.

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Further, several states structure their mandatory reporting law without a *scienter* requirement, i.e., a requirement of the knowledge of the nature of one’s act or omission. In criminal law, a properly constructed statute not only explicitly describes the criminal action but also describes the requisite state of intent, the *mens rea* standard. As murder is easily distinguished from negligent manslaughter both in fact, punishment, and social opprobrium, the distinction is codified in the law with differing degrees of *mens rea*. Failing to specify a *scienter* requirement in civil law leads to problems distinguishing truly accidental violations of a law with deliberate lawbreaking.

For example, both California (Cal. Pen. Code § 25250) and Connecticut (Conn. Gen. Stat. § 53-202g) mandate the report be made within a set time after “when such person discovered or should have discovered the loss or theft.” This subjective standard imperils unknowing, law-abiding gun owners for the criminal acts of others. While it is best practice to know where one’s firearm is at all times, mandating so through law with felony penalties for failure to report in a timely fashion punishes the wrong individual.

The proposal in the governor’s *Texas Safety Action Report* does take a different approach than the other states, seeking to incentivize reporting by limiting “the owner’s liability if the gun is subsequently used in the commission of a crime.” However, much as in the case of a gun seller, a gun owner in Texas currently faces little, if any, liability for how the gun is subsequently

used. In one case, the plaintiff argued that Carter’s Country, a retailer in Houston, had “violated its duty to exercise care in the storage and display of its firearms” when it allowed a gun to be stolen that was later used in a murder (*Ambrosio v. Carter’s Shooting Ctr., Inc.*). The trial court disagreed, granting summary judgment, which was later affirmed upon appeal. Courts have also offered summary judgment to individual owners in similar cases (*Richardson v. Crawford*). Additionally, this approach still faces the challenge that increased reporting has not proven to positively affect gun crimes.

Restrictions on Gun and Ammunition Ownership, Possession, or Use

Limiting the Open Carry of Some Semi-Automatic Long Guns ([Texas House Democratic Caucus](#))

Texas, along with 43 other states, permits the open carry of long guns. Some believe that if the carry of long guns, such as the AR-15, is prohibited, individuals seeking to begin a mass shooting will be intercepted before the incident begins. There is no empirical or anecdotal evidence in support of this policy.

Some believe that there is an “agitation effect” caused by the open carry of long guns: that upon sight of a carried weapon in a contentious situation, tempers may flare, leading to violence. This arises from a small body of lab-based scholarship where participants were shown pictures of weapons and asked about how it made them feel and extrapolating the minute increase in agitation as summary proof that seeing weapons leads to violence. This has never been replicated outside of a social sciences lab, empirically or anecdotally. In sum, there is no evidence that open carry restrictions have any effect on any form of violent crime (e.g., see Benjamin, Kepes, and Bushway). This is to say nothing of the fact that long guns are used in less than 10 percent of all homicides.

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Banning the Sale of High-Capacity Magazines ([Texas House Democratic Caucus](#))

Banning the sale of magazines above a certain size has yet to be academically evaluated independent of a larger “assault weapons” ban.

The Legislature should consider prohibiting juvenile offenders convicted of certain violent crimes from legally purchasing firearms (Governor’s [Texas Safety Action Report](#))

Felons can possess firearms five years after getting “off paper” (completing probation, parole, or being released from a facility without supervision). However, this only applies to juveniles in the rare instance that they are “certified” as an adult and subject to the full brunt of Texas’ criminal laws, even if their conduct is indistinguishable from an adult violent felony. This suggestion would simply apply the existing five-year possession prohibition for adult felons to certain adjudicated juveniles.

This proposal has never been directly studied, but a juvenile who was imprisoned for a violent offense and released in their late teens would have two common factors seen in gun violence: age and violent predilection. Young people are more violence-prone, especially those who have demonstrated a capacity for it in the past (Loeber and Farrington). A five-year prohibition period is well-justified.

Extreme Risk Protective Orders (ERPOs) ([Texas House Democratic Caucus](#))

ERPOs, gun violence restraining orders (GVROs), or “red flag laws” are civil frameworks that allow law enforcement to temporarily seize firearms belonging to individuals judged to be a threat to others or themselves. Currently, there are 17 states that have some form of GVRO.

Generally speaking, the GVRO process begins when an individual’s family member, law enforcement, or relevant stakeholder files an emergency petition in civil court alleging that the individual may be a risk. This petition is brought before a judge who considers relevant factors outlined in the enabling statute. If the judge finds the evidence sufficient to a civil standard—commonly probable cause or reasonable suspicion—the judge will order the individual’s firearms to be confiscated. This comes in the form of an emergency *ex parte* order where an individual is not present during the hearing. *Ex parte* orders are subject to a review timeline, with the maximum duration ranging from 6 to 21 days, depending on the state. This timeline often specifies when a review hearing must be held with the subject present to consider extending the *ex parte* order under a final order, which ranges in GVRO states from six months to life (subject to court termination) if the merits exceed the threshold of preponderance or clear and convincing evidence.

Currently, there is no empirical support of, or contrary evidence to, the efficacy of GVROs on incidents of mass casualty shootings ([Rand Corporation 2018a](#)). There is, however, a small body of research suggesting that GVROs produce a limited decrease in suicides ([Rand Corporation 2018b](#)).

GVROs are controversial both constitutionally and in practice. Constitutionally, these processes deprive individuals of an explicitly enumerated right based upon one judge's perception of the individual's future action. In practice, they are largely castigated for failing to provide an adequate measure of due process to subject individual. Sufficiency standards are seen as too low (the predominant threshold is probable/reasonable/good cause for *ex parte* orders) or too amorphous and subjective. Since these petitions are processed through local civil court, officials of jurisdictions more averse to gun ownership may liberally interpret the statute outside of justified bounds. Further, the realm of facts mandated for consideration includes proximate factors such as recent threats of violence to those only tangentially related to gun violence like the simple purchase of firearms and ammunition.

Finally, most GVRO laws also fail to remedy the underlying cause for removing firearms. If an individual is mentally ill enough to pose an imminent threat to himself or others, simply restricting access to firearms will not necessarily stop or delay tragedy. Replacement firearms are available through legal and illegal means, and other weaponry such as knives or makeshift weaponry such as vehicles are ever-present.

Enact New or Increased Criminal Penalties

The Legislature should consider prohibiting straw purchases of firearms under state law. A primary goal is to keep guns out of the hands of criminals while protecting the Second Amendment rights of law-abiding citizens. (Governor's [Texas Safety Action Report](#))

While legally buying a firearm with the intent to provide it to a prohibited possessor—or “straw purchasing”—is currently against federal law, there is no analogous state offense. By adding a parallel statute in the state's penal code, prosecutors could more easily add counts of straw purchasing to any other violations of state law. This could be seen as a “belt and suspenders” approach, as it simply makes already-criminal behavior criminal under a different sovereign's laws. It is important to note that a properly constructed law would have an explicit *mens rea* requirement on both the original purchase and the transfer component.

Roughly one-third of states have enacted additional penalties for the purchaser, the recipient, or both in a straw purchase. However, this subject area has been notoriously difficult to gauge for effectiveness since even if a straw purchase is prevented or an illegally obtained gun recovered, only instances in which a straw purchase has resulted in a criminal act AND a weapon is recovered AND can be traced to a straw purchase can count toward the measurement. As most guns used criminally are acquired in equally illicit fashion, a point-of-sale penalty is likely to only apply to a handful of additional cases. Additionally, numerous and duplicative laws effectively allow law enforcement to ticket, arrest, and prosecute almost anyone—their discretion is maximized rather than checked. Creating a state crime for straw purchases where there is already a federal crime has the potential for allowing this abuse.

The Legislature should consider laws that crack down on criminals who try to illegally buy or possess guns (Governor's [Texas Safety Action Report](#))

This suggestion has two central components: (1) law enforcement interagency cooperation, and (2) punishing serious weapons traffickers. There needs to be an explicit delineation—both in statute and in any subsequent memoranda of understanding between agencies—on what the jurisdictional bounds are going forward. For example, if the local prosecutors want to start referring all crimes of a certain type to their federal equivalents and the Legislature decides to forego enacting the suggested increased penalties and enhancements, district attorneys could be left unprepared and undermanned if the United States attorneys stop accepting certain cases. Secondly, Texas has a widely regarded indeterminate sentencing scheme with broad brackets for each level of offense.

The research into determinate sentencing schemes is mixed, at best, but suggests that it fails to affect crime rates in the aggregate. However, it is cursorily understood to provide for longer periods of incapacitation. Seeking an optional enhancement would allow prosecutors to reserve the extended period of incarceration for those whose crimes were most deserving while not tying the hands of the sentencing juries. However, caution must be exercised when allowing for even optional enhancements to be sought. If it cannot be demonstrated that a new enhancement would both demonstrably deter criminals and that existing penalties are inefficient, the rationale for allowing such an enhancement vanishes (e.g., see [Levin](#)).

The Legislature should consider stiffer consequences for criminals convicted of violent offenses (Governor's [Texas Safety Action Report](#)).

Federal law currently prohibits anyone with a felony conviction from purchasing a firearm. However, under state law, a convicted felon could possess a firearm five years after being “off paper.” The report suggests the Legislature identify crimes that represent a “callous danger to others” and consider extending the possession ban up to and including a lifetime prohibition.

This is an under-researched area of policy. Criminologists have routinely demonstrated that as time since one’s last offense increases, one’s likelihood of reoffending drops considerably to be indistinguishable from that of the general population ([Blumstein and Nakamura](#)). This pattern holds even for violent crimes. However, what has yet to be shown is whether people who use a firearm in a way that could be considered a “callous danger to others”—however statutorily defined—uniquely deviate from this pattern in comparison to other violent criminals.

Increase and Improve the Use of Suspicious Activity Reporting

On Thursday, September 5, 2019, the office of Gov. Greg Abbott ([2019a](#)) issued eight firearm-related executive orders. These orders are:

1. “Within thirty days of this order, the Texas Department of Public Safety shall develop standardized intake questions that can be used by all Texas law-enforcement agencies to better identify whether a person calling the agency has information that should be reported to the Texas Suspicious Activity Reporting Network.
2. Within thirty days of this order, the Department of Public Safety shall develop clear guidance, based on the appropriate legal standard, for when and how Texas law-enforcement agencies should submit Suspicious Activity Reports.
3. Within sixty days of this order, the Texas Commission on Law Enforcement shall make training available to educate all law-enforcement officers regarding the standards that will be developed pursuant to Order No. 1 and Order No. 2.
4. The Department of Public Safety shall create and conduct an initiative to raise public awareness and understanding of how Suspicious Activity Reports are used by law-enforcement agencies to identify potential mass shooters or terroristic threats, so that

the general public and friends, family members, coworkers, neighbors, and classmates will be more likely to report information about potential gunmen.

5. The Department of Public Safety shall work with the Texas Education Agency and the Texas Higher Education Coordinating Board on ways to better inform schools, students, staff, and families about the importance of Suspicious Activity Reports and how to initiate that process.
6. The Department of Public Safety shall work with local law enforcement, mental-health professionals, school districts, and others to create multi-disciplinary threat assessment teams for each of its regions, and when appropriate shall coordinate with federal partners.
7. The Department of Public Safety, as well as the Office of the Governor, shall use all available resources to increase staff at all fusion centers in Texas for the purpose of better collecting and responding to Suspicious Activity Reports, and better monitoring and analyzing social media and other online forums, for potential threats.
8. Beginning January 1, 2020, all future grant awards from the Office of the Governor to counties shall require a commitment that the county will report at least 90 percent of convictions within seven business days to the Criminal Justice Information System at the Department of Public Safety. By January 1, 2021, such reporting must take place within five business days.”

Additionally, the governor’s *Texas Safety Action Report* included this recommendation:

The Legislature should spur cooperation to encourage social media companies to report suspicious activity to law enforcement.

This block of orders generally seeks to improve the effectiveness and fidelity of suspicious activity reporting, particularly of the Texas Suspicious Activity Reporting Network and its product, Suspicious Activity Reports, as produced and used by state agencies. Region 7 of Texas’ Department of Public Safety (DPS) started using the platform in 2010, and it has been incrementally developed to include a public-facing online reporting portal and mobile phone application. While other states have similar structures in place, the decentralized nature of Texas criminal justice processes makes like comparison difficult, and there is no scholarly research in support of or contrary to the effectiveness of these orders. The governor is within

his authority to seek to improve the effectiveness of his subordinate agencies, as done through these orders.

However, efficacy and appropriate ambit of suspicious activity reporting, conducted through regional fusion centers, are mixed and anecdotal as a tool of domestic, civilian law enforcement. Despite the promulgation of such partnerships following the September 11 attacks, little analysis has been conducted on the outcomes driven by these partnerships. Research has demonstrated that while fusion centers can be seen as a valuable tool by local law enforcement partners (e.g., see Cooney, Rojek, and Kaminski), the application has not been empirically supported and has raised concerns about civil liberties (Regan, Monahan, and Craven; Taylor and Russell). Fusion centers may be a useful tool in international and counterterrorism applications, even though their domestic efficacy is inconclusive.

Regarding the effort to encourage social media companies to report suspicious activity to law enforcement, it is difficult to say how effective this recommendation would be if implemented, and what (if any) role the state government can play legislatively or executively. Under current law, social media networks qualify as “platforms” under Section 230 of the Communications Decency Act of 1996. This federal legislation severely curtails the liability the network’s operator could face if someone were to use the platform for nefarious means. While Section 230 is currently under intense debate in Washington, offering per se indemnification for reporting suspicious activity is unlikely to be enough incentive for these companies to change current behavior.

Per se indemnification for reporting suspicious activity is unlikely to be enough incentive for social media companies to change current behavior.

Increase the Efficiency of Current Laws, Procedures, and Programs

The Legislature should consider expediting the reporting of criminal convictions to the Texas Department of Public Safety (Governor’s [Texas Safety Action Report](#)).

Under current law, Texas public agencies must transmit relevant criminal justice data to DPS within 30 days, save for arrest and bench warrant release information, which must be transmitted in seven days (Texas

Government Code § 411.0521). This item suggests bringing current reporting requirements for all criminal justice data down to seven days by the start of 2020, to five days by 2021, and codifying the changes into law once the Legislature reconvenes. In the interim, compliance will be encouraged by tying subsequent grant dollars controlled by the Office of the Governor to meeting a countywide 90 percent compliance rate. There has yet to be any data concerning expedited reporting requirements.

The Legislature should consider requiring courts to inform convicted criminals, both orally and in writing, that they may no longer possess firearms (Governor’s [Texas Safety Action Report](#)).

Currently, the court is already commanded to make certain admonitions to the defendant both before and after adjudication (e.g., see Texas Code of Criminal Procedure § 26.13). This would simply require courts to additionally instruct once-permitted possessors who received a disqualifying conviction that they are no longer able to possess firearms, under penalty of law.

The Legislature should consider implementing and funding a Texas program similar to federal initiatives, which uses a multi-pronged strategy of policing and prosecution, agency integration, and identification of violent crime hot spots. The focus would be on criminals with guns, not law-abiding Texans (Governor’s [Texas Safety Action Report](#)).

Of all the recommendations made in this report, this enjoys the strongest scholarly backing. This essentially describes what is known as “focused deterrence,” a holistic public safety strategy that includes law enforcement, prosecutors, social services, and analysts. The process begins when on-the-street law enforcement describes gang conditions in the area they patrol, both in terms of geography (what is the gang’s “territory”) and identifying key members. The analysts then create a gang map as well as a relational network of the gang. Those in the gang are notified that they have been identified as such and invited to a “call-in.” During this meeting, attendees are informed of the strategy and, should violence persist associated with the gang, not only will state and federal prosecutors seek the maximum punishment for all potential criminal charges, but gang members stand to face these charges should others within the network be responsible for furthering violence. Conversely, attendees are offered the option of enrolling in relevant social services to ease the transition to a more law-abiding life.

These programs have gone by multiple names during their ascendancy: Cincinnati Initiative to Reduce Violence (CIRV), Operation: Ceasefire, and the like. Their efficacy has been demonstrated in individual and meta-analyses, suggesting “that focused deterrence strategies are associated with an overall statistically significant, medium-sized crime reduction effect” (Braga and Weisburd). It is important to note that such programs must be stringently evaluated, as poor fidelity to the crime control component and providing social services irrespective of need or appropriateness can quickly lead to wasteful spending for no appreciable result.

Conclusion

Crafting firearm law is distinctively difficult. Many policy approaches—especially the more controversial proposals—illustrate the problem with restricting an explicitly enumerated right for a perceived modicum of increased safety. These proposals often represent an incontrovertible abridgment or negation of the right to keep and bear arms because of something that may allegedly happen in the future. It is paramount that any policy proposal recognizes the fundamental nature of this right, the nature of man, and the limited ability of a bureaucracy to intercede in either. ★

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