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## COMMENT

# KEVLAR™ FOR THE INNOCENT: WHY MODELING GUN REGULATION AFTER GREAT BRITAIN, AUSTRALIA, AND SWITZERLAND WILL REDUCE THE RATE OF MASS SHOOTINGS IN AMERICA

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## I. INTRODUCTION

On December 14, 2012, Adam Lanza shot and killed twenty first-grade children and six adults at Sandy Hook Elementary in Newton, Connecticut.<sup>1</sup> Lanza shot his way into the school, armed with ten 30-round ammunition magazines, a semiautomatic Bushmaster .223 caliber XM15 rifle,<sup>2</sup> two handguns, and one shotgun.<sup>3</sup> The attack

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1. Barak Obama, President of the U.S., Remarks on New Gun Control Actions (Jan. 16, 2013), available at [http://www.washingtonpost.com/pb/politics/president-obamas-remarks-on-new-gun-control-proposals-jan-16-2013-transcript/2013/01/16/528e7758-5ffc-11e2-b05a-605528f6b712\\_story.html](http://www.washingtonpost.com/pb/politics/president-obamas-remarks-on-new-gun-control-proposals-jan-16-2013-transcript/2013/01/16/528e7758-5ffc-11e2-b05a-605528f6b712_story.html).

2. A semiautomatic Bushmaster .223 caliber XM15 rifle is a modified version of the United States military's M-16 semiautomatic assault rifle. Lee Ferran & Shushannah Washe, *Newton Massacre: What is a Bushmaster .223*, ABC NEWS

lasted less than five minutes, and the destruction was inconceivable; Lanza shot an average of one bullet for every two seconds he was in the school.<sup>4</sup> During the investigation into this senseless massacre, investigators found 1,600 rounds of unspent ammunition inside the home Lanza shared with his mother Nancy,<sup>5</sup> who Lanza also murdered that day.<sup>6</sup> Nancy had legally purchased the firearms Lanza used at Sandy Hook, all of which were kept in a gun locker inside their home.<sup>7</sup>

After the Sandy Hook massacre, President Obama addressed the nation and said, “We won’t be able to stop every violent act, but if there is even one thing that we can do to prevent any of these events, we have a deep obligation . . . to try.”<sup>8</sup>

Since the 1999 Columbine High School shooting, there have been over 110 active shooter events (“ASE”) in the United States.<sup>9</sup> The Federal Bureau of Investigation defines an ASE as “one or more persons engaged in killing or attempting to kill multiple people in an area occupied by unrelated individuals, one of which must be unrelated to the shooter,” with the primary motive being mass murder.<sup>10</sup> While there is not an official definition for the more popular

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(Dec. 17, 2012), <http://abcnews.go.com/Blotter/newtown-massacre-bushmaster-223/story?id=18000884>. The .223 caliber rounds provide superior fragmentation on impact, which increases the damage inflicted and reduces the chance of the round passing through and striking something other than the target. *Id.*

3. Susan Candiotti et al., *Newton shooting details revealed in newly released documents*, CNN (Mar. 29, 2013, 9:53 AM), <http://www.cnn.com/2013/03/28/us/connecticut-shooting-documents>.

4. *Id.*

5. *Id.*

6. *Sandy Hook Shooting: What Happened?*, CNN, <http://www.cnn.com/interactive/2012/12/us/sandy-hook-timeline> (last visited Apr. 4, 2014).

7. See Candiotti et al., *supra* note 3.

8. See *Now is the Time to do Something About Gun Violence*, WHITEHOUSE.GOV, <http://www.whitehouse.gov/issues/preventing-gun-violence> (last visited Feb. 21, 2014) [hereinafter *Now is the Time*].

9. J. Pete Blair et al., *Active Shooter Events from 2000 to 2012*, FED. BUREAU OF INVESTIGATION (Jan. 7, 2014), <http://leb.fbi.gov/2014/january/active-shooter-events-from-2000-to-2012>.

10. *Id.* Mass murder is defined as killing of four or more persons “occurring during the same incident, with no distinctive time period between the murders.” LEONARD G. JONES ET AL., FED. BUREAU OF INVESTIGATION, SERIAL MURDER 8

term of mass shooting, it generally refers to acts of gun violence that include several victims.<sup>11</sup> On average, an ASE lasts twelve minutes; however, thirty-seven percent of ASEs last less than five minutes.<sup>12</sup> From 2000 to 2008, the average rate of ASEs in the United States was one every other month.<sup>13</sup> From 2009 to 2013, this number increased to an average of more than one per month.<sup>14</sup>

Other countries have also experienced mass shootings. In 1987, Great Britain experienced one of its worst when a gunman, armed with a Kalashnikov assault rifle,<sup>15</sup> an automatic rifle, and a Beretta pistol, killed sixteen people and wounded fourteen others in what is known as the Hungerford massacre.<sup>16</sup> In 1996, a shooter in Dunblane, Scotland, armed with four handguns, walked into a primary school and killed sixteen children, ages five and six, and injured twelve more.<sup>17</sup> In 2010, a taxi driver in Cumbria, England, armed with a .22 caliber rifle and shotgun, killed twelve people and injured eleven

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(Robert J. Morton & Mark A. Hiltz eds., 2005). This author will use the ASE definition when referring to mass shootings.

11. *Defining a Mass Shooting*, NATION OF CHANGE, <http://www.nationofchange.org/defining-mass-shooting-1345908412> (last visited Apr. 5, 2014).

12. Katherine W. Schweit, *Addressing the Problem of the Active Shooter*, FED. BUREAU OF INVESTIGATION (May 3, 2013), <http://leb.fbi.gov/2013/may/addressing-the-problem-of-the-active-shooter>.

13. Blair et al., *supra* note 9.

14. FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUST., *A STUDY OF ACTIVE SHOOTER INCIDENTS IN THE UNITED STATES BETWEEN 2000 AND 2013* 8 (Sept. 13, 2013), available at <http://www.fbi.gov/news/stories/2014/september/fbi-releases-study-on-active-shooter-incidents/pdfs/a-study-of-active-shooter-incidents-in-the-u.s.-between-2000-and-2013>.

15. An assault rifle is a short, compact, selective-fire weapon with mild recoil characteristics making it effective as a fully-automatic weapon at ranges of up to 300 meters. Nicholas J. Johnson, *Supply Restrictions at the Margins of Heller and the Abortion Analogue: Stenberg Principles, Assault Weapons, and the Attitudinal Critique*, 60 HASTINGS L.J. 1285, 1290 (2009).

16. *How a Gun Massacre Changed Britain*, BBC NEWS (Dec. 7, 2004), [http://news.bbc.co.uk/2/hi/uk\\_news/magazine/4075055.stm](http://news.bbc.co.uk/2/hi/uk_news/magazine/4075055.stm).

17. Erland Clouston & Sarah Boseley, *From the Archive, 14 March 1996: Sixteen Children Killed in Dunblane Massacre*, THE GUARDIAN (March 14, 2013), <http://www.theguardian.com/theguardian/2013/mar/14/dunblane-massacre-scotland-killing>.

more.<sup>18</sup> In 1996, a man in Australia, armed with a semiautomatic rifle,<sup>19</sup> shot and killed thirty-five people and injured numerous others in what is known as the Port Arthur massacre.<sup>20</sup> In 2001, a gunman in Switzerland, armed with an assault rifle and pistol, killed fourteen people and wounded ten others when he entered the regional parliament dressed as a police officer.<sup>21</sup> It was deemed the worst mass shooting in Switzerland history.<sup>22</sup> In 2013, a man in the village of Daillon, Switzerland, armed with a military rifle, fired an estimated twenty shots, killing three people and injuring two more.<sup>23</sup> When the gunman began receiving psychiatric care in 2005, the Swiss government confiscated his military weapon and, at the time of the shooting, there was no record of any firearms registered in his name.<sup>24</sup> Most recently, on February 27, 2013, yet another gunman in Switzerland killed three people and injured seven others at the wood processing factory where he worked.<sup>25</sup> This gunman was a naturalized Swiss citizen, and he is believed to have used his brother's gun in the shooting.<sup>26</sup>

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18. Helen Carter et al., *Cumbria Shootings: 12 Dead as Gunman Goes on Killing Spree*, THE GUARDIAN (June 2, 2010), <http://www.theguardian.com/uk/2010/jun/02/cumbria-shootings-slaughter-countryside-derrick-bird>.

19. A semiautomatic rifle is defined as a firearm fired from the shoulder that requires a separate pull of the trigger for each round fired. 18 U.S.C.A. § 921 (West 2006). The rifle automatically expels the used cartridge and loads the next round each time it is fired. *Id.*

20. *A Brief Outline of Events*, PORT ARTHUR HISTORIC SITES, <http://www.portarthur.org.au/index.aspx?base=2594> (last visited Apr. 6, 2014).

21. *Gunman Kills 14 in Swiss Assembly*, BBC NEWS (Sept. 27, 2001), <http://news.bbc.co.uk/2/hi/europe/1566321.stm>; John Heilprin, *Daillon Shooting: Switzerland Gunman Kills 3 Women, Injures 2 Men*, HUFFINGTON POST (Jan. 3, 2013), [http://www.huffingtonpost.com/2013/01/03/daillon-shooting-switzerland\\_n\\_2401987.html](http://www.huffingtonpost.com/2013/01/03/daillon-shooting-switzerland_n_2401987.html).

22. *Gunman Kills 14 in Swiss Assembly*, *supra* note 21; Heilprin, *supra* note 21.

23. Heilprin, *supra* note 21.

24. *Id.*

25. Nick Cumming-Bruce, *Three Dead in Shooting at Swiss Factory*, N.Y. TIMES (Feb. 27, 2013), [http://www.nytimes.com/2013/02/28/world/europe/deadly-shooting-in-swiss-factory.html?\\_r=0](http://www.nytimes.com/2013/02/28/world/europe/deadly-shooting-in-swiss-factory.html?_r=0).

26. Helena Backmann, *Why Two Mass Shootings Will Not Change Swiss Gun Culture*, TIME WORLD (Mar. 4, 2013), <http://world.time.com/2013/03/04/why-two-mass-shootings-will-not-change-swiss-gun-culture>.

While the United States struggles with ASE and mass murder, other countries have found a solution to the same problem. Australia has not experienced a mass shooting since 1996 when it implemented more stringent gun policies in response to the Port Arthur massacre.<sup>27</sup> Great Britain has faced only one mass shooting since enacting strict gun regulations in 1997,<sup>28</sup> and Switzerland, which has a liberal approach to gun control, has seen only three since 2001.<sup>29</sup>

To reduce the rate of mass shootings in the United States, the legislature should implement more stringent universal firearm regulations modeled after current gun policies in Great Britain, Australia, Switzerland, and the 1994 United States Violent Crime Control Act. Section II of this comment will discuss the current gun policies in the United States, Australia, Great Britain, and Switzerland and propose model legislation based on those policies. Section II will also analyze the impact such a policy will have on the mass shooting rate in the United States. Section III will discuss the conservative view regarding more stringent gun regulation in the United States. Finally, Section IV will briefly discuss the constitutionality of the proposed gun regulation.

## II. CURRENT FIREARM AND AMMUNITION POLICIES

Gun legislation in the United States, Great Britain, Australia, and Switzerland is drastically different. Great Britain is perceived to maintain the most stringent policies, effectively banning most firearms and creating strict standards for ownership certificates.<sup>30</sup> Australia has similar regulations and standards but also requires applicants to

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27. S. Chapman et al., *Australia's 1996 Gun Law Reforms: Faster Falls in Firearm Deaths, Firearm Suicides, and a Decade Without Mass Shootings*, 12 INJ. PREVENTION 365, 366, 371 (2006) (Austl.).

28. See Anthony Faiola, *After Shooting Tragedies, Britain Goes after Guns*, WASH. POST (Feb. 1, 2013), [http://www.washingtonpost.com/world/europe/after-shooting-tragedies-britain-went-after-guns/2013/01/31/b94d20c0-6a15-11e2-9a0b-db931670f35d\\_story.html](http://www.washingtonpost.com/world/europe/after-shooting-tragedies-britain-went-after-guns/2013/01/31/b94d20c0-6a15-11e2-9a0b-db931670f35d_story.html).

29. For a description of the three documented shootings, see Cumming-Bruce, *supra* note 25; *Gunman Kills 14 in Swiss Assembly*, *supra* note 21; and Heilprin, *supra* note 21.

30. *Firearms-Control Legislation and Policy: Great Britain*, LIBRARY OF CONGRESS, available at <http://www.loc.gov/law/help/firearms-control/greatbritain.php> (last updated Nov. 23, 2013).

complete an educational course on firearm laws before issuing a firearm permit.<sup>31</sup> Switzerland has arguably the most relaxed legislation but still requires applicants to pass a written and practical examination demonstrating their knowledge and skill of firearms before approving an open carry application.<sup>32</sup> Great Britain, Australia, and Switzerland have had great success in preventing and reducing the rates of ASEs, while the United States seems faced with a growing number of such events.<sup>33</sup>

The Constitution of the United States guarantees a person the right to keep and bear arms.<sup>34</sup> While most gun owners are law-abiding, there are instances where gunmen murder innocent people.<sup>35</sup> These acts can be prevented with proper firearm and ammunition regulation.<sup>36</sup> To reduce the rate of ASEs, the United States should follow the examples set by Great Britain, Australia, and Switzerland and ban automatic-weapons, high capacity ammunition clips, and require ammunition logs. Additionally, the United States should enact a buyback program, require firearm purchasers to pass an examination before transferring a weapon, and implement more thorough universal background checks to reduce ASEs and ensure firearms stay out of the hands of dangerous individuals.

### *A. Assault Weapons Ban and Ammunition Regulation*

#### *1. Great Britain*

Great Britain has a restrictive approach to firearm sale and acquisition.<sup>37</sup> The primary firearm legislation is the Firearms Act of

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31. *Firearms-Control Legislation and Policy: Australia*, LIBRARY OF CONGRESS, available at <http://www.loc.gov/law/help/firearms-control/australia.php> (last updated Sept. 11, 2013).

32. *Firearms-Control Legislation and Policy: Switzerland*, LIBRARY OF CONGRESS, available at <http://www.loc.gov/law/help/firearms-control/switzerland.php> (last updated May 31, 2013).

33. See *id.*; FED. BUREAU OF INVESTIGATION, *supra* note 14; Chapman et al., *supra* note 27; Faiola, *supra* note 28;

34. U.S. CONST. amend. II. (West).

35. *Now is the Time*, *supra* note 8.

36. See *id.*

37. See *Firearms-Control Legislation and Policy: Great Britain*, *supra* note 30.



1968, which was amended due to public support for more stringent regulations in the wake of ASEs in 1988 and 1997.<sup>38</sup> The Firearms Act of 1968 prohibits a number of firearms and makes illegal the possession, purchase, acquisition, manufacture, sale, or transfer of those prohibited firearms.<sup>39</sup> Prohibited firearms include military-style weapons, firearms that can discharge two or more bullets without repeated pressure on the trigger, self-loading or pump action rifled guns, firearms with barrels less than thirty centimeters in length or less than sixty centimeters in length overall, and any self-loading or pump action smooth-bore gun that is not an air weapon.<sup>40</sup> Additionally, rocket launchers,<sup>41</sup> air rifles,<sup>42</sup> and air guns with self-contained gas cartridge systems<sup>43</sup> are also prohibited.<sup>44</sup>

After the Hungerford massacre in 1987, Great Britain passed the Firearms (Amendment) Act 1988 and banned the ownership of high power self-loading rifles and burst-fire weapons.<sup>45</sup> Great Britain later passed the Firearms (Amendment) Act 1997 in response to tremendous public support for a ban on firearms after the tragedy in Dunblane, Scotland.<sup>46</sup> That act prohibited the ownership of handguns by private citizens in Great Britain.<sup>47</sup>

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38. *See id.*

39. Firearms Act, 1968, c. 27, § 5(1) (U.K.).

40. Firearms (Amendment) Act, 1988, c. 45, § 1 (U.K.); *see also* Firearms Act, 1968, c. 27, §§ 5, 7-10. Individuals exempt from England's certificate requirement include those with a police permit, authorized firearms dealers, carriers, auctioneers, and licensed slaughters. *Id.* §§ 7-10.

41. A rocket launcher is used to fire a stabilizing explosive projectile. Firearms (Amendment) Act, 1988, c. 45, § 5(1) (U.K.).

42. Air rifles use a compressed air cartridge to fire a projectile. *Id.*

43. Air guns with self-contained gas cartridge systems are any type of firearm other than a rifle or pistol that uses a compressed air cartridge to fire a projectile. *Id.*

44. *Id.*

45. *See How a Gun Massacre Changed Britain*, *supra* note 16; Firearms (Amendment) Act, 1988, c. 45, § 1 (U.K.). Burst-fire weapons are those that fire several, typically three to five, successive rounds with each pull of the trigger. HOME OFFICE, GUIDE ON FIREARMS LICENSING LAW 20 (Oct. 2014) (U.K.).

46. *Firearms-Control Legislation and Policy: Great Britain*, *supra* note 30.

47. *Id.*

Since implementing the Firearms (Amendment) Act 1997, there has only been one mass shooting in Great Britain.<sup>48</sup> In comparison, the United States saw seventeen ASEs in 2013 alone.<sup>49</sup> The ban on certain categories of weapons has contributed to the reduced number of mass shootings in Great Britain.<sup>50</sup> By restricting the types of weapons available to citizens, Great Britain has successfully limited the number of high-powered firearms that fall into potential shooters' hands.

## 2. Australia

Since the 1996 Port Arthur massacre, Australia has taken a restrictive approach to firearms legislation.<sup>51</sup> Less than two weeks after the April 28, 1996 tragedy, the Australasian Police Ministers' Council ("APMC") convened a special meeting and agreed to more stringent universal firearm legislation.<sup>52</sup> APMC drafted the 1996 National Firearms Agreement, which was adopted by all states and territories.<sup>53</sup>

The 1996 National Firearms Agreement banned the importation, sale, resale, transfer, possession, manufacture, and use of all semi-automatic, self-loading, and pump-action longarms.<sup>54</sup> The ban did not

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48. See *Gun Crime*, POLITICS.CO.UK, <http://www.politics.co.uk/reference/gun-crime> (last visited Feb. 23, 2014).

49. FED. BUREAU OF INVESTIGATION, *supra* note 14. This number reflects the number of ASEs through September 2013.

50. See Faiola, *supra* note 28.

51. See *Firearms-Control Legislation and Policy: Australia*, *supra* note 31.

52. See *id.*

53. *Firearms-Control Legislation and Policy: Australia*, *supra* note 31. Under the Australian Commonwealth Constitution, it is the responsibility of the states and territories to pass firearm regulation. JENNIFER NORBERRY ET AL., PARLIAMENTARY RESEARCH SERVICE NO. 16, AFTER PORT ARTHUR-ISSUES OF GUN CONTROL IN AUSTRALIA 7 (1996). Therefore, at the 1996 APMC special meeting, all states and territories agreed to pass identical firearm legislation. See *id.* at 8.

54. These weapons are firearms other than handguns. See NSW POLICE FORCE, FIREARMS (LONGARMS) USER GUIDE 7 (Sept. 2006) (Austl.). Self-loading firearms automatically reload the next round or the next round can be manually operated to reload from the magazine, and one round is fired with each pull of the trigger. *Id.* These are also known as semi-automatic firearms. *Id.*

apply to military, police, government, and occupational shooters.<sup>55</sup> Additionally, with the exception of certain occupations, the Agreement prohibited semi-automatic rimfire rifles<sup>56</sup> with a magazine capacity of more than ten rounds, semiautomatic shotguns with a magazine capacity greater than five rounds, and pump action shotguns with a magazine capacity greater than five rounds.<sup>57</sup> The following were also generally prohibited: self-loading centre fire rifles designed or adapted for military purposes,<sup>58</sup> non-military style self-loading centre fire rifles with a detachable magazine, self-loading shotguns with a detachable magazine and pump action shotguns of more than five rounds, and self-loading rim-fire rifles with a magazine capacity of ten or more rounds.<sup>59</sup> Lastly, it required all firearms purchases be conducted through a licensed dealer, and limited owners' ammunition purchases to ammunition for firearms registered in their name.<sup>60</sup>

Prior to implementing the 1996 National Firearms Agreement, Australia had experienced thirteen mass shootings over an eighteen year span.<sup>61</sup> From 1996 to 2014, there were no mass shootings.<sup>62</sup> As discussed above, the types of weapons Australia prohibits are generally those with a high fire rate capable of shooting several rounds of ammunition without the need to reload. By restricting the types of weapons civilians can acquire and possess, Australia has significantly contributed to the elimination of mass shootings.

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55. AUSTRALASIAN POLICE MINISTERS' COUNCIL, SPECIAL FIREARMS MEETING 2 (1996).

56. A semi-automatic rimfire rifle is a rifle that uses rimfire ammunition. See NSW POLICE FORCE, *supra* note 54, at 11. This type of ammunition places the primer used to trigger the explosive charge of the round along the inner edges of the casing. *Id.* Modern rimfire ammunition is generally limited to smaller calibers. *Id.*

57. AUSTRALASIAN POLICE MINISTERS' COUNCIL, *supra* note 55, at 9.

58. These types of rifles use center fire ammunition, which places the primer used to trigger the explosive charge of the round in the middle of the head of the casing. NSW POLICE FORCE, *supra* note 54, at 11.

59. AUSTRALASIAN POLICE MINISTERS' COUNCIL, *supra* note 55, at 9.

60. *Id.* at 12-13.

61. Chapman et al., *supra* note 27.

62. Interview by Tumblr CEO with Barak Obama, President of the U.S., in Wash. D.C. (June 10, 2014), available at <http://www.motherjones.com/politics/2014/06/obama-guns-mass-shootings>.

### 3. *Switzerland*

Switzerland has a relaxed universal approach to firearm legislation compared to Great Britain and Australia. Each member of Switzerland's militia is issued a personal firearm and ammunition and is authorized to keep the weapon in their home or at their unit's armory.<sup>63</sup> Switzerland requires all able-bodied men between the ages of nineteen and fifty to serve in the country's militia, which has resulted in hundreds of thousands of Swiss men owning firearms.<sup>64</sup> Upon retirement, these men have the option to continue to keep the firearm in their home if it has been properly maintained.<sup>65</sup> However, all ammunition for the firearm must be stored in central arsenals.<sup>66</sup> There are few exceptions to this restriction, with only 2,000 specialist troops exempt.<sup>67</sup> But, the Swiss government reserves the right to lift this restriction.<sup>68</sup> Further, if at any time there is suspicion of danger, abuse, or improper handling of the weapon, it will be confiscated.<sup>69</sup>

In 1993, Swiss voters approved a constitutional amendment that allowed Parliament to pass a gun abuse law.<sup>70</sup> The law was finally adopted in 1997, went into effect in 1998, and is now known as the Weapons Act.<sup>71</sup> While the law preserved the right for Swiss citizens to acquire, own, and carry firearms, it banned certain types of weapons such as fully automatic guns, dangerous weapons including stun guns, and firearm accessories such as silencers.<sup>72</sup>

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63. See *Firearms-Control Legislation and Policy: Switzerland*, *supra* note 32; *Soldiers Can Keep Guns at Home but Not Ammo*, SWISSINFO.CH (Sept. 27, 2007), <http://www.swissinfo.ch/eng/soldiers-can-keep-guns-at-home-but-not-ammo/970614>.

64. *Firearms-Control Legislation and Policy: Switzerland*, *supra* note 32; see *Soldiers Can Keep Guns at Home but Not Ammo*, *supra* note 63.

65. *Firearms-Control Legislation and Policy: Switzerland*, *supra* note 32.

66. *Soldiers Can Keep Guns at Home But Not Ammo*, *supra* note 63.

67. *Id.*

68. *Id.*

69. *Id.*

70. KEVIN E. MCCARTHY, GUN LAWS IN SWITZERLAND, OLR RESEARCH REPORT (1999).

71. *Id.*

72. *Id.*

In 2011, an initiative was presented that sought to ban military issued firearms from the home, create stricter regulation for possession, establish a national database, and develop a more comprehensive licensing system.<sup>73</sup> However, the majority of citizens were opposed to the initiative, ultimately voting it down with a vote of more than fifty-six percent.<sup>74</sup>

Switzerland has experienced only three mass shootings in last the sixteen years since the Weapons Act was passed.<sup>75</sup> While relatively more than Great Britain and Australia, it is drastically less than the seventeen mass shootings that took place in the United States in 2013.<sup>76</sup>

#### *4. Current Problems in the United States absent Assault Weapons Ban and Ammunition Regulation*

In 1994, United States Congress adopted the Violent Crime Control Act, which prohibited the transfer or possession of semi-automatic assault weapons and ammunition magazines capable of holding more than ten rounds.<sup>77</sup> In part, it was enacted in response to the 1993 101 California Street shooting, in which the gunman, using assault weapons with thirty-two round magazines, killed eight people and wounded six others.<sup>78</sup> The act expired in 2004<sup>79</sup> and, despite

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73. Morven McLean, *Swiss Voters Reject Anti-gun Initiative*, SWISSINFO.CH (Feb. 13, 2011), <http://www.swissinfo.ch/eng/swiss-voters-reject-anti-gun-initiative-/29484482>.

74. *Id.*

75. See Cumming-Bruce, *supra* note 25; *Gunman Kills 14 in Swiss Assembly*, *supra* note 21; Heilprin, *supra* note 21.

76. FED. BUREAU OF INVESTIGATION, *supra* note 14.

77. The Public Safety and Recreational Firearms Use Protection Act of 1004, 18 U.S.C.A. §§ 921(a)(31), 922(w) (West 2000) (repealed 2004).

78. See Diane Dwyer & Amanda Hochmuth, *101 California Shooting: 20 Years Later*, NBC BAY AREA (July 1, 2013), <http://www.nbcbayarea.com/news/local/101-California-Shooting-20-Years-Later-213705691.html>. The 1994 assault weapons ban did not face the same strong resistance as the proposed 2013 ban. See Chris Good, *A Lot Has Changed Since Congress Passed the Assault Weapons Ban*, ABC NEWS (Jan. 15, 2013), <http://abcnews.go.com/blogs/politics/2013/01/a-lot-has-changed-since-congress-passed-the-assault-weapons-ban>. In 1994, the Democratic Party held the majority in both the House and Senate and a Democrat was President. *Id.* This gave Democrats the ability to enact legislation that may have been unpopular with Republicans. See

continued efforts, has not been reinstated.<sup>80</sup> The overall impact of the act on general gun violence is unclear, but it did reduce the number of people killed in mass shootings.<sup>81</sup> While the act was in effect from 1995 to 2004, an average of 25.5 people were shot per year in mass shootings.<sup>82</sup> In comparison, during the years following the act's expiration from 2005 to 2012, an average of 54.8 people were shot per year in mass shootings.<sup>83</sup>

After the Sandy Hook massacre, Americans began pressuring Congress to renew the federal ban on assault weapons and to consider limiting the access to ammunition magazines that hold more than ten rounds.<sup>84</sup> President Obama also tried to implement stricter gun

*id.* Additionally, the 1994 ban was proposed as a larger bill targeting crime in general instead of focusing solely on firearms legislation. *Id.*

79. The Public Safety and Recreational Firearms Use Protection Act of 1994, 18 U.S.C.A. §§ 921(a)(31), 922(w) (West 2000) (repealed 2004).

80. Elizabeth Hartfield, *The Assault Weapons Ban: What Was It and Did It Work*, ABC NEWS (Dec. 18, 2012), <http://abcnews.go.com/Politics/OTUS/newtown-connecticut-shootings-assault-weapons-ban-work/story?id=18000724>.

81. *Id.* The reduction in individuals killed in mass shootings excludes 1999—the year when the Columbine High School shooting occurred. *Id.* On April 20, 1999, two students entered Columbine High School armed with semi-automatic weapons and explosives and began targeting students. James Brooke, *Terror in Littleton: The Overview*, N.Y. TIMES (Apr. 21, 1999), <http://www.nytimes.com/1999/04/21/us/terror-littleton-overview-2-students-colorado-school-said-gun-down-many-23-kill.html?ref=columbinehighschool>. The rampage left twenty-three students and faculty dead and twenty more were injured. *Id.*

82. Sam Wang, *Did the Federal Ban on Assault Weapons Matter?*, PRINCETON ELECTION CONSORTIUM (Dec. 14, 2012), <http://election.princeton.edu/2012/12/14/did-the-federal-ban-on-assault-weapons-matter>.

83. *Id.*

84. *See Now is the Time*, *supra* note 8; *see also* Candiotti et al., *supra* note 3 (discussing that fifty-two percent of Americans supported major firearm regulation reform). The 1994 Violent Crime Control Act defined assault weapon firearms as ones with characteristics “which render these weapons more dangerous than ordinary weapons typically possessed by law-abiding citizens for lawful purposes.” VIVIAN S. CHU, CONG. RESEARCH SERV. R42957, FEDERAL ASSAULT WEAPONS BAN: LEGAL ISSUES 12 (2013). Commonly, assault weapons are described as firearms with detachable magazines and military features. Erica Goode, *Even Defining Assault Rifles is Complicated*, N.Y. TIMES (Jan. 16, 2013), [http://www.nytimes.com/2013/01/17/us/even-defining-assault-weapons-is-complicated.html?pagewanted=all&\\_r=1&](http://www.nytimes.com/2013/01/17/us/even-defining-assault-weapons-is-complicated.html?pagewanted=all&_r=1&). Whether the term refers solely to

legislation by proposing more thorough universal background checks for gun buyers, banning military-style assault weapons, and banning magazines capable of holding more than ten rounds.<sup>85</sup> However, the National Rifle Association (“NRA”) opposed these efforts and was prepared to punish lawmakers who were inclined to vote for stricter measures.<sup>86</sup> Currently, there is not a federal ban on assault weapons, military style .50 caliber rifles,<sup>87</sup> or large capacity ammunition magazines.<sup>88</sup>

*5. The United States Should Reenact the Ban on Assault Weapons and High Capacity Ammunition Clips as well as Closely Regulate Ammunition*

The 1994 Violent Crime Control Act expired in 2004.<sup>89</sup> Although several other pieces of federal legislation currently regulate possession and acquisition of firearms in the United States, they have been ineffective in reducing ASEs. In order to reduce the rate of mass shootings, the 1994 Violent Crime Control Act needs to be reinstated. President Obama, through his “Now is the Time” campaign,<sup>90</sup> has called for its reinstatement and proposed strengthening the ban on the

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automatic weapons such as machine guns or includes semi-automatic weapons is a matter of debate. *See id.*

85. Obama, *supra* note 1.

86. *See generally* Eleanor Clift, *The NRA is Beating President Obama on Gun Control*, THE DAILY BEAST (Apr. 3, 2014), <http://www.thedailybeast.com/articles/2013/04/03/the-nra-is-beating-president-obama-on-gun-control.html>.

87. A military style .50 caliber rifle is a heavy-duty machine gun developed by the United States military during World War I for use as an anti-tank weapon. Allen Rostron, *High Powered Controversy: Gun Control, Terrorism, and the Fight Over .50 Caliber Rifles*, 73 U. Cin. L. Rev. 1415, 1423-24 (2005).

88. Jonathan Masters, *U.S. Gun Policy: Global Comparisons*, PBS (Dec. 21, 2012), <http://www.pbs.org/newshour/runtdown/gun-policy>.

89. *See* The Public Safety and Recreational Firearms Use Protection Act of 1994, 18 U.S.C.A. §§ 921(a)(31), 922(w) (West 2000) (repealed 2004).

90. In January 2013, President Obama launched the *Now is the Time* campaign, which focused on reforming federal firearm legislation in wake of the Sandy Hook Massacre. *Now is the Time*, *supra* note 8. In April 2013, a bipartisan compromise based on the proposals failed to get the number of Senate votes needed and was defeated. Jonathan Weisman, *Senate Blocks Drive for Gun Control*, N.Y. TIMES (Apr. 17, 2013), <http://www.nytimes.com/2013/04/18/us/politics/senate-obama-gun-control.html?pagewanted=all>.

manufacturing of cosmetic modifications for the banned firearms.<sup>91</sup> Shooters in both the Aurora, Colorado<sup>92</sup> and Sandy Hook massacres used weapons that the law would have banned if the regulation had been reinstated.<sup>93</sup> The ban could have saved thirty-eight lives collectively in the massacres.<sup>94</sup> Further, an assault weapons prohibition has strong public support, including support from gun owners.<sup>95</sup>

The regulation on high capacity ammunition magazines, banned in the 1994 Violent Crime Control Act,<sup>96</sup> should also be reinstated. Recent ASEs at Virginia Tech University,<sup>97</sup> Tucson, Arizona,<sup>98</sup>

91. *Now is the Time*, *supra* note 8.

92. Twelve people were killed and fifty-eight injured on July 20, 2012, during a midnight showing of “The Dark Night Rises.” *Colorado Theater Shooting Fast Facts*, CNN (July 13, 2014), <http://www.cnn.com/2013/07/19/us/colorado-theater-shooting-fast-facts>. The shooter was armed with an AR 15 rifle, 12 gauge shotgun, and two .40 caliber handguns. *Id.*

93. *Now is the Time*, *supra* note 8.

94. *See id.*

95. *See generally* Brian Roth, *Reconsidering a Federal Assault Weapons Ban in the Wake of the Aurora, Oak Creek, and Portland Shootings: Is it Constitutional in the Post-Heller Era?*, 37 NOVA L. REV. 405, 433 (2013) (describing polls that indicate 62% of Americans approve the banning of semi-automatic assault weapons, including gun owners, but at a lower rate). Those who do not support the ban argue that the effect of the 1994 assault weapons ban had an inconclusive effect of gun violence. Doug McKelway, *Dems Ramp Up Push for Assault Weapons Ban, Face Headwinds from States*, FOX NEWS (Feb. 28, 2013), <http://www.foxnews.com/politics/2013/02/28/democrats-push-for-assault-weapons-ban-in-congress-but-it-still-faces-uphill>. The statistics for the ban’s effect on ASEs, however, is more conclusive. *See* Brad Plumer, *Everything You Need to Know About the Assault Weapons Ban In One Post*, WASH. POST (Dec. 17, 2012), <http://www.washingtonpost.com/blogs/wonkblog/wp/2012/12/17/everything-you-need-to-know-about-banning-assault-weapons-in-one-post/>. The number of people killed in mass shootings declined while the ban was in effect. *See* Wang, *supra* note 82.

96. *See* The Public Safety and Recreational Firearms Use Protection Act of 1994, 18 U.S.C.A. §§ 921(a)(31), 922(w) (West 2000) (repealed 2004).

97. On April 16, 2007, a student shot and killed thirty-two and injured fifteen others, before turning the gun on himself. Christine Hauser & Anahad O’Connor, *Virginia Tech Shooting Leaves 33 Dead*, N.Y. TIMES (Apr. 16, 2007), [http://www.nytimes.com/2007/04/16/us/16cnd-shooting.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2007/04/16/us/16cnd-shooting.html?pagewanted=all&_r=0). The shooter was armed with a Walther P-22 pistol, 9mm Glock pistol, and had fifty rounds of ammunition on him. *Virginia Tech*



Aurora, Colorado,<sup>99</sup> Oak Creek, Wisconsin,<sup>100</sup> and Newton all involved shooters using high capacity ammunition magazines capable of holding ten or more rounds.<sup>101</sup> Assault weapons with high capacity magazines have the ability to fire large amounts of ammunition without the shooter needing to reload.<sup>102</sup> This deadly combination is what gives the shooter the ability to take many lives in such a short period of time. Banning assault weapons in addition to high capacity magazines will greatly reduce the rate of ASEs in the United States.<sup>103</sup>

In addition, Congress should also seek to regulate ammunition itself. Implementing a universal requirement for ammunition logs would prevent illegal gun owners from purchasing ammunition.<sup>104</sup> The Gun Control Act of 1968 required limited federal recordkeeping, however, the Firearm Owners' Protection Act of 1986 eliminated this requirement.<sup>105</sup> Currently, ammunition sales are not federally regulated and ammunition logs are not required.<sup>106</sup> However, some states require permits to purchase ammunition for the same caliber or

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*Shootings Fast Facts*, CNN (Apr. 6, 2014), <http://www.cnn.com/2013/10/31/us/virginia-tech-shootings-fast-facts>.

98. On January 8, 2011, at a "Congress on Your Corner" event at a local grocery store, a shooter killed six people, and injured thirteen others, including United States Representative Gabrielle Giffords. See *Arizona Safeway Shooting Fast Facts*, CNN (Jan. 8, 2014), <http://www.cnn.com/2013/06/10/us/arizona-safeway-shootings-fast-facts>.

99. *Colorado Theater Shooting Fast Facts*, *supra* note 92.

100. On August 5, 2012, at a Sikh Temple in Oak Creek, Wisconsin, a man shot and killed six and wounded three. Colleen Curry et al., *7 Dead at Sikh Temple in Oak Creek, Wis.; Officials Believe 'White Supremacist' Behind 'Domestic Terrorism'*, ABC NEWS (Aug. 5, 2012), <http://abcnews.go.com/US/sikh-temple-oak-creek-wisconsin-officials-white-supremacist/story?id=16933779>.

101. *Now is the Time*, *supra* note 8.

102. Thomas W. Mcgoldrick, Comment, *Happiness Is a Warm Gun: The Sixth Circuit Shoots Down a Ban on Assault Weapons*, 5 TEMP. POL. & CIV. RTS. L. REV. 203, 216 (1996).

103. See *id.*

104. See GREG RIDGEWAY, SUMMARY OF SELECT FIREARM VIOLENCE PREVENTION STRATEGIES 4 (2013), available at <http://www.nraila.org/media/10883516/nij-gun-policy-memo.pdf>.

105. Brendan J. Healey, *Plugging the Bullet Holes in U.S. Gun Law: An Ammunition-Based Proposal for Tightening Gun Control*, 32 J. MARSHALL L. REV. 1, 28 (1998).

106. RIDGEWAY, *supra* note 104.

gauge as the purchaser's firearm,<sup>107</sup> comparable to Australia's regulation.<sup>108</sup>

The proposed logs would require an ammunition vendor to record the purchaser's name, address, date of birth, driver's license number, and the date of sale, similar to a current city code in Sacramento, California.<sup>109</sup> The vendor would also record the brand, type, and quantity of firearm ammunition purchased, the identity of the person selling the ammunition, and the purchaser's signature and thumbprint.<sup>110</sup> A uniform state requirement to maintain ammunition logs would enable local authorities to monitor and determine whether purchasers are stockpiling ammunition—a possible indicator of mass shootings.<sup>111</sup>

The federal government should also reinstate the ban on internet and mail order purchases of ammunition.<sup>112</sup> The Gun Control Act of 1968 previously banned these purchases; however, similar to ammunition logs, the Firearm Owners' Protection Act repealed the ban.<sup>113</sup> Thus, in a matter of minutes people are able to purchase large amounts of ammunition online or over the phone with few or no restrictions.<sup>114</sup> To ensure the quantity and type of ammunition is legally purchased, it is imperative the United States federal government ban sales that do not occur face-to-face with a Federal Firearms Licensee ("FFL").<sup>115</sup>

107. *Id.*

108. AUSTRALASIAN POLICE MINISTERS' COUNCIL, *supra* note 55, at 12-13.

109. SACRAMENTO, CAL. CITY CODE § 5.66.020 (2007).

110. *Id.*

111. *See generally* RIDGEWAY, *supra* note 104 (describing a 2004 study in Los Angeles that found police were able to use ammunition logs as a tool to find illegal firearms and ammunition).

112. Healey, *supra* note 105, at 33.

113. *Id.*

114. *Id.*

115. *Id.* at 34. There are nine types of FFLs, with licenses varying depending on the type of firearm business to be conducted. Dan Zimmerman & Natalie Bailey, *Thinking About Getting Your Own FFL? THE TRUTH ABOUT GUNS* (July 28, 2013), <http://www.thetruthaboutguns.com/2013/07/daniel-zimmerman/thinking-about-getting-your-own-ffl>. Firearm dealers are classified as a level one, and must engage in transfers with other people. *Id.* In other words, FFLs cannot use the license only for personal use. *Id.*

## *B. Weapons Buyback Programs*

### *1. Great Britain*

Following the Firearms (Amendment) Act 1997, Great Britain implemented a buyback program that compensated handgun owners who turned in illegal firearms to local police stations.<sup>116</sup> The compensation program ran from September 1997 through February 1998, and led to the surrender of 162,000 handguns and 700 tons of ammunition.<sup>117</sup>

### *2. Australia*

The 1996 National Firearms Agreement also implemented Australia's buyback program.<sup>118</sup> From October 1, 1996, to September 30, 1997, owners relinquished 643,726 prohibited firearms nationwide.<sup>119</sup> This is estimated to be equivalent to one-fifth of the civilian firearms in the country at the time.<sup>120</sup>

### *3. Problems in the United States absent Buyback Programs*

A survey conducted by the National Crime Victimization Survey concluded that 467,321 individuals were victims of a crime involving a firearm in 2011 alone.<sup>121</sup> According to the United States Bureau of Alcohol, Tobacco, Firearms and Explosives, there are approximately 300 million firearms throughout the United States.<sup>122</sup> But, because there is no national registry for firearms, this figure is an estimate.<sup>123</sup>

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116. *Firearms-Control Legislation and Policy: Great Britain*, *supra* note 30.

117. *UK Report Criticises Handgun Handover*, BBC NEWS (Feb. 26, 1999), [http://news.bbc.co.uk/2/hi/uk\\_news/286603.stm](http://news.bbc.co.uk/2/hi/uk_news/286603.stm).

118. *Firearms-Control Legislation and Policy: Australia*, *supra* note 31.

119. Chapman et al., *supra* note 27, at 365; *see also Firearms-Control Legislation and Policy: Australia*, *supra* note 31.

120. *Firearms-Control Legislation and Policy: Australia*, *supra* note 31.

121. *Gun Violence*, NATIONAL INSTITUTE OF JUST., <http://www.nij.gov/topics/crime/gun-violence/Pages/welcome.aspx> (last modified Apr. 4, 2013).

122. Michael Long, *How Many Guns in The United States?*, GUN FAQ (Mar. 7, 2013), <http://www.gunfaq.org/2013/03/how-many-guns-in-the-united-states>.

123. *Id.*

The number of privately owned firearms rises by ten million per year.<sup>124</sup> With the number of firearms in the United States growing at an alarming rate, taking weapons off the streets and away from potentially dangerous individuals can help to reduce ASEs.

#### 4. *The United States Should Enact a Nationwide Buyback Program*

The United States should implement a buyback program that targets assault weapons and high capacity ammunition magazines, similar to the programs in Great Britain and Australia.<sup>125</sup> A buyback program is voluntary and aimed at taking weapons off the streets.<sup>126</sup> The program would need to be federally funded, which could be accomplished by a one-time tax increase, identical to how Australia funded their program.<sup>127</sup> The federal government would reduce the number of assault weapons and high capacity ammunition magazines in circulation if it enacted a buyback program.<sup>128</sup> Fewer high-powered weapons in circulation would make them less available to potential shooters and therefore help reduce the rate of ASEs.

### C. *Current Screening, Licensing, and Examination Procedures*

#### 1. *Great Britain*

In response to the 1987 Hungerford massacre, Great Britain also created stricter standards for issuing ownership certificates for certain shotguns.<sup>129</sup> Weapons and ammunition not prohibited now require a

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124. *Id.*

125. *See generally* RIDGEWAY, *supra* note 104, at 1 (describing how firearm buyback programs are ineffective because the guns turned in “are at low risk of being used in a crime”).

126. *See* Debbi Baker, *Gun Buy Back Kicks Off a ‘Year of Peace’*, UT SAN DIEGO (Aug. 28, 2014), <http://www.utsandiego.com/news/2014/aug/28/gun-buy-back-program-year-peace-kickoff/?#article-copy>.

127. GUY REEVE & MICHAEL LEWIS, AUSTRALIAN NATIONAL AUDIT OFFICE, *THE GUN BUY-BACK SCHEME* 54 (1997).

128. *See* RIDGEWAY, *supra* note 104 (discussing how a similar program was effective in Australia).

129. *See* Firearms (Amendment) Act, 1988, c. 45, § 2(2) (U.K.). The standard applies to pump-action shotguns capable of taking a magazine with more than two

certificate to possess or acquire with few exceptions.<sup>130</sup> To obtain a certificate, applicants must apply with the chief police officer in their area and demonstrate they have a good reason for possession.<sup>131</sup> The reason for wanting a certificate must be genuine and substantial and police officers are expected to conduct a reasonable investigation to verify the applicant's reason.<sup>132</sup> For example, if the purpose listed is to shoot animals present on the applicant's property, police officers would verify the particular animal species listed is present on the applicant's land.<sup>133</sup> Ultimately, the chief police officer has complete discretion in granting certificates.<sup>134</sup> Self-defense and the desire to own a particular weapon are not considered valid reasons for obtaining a certificate.<sup>135</sup>

To obtain a shotgun certificate, the applicant must also submit a completed shotgun application form,<sup>136</sup> and four passport size photographs with one signed by a reference declaring the picture is a true likeness of the applicant.<sup>137</sup> Additionally, a signed statement by a reference declaring the information contained on the application is correct and that the reference is unaware of a reason why the applicant should not be in possession of a shotgun must be submitted.<sup>138</sup> The reference must be a resident of Great Britain, have known the applicant for at least two years, and be a member of Parliament, justice of the peace, minister of religion, doctor, lawyer, or a person in similar standing.<sup>139</sup> A shotgun certificate may only be granted or renewed if the chief police officer has no reason to believe the applicant is prohibited from possessing a shotgun and is satisfied the applicant has a good reason for possessing or purchasing the

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bullets. *See id.* A pump action shotgun is a shotgun that is designed or adapted to reload by manual operation. *Id.* § 57(4).

130. *Id.* §§ 1-2.

131. *Firearms-Control Legislation and Policy: Great Britain, supra* note 30.

132. HOME OFFICE, *supra* note 45, at 103.

133. *Firearms-Control Legislation and Policy: Great Britain, supra* note 30.

134. *See* HOME OFFICE, *supra* note 45, at 103.

135. *Firearms-Control Legislation and Policy: Great Britain, supra* note 30.

136. Firearms Rules, c. 1941, § 5(1) (1998) (U.K.).

137. *Id.* § 7 (b).

138. *Id.* § 6(1).

139. *Id.* § 6(2)(a)-(c).

shotgun.<sup>140</sup> A good reason for granting a shotgun certificate includes sporting or competition purposes or shooting vermin.<sup>141</sup>

The requirements for a firearm certificate are identical to those for a shotgun certificate except for who qualifies as a reference and the number of references required.<sup>142</sup> Specifically, two references are required and both must be Great Britain residents, have known the applicant for at least two years, be of good character, and may not be a member of the applicant's family, a serving officer, or a registered firearms dealer.<sup>143</sup> A certificate is granted if the chief police officer is satisfied the applicant is fit to own a firearm, has a good reason for possession of a firearm, and can be trusted in all circumstances to possess the firearm and ammunition without danger to public safety.<sup>144</sup>

In order to ensure an applicant can be trusted, officers check the Police National Computer ("PNC") for any criminal record.<sup>145</sup> A PNC record includes in part the person's name, date of birth, sex, ethnic appearance, arrest summons number, and convictions and arrests.<sup>146</sup> Several types of crimes and sentences can prohibit a person from possessing firearms or ammunition.<sup>147</sup> For example, a person who receives a suspended sentence of three or more months for a crime may not possess firearms or ammunition for five years from the end of the sentence.<sup>148</sup> Additionally, those who have served a custodial

140. Firearms (Amendment) Act, 1988, c. 45, § 3(1)(1A) (U.K.).

141. *Id.* § 3(1)(1B).

142. Firearms Rules, c. 1941, § 5(1)(1998) (U.K.). In Great Britain, a shotgun is considered any smooth-bore gun that "has a barrel not less than 24 inches in length and does not have any barrel with a bore exceeding 2 inches in diameter; either has no magazine or has a non-detachable magazine incapable of holding more than two cartridges; and is not a revolver gun." Firearms (Amendment) Act, 1988, c. 27, § 2(2)(a) (U.K.). The firearms certificate applies to all firearms not prohibited by law except shotguns and air weapons. *Id.*

143. Firearms Rules, c. 1941, § 4(3) (1998) (U.K.).

144. Firearms Act, 1968, c.27, §27(1) (U.K.).

145. Dominic Casciani, *Gun Control and Ownership Laws in the UK*, BBC (Nov. 2, 2010), <http://www.bbc.co.uk/news/10220974>.

146. *Police National Computer*, GENEWATCH UK, <http://www.genewatch.org/sub-567725> (last visited Aug. 11, 2014).

147. HOME OFFICE, *supra* note 45, at 95.

148. *Id.*

sentence of more than three years are prohibited from acquiring or possessing firearms.<sup>149</sup>

Before granting a certificate, an officer must ensure the applicant can be entrusted to possess a firearm or shotgun without danger to public safety.<sup>150</sup> While the suitability test is specifically for firearms, the criteria may also be applied to determine whether an applicant can possess a shotgun without posing a danger to public safety.<sup>151</sup> An officer must assess whether the applicant is a prohibited person as described above, has intemperate habits, or an unsound mind.<sup>152</sup> Intemperate habits means a lack of self-control and is determined on a case-by-case basis.<sup>153</sup> Evidence of drug or alcohol abuse, aggressive or anti-social behavior, and disturbing and unusual behavior can all be evaluated in determining whether intemperate habits exist in an applicant.<sup>154</sup> In determining whether an applicant has an unsound mind, officers must consider signs of serious depression, suicidal tendencies, or longstanding or intermittent periods of emotional instability or unpredictable behavior.<sup>155</sup>

To obtain information relating to intemperate habits and unsound mind, applicants are required to give permission for police officers to approach their general practitioner in order to obtain information about their mental and physical health, as it relates to the safe possession of firearms.<sup>156</sup> Police officers can approach the general practitioner at any point while the certificate is valid if there are concerns about the applicant's suitability.<sup>157</sup> A general practitioner also has a duty to contact a police officer if there is concern about a certificate holder's suitability.<sup>158</sup> However, general practitioners are not required to monitor or assess a patient.<sup>159</sup>

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149. *Id.*

150. *Id.* at 9.

151. *Id.* at 95.

152. HOME OFFICE, *supra* note 45 at 73, 86, 98.

153. *Id.* at 97.

154. *Id.*

155. *Id.* at 98.

156. *Id.* at 74.

157. *Id.*

158. *Id.*

159. *Id.*

In sum, since 1996, Great Britain has taken great measures to ensure firearms and shotguns stay out of the hands of dangerous individuals—it has been successful in this regard.<sup>160</sup> Part of that success can arguably be attributed to its strict screening regulations that ensure certificates are only issued to those citizens who can be trusted.

## 2. Australia

Australia's current firearm regulations are also tailored to ensure dangerous weapons stay out of dangerous individuals' hands. The 1996 National Firearms Agreement requires a separate permit for the acquisition of each firearm, a twenty-eight day waiting period before permits are granted,<sup>161</sup> and a nationwide firearm registration system.<sup>162</sup> The Agreement also affects the licensing requirements for the purchase and acquisition of firearms.<sup>163</sup>

First-time applicants are now required to complete a standardized and accredited firearm safety course that covers Australia's Firearms Safety Code.<sup>164</sup> Additionally, applicants must show a genuine reason for firearm possession which does not include personal protection.<sup>165</sup> To qualify as a genuine reason, the applicant must show he is a sport shooter with a valid membership to an approved shooting club, a recreational shooter or hunter, a bona fide collector, has professional requirements, or at a minimum, demonstrate a genuine need for the particular type of firearm.<sup>166</sup> Those seeking a firearm license for the first time must also show that they have proper storage and safety procedures adequate enough to satisfy the licensing authority.<sup>167</sup>

The 1996 National Firearms Agreement counsel provided criteria for states and territories to use in determining when to withhold or revoke a firearm license.<sup>168</sup> A license may be withheld or revoked if

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160. Faiola, *supra* note 28.

161. AUSTRALASIAN POLICE MINISTERS' COUNCIL, *supra* note 55, at 11.

162. *Id.* at 2.

163. *See id.* at 5-6.

164. *Id.* at 9.

165. *Id.* at 3, 5.

166. *Id.* at 3.

167. *Id.* at 11.

168. *Id.* at 10.



the applicant is not of good character, possesses a mental or physical condition rendering him unsuitable for possessing a firearm, has a conviction of a violence offense in the last five years, or has an apprehended violence order, domestic violence order, or restraining order.<sup>169</sup> A license may also be revoked if the gun owner no longer has a genuine reason to possess the firearm or lacks safe storage it.<sup>170</sup>

As there is no national database in Australia, states and territories are left to determine how to impose these restrictions and gather the relevant information. The license application in New South Wales, for example, gives authorization to release all information to the Commissioner or Commissioner's third party for purposes of verifying the information.<sup>171</sup> Additionally, in New South Wales, a doctor or medical professional does not have a duty to report an applicant's suspicious behavior and can rely on their professional discretion.<sup>172</sup> In contrast, Queensland requires authorized officers to consider the public interest in granting each firearm application along with the applicant's mental health and fitness, any domestic violence orders, and any false or misleading statements made on application.<sup>173</sup> But, it is unclear how the authorized officer comes to verify this information.<sup>174</sup> Regardless of the method used to impose the restrictions, it is apparent from the lack of mass shootings since the 1996 National Firearms Agreement's passage<sup>175</sup> that the regulations are working to prohibit dangerous people from obtaining firearms.

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169. *Id.*

170. *Id.*

171. *Application for a Personal Firearms License*, NSW POLICE FORCE, [https://www.police.nsw.gov.au/\\_\\_data/assets/pdf\\_file/0013/131107/SAMPLE\\_FOR\\_M\\_P561\\_V1.7.pdf](https://www.police.nsw.gov.au/__data/assets/pdf_file/0013/131107/SAMPLE_FOR_M_P561_V1.7.pdf) (last visited Aug. 15, 2014) (Austl.).

172. *See Firearms Registry Disclosure of Information by Health Professionals*, NSW POLICE FORCE, [http://www.police.nsw.gov.au/\\_\\_data/assets/pdf\\_file/0016/131155/S79\\_Notification\\_FACT\\_Sheet\\_-\\_March\\_2013.pdf](http://www.police.nsw.gov.au/__data/assets/pdf_file/0016/131155/S79_Notification_FACT_Sheet_-_March_2013.pdf) (last visited Aug. 15, 2014) (Austl.).

173. *Fit and Proper*, QUEENSLAND POLICE, <http://www.police.qld.gov.au/programs/weaponsLicensing/licenceApplication/applicant/fitandproper.htm> (last updated Nov. 12, 2012) (Austl.).

174. *Id.*

175. *See* Obama, *supra* note 62.

### 3. Switzerland

Switzerland's Weapons Act limits who may acquire and carry firearms and requires a permit to purchase a handgun.<sup>176</sup> To obtain a permit, an applicant must be free of any violent criminal convictions and cannot be a danger to himself or others.<sup>177</sup> If granted, the permit is valid for six to nine months and is typically applicable to one weapon only.<sup>178</sup>

To ensure prohibited persons do not come in possession of firearms, Switzerland requires buyers to pass a background check before the purchase or transfer is complete.<sup>179</sup> The background check considers mental, criminal, and domestic violence history.<sup>180</sup> There is no national database for information considered in the application and each canton is responsible for keeping their own database.<sup>181</sup>

To acquire a carrying license, the applicant must pass an examination and demonstrate a need to protect himself, others, or his property.<sup>182</sup> The theoretical portion of the exam tests "criminal provisions on violent crimes and self-defense, and necessity for justification or excuse; federal and cantonal weapons law provisions; types of weapons and ammunition; and security measures and proper conduct when carrying weapons."<sup>183</sup> Additionally, the exam's practical portion tests weapon handling skills including, "loading, unloading, operating the safety device, and shooting."<sup>184</sup> Switzerland's examination and licensing process ensures those who

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176. See Stephen P. Halbrook, *Symposium on the Legal, Economic, and Human Rights Implications of Civilian Firearms Ownership and Regulation: Citizens in Arms: The Swiss*, 8 TEX. REV. L. & POL. 141, 148 (2003).

177. *Firearms-Control Legislation and Policy: Switzerland*, *supra* note 32; see Halbrook, *supra* note 176, at 153.

178. *Firearms-Control Legislation and Policy: Switzerland*, *supra* note 32.

179. *Switzerland- Gun Facts, Figures and the Law*, GUNPOLICY.ORG, <http://www.gunpolicy.org/firearms/region/switzerland> (last visited Aug. 15, 2014).

180. *Id.*

181. Edward Cody, *In Aftermath of Swiss Shooting, Echoes of U.S. Gun-Control Debate*, WASH. POST (Feb. 7, 2013), [http://www.washingtonpost.com/world/europe/in-aftermath-of-swiss-shooting-echoes-of-us-gun-control-debate/2013/02/07/38457624-6e1d-11e2-ac36-3d8d9dcaa2e2\\_story.html](http://www.washingtonpost.com/world/europe/in-aftermath-of-swiss-shooting-echoes-of-us-gun-control-debate/2013/02/07/38457624-6e1d-11e2-ac36-3d8d9dcaa2e2_story.html).

182. *Switzerland- Gun Facts, Figures and the Law*, *supra* note 179.

183. *Firearms-Control Legislation and Policy: Switzerland*, *supra* note 32.

184. *Id.*

possess firearms are capable and trustworthy, which contributes to the low mass shooting rate in the country.<sup>185</sup>

#### 4. *The United States' Problems in the absence of Adequate Licensing and Examination*

Currently, the United States has no federal regulation that requires practical or theoretical examinations for firearm purchasers.<sup>186</sup> But, several states require such testing to obtain an open carry permit.<sup>187</sup> California, for example, implemented the Handgun Safety Certificate Program in 2003.<sup>188</sup> The program requires individuals to obtain a Handgun Safety Certificate ("HSC") prior to purchasing a handgun and perform a handgun safety demonstration before taking possession.<sup>189</sup> To obtain an HSC, an applicant must pass a written examination, conducted at a firearm dealership, and administered by a Department of Justice ("DOJ") Certified Instructor.<sup>190</sup> The HSC

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185. Switzerland has only seen three mass shootings since 2001. *See generally* Cumming-Bruce, *supra* note 25; *Gunman Kills 14 in Swiss Assembly*, *supra* note 21; Heilprin, *supra* note 21.

186. *Quick Reference to Federal Firearms Laws*, DEP'T OF JUST., <http://www.justice.gov/usao/ut/documents/guncard.pdf> (last visited Dec. 15, 2014).

187. *See* Debra L. Whitter, *In This Issue, Individual Gun Rights, Gun Laws, and Franchising: Why Franchisors Cannot Ignore the Controversy*, 29 *FRANCHISE L.J.* 239, 239 (2010).

188. *Handgun Safety Certificate Program*, STATE OF CAL. DEP'T OF JUST., <http://oag.ca.gov/firearms/hscinfo> (last visited Apr. 3, 2014).

189. *Id.* Certain individuals are exempt from the HSC requirement including special weapons permit holders, operation of law representatives, and active and honorably retired peace officers. CAL. DEP'T OF JUST., *HANDGUN SAFETY CERTIFICATE MANUAL FOR CALIFORNIA FIREARMS DEALERS AND DOJ CERTIFIED INSTRUCTORS 3-4* (2013), available at <http://oag.ca.gov/sites/all/files/agweb/pdfs/firearms/forms/hscman.pdf>. Additionally, an HSC is not required when a handgun is being returned to a rightful owner, when acquiring a relic handgun, and when an inoperable law enforcement service gun is presented to a family member. *Id.* at 4-5.

190. KAMALA D. HARRIS, CAL. DEP'T OF JUST., *CALIFORNIA FIREARMS LAW SUMMARY 4* (2013), available at <http://oag.ca.gov/sites/all/files/agweb/pdfs/firearms/pdf/cfl2013.pdf>. To become a DOJ Certified Instructor, an applicant must be legally eligible to own or possess a firearm under California law and pass a background check. *Frequently Asked Questions, Handgun Safety Program*, ST. OF CAL. DEP'T OF JUST., <https://oag.ca.gov/firearms/hscfaqs> (last visited Apr. 3, 2014). Applicants must also complete a DOJ Certified Instructor program and submit a Certified Instructor Application and fourteen dollar fee. *Id.*

written test covers basic gun safety rules, handgun owner responsibility, handgun parts and operation, and safe storage devices and methods.<sup>191</sup> Examinations can also cover prohibited firearm transfers, straw purchases,<sup>192</sup> and general firearm laws.<sup>193</sup> Applicants must attain a score of at least seventy-five percent to receive an HSC.<sup>194</sup> The HSC is then valid for five years from the date of issue.<sup>195</sup>

In comparison, California's handgun safety demonstration ensures purchasers are familiar with the proper way to handle their firearm.<sup>196</sup> The purchaser must show they can properly load, unload, and disarm the handgun they intend to buy, all the while maintaining trigger discipline and muzzle awareness.<sup>197</sup> The HSC requires this demonstration take place at a firearm dealership, in front of a DOJ Certified Instructor, on or before the date the handgun is transferred.<sup>198</sup> Certain types of transfers, including pawn returns and intra-familial transfers, are exempt from the safety demonstration requirement.<sup>199</sup>

### 5. *The United States Should Require All Prospective Purchasers to Pass a Written and Practical Examination*

The United States should require firearm purchasers to pass a standardized written and practical examination, similar to Switzerland.<sup>200</sup> In Switzerland, those applying for a carry permit must pass a theoretical examination, which tests an applicant's knowledge

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191. CAL. DEP'T OF JUST., HANDGUN SAFETY CERTIFICATE STUDY GUIDE 9, 13, 17, 29 (2012) [hereinafter HANDGUN STUDY GUIDE], available at <https://oag.ca.gov/sites/all/files/agweb/pdfs/firearms/forms/hscsg.pdf>.

192. For discussion on straw purchases, see *infra* Part II.C.vi.1.

193. HANDGUN STUDY GUIDE, *supra* note 191, at 33.

194. HARRIS, *supra* note 190, at 4.

195. HANDGUN STUDY GUIDE, *supra* note 191, at 5.

196. See *generally id.* at 45-51.

197. See *id.* at 46. Proper trigger discipline is demonstrated when "the trigger finger is outside of the trigger guard and along side of the handgun frame." *Id.* Additionally, proper muzzle awareness is demonstrated when "the firearm is pointed in a safe direction, preferably down at the ground" at all times. *Id.*

198. See HARRIS, *supra* note 190, at 4.

199. *Id.*

200. *Firearms-Control Legislation and Policy: Switzerland*, *supra* note 32.

of firearm regulations, and a practical examination, which tests an applicant's ability to disarm, dismantle, and shoot their firearm.<sup>201</sup>

Similar examinations in the United States would provide a barrier between the gunman and his or her weapons. The written examination should test knowledge of federal and applicable state firearm laws, as well as safety measures and weapon components.<sup>202</sup> The practical portion of the exam should cover loading, unloading, and disarming a weapon, as well as safe shooting techniques.<sup>203</sup> Also, by implementing such requirements, firearm purchasers will be more informed and better able to properly handle their weapons.

#### 6. *Problems with Background Checks in the United States*

The Gun Control Act of 1968 prohibits the sale and acquisition of firearms to certain classes of individuals,<sup>204</sup> including convicted felons, fugitives from justice, illegal aliens, and dishonorably discharged military servicemen.<sup>205</sup> Additionally, it prohibits illicit drug users, the mentally incompetent, and people with domestic violence convictions or restraining orders from purchasing or acquiring firearms.<sup>206</sup>

The Brady Handgun Violence Prevention Act of 1993 ("Brady Act"), a temporary five-year act, required FFLs to conduct a criminal background check before transferring a firearm to a buyer.<sup>207</sup> The

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201. *Id.*

202. See generally HANDGUN STUDY GUIDE, *supra* note 191 (HSC tests include questions regarding safe handling of weapons and weapon parts.); *Firearms-Control Legislation and Policy: Switzerland*, *supra* note 32 (describing Switzerland's licensing test questions requiring cantonal weapon's laws knowledge and proper security measures knowledge).

203. See HANDGUN STUDY GUIDE, *supra* note 191, at 45-47 (describing the safe demonstration requirements to obtain a HSC); *Firearms-Control Legislation and Policy: Switzerland*, *supra* note 32 (describing Switzerland's gun permit test that includes a practical portion that tests skill in handling the firearm, operating a safety device, and shooting).

204. U.S. DEP'T OF JUST., FEDERAL FIREARMS REGULATION REFERENCE GUIDE 10-11 (2005).

205. Gun Control Act, 18 U.S.C.A. § 922(d) (West 2014).

206. *Id.*

207. Brady Handgun Violence Prevention Act, H.R. 1025, 103d Cong. § 102(a) (1993), available at <http://www.gpo.gov/fdsys/pkg/BILLS->

original act imposed a five-day waiting period for law enforcement to perform the background check.<sup>208</sup>

These background provisions became permanent on November 30, 1998, but the five-day waiting period was replaced with the National Instant Criminal Background Check System (“NICS”), a national database that identifies prohibited purchasers of firearms.<sup>209</sup> FFLs now contact NICS to determine whether the buyer is eligible to purchase firearms.<sup>210</sup> However, states are not required to subscribe to the NICS and may implement their own system.<sup>211</sup> Further, the background check requirement only applies to FFLs and does not cover private dealers.<sup>212</sup> As a result, an estimated forty percent of firearm purchases are made through private sellers.<sup>213</sup> Even worse, only an estimated twelve percent of handguns used in crimes are obtained from an FFL.<sup>214</sup>

#### *a. Straw Purchases and Gun Shows*

Approximately 5,200 gun shows are held in the United States every year.<sup>215</sup> These gun shows, coupled with other events where guns are for sale, make up a large portion of the nation’s firearms market.<sup>216</sup> At these events, firearms are often transferred to anonymous buyers without background checks.<sup>217</sup> Since these

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103hr1025enr/pdf/BILLS-103hr1025enr.pdf; *Brady Handgun Violence Prevention Act of 1993*, FED. BUREAU OF INVESTIGATION (Dec. 2013), <http://www.fbi.gov/about-us/cjis/nics/general-information/nics-overview>.

208. *Brady Handgun Violence Prevention Act*, H.R. 1025, 103d Cong. § 102(a) (1993); *see also Brady Handgun Violence Prevention Act of 1993*, *supra* note 207.

209. *Brady Handgun Violence Prevention Act of 1993*, *supra* note 207.

210. *Fact Sheet*, FED. BUREAU OF INVESTIGATION, <http://www.fbi.gov/about-us/cjis/nics/general-information/fact-sheet> (last visited Apr. 5, 2014).

211. *Brady Handgun Violence Prevention Act of 1993*, *supra* note 207.

212. *Now is the Time*, *supra* note 8.

213. *Id.*

214. *Id.*

215. *Gun Show Background Check Act of 2013*, S. 22, 113th Cong. § 2(a) (2013), *available at* <https://www.congress.gov/bill/113th-congress/senate-bill/22/text>.

216. *Id.*

217. *Id.*

firearms are not registered and buyers may often purchase firearms anonymously at gun shows, prohibited persons can easily acquire them.<sup>218</sup> Similarly, a straw purchase occurs when a person wants to acquire a firearm but is unable to pass a background check, or does not want their name associated with the firearm.<sup>219</sup> A third party is therefore enlisted to purchase the firearm for them.

In January 2013, the Gun Show Background Check Act was introduced to the United States Congress.<sup>220</sup> The act acknowledged more than 1,600,000 illegal buyers have been denied guns since the enactment of the Brady Act in 1993.<sup>221</sup> The act would have required all gun show sales be made through FFLs.<sup>222</sup> The FFLs would keep record of the transaction and perform a background check through NICS before releasing the firearm to the purchaser.<sup>223</sup> But, the act was opposed by the NRA and in April 2013, it failed to pass the Senate.<sup>224</sup>

*b. HIPAA*

Because the NICS is used to identify potentially prohibited purchasers, it includes records of those who have been involuntarily committed to a mental health facility.<sup>225</sup> A recent report from the United States Government Accountability Office found that seventeen states have made ten or fewer individual mental health records available to NICS.<sup>226</sup> Local, state, tribal, and federal agencies

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218. *Id.*

219. *Don't Lie For The Other Guy*, NATIONAL SHOOTING SPORTS FOUNDATION, <https://www.nssf.org/factsheets/PDF/strawPurchase.pdf> (last visited Dec. 15, 2014).

220. Gun Show Background Check Act of 2013, S. 22, 113th Cong. § 1 (2013), available at <https://www.congress.gov/bill/113th-congress/senate-bill/22/text>.

221. *Id.* § 2.

222. *See id.* § 2(c) (amending § 932).

223. *Id.*

224. Ted Barrett & Tom Cohen, *Senate Rejects Expanding Gun Background Checks*, CNN (Apr. 18, 2013), <http://www.cnn.com/2013/04/17/politics/senate-guns-vote>.

225. EDWARD C. LIU ET AL., CONG. RES. SERV., R43040, SUBMISSION OF MENTAL HEALTH RECORDS TO NICS AND THE HIPAA PRIVACY RULE 1-2 (2013).

226. *Sharing Promising Practices and Assessing Incentives Could Better Position Justice to Assist States in Providing Records for Background Checks*, GUN

voluntarily provide records to NICS, and are only required to furnish records to the NICS when it is requested by the Attorney General.<sup>227</sup> Without adequate records, NICS and state agencies are unable to accurately determine whether a buyer is a potentially prohibited person under the Gun Control Act of 1968.<sup>228</sup>

One of the main concerns for states in reporting individual mental health records is the risk of violating the Health Insurance Portability and Accountability Privacy Rule (“HIPAA”).<sup>229</sup> In part, HIPAA covers the use or disclosure of personal health information, which includes identifiable information that relates to the past, present, and future mental health of an individual.<sup>230</sup> HIPAA prohibits this information from being disclosed unless permitted or required by the rule.<sup>231</sup> The rule specifies two instances in which it requires an entity to disclose the information: 1) the individual requesting it is the subject of the information, or 2) United States Department of Health and Human Services (“HHS”) is requesting the information to investigate a potential violation of HIPAA.<sup>232</sup> All other disclosures are subject to the discretion of professional ethics and generally only occur for the purposes of treatment, payment, and other routine health care operations.<sup>233</sup> The rule also provides for the release of information for law enforcement purposes, averting serious threat to health or safety, specialized government functions, and when required by law.<sup>234</sup>

Hospitals, state health departments, and other healthcare providers are subject to HIPAA, which directly conflicts with the Gun Control Act of 1968.<sup>235</sup> They are therefore required to obtain expressed

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CONTROL, U.S. GOV'T ACCOUNTABILITY OFF. 10 (July 2012), *available at* <http://www.gao.gov/assets/600/592452.pdf>.

227. LIU ET AL., *supra* note 225, at 5-6.

228. *See id.* at 1; *Now is the Time*, *supra* note 8.

229. LIU ET AL., *supra* note 225 at 9-10.

230. U.S. DEP'T OF HEALTH & HUMAN SERVICES, SUMMARY OF THE HIPAA PRIVACY RULE 1, 4 (May 2003).

231. LIU ET AL., *supra* note 225 at 11.

232. *Id.* at 1-2.

233. U.S. DEP'T OF HEALTH & HUMAN SERVICES, *supra* note 230, at 5.

234. *See* LIU ET AL., *supra* note 225, at 9-10.

235. *Id.* at 10.



written permission from the patient before releasing private healthcare information to NICS.<sup>236</sup>

7. *The United States Should Enact a More Stringent Background Check Policy for Prospective Firearm Purchasers*

In order to ensure NICS keeps firearms out of the wrong hands, background checks should be extended to gun shows and other organized events, as the Gun Show Background Check Act suggested.<sup>237</sup> All firearm sales vendors should be registered FFLs. The FFLs would be required to register their sales with the Attorney General within ten days, which would help ensure NICS was being utilized in every transaction.<sup>238</sup> In order for this process to be effective, background checks themselves must become more efficient and accurate, similar to those in Great Britain and Australia.<sup>239</sup>

In order to resolve the conflict between NICS and HIPAA, the HHS has proposed an amendment to HIPAA that would permit certain entities to report the “identities of persons prohibited by federal law from possessing or receiving a firearm for reasons related to public health.”<sup>240</sup> Only those with authority to involuntarily commit an individual to a mental health hospital or entities acting as a repository of records for NICS would be permitted to report the information to NICS.<sup>241</sup> If this amendment to HIPAA is passed, the information

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236. *Id.*

237. See Gun Show Background Check Act of 2013, S. 22, 113th Cong. § 2 (c) (2013) (amending § 932).

238. *Id.*

239. *Firearms-Control Legislation and Policy: Great Britain, supra* note 30; *Firearms-Control Legislation and Policy: Australia, supra* note 31.

240. Health Insurance Portability and Accountability Act (HIPAA) and National Instant Criminal Background Check System (NICS), 79 Fed. Reg. 784 (proposed Jan. 7, 2014) [hereinafter HIPAA and NICS], available at <https://federalregister.gov/a/2014-00055>. See *HIPAA Privacy Rule and the National Instant Background Check System (NICS)*, U.S. DEP’T OF HEALTH & HUMAN SERVICES, <http://www.hhs.gov/ocr/privacy/hipaa/understanding/special/NICS> (last visited Mar. 31, 2014). The personal information that is proposed to be required is minimal and only necessary to identify individuals who have been involuntarily committed to a mental hospital. *Id.* Entities covered under this proposed rule would not be required to report “clinical, diagnostic, or other mental health information.” *Id.*

241. HIPAA and NICS, *supra* note 240.

available to NICS regarding mentally ill individuals could rise significantly, thus preventing those individuals from purchasing firearms.

### III. CONSERVATIVE OPINION REGARDING FIREARM REGULATIONS IN THE UNITED STATES

President Obama's "Now is the Time" campaign proposed reforming gun laws in the wake of the Sandy Hook massacre.<sup>242</sup> In response, 109 state laws were passed concerning gun control.<sup>243</sup> Republican controlled states passed seventy laws relaxing gun restrictions, while in comparison, Democratic controlled states passed thirty-nine laws tightening gun restrictions.<sup>244</sup> More than half of states tried to pass measures that would make proposed federal gun regulations illegal statewide.<sup>245</sup> Georgia recently passed the Safe Carry Protection Act, which allows licensed gun owners to carry firearms into places such as government buildings and bars.<sup>246</sup> In comparison, in 2013, New York passed a law that regulates some assault weapons and ammunition magazines capable of holding more than seven rounds, which is more restrictive than the proposed federal regulation.<sup>247</sup>

National views on gun control remain largely divided between political parties—seventy-seven percent of Democrats polled were in favor of more stringent gun laws, while only twenty-three percent of Republicans believe the same.<sup>248</sup> Currently, there is no universal gun

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242. *Now is the Time*, *supra* note 8.

243. Karen Yourish, et al., *State Gun Laws Enacted in the Year Since Newton*, N.Y. TIMES (Dec. 10, 2013), <http://www.nytimes.com/interactive/2013/12/10/us/state-gun-laws-enacted-in-the-year-since-newtown.html>.

244. *See id.*

245. David Sherfinski, *Obama's Gun Control Push Moves States to Fight It*, WASH. TIMES (Feb. 4, 2013), <http://www.washingtontimes.com/news/2013/feb/4/obamas-gun-control-push-moves-states-to-fight-it>.

246. Shauna Stuart, *Poll: Georgia Voters Disapprove of New Gun Law*, PBS (May 19, 2014), <http://www.pbs.org/newshour/rundown/poll-georgia-voters-disapprove-new-gun-law>.

247. Sherfinski, *supra* note 245.

248. Michele Richinick, *Americans Still Divided on Gun-Control Legislation*, MSNBC (last updated Dec. 20, 2014, 1:05 PM), <http://www.msnbc.com/msnbc/half-the-country-want-strict-gun-laws>.

regulation in the United States and each state has its own policy.<sup>249</sup> The difference in policies across the nation creates confusion among gun owners, as simply crossing state borders can make a lawful possession suddenly unlawful.

#### IV. CONSTITUTIONALITY OF PROPOSALS

The Second Amendment of the United States Constitution guarantees a person the right to keep and bear arms.<sup>250</sup> This comment proposes a more stringent and universal approach to firearm regulations in the United States. As such, it is imperative to discuss the constitutionality of the proposals. This section will discuss the constitutionality of the proposed universal assault weapons ban, ammunition regulation, buyback program, and background check and examination requirements.

##### A. Bans

In 2008, the United States Supreme Court held in *District of Columbia v. Heller*<sup>251</sup> that the Second Amendment ensures all law abiding and eligible citizens the right to possess and carry firearms for self-defense purposes.<sup>252</sup> Two years later, in *McDonald v. City of Chicago*,<sup>253</sup> the Court held Second Amendment rights are applicable to states through the Due Process Clause of the Fourteenth Amendment.<sup>254</sup> Since these decisions, lower courts have struggled to interpret the meaning of the Court's holdings, specifically how far the right to keep and bear arms extends.<sup>255</sup>

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249. California, for example, prohibits openly carrying a handgun while in a public place or on a public street. HARRIS, *supra* note 190, at 10-11. Conversely, Alabama allows open carrying of a handgun except in places such as police buildings, prisons or jails, and courthouses. *Alabama*, NRA-ILA (Apr. 29, 2013), <http://www.nraila.org/gun-laws/state-laws/alabama>.

250. U.S. CONST. amend. II. (West).

251. *District of Columbia v. Heller (Heller I)*, 554 U.S. 570 (2008).

252. *Id.* at 592, 626.

253. *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

254. *Id.* at 790-91.

255. Roth, *supra* note 95, at 420.

### 1. Assault Weapons

In *Heller*, the Court held that a regulation prohibiting the unlicensed possession of handguns in the home violated the Second Amendment right to keep and bear arms.<sup>256</sup> It defined “arms” within the meaning of the Second Amendment as weapons commonly used by law-abiding citizens.<sup>257</sup> However, the Court clarified that the holding should not be interpreted as a right to “keep and carry any weapon whatsoever in any matter whatsoever and for whatever purpose.”<sup>258</sup>

The California Court of Appeal, in *People v. James*,<sup>259</sup> was one of the first courts to interpret how the decision and reasoning in *Heller* affected a ban on assault weapons.<sup>260</sup> In *James*, the defendant contended his conviction for unlawful possession of an assault weapon violated his Second Amendment right to keep and bear arms.<sup>261</sup> Specifically, the defendant argued California Penal Code section 12280, subdivision (b), which bans assault weapons, was unconstitutional.<sup>262</sup> The California Court of Appeal held the Second Amendment did not extend to assault weapons.<sup>263</sup> In its reasoning, the court looked at the legislative intent for implementing the ban and determined the primary concern was the increase in use of unusually dangerous weapons.<sup>264</sup> The California Penal Code classifies assault weapons as weapons of war, and the court determined there was no indication in *Heller* that Second Amendment rights protected the use or possession of atypical weapons.<sup>265</sup>

In *Heller v. District of Columbia (Heller II)*,<sup>266</sup> the United States Court of Appeals for the District of Columbia Circuit reviewed

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256. *District of Columbia v. Heller (Heller I)*, 554 U.S. 570, 635 (2008).

257. *Id.* at 625.

258. *Id.* at 626.

259. *People v. James*, 94 Cal. Rptr. 3d 576 (2009).

260. *See James*, 94 Cal. Rptr. 3d 576; Roth, *supra* note 95, at 421.

261. *James*, 94 Cal. Rptr. 3d at 577.

262. *Id.* at 578; Roth, *supra* note 95, at 420.

263. *People v. James*, 94 Cal. Rptr. 3d 576, 577 (2009).

264. *Id.* at 583-84.

265. *Id.* at 586; Roth, *supra* note 95, at 422.

266. *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244 (D.C. Cir. 2011).

amended legislation originally challenged in *Heller* which, among other restrictions, banned assault weapons.<sup>267</sup> The court adopted a two-step analysis to determine whether a gun control law is constitutional.<sup>268</sup> First, the court asks whether the regulation infringes upon a Second Amendment right.<sup>269</sup> If it does, the court then determines whether the regulation “passes muster under the appropriate level of constitutional scrutiny.”<sup>270</sup> There are three types of constitutional scrutiny: rational basis, intermediate scrutiny, and strict scrutiny.<sup>271</sup> The court applied intermediate scrutiny, which requires the Government to show there is a substantial relationship between the regulation and the government interest the regulation is protecting.<sup>272</sup>

First, the court determined that assault weapons were in common use but were not necessarily used for self-defense.<sup>273</sup> The court next focused on whether the ban could pass intermediate constitutional scrutiny.<sup>274</sup> The court found the assault weapons ban was implemented to protect police officers and control crime.<sup>275</sup> The District of Columbia was able to adequately show assault weapons were dangerous and posed a significant threat to law enforcement and the public alike.<sup>276</sup> The Government relied heavily on reports that

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267. *Id.* at 1247-48.

268. *Id.* at 1252.

269. *Id.*

270. *Id.*

271. *See generally* *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1256-58 (D.C. Cir. 2011). Strict scrutiny is the most stringent level of constitutional scrutiny and requires the “[g]overnment to prove its law ‘furthers a compelling interest and is narrowly tailored to achieve that interest.’” *Id.* at 1256. Intermediate scrutiny requires the government to show the law is “substantially related to an important government objective. *Id.* at 1258. Finally, rational basis review is a reasonableness test. *Id.* at 1256. Specifically, rational basis review requires the law be “rationally related to a legitimate government interest.” *Rational Basis*, CORNELL UNIVERSITY SCHOOL OF LAW, [http://www.law.cornell.edu/wex/rational\\_basis](http://www.law.cornell.edu/wex/rational_basis) (last visited Dec. 16, 2014).

272. *Heller II*, 670 F.3d at 1262.

273. *Id.* at 1261.

274. *Id.*

275. *Id.* at 1262.

276. *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1263 (D.C. Cir. 2011).

indicated assault weapons accounted for a large percentage of guns used in mass shootings because of their high rate of fire capabilities.<sup>277</sup> The court concluded the ban on assault weapons had a substantial relationship with the government's interest in protecting police and the public, and therefore, the court upheld the ban as constitutional.<sup>278</sup>

When considering the constitutionality of the proposed assault weapons ban in this comment, the *James* rationale would suggest these weapons are unusually dangerous because they make it easier to kill large numbers of people and are increasingly being used in crimes. As such, they are not typically possessed by law abiding citizens for law abiding purposes.<sup>279</sup> This would exclude assault weapons from the definition of "arms" under the Second Amendment, as set forth in *Heller*.<sup>280</sup>

Alternatively, a court considering a constitutional challenge to an assault weapons ban may also apply the two-step analysis from *Heller II*.<sup>281</sup> Under this analysis, the Second Amendment right to bear arms would not be violated because, although it infringes on the Second Amendment right, there is a substantial relationship between a ban on assault weapons and public safety, as described by the court in *Heller II*.<sup>282</sup> Therefore, under both *James* and *Heller II*, a ban on assault weapons would pass constitutional scrutiny.

## 2. High Capacity Ammunition Magazines and Ammunition Regulation

*Heller II* also considered a ban on ammunition magazines capable of holding ten or more rounds and the court found similar results.<sup>283</sup> The court applied the two-step analysis and concluded that while the ban on high capacity ammunition magazines infringed on Second

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277. *Id.* at 1262.

278. *Id.* at 1264.

279. Roth, *supra* note 95, at 424.

280. *District of Columbia v. Heller (Heller I)*, 554 U.S. 570, 625 (2008).

281. *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1252 (D.C. Cir. 2011).

282. *Id.* at 1263-1264 (A showing of a substantial relationship between a ban on assault weapons and public safety passes intermediate scrutiny.).

283. *Id.*

Amendment rights, the substantial relationship between the ban and public safety enabled the regulation to pass constitutional muster.<sup>284</sup> In reaching this conclusion, the court relied on testimony explaining that when a gunman is able to fire more than ten rounds without having to reload, the number of innocent people killed increases.<sup>285</sup> Further, the testimony indicated high capacity ammunition magazines are actually dangerous when involved in self-defense because “the tendency is for defenders to keep firing until all bullets have been expended, which poses grave risks to others in the household, passerby, and bystanders.”<sup>286</sup>

In 2013, Sunnyvale, California passed Municipal Code section 9.44.050 that banned, with certain exceptions, high capacity ammunition magazines capable of holding ten or more rounds.<sup>287</sup> The code passed with over sixty-six percent vote.<sup>288</sup> But, later that year several residents filed for a preliminary injunction in federal court claiming that Municipal Code section 9.44.050 violated the Second Amendment.<sup>289</sup> Using a two-step analysis identical to *Heller II*, the District Court for the Northern District of California held the ban on ammunition magazines capable of holding ten or more rounds placed a burden on Second Amendment rights.<sup>290</sup> However, the burden was not enough to overcome the government’s interest in public safety.<sup>291</sup> The court noted these high capacity ammunition magazines are not necessary for individuals to exercise their Second Amendment right to bear arms.<sup>292</sup> The preliminary injunction was denied<sup>293</sup> and on March

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284. *See id.*

285. *Id.* at 1263.

286. *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1263-64 (D.C. Cir. 2011).

287. SUNNYVALE, CAL., CODE § 9.44.050 (2013).

288. *Fyock v. City of Sunnyvale*, 2014 U.S. Dist. LEXIS 29722, at \*3 (N.D. Cal. Mar. 5, 2014).

289. *Id.* at \*3, \*6.

290. *Id.* at \*10, \*17.

291. *Id.* at \*10, \*30. The court stated that while high capacity ammunition magazines were a questionable choice for self-defense, the plaintiffs provided enough evidence to indicate they are often chosen for that purpose. *Id.* at \*11. Therefore, a ban on these magazines burdens Second Amendment rights. *Id.*

292. *Id.* at \*22 (reasoning that smaller magazines are the most popular choice for self-defense among gun owners).

12, 2014, the United States Supreme Court refused, without comment, to prevent implementation of Sunnyvale Municipal Code section 9.44.050.<sup>294</sup>

Colorado also recently passed a bill banning high capacity ammunition magazines.<sup>295</sup> Under Colorado law, it is illegal to possess an ammunition magazine capable of holding ten or more rounds or more than five shotgun shells.<sup>296</sup> Unlike Sunnyvale Municipal Code section 9.44.050, the Colorado law has a “grandfather” clause allowing individuals who owned the magazine on or before the effective date of July 1, 2013, to continue to possess it without penalty.<sup>297</sup> The law has met opposition, but has survived an attempt to repeal it.<sup>298</sup> Opponents have recently filed suit claiming the measure violates the Second Amendment.<sup>299</sup>

Using the two-step analysis applied in *Sunnyvale* and *Heller II*, if a ban on high capacity ammunition clips is found to infringe on Second Amendment rights, it is likely to pass constitutional muster if the government has an interest in protecting public safety.<sup>300</sup> Banning high capacity magazines is not effectively banning all magazines, nor is it disarming individuals leaving them with no means to protect themselves.<sup>301</sup> It would stop the increase in gun fatalities, which is

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293. *Fyock v. City of Sunnyvale*, 2014 U.S. Dist. LEXIS 29722, at \*38-39 (N.D. Cal. Mar. 5, 2014).

294. Bob Egelko, *Supreme Court Won't Block Ban on Guns' High Capacity Magazines*, SFGATE (last updated Mar. 13, 2014), <http://www.sfgate.com/bayarea/article/Supreme-Court-won-t-block-ban-on-guns-5312320.php>.

295. See H.B. 1224, 69th Gen. Assemb., Reg. Sess. (Colo. 2013).

296. *Id.*

297. *Id.*

298. Matt Ferner, *Effort to Repeal Colorado Gun Control Law Fails*, HUFFINGTON POST (Feb. 11, 2014), [http://www.huffingtonpost.com/2014/02/11/colorado-gun-control-repeal\\_n\\_4768638.html](http://www.huffingtonpost.com/2014/02/11/colorado-gun-control-repeal_n_4768638.html).

299. Ben Markus, *Amid Pushback, Colorado Gun Control Measure Goes on Trial*, NPR (Mar. 31, 2014), <http://www.npr.org/2014/03/31/295823883/amid-pushback-colorado-gun-control-measure-goes-on-trial>.

300. *Fyock v. City of Sunnyvale*, 2014 U.S. Dist. LEXIS 29722, at \*10, \*30 (N.D. Cal. Mar. 5, 2014); *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1263-64 (D.C. Cir. 2011).

301. See *Heller II*, 670 F.3d at 1262.



linked to high capacity ammunition magazines.<sup>302</sup> Therefore, a ban on these magazines is constitutional under the Second Amendment.

Courts have also addressed the constitutionality of ammunition logs.<sup>303</sup> California attempted to require handgun ammunition logs, but a state appellate court deemed the statute unconstitutionally vague because it did not provide an adequate definition for the term “handgun ammunition.”<sup>304</sup> The Supreme Court of California has granted review of this matter.<sup>305</sup>

Whether Second Amendment rights are infringed by a universal requirement for ammunition logs will depend heavily on the California Supreme Court’s interpretation of the Government’s interest. If the interest is deemed to be public safety, the requirement will likely pass constitutional muster under the *Heller II* two-part analysis based on similar rationale for banning high capacity ammunition magazines.<sup>306</sup>

### *B. Buyback Programs*

The Court in *Heller* did not directly prohibit or address the constitutionality of buyback programs.<sup>307</sup> On December 14, 2013, the one-year anniversary of the Sandy Hook massacre, California held “a statewide gun-buyback program.”<sup>308</sup> More than 1,500 firearms were voluntarily surrendered in exchange for grocery-store gift cards.<sup>309</sup> Los Angeles alone has held seven buybacks since 2009, receiving more than 12,000 guns in all.<sup>310</sup> There has not been a Second

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302. *See id.* at 1263-64.

303. *See Parker v. State*, 164 Cal. Rptr. 3d 345, 356 (2013).

304. *Id.* at 370.

305. *Parker v. State*, 317 P.3d 1184 (2014).

306. *See Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1252 (D.C. Cir. 2011).

307. Eric P. Dolce, *To Keep and Bear Arms: Reconciling Firearms and the Public Health after Heller and McDonald*, 15 QUINNIPIAC HEALTH L.J. 155, 169 (2011-2012).

308. *See Rick Orlov, Gun Buyback Nets 1,500 Weapons—and Debate over Program’s Value*, LOS ANGELES DAILY NEWS (Dec. 16, 2013), <http://www.dailynews.com/government-and-politics/20131216/gun-buyback-nets-1500-weapons-x2014-and-debate-over-programs-value>.

309. *Id.*

310. *Id.*

Amendment challenge to the program directly; possibly because it is a voluntary program.<sup>311</sup>

If a court were to apply the *Heller II* two-step analysis<sup>312</sup> to the buyback program, such a program would likely not infringe on Second Amendment rights because gun owners are not forced to participate, but rather choose to participate. Therefore, the program does restrict gun owner's right to bear or access arms. Thus, a buyback program would pass constitutional scrutiny.

### C. Background Checks

The Supreme Court in *Heller* held that the Second Amendment guaranteed the right to carry weapons for self-defense.<sup>313</sup> However, this guarantee did not extend to those already prohibited from obtaining firearms, such as felons or the mentally ill.<sup>314</sup> The Brady Act currently requires FFLs to conduct background checks through the NICS before transferring a firearm.<sup>315</sup> The background check proposal of this comment would only affect the requirements for hospitals and healthcare agencies in reporting information to allow NICS to determine if a person is prohibited from purchasing a firearm. The main obstacle preventing this is the HIPAA Privacy Rule.<sup>316</sup> The government can navigate around HIPAA and encourage states to report information more frequently, as discussed above. The proposed requirement seeks to identify those individuals already prohibited

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311. See generally *id.* The only opposition to buyback programs concerns the release of documents concerning the buybacks and whether the collected firearms will be destroyed. See Lynn Thompson, *Withheld Documents to Cost City \$38K to Settle Gun-Buyback Suit*, SEATTLE TIMES (Dec. 17, 2013), [http://seattletimes.com/html/localnews/2022474846\\_gunsettlement1.xml.html](http://seattletimes.com/html/localnews/2022474846_gunsettlement1.xml.html); Brian Skoloff, *NRA Vows to Stop Tucson from Destroying Guns*, NPR (Jan. 9, 2013), <http://www.npr.org/2013/01/09/168926749/nra-vows-to-stop-tuscon-from-destroying-guns>.

312. *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1252 (D.C. Cir. 2011).

313. *District of Columbia v. Heller (Heller I)*, 554 U.S. 570, 626 (2008).

314. *Id.*

315. Brady Handgun Violence Prevention Act of 1993, H.R. 1025, 103rd Cong. § 102(a) (1993).

316. See generally U.S. DEP'T OF HEALTH & HUMAN SERVICES, *supra* note 230.

from acquiring or possessing firearms.<sup>317</sup> Therefore, this regulation would pass constitutional scrutiny.

#### D. Examinations

*Heller* suggests that reasonable prohibitions and qualifications required to lawfully purchase firearms would not violate the Second Amendment.<sup>318</sup> *Heller II* also considered a number of registration requirements for firearms, including demonstrating knowledge of firearms and taking a firearm safety and training course.<sup>319</sup> The court in *Heller II* again applied the two-part analysis and determined that these types of novel requirements infringe on Second Amendment rights by making it more difficult to lawfully obtain a firearm for self-defense.<sup>320</sup> The court then applied intermediate scrutiny, concluded that there was not enough evidence to confirm or deny the existence of a substantial relationship between the novel registration requirements and the government's interest, and remanded the issue.<sup>321</sup>

Currently, a majority of states require some variation of California's HSC requirement to obtain a concealed weapon permit, which includes mandatory training.<sup>322</sup> The NRA is currently in favor of gun safety training, although there is some controversy regarding the number of hours that should be required.<sup>323</sup> The proposed

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317. The Court in *Heller* stated that its decision does not apply to mentally ill or felons, who are already prohibited access to firearms pursuant to the Gun Control Act of 1968. *Heller I*, 554 U.S. at 626; see George A. Nation III, *The New Constitutional Right to Guns: Exploring the Illegitimate Birth and Acceptable Limitations of This New Right*, 40 RUTGERS L. J. 353, 412 (2009).

318. *District of Columbia v. Heller (Heller I)*, 554 U.S. 570, 626 (2008).

319. *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1255 (D.C. Cir. 2011).

320. *Id.*

321. *Id.* at 1259-60.

322. See Adam Benforado, *Quick on the Draw: Implicit Bias and the Second Amendment*, 89 Or. L. Rev. 1, 51 (2010).

323. Ben Armbruster, *NRA Members Say Training Should Be Required Before Obtaining Concealed Carry Permit*, THINK PROGRESS (Apr. 16, 2012), <http://thinkprogress.org/security/2012/04/16/464729/nra-concealed-carry-training> (discussing NRA's objection to Wisconsin state law requiring four hours of handgun safety training).

examination requirement does not include a specific amount of mandatory training hours, just a passing grade on both examinations.

Under *Heller*, these examinations are reasonable qualifications that need to be satisfied prior purchasing firearms.<sup>324</sup> Additionally, such requirements are substantially related to the government interest of public safety.<sup>325</sup> Considering that the majority of states have already required some type of examination prior to obtaining a concealed weapon permit, the examinations should be considered constitutional under the Second Amendment.<sup>326</sup>

## V. CONCLUSION

Mass shootings may unfortunately always be a part of America's reality. While these tragedies cannot be eliminated completely, it is possible to reduce their frequency.<sup>327</sup> From 2007 through 2013, 146 mass shootings occurred in the United States, killing more than 900 individuals.<sup>328</sup> The United States should follow England and Australia's examples and implement firearm regulations to restrict access to dangerous weapons.<sup>329</sup> Additionally, this country should require testing similar to those implemented in Switzerland, to ensure purchasers have adequate knowledge of firearm safety and to deter purchasers who intend to conduct mass shootings.<sup>330</sup> Such implementations could have spared some of the 900 who lost their

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324. *District of Columbia v. Heller (Heller I)*, 554 U.S. 570, 626 (2008).

325. *See Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1252 (D.C. Cir. 2011).

326. The NRA supports requiring an examination prior to obtaining a concealed weapons permit. *Armbruster*, *supra* note 323; *Benforado*, *supra* note 322.

327. *See Now is the Time*, *supra* note 8.

328. *Mass Shootings Toll Exceeds 900 in Past Seven Years*, USA TODAY (Dec. 2, 2013), <http://www.usatoday.com/story/news/nation/2013/02/21/mass-shootings-domestic-violence-nra/1937041>.

329. *See Firearms-Control Legislation and Policy: Australia*, *supra* note 31 (discussing that the new firearm regulations were implemented in response to the Port Arthur Massacre); *Firearms-Control Legislation and Policy: Great Britain*, *supra* note 30 (discussing that more stringent firearm regulation was implemented in response to Hungerford and Dunblane).

330. *See Firearms-Control Legislation and Policy: Switzerland*, *supra* note 32 (describing federal testing requirements to obtain open carry permits).

lives in mass shootings.<sup>331</sup> While these provisions may not eliminate mass shootings entirely, the United States has an obligation to take any action available to prevent the frequency of mass murder.<sup>332</sup>

*Ashley Mata \**

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331. *See Now is the Time*, *supra* note 8.

332. *Id.*

\* J.D. Candidate 2015, California Western School of Law. I would like to dedicate this article to my mother for her unwavering love and support throughout the years. Also, my fiancé Brandon Britton for his constant strength and love. I would like to thank Professor Roberta Thyfault for her guidance throughout the writing process and encouraging me to be the best legal writer I can be.

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