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AMERICA'S RESEARCH ON FIREARMS

WHAT ARE WE LACKING AND HOW IS IT IMPACTING US?

Written by:
Sara Khan

Introduction

Mortality and injuries due to gun violence have long been used by proponents of gun control to force the Congress to enact and enforce stricter laws on gun control. Due to the high mortality and injury rates due to firearms, the guns have become a major public health problem. For this reason, mortality and firearm-related injuries statistics have become a major component of the gun debate, which requires research as any public health problem. There has been very little to no research conducted from public funds made available through CDC and NIH grants. Many people have misconstrued it to be because of laws that are believed to prevent or hinder public research. This paper aims to address those myths, and present evidence against popular misconceptions on research on firearms. The paper will first explore the general perception on research on firearms, the laws that are blamed for causing the hindrance to gun research (four particular laws will be examined in greater detail), and solutions will be suggested.

Background

The right to bear firearms for the citizens and residents of the United States stems from the Second Amendment of the Constitution¹, which it states is for maintaining a “well regulated militia”.² *District of Columbia v. Heller*³ differentiated the right to bear arms from the idea of a “well regulated militia”, as the concept of militias became a moot point.⁴ People, however, have

¹ Since the right to bear firearms is a constitutional right, all laws are subject to fit within the boundaries of the Second Amendment. However, the Second Amendment is beyond the scope of this paper despite being the first law pertaining to firearms, and it will not be addressed here since this paper focuses on laws that address research on guns and not the right to bear arms.

² United States Constitution, Second Amendment, states that “A well-regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.

³ *District of Columbia v. Heller*, 478 F. 3d 370 (2008)

⁴ The Court in *Heller* emphasized that “Indeed, it may be true that no amount of small arms could be useful against modern-day bombers and tanks.” *District of Columbia v. Heller*, 554 U.S. 570, 627 Thus indicating that militia

still held on to their constitutional right to bear firearms. “According to gun-rights advocates, the second part of the Amendment protects an individual right, no different in kind from the right of free speech protected by the First Amendment.”⁵

Gun control has been a major issue in American socio-political arena, and a major concern for public health officials, given that in the past ten years, there has been no change in gun-related mortality rates in the country.⁶ CNN reported that within the first twenty-one weeks of 2018, there had already been twenty-three school shootings in the country.⁷ That is, on average, more than one school shooting per week. A Business Insider report indicated that by beginning of November 2018, there had been a total of 307 mass shootings⁸ in the United States.⁹ An updated report by the Gun Violence Archive has indicated a total of 331 mass shootings by December 2018.¹⁰ Research has shown that the United States is not a more violent

would not be feasible since the government and the military now have heavy artillery which private citizens neither have, nor have the capacity to carry. *Id.*

⁵ Mark Tushnet, Interpreting the Right to Bear Arms — Gun Regulation and Constitutional Law, 358 N. Engl. J. Med, 1424 (2008).

⁶ Kaiser Family Foundation reports that the number of deaths due to injury by firearms in 2006 was 10.3 deaths per 100,000 people, which remained more or less steady by 2010 at 10.1 per 100,000. This increased slightly to 11.8 deaths per 100,000 population in 2016. Henry J. Kaiser Family Foundation, Deaths Due to Firearms, Available at: <https://www.kff.org/other/state-indicator/firearms-death-rate-per-100000/?currentTimeframe=10&selectedRows=%7B%22wrapups%22:%7B%22united-states%22:%7B%7D%7D%7D&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D>. In 2017, CDC report indicated total number of 14,542 assaults related to firearms (small and large firearms) and 338 uses of firearms with undetermined intent in the year in the country. Centers for Disease Control and Prevention, National Center for Health Statistics. Underlying Cause of Death 1999-2017 on CDC WONDER Online Database, released December, 2018, Available at <http://wonder.cdc.gov/ucd-icd10.html>.

⁷ Saeed Ahmed & Christina Walker, There has been, on average, 1 school shooting every week this year, CNN, May 25, 2018. <https://www.cnn.com/2018/03/02/us/school-shootings-2018-list-trnd/index.html>.

⁸ Although there is no standard definition for mass shooting that can be found, Congress has identified, for the purposes of a report, “mass shootings” a “multiple homicide incident in which four or more victims are murdered with firearms, not including the offender, within one event, and in one or more locations relatively near one another.” William Krouse & Daniel Richardson, Cong. Research Serv., R44126, Mass Murder with Firearms: Incidents and Victims, 1999-2013, 2 (2015).

⁹ Melia Robinson et al., There have been 307 mass shootings in the US so far in 2018 – Here’s the full list, Business Insider, June 28, 2018. Available at: <https://www.businessinsider.com/how-many-mass-shootings-in-america-this-year-2018-2>.

¹⁰ Gun Violence Archive: Mass Shootings in 2018, Available at: <https://www.gunviolencearchive.org/reports/mass-shooting>. The statistics are updated as of December 14, 2018.

country than all the other developed nations in the world.¹¹ However, the probability of a fatal injury from violence is higher in the U.S. than in any other country.¹² Despite this, there seems to be a dearth of policies that effectively regulate available guns in the market.

American Public Health Association and the CDC foundation describe public health as a science that promotes, protects and improves the health of people and the communities.¹³ Thus among other things, public health also includes conducting scientific research to prevent people from getting sick or injured, educating people to prevent spread of the disease, and/or educating people about their health and risks to their health.¹⁴ In light of this definition, gun violence is a major public health issue, because it affects people's health in multiple ways.

“The first step in ameliorating a public health problem is to identify what the problem is.”¹⁵ And “The problem [here] is that, year after year, many more Americans are dying by gunfire than people in any other high income nations.”¹⁶ Scientific research plays a vital role in public health as it can “track disease outbreaks, prevent injuries and shed light on why [certain issues affect some people more than] others.”¹⁷ Due to the fact that gun violence has been recognized as a major public health problem,¹⁸ scientific research is necessary to address issues such as the causes of the violence, the populations gun violence affects, and to find solutions to prevent injuries and homicides. Utilizing scientific research would allow policy makers to make

¹¹ Matthew Miller et al., Firearms and Violent Death in the United States, Reducing Gun Violence in America, 3-13, 15 (D.W. Webster, J.S. Vernick, eds. 2013).

¹² Id.

¹³ See CDC Foundation. What is Public Health? Available at: <https://www.cdcfoundation.org/what-public-health>. American Public Health Association. See also What is Public Health? Available at: <https://www.apha.org/what-is-public-health>.

¹⁴ Id.

¹⁵ Miller, *supra* note 10, at 15.

¹⁶ Id.

¹⁷ What is Public Health? *Supra* note 12.

¹⁸ See Miller, *supra* note 10.

effective policies to curtail the growing problem of mortality and injuries from firearms, and address the issue of mental health as it relates to firearms.

General Perception of and Available Gun Research

A general perception is that NRA's successful lobbying, particularly through the Dickey Amendment of 1996,¹⁹ has stifled gun research by limiting federal funding.²⁰ The Dickey Amendment, as will be discussed later, was a response to CDC's efforts to reduce deaths and injuries from violence.²¹ After a study was published that revealed an association between violence and presence of firearms at home, the NRA successfully lobbied two-lines in an omnibus bill that redirected federal funds available for firearm injury research to traumatic brain injuries.²² Multiple online resources have indicated that Representative Jay Dickey of Arkansas, the author of the Dickey Amendment, regrets sponsoring the bill that has created the shortage of gun research.²³ Bloomberg School of Public Health at Johns Hopkins University estimates that the lack in congressional funding towards research on gun violence created by the Dickey Amendment that was included in subsequent appropriations legislation that funds the CDC every

¹⁹ See *infra* Section Dickey Amendment (1996).

²⁰ See Ramin Skibba, Researchers Tackle Gun Violence Despite Lack of Federal Funding, N.P.R., May 12, 2018, <https://www.npr.org/sections/health-shots/2018/05/12/609701029/researchers-tackle-gun-violence-despite-lack-of-federal-funding>. See also How the NRA Suppressed Gun Violence Research, Center for Science and Democracy, Accessed on November 5, 2018, <https://www.ucsusa.org/suppressing-research-effects-gun-violence#.W-SR85NKiUk>. See also Gun Violence Research, Giffords, Accessed on October 30, 2018, <https://giffords.org/issue/gun-violence-research/>.

²¹ Rostron, Allen, The Dickey Amendment on Federal Funding for Research on Gun Violence: A Legal Dissection, *American Journal of Public Health*, 108(7), 865 (2018).

²² *Id.* At 865.

²³ Ex-Rep. Dickey Regrets Restrictive Law On Gun Violence Research, NPR, Oct. 9, 2015, <https://www.npr.org/2015/10/09/447098666/ex-rep-dickey-regrets-restrictive-law-on-gun-violence-research>. See also Sam Stein, The Congressman Who Restricted Gun Violence Research Has Regrets, Oct. 6, 2015, https://www.huffingtonpost.com/entry/jay-dickey-gun-violence-research-amendment_us_561333d7e4b022a4ce5f45bf.

year, has led to lack of researchers on gun policies, with currently only 30 gun policy researchers in the entire country.²⁴

Historically, public funding provided by the Congress to the Centers for Disease Control and Prevention (CDC) has been the primary source of funding for gun research and firearm related injuries.²⁵ In the early 1980's, the CDC began conducting research on gun violence as a public health issue,²⁶ as mentioned earlier, which led to the NRA's successful lobbying in approving the Dickey Amendment.²⁷ As CDC's congressional funding for research on firearm violence dried up, National Institutes of Health continued to conduct its research. In 2011, Congress attached similarly worded additions to appropriations acts, which extended the Dickey Amendment and cut off funding to the NIH.²⁸

However, this has not prevented the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) from collecting data that has helped the ATF, FBI and other surveillance agencies monitor gun ownership.²⁹ FBI additionally collects, and has collected since the 1970s, monthly crime reports from different crime categories (currently 22 crime categories) as part of their Uniform Crime Reports Program.³⁰ The Crime Reports Program consists of four data collection systems: The National Incident-Based Reporting System (NIBRS), the Summary

²⁴ Laura Wexler, Gun Shy, How a lack of funds translates to inadequate research on gun violence in America, Johns Hopkins Bloomberg School of Public Health, 2017. <https://magazine.jhsph.edu/2017/fall/features/cassandra-crifasi-hopkins-moderate-gun-owner-gun-policy-researcher/how-the-dickey-amendment-affects-gun-violence-research.html>.

²⁵ Lance Lindeen, Keep Off the Grass!: An Alternative Approach to the Gun Control Debate, 85 Ind. L.J. 1659, 1666 (2010).

²⁶ Andrew J. McClurg, In Search of the Golden Mean in the Gun Debate, 58 How. L.J. 779, 785-786 (2015).

²⁷ Id. At 786. See Michael Hiltzik, The NRA Has Blocked Gun Violence Research for 20 Years. Let's End Its Stranglehold on Science, L.A. Times (June 14, 2016), <http://www.latimes.com/business/hiltzik/la-fi-hiltzik-gun-research-funding-20160614-snap-story.html>. See also Natalie Ram, Science as Speech, 102 Iowa L. Rev. 1187, 1193 (2017).

²⁸ See McClurg *supra* note 31, at 787. See also Rostron *supra* note 21, at 866.

²⁹ This is reported on the ATF's website under Annual Statistical Update 2018, Exhibit 1: Firearms Manufactured 1986-2016. See also William J. Krouse, Cong. Research Serv., RL32842, Gun Control Legislation, (2012), where Krouse has cited multiple statistics from multiple government agencies, especially through ATF.

³⁰ William Krouse & Daniel Richardson, Cong. Research Serv., R44126, Mass Murder with Firearms: Incidents and Victims, 1999-2013, Note 36 (2015).

Reporting System (SRS), the Law Enforcement Officers Killed and Assaulted (LEOKA) Program, and the Hate Crime Statistics Program.³¹ The latest countrywide reports from 2017 include categories such as violent crimes, aggravated assaults³² and weapons used for murders.³³ Criminologists, statisticians, sociologists and other researchers have studied and analyzed these data for further reporting.³⁴ It is important to note that the data collected has been for surveillance purposes, and not for research purposes. The analysis of the data is conducted by private research grants only.³⁵

As will be discussed, the laws have never prohibited gun research, and the language does not indicate so. However, the laws limit federal funding provided to government agencies for specific purposes only,³⁶ such as limiting congressional funds to CDC for traumatic brain injuries, and preventing funds given to the Department of Human and Health Services for the Patient Protection and Affordable Care Act from being used for data collection on gun ownership. These laws, however, are narrowly written, but seem to have had broader implications for government agencies.³⁷

³¹ See FBI Uniform Crime Reports Program website, Available at: <https://www.fbi.gov/services/cjis/ucr>.

³² See FBI website for 2017 Crime in the United States, Table 12: Crime Trends by Population Group, 2016-17, Available at: <https://ucr.fbi.gov/crime-in-the-u.s/2017/crime-in-the-u.s.-2017/tables/table-12>. See also FBI website for 2017 Crime in the United States, Table 13: Crime Trends by Suburban and Nonsuburban Cities, Available at: <https://ucr.fbi.gov/crime-in-the-u.s/2017/crime-in-the-u.s.-2017/tables/table-13>.

³³ See FBI website for 2017 Crime in the United States, Table 20: Murder. Available at: <https://ucr.fbi.gov/crime-in-the-u.s/2017/crime-in-the-u.s.-2017/tables/table-20>.

³⁴ See Krouse and Richarson, *supra* note 25 at 7. See also Don b. Kates, et al., Guns And Public Health: Epidemic Of Violence Or Pandemic Of Propaganda?, 62 Tenn. L. Rev. 513, 513-514 (1995): “Predictably, gun violence, particularly homicide, is a major study topic for social scientists, particularly criminologists. Less predictably, gun crime, accidents, and suicide are also a topic of study among medical and public health professionals. [However,] medical and public health writers treat firearms issues [remarkably differently than] the way social scientists treat those issues.”

³⁵ See *infra* section Dickey Amendment (1996).

³⁶ More on this will be discussed later.

³⁷ The Dickey Amendment is only two lines in a larger bill, but it has been deemed as the root cause of lack of funding for gun research. Title X of the ACA has an entire section on how it cannot be used to authorize employers or health insurance companies from inquiring about guns at home. It also prevents doctors from discussing at-home-guns with their patients. Additionally, Title X warns the Secretary of the Department of Human and Health Services to not use the ACA as authorization for collecting data on gun ownership. However, both laws have been stretched to read as hindering research on guns.

Laws that have influenced firearms research

There are four major laws that have influenced gun research: (1) The Gun Control Act of 1968; (2) The Brady Act of 1993; (3) The Dickey Amendment of 1996; and (4) The Affordable Care Act of 2013.

The Gun Control Act (1968) and The Brady Act (1993)

The Gun Control Act (GCA) was passed in 1968 in the wake of the assassinations of leading political figures such as Presidents John F. Kennedy, Robert Kennedy and Martin Luther King, Jr.³⁸ The GCA sets the framework for the regulation of firearms, particularly providing federal firearms licenses (FFL), the formation of the database that would keep a record of these firearms, and prohibit interstate sale of guns only to licensees.³⁹ The GCA was essentially a revision of the previous National Firearms Act (NFA) of 1934 and the Federal Firearms Act (FFA) of 1938.⁴⁰ Other key provisions of the GCA included establishing minimum ages for firearm purchasers, putting serial numbers on all firearms, and establishing a record of the people who would be prohibited from purchasing a firearm.⁴¹

The Brady Handgun Violence Prevention Act was enacted in 1993 to amend the GCA.⁴² This Act expanded on the GCA by mandating background checks on individuals seeking to buy guns. The inclusion of the mandated background checks aimed to prevent the sales of guns to

³⁸ History of Gun-Control Legislation, The Washington Post, Accessed on October 28, 2018, https://www.washingtonpost.com/national/history-of-gun-control-legislation/2012/12/22/80c8d624-4ad3-11e2-9a42-d1ce6d0ed278_story.html?utm_term=.d09b8138fa11

³⁹ Philip Cook and Jens Ludwig, The Limited Impact of the Brady Act, in Reducing Gun Violence in America, 21, 22 (Daniel Webster & Jon Vernick, 2013)

⁴⁰ Neither of the two pre-existing will be discussed here, even though the NFA was the first federal regulation of firearms. This is because the GCA replaced both Acts later. Additionally, the NFA excluded a vast majority of handguns, and the FFA was almost completely repealed by the GCA. Key Federal Acts Regulating Firearms, Giffords Law Center, Accessed on October 28, 2018. <https://lawcenter.giffords.org/gun-laws/federal-law/other-laws/key-federal-acts-regulating-firearms/>

⁴¹ See Gun Control Act, Bureau of Alcohol, Tobacco, Firearms and Explosives, Accessed on October 28, 2018, <https://www.atf.gov/rules-and-regulations/gun-control-act>. See also Key Federal Acts Regulating Firearms, *supra* note 40, and History of Gun-Control Legislation, *supra* note 27.

⁴² Id. At <https://www.atf.gov/rules-and-regulations/brady-law>

people who were prohibited from carrying a weapon (or applying for a license) under the GCA.⁴³ The Brady Act contained detailed provisions on how Congress could allocate large amounts of funds to create and maintain criminal record databases⁴⁴ that would expedite background checks through the National Instant Criminal Background Check System (NICS).⁴⁵ This system would allow firearm sellers to determine whether a potential buyer is eligible to buy firearms under the GCA as quickly as possible.⁴⁶

The Brady Act stated:

Prohibition Relating To Establishment of Registration Systems With Respect to Firearms.--No department, agency, officer, or employee of the United States may—

- (1) require that any record or portion thereof generated by the system established under this section be recorded at or transferred to a facility owned, managed, or controlled by the United States or any State or political subdivision thereof; or
- (2) use the system established under this section to establish any system for the registration of firearms, firearm owners, or firearm transactions or dispositions, except with respect to persons, prohibited by section 922 (g) or (n) of title 18, United States Code or State law, from receiving a firearm.⁴⁷

The Brady Act took additional measures to ensure that unless the transferring of a firearm violated any federal, state or local law, the statement of transfer would be destroyed by the receiving law enforcement officer, and any information not made to the public would also not be kept by the seller (or transferor).⁴⁸

⁴³ History of Gun-Control Legislation, *supra* note 27.

⁴⁴ *See* Brady Handgun Violence Prevention Act of 1993, Pub. L. 103-159, Title I (codified as amended in scattered sections of 107 Stat. 1536)

⁴⁵ National Instant Criminal Background Check System (NICS), Federal Bureau of Investigation, Accessed on October 28, 2018, <https://www.fbi.gov/services/cjis/nics>

⁴⁶ Id.

⁴⁷ *See* 18 U.S.C. § 921 (2013).

⁴⁸ Id.

A preceding law, the 1986 Firearm Owners Protection Act, forbade the government from creating a national registry of gun ownership.⁴⁹ This directly conflicted with the FFL system proposed in the GCA. Subsequently, the data from the background checks under the Brady Act could not be preserved because of the preceding 1986 federal law.⁵⁰ Maintaining a good record system has always been an effective strategy for the government. For example, state governments maintain records of cars and drivers licenses in the local Driver and Motor Vehicle Registration Systems in each State. This mechanism is utilized to ensure traffic safety and control. Similarly, the Securities and Exchange Commission (SEC), a federal government body, keeps a record of all the companies incorporated in the country to monitor their performance and protect investors and citizens. In cases of emergency or illegal activities, it becomes easy for SEC to find the companies and the people (directors or CEOs) in the company responsible for the illegal activities. Maintaining a database for gun licenses can be analogized to said records and databases. It is important to keep gun records because in cases of illegal activities, law enforcement agencies would be able to track down the person responsible for the misuse of the firearm, which would in turn tackle the growing problem of guns in unsafe hands. So far, the government has collected copious amounts of data, but data on registered guns is not available.⁵¹

The Brady Act, due to its painstaking wording and direct conflict with a preceding federal law, forbade record keeping by any licensee or by any officer who obtained approval for

⁴⁹ History of Gun-Control Legislation, *supra* note 27.

⁵⁰ Id.

⁵¹ California is a good case in point. The following website identifies the data that California state government collects: Government Records and Your Privacy, <https://www.privacyrights.org/consumer-guides/government-records-and-your-privacy> (Accessed on November 6, 2018). The website, however, does not indicate data collected by the federal government, or whether any of this data is transferred to a “U.S. facility” (using the language of the Brady Act). It is important to distinguish that the idea is not that the federal government should create and maintain a database where gun licenses are logged, but only that there should be some sort of database to help law enforcement agencies, even if the database is confidential and maintained by the state or local governments. Since gun laws are federal laws, the jurisdiction for maintaining records would naturally fall under federal. However, this is not necessary. The data would not hinder access to guns, or would even have to be public (much like Social Security data and medical records are confidential. *See Id.*) However, under the Brady Act, even state law enforcement agencies were *forbidden* (according to the language of the Brady Act) from collecting data.

a gun license.⁵² There were three major problems with the Brady Act. First, the Brady Act, along with the Firearms Owner Protection Act of 1986, nullified the national registry for recording FFLs in a centralized federal database, which meant there was no longer a centralized system of records of gun ownership. Additionally, since state law enforcement agencies were not keeping any records, and no other provision addressed this issue, guns could be taken privately across state lines. In the absence of record retention, gun tracking became more difficult. Moreover, the background checks requirement had no direct effect on the vast majority of dealings that put guns in the hands on criminals.⁵³

A second problem that the Brady Act did not address was that records would only be collected when the sale was from a licensee.⁵⁴ The Act defined a *licensee* as an importer, manufacturer or a dealer,⁵⁵ and it left out private third party sellers.⁵⁶ Researchers used old surveys of prisoners in the 1980s to show that only one-fifth of these prisoners had obtained their guns directly from a licensed gun dealer.⁵⁷ The same research reported that the majority of guns used in a crime were not through licensed FFLs, but through unregulated private transactions.⁵⁸

Finally, under the Brady Act an incomprehensive database for a criminal records was maintained which did not take into account additional factors, such as citizenship status, dishonorable discharge from the military or mental health issues.⁵⁹ Records for similar issues, such as mental health status and citizenship status, that could prevent a person from obtaining a

⁵² See *supra* note 47.

⁵³ Cook and Ludwig, *supra* note 39, at 28.

⁵⁴ *Id.*

⁵⁵ See 18 U.S.C. § 921 (2013).

⁵⁶ Cook and Ludwig, *supra* note 39, at 28. See also History of Gun-Control Legislation, *supra* note 27. This also did not take into account transfer of guns between family members, such as a mother purchasing a gun for her son for safety. See Timothy J. Burger, Brady Shady on Gun Rules Control Backer Got Son Rifle, N.Y. Daily News (March 22, 2002), <http://www.nydailynews.com/archives/news/brady-shady-gun-rules-control-backer-son-rifle-article-1.477603>

⁵⁷ Cook and Ludwig, *supra* note 39, at 28. Citations omitted.

⁵⁸ *Id.*

⁵⁹ U.S. Gen. Accounting Off., GAO/GGD-00-56, Gun Control: Options for Improving the National Instant Criminal Background Check System 6 (2000).

license, were often incomplete and unavailable on state level and thus were harder for state law enforcement agencies to obtain.⁶⁰ This issue of incomplete records created a loophole allowing a person who would technically be ineligible to obtain a license under GCA, to circumvent the system and purchase a firearm.⁶¹ Under the Brady Act, this loophole was finally closed with the creation of NICS in 1998.⁶²

Despite multiple issues with the Brady Act, there were a few good controls that resulted from the law. The most important result of the Brady Act was the creation of the NICS, which included other factors such as mental health of the purchaser of the firearm, and other non-felony factors within a state. These factors were previously not available to local law enforcement agencies that would allow them to approve a license.⁶³ The NICS also greatly expedited background check system by conjugating state and federal systems, including making FBI data available to all states and licensees even though the FBI could not maintain records of requests for background checks anymore.⁶⁴ The Brady Act has since expired (Brady Act expired on November 30, 1998),⁶⁵ whereas the GCA remained a part of the Federal Firearms Law.⁶⁶

The Dickey Amendment (1996)

The most notorious and misunderstood act of gun control, the Dickey Amendment, has become the subject of much controversy and media scrutiny, despite how little the Amendment itself states.⁶⁷

⁶⁰ Id.

⁶¹ Cook and Ludwig, *supra* note 39, at 28.

⁶² Id.

⁶³ See U.S. Gen. Accounting Off., GAO/GGD-00-56, *supra* note 46.

⁶⁴ Id.

⁶⁵ Lindeen *supra* note 25, at 1678.

⁶⁶ U.S. Department of Justice Bureau of Alcohol, Tobacco, Firearms and Explosives Office of Enforcement Programs and Services, Firearms Programs Division. Federal Firearms Regulations Reference Guide, 2005. Available at: <https://www.atf.gov/file/58686/download>.

⁶⁷ See Skibba *supra* note 20. See also Hiltzik, *supra* note 27.

The Dickey Amendment is a “sentence” in the Omnibus Consolidated Appropriations Bill of 1996-97⁶⁸ that states, “None of the funds made available for injury prevention and control at the Centers for Disease Control and Prevention may be used to advocate or promote gun control.”⁶⁹ It was first proposed by Republican Representative, Jay Dickey of Arkansas⁷⁰ (after which it is named) with support from the National Rifle Association (NRA)^{71, 72}

“The meaning of the Dickey Amendment has never been completely clear.”⁷³ Many critics of the Dickey Amendment admit that the writing of the Amendment is unclear and ambiguous, but the Amendment itself has never forbidden research on guns and firearms.⁷⁴ Some critics have pointed out that as a result of the Amendment, Congress lowered CDC’s budget for research just enough to prohibit funding for gun research.⁷⁵ Presumably, it was targeted at gun research. Other critics, such as Dr. Arthur Kellermann, one of the most renowned and controversial gun researchers, opined that it is not lack of funds that have cut the research, but rather vice versa: that after the Dickey Amendment, no federal employee was willing to risk his or her career, or their sponsoring agency's funding to find out what the Dickey Amendment truly meant.⁷⁶ As a result, funds available for firearm injury prevention dwindled over time.⁷⁷ Dr. Kellermann further reported that in 2011, two years after a similar study funded by the National

⁶⁸ Omnibus Consolidated Appropriations Act of 1996, H.R. 3610, 104th Cong. Title II (1996).

⁶⁹ Underlined for emphasis.

⁷⁰ See Ex-Rep. Dickey Regrets Restrictive Law On Gun Violence Research, NPR, Oct. 9, 2015, <https://www.npr.org/2015/10/09/447098666/ex-rep-dickey-regrets-restrictive-law-on-gun-violence-research>. See also Sam Stein, The Congressman Who Restricted Gun Violence Research Has Regrets, Oct. 6, 2015, https://www.huffingtonpost.com/entry/jay-dickey-gun-violence-research-amendment_us_561333d7e4b022a4ce5f45bf.

⁷¹ NRA is the biggest lobbyist of the Second Amendment’s right to bear arms. It boasts a membership of five million people nation-wide. See NRA website (last accessed on November 9, 2018): <https://home.nra.org/>

⁷² See Wexler *supra* note 24.

⁷³ McClurg *supra* note 31, at 786.

⁷⁴ *Id.* See also Sarah Zhang, Why Can’t the U.S. Treat Gun Violence as a Public Health Problem, The Atlantic, February 15, 2018. <https://www.theatlantic.com/health/archive/2018/02/gun-violence-public-health/553430/>

⁷⁵ *Id.*

⁷⁶ Arthur Kellermann and Frederick Rivara, Silencing the Science on Gun Research, Journal of American Medical Association (JAMA), Vol. 309 No. 6, 549, 549.

⁷⁷ *Id.*

Institute on Alcohol Abuse and Alcoholism was published on the affect of carrying a gun on the risk of assault with a firearm, the Congress extended the restriction of federal funds on CDC to all Department of Health and Human Services Agencies, including the NIH.⁷⁸ Although no causal relationship has been established between the published study and the restriction on NIH grants, proponents of gun research have concluded that CDC (and other government research agencies) understood that any funding directed towards any research that would anger the gun lobby would result in substantial cuts to their budgets.⁷⁹

Researchers have explained that without any federal funding, there are no grants available to train researchers, doctoral students or postdocs, which leads to fewer researchers in gun policy research, unlike other public policy fields.⁸⁰ Dr. Kellermann states that “Injury prevention research can have real and lasting effects.”⁸¹ He cites how interventions resulting from research have reduced the number of people dying in motor vehicle crashes and deaths from fire and drowning, and suggests that perhaps more funding into research for prevention of gun violence might have similar effects.⁸²

This, however, is only one side of the argument. Some critics of the dwindling public funds in gun research have admitted that despite the death of federal funds, private research is being conducted into gun violence.⁸³ “Research into gun violence has actually increased in recent years, rising from fewer than 90 annual publications in 2010 to 150 in 2014. Universities, think tanks, private philanthropy – even the state of California – have offered support.”⁸⁴ Other researchers have indicated that there are active research programs in other disciplines (such as

⁷⁸ *Id.* At 550, *citing* Consolidated Appropriations Act 2012, Pub. L. No. 112-74. <http://www.gpo.gov/fdsys/pkg/PLAW-112publ74/pdf/PLAW-112publ74.pdf>. December 2011.

⁷⁹ Wexler *supra* note 24.

⁸⁰ *Id.*

⁸¹ *See* Kellermann and Rivara, *supra* note 76, at 250.

⁸² *Id.*

⁸³ *See* Skibba *supra* note 20.

⁸⁴ *Id.*

social sciences, medicine, public health and law), which are sponsored by universities and private think tanks that have continued the research on the effects of gun violence and prevention separate from the federal funding, which often go unappreciated.⁸⁵

In light of all of the private funds being given to gun research, one must ask, what does the Dickey Amendment actually mean? Examination of the Dickey Amendment indicates a very narrow reading of the law itself that CDC and NIH have interpreted in a much broader context. When read at face value, the law clearly states that the funds provided to the two agencies (initially CDC and later NIH) under injury prevention and control cannot be used for purposes other than injury prevention and control. The law goes even further to point out that these funds provided to a government agency cannot be used to further the agency's own agenda of gun control. To make it even clearer, the "prohibition"⁸⁶ is only applicable to CDC (extended to NIH) to limit their fund allocation on research projects pertaining to guns that would further advocate or promote gun control. The prohibition does not extend to private funds, or other research funds.

In light of this, CDC and NIH's misinterpretation of the Dickey Amendment, so as to not enrage the NRA has only affected publicly funded research on gun violence. The research is still being conducted and is available through private funding, so in no way has research been halted. The only affect that the interpretation of the Dickey Amendment would seemingly have had on research would be that instead of an exponential growth of research, there is only a steady growth of research in violence pertaining to firearms. The Amendment, however, has in no way prohibited completely the research of such a big public health issue.

⁸⁵ See Philip Cook and John Donohue, *Saving Lives by Regulating Guns: Evidence for Policy*, Science Vol. 358 (6368), pp. 1259.

⁸⁶ This term is used very loosely here, for lack of a better word.

The Affordable Care Act (2010)

The Patient Protection and Affordable Care Act (ACA) comprises of a very small portion of the gun research debate especially since Title X, the clause that addresses gun research, is relatively less known by the public, and it is overshadowed by the ongoing debates and the continuing unpopularity of the Dickey Amendment. The reason why it is discussed here, however, is the oddity of the Title X Clause in a healthcare bill.

The relevant part of Title X of the ACA is titled Protection Of Second Amendment Gun Rights. Considering that the ACA is a healthcare law, Title X seems misplaced. For example, the clause lists (referring to wellness and prevention programs at work) that:

- 1) A wellness and health promotion activity implemented under subsection (a)(1)(D) may not require the disclosure or collection of any information relating to—
 - a) The presence or storage of a lawfully-possessed firearm or ammunition in the residence or on the property of an individual; or
 - b) the lawful use, possession, or storage of a firearm or ammunition by an individual.

This of course, assumes that wellness programs were, or could be used to collect data on ownership of firearms. It is also worthwhile to note that the aforementioned subsection of Title X refers to “lawfully-possessed firearm”.

Lawful possession, of course, does not distinguish between

- 2) **LIMITATION ON DATA COLLECTION.**—None of the authorities provided to the Secretary under the Patient Protection and Affordable Care Act or an amendment made by that Act shall be construed to authorize or may be used for the collection of any information relating to—
 - a) the lawful ownership or possession of a firearm or ammunition;
 - b) the lawful use of a firearm or ammunition; or
 - c) the lawful storage of a firearm or ammunition.
- 3) **LIMITATION ON DATABASES OR DATA BANKS**—None of the authorities provided to the Secretary under the Patient

Protection and Affordable Care Act or an amendment made by that Act shall be construed to authorize or may be used to maintain records of individual ownership or possession of a firearm or ammunition.

- 4) **LIMITATION ON DETERMINATION OF PREMIUM RATES OR ELIGIBILITY FOR HEALTH INSURANCE**—A premium rate may not be increased, health insurance coverage may not be denied, and a discount, rebate, or reward offered for participation in a wellness program may not be reduced or withheld under any health benefit plan issued pursuant to or in accordance with the Patient Protection and Affordable Care Act or an amendment made by that Act on the basis of, or on reliance upon—(A) the lawful ownership or possession of a firearm or Ammunition; or (B) the lawful use or storage of a firearm or ammunition.
- 5) **LIMITATION ON DATA COLLECTION REQUIREMENTS FOR INDIVIDUALS**—No individual shall be required to disclose any information under any data collection activity authorized under the Patient Protection and Affordable Care Act or an amendment made by that Act relating to—(A) the lawful ownership or possession of a firearm or ammunition; or (B) the lawful use, possession, or storage of a firearm or ammunition.

Title X of the ACA, albeit recent, has still minimal media attention. Interestingly, the strategic position of a provision that prohibits collection of data on firearm ownership by certain entities (such as insurance companies and employers) in a healthcare law may be the reason why media has not given it much attention. Some proponents of gun control have identified Title X of the ACA as removing violence pertaining to firearms as a public health problem.⁸⁷ A few physicians have gone further to indicate that Title X could be interpreted as barring physicians from having conversations with families about firearms and the risks associated with having a firearm at home by not requiring individuals from disclosing any information.⁸⁸

⁸⁷ Peter Wallsten and Tom Hamburger, NRA Fingerprints in Landmark Health-care Law, The Washington Post, December 30, 2012. https://www.washingtonpost.com/politics/nra-fingerprints-in-landmark-health-care-law/2012/12/30/e6018656-5066-11e2-950a-7863a013264b_story.html?utm_term=.4f6e94da0a97

⁸⁸ Michael L. Nance et al., Firearms, Children, and Health Care Professionals, *Pediatrics Perspective*, Vol. 133, Iss. 3, (2014). <http://pediatrics.aappublications.org/content/133/3/361>. This physician perception may again be misconstrued. Perhaps physicians have misinterpreted the provisions on limitation on data collection (Nos. 2 and 5 above in the “Protection of Second Amendment Gun Rights” Provision of the ACA). Physicians might believe that by suggesting that individuals are not required to disclose information to any data collection agency, the ACA

Title X prohibits insurance companies from collecting data on firearms at home.⁸⁹ “NRA officials say they requested the provision out of concern that insurance companies could use such data to raise premiums on gun owners.”⁹⁰ This, however, seems arbitrary since Title I of the ACA has guaranteed universal health coverage without any discriminatory factors.⁹¹

The media’s interviews with physicians, particularly pediatricians, have indicated that the only thing Title X generated from the health provider community was skepticism and perhaps some resistance to be allowed to do their job.⁹² Health Insurance companies have been silent about the issue.⁹³ The first three clauses of Article X, although may at face seem to be limiting the Secretary of Health and Human Services’ authority. However a closer reading of Title X only indicates that this law cannot be misconstrued for limitation of the Secretary’s authority to collect data on guns, but rather that it does not authorize Secretary (of Department of Health and Human Services) to collect data and maintain a database on private gun ownership, storage or use. Such a provision in a healthcare bill indeed seems misplaced.

presupposes that these “data collection agents” might be physicians. Of course, there is no legal justification provided by physicians which would lead physicians to believe that they cannot counsel patients on gun ownership. This would make one ask if this a conversation that physicians were already having that would warrant such a provision? Researchers are also wondering the impact of such conversations on patients’ safety. Kaiser Health News, [Health Laws Don't Affect Doctors' Rights to Ask About Guns](https://www.usnews.com/news/healthcare-of-tomorrow/articles/2017-01-23/doctors-rights-to-ask-about-guns-not-affected-by-health-law-provisions), U.S. News, January 23, 2017, <https://www.usnews.com/news/healthcare-of-tomorrow/articles/2017-01-23/doctors-rights-to-ask-about-guns-not-affected-by-health-law-provisions>. Conversely, researchers have also questioned if having a conversation about gun access, storage and use is a good practice for physicians to follow. *Id.* Historically, there have been no laws prohibiting physicians from asking or counseling patients on gun ownership. *Id.* However, with NRA’s lobbying, physicians, in addition to being allowed to conduct research to practice evidence-based medicine, have requested that the sanctity of the physician-patient relationship not be violated by being asked to not counsel a patient on gun ownership, should the physician see fit. *See* Michael L. Nance et al. *supra* note 88. Perhaps this idea of interference stems from NRA’s lobbying. The ACA, however, does not dictate physicians counseling strategies, nor does it prohibit physicians from conducting research on patients’ gun ownership and the effect this has on their social determinants of health, such as familial relationships and mental health.

⁸⁹ Title X, Part 4 seen above.

⁹⁰ Wallsten & Hamburger *supra* note 87.

⁹¹ Carolyn McClanahan, [Gun Owner Rights and Obamacare - Yes It Is In The Law](https://www.forbes.com/sites/carolynmcclanahan/2012/07/23/gun-owner-rights-and-obamacare-yes-it-is-in-the-law/#49d540c5144a), Forbes, July 23, 2012, <https://www.forbes.com/sites/carolynmcclanahan/2012/07/23/gun-owner-rights-and-obamacare-yes-it-is-in-the-law/#49d540c5144a>

⁹² *See* Wallsten & Hamburger *supra* note 87. *See also* Michael L. Nance et al. *supra* note 88.

⁹³ Upon research, no statement issued by any health insurance company was found that would support Title X. Additionally, insurance companies have also not provided any information on whether data on owning a firearm at home was previously collected or not.

Other Gun Laws

Other laws, though not as controversial, have impacted gun control research, as they have indicated the NRA's successful lobbying despite the increase in firearm-related crimes.⁹⁴ The annual figures of homicides due to firearms have fluctuated over a period of the last 10 years.⁹⁵ The reason for decline, however, is not due to non-availability of firearms or better research, but rather other 'comorbidity' factors such as more police officers, less alcohol, and a better economy.⁹⁶ This gave NRA another reason to successfully lobby the enactment of laws that served the interest of "right to bear arms."⁹⁷

In 2003, Congress (after lobbying by the NRA) passed the Tiahrt Amendment, which was attached to a federal spending bill.⁹⁸ The law prohibited law enforcement agencies from disclosing data on how and where criminals bought their firearms.⁹⁹ Although this did not have much impact on research or research funding, it limited the public's already very limited access to data on guns.

The National Instant Criminal Background Check System Improvement Amendments Act (NICS Act) of 2007, was one of the positive laws enacted to upgrade the existing database by providing state authorities additional resources to report mental health information to NICS

⁹⁴ National Institute of Justice reports that in 1993, homicides committed with firearms peaked to 17,075 deaths, but declined steadily over the next few years to 10,117 in 1999, only to increase slightly to a high of 11,547 in 2006. This figure rose again in 2008 to 10,869 deaths. See Gun Violence, National Institute of Justice, last modified on March 13, 2018, <https://www.nij.gov/topics/crime/gun-violence/pages/welcome.aspx#note3>. By 2010, there were as many as 31,000 deaths from gunshot wounds. See Webster and Vernick, *supra* note 15, at xxv.

⁹⁵ See the figures in *supra* note 94.

⁹⁶ Max Ehrefreund, *We've had a massive decline in gun violence in the United States. Here's why*, The Washington Post, December 3, 2015, https://www.washingtonpost.com/news/wonk/wp/2015/12/03/weve-had-a-massive-decline-in-gun-violence-in-the-united-states-heres-why/?noredirect=on&utm_term=.51b98b596371

⁹⁷ Under the Second Amendment.

⁹⁸ See History of Gun-Control Legislation, *supra* note 27.

⁹⁹ Id.

database.¹⁰⁰ Unfortunately, the updates still did not require law enforcement agencies, including the FBI, to record whose information was being requested.

These laws were considered wins for the NRA and pro-gun lobbyists, even though they did not have a significant impact on gun research or data collection.

Analysis of the laws

Although colloquially, the words “prohibit” and “limit” are used by critics of firearms to indicate the impact of certain laws on research on firearms, particularly the impact of the Dickey Amendment, it can be clearly seen when reading the statute that the words themselves are not reflected in the purpose or the language of the laws. In almost all of the laws mentioned here, the words have been misconstrued and meaning derived has been much more limiting than the law itself.

The Dickey Amendment is a first instance. The law itself never prohibited research on guns or violence pertaining to guns. The language of the law itself prohibited the use of federal funds to anything that could promote gun control. But data accumulated for surveillance, such as that by the FBI, was never prohibited. Additionally, the Dickey Amendment did not prohibit private grants from funding research by the CDC into gun violence.

The Affordable Care Act on the other hand, while details more information on the protection of the Second Amendment than the Dickey Amendment, has prohibited data collection on gun ownership only by certain agencies: the employers, the insurance companies and the Department of Human and Health Services and related agencies. This does not mean that other data relating to gun violence cannot be collected. The placement of the Second Amendment Protection in Title X provision of a healthcare law, while may seem conspicuous,

¹⁰⁰ See Key Federal Acts Regulating Firearms, *supra* note 40.

does little harm to gun research, because there was very little data being collected on gun ownership by the agencies identified in the provision. The agencies that actually collect data on firearm ownership are, as previously mentioned, the FBI and the ATF. These agencies have been collecting data on firearm ownership since the 1970s.¹⁰¹

The inadvertent effect of these laws on funding for gun research was the dwindling of public funds to conduct research, and increase of private funding. The question remains whether these private grants were just filling the gap of the lack of public funding, or were these grants trying to promote gun research, independent of federal grants. Assuming that these private grants would still have funded research on firearm violence, the lack of public funds hindered research by making less funds available. For example, if the \$2 million that the Congress reallocated from CDC's budget for gun violence prevention research to brain trauma research would have still been provided for research on gun violence, this amount would have added to all the funds available through private grants in gun violence prevention.

“Existing research studies and data include a wealth of descriptive information on homicide, suicide, and firearms, but, because of the limitations of existing data and methods, do not credibly demonstrate a causal relationship between the ownership of firearms and the causes or prevention of criminal violence or suicide.”¹⁰² Such a report demonstrates lack of causal relationship between violence and gun ownership, and this is precisely why more research is needed to figure out such dispositions.

Thus although the laws may not have directly prohibited research on firearm violence, the laws considerably hindered funding that led to a decline in the total amount of research conducted. The laws did not expressly state withholding of funds, however, Congress redirected

¹⁰¹ See *supra* Section “The Gun Control Act and The Brady Act.”

¹⁰² Firearms and Violence: A Critical Review, National Research Council of the National Academies, pp. 6 (National Academies Press, 2005)

or even cut funds allocated for research on gun violence (by CDC and NIH) under the premise of the law.¹⁰³

What happens next?

The question remains, will people change their minds about guns with more research? As mentioned previously, there has been an increased number of research from private universities and agencies.¹⁰⁴ With this available research, have people really changed their minds about stricter gun laws? One research shows that “Many academics, policymakers, and citizens have changed their minds about guns when presented with the evidence.”¹⁰⁵ However, whether this change has been significant or not remains to be researched.

With that being said, it is important to bear in mind that all the laws that have been perceived to forbid gun research have actually not forbidden any research. Nor has research been stopped completely. The dearth of research by government agencies is of their own volition and because of what they have perceived as a threat from the gun lobby in Congress.¹⁰⁶ Private organizations have filled the void with their own research. Additionally, government agencies like the Federal Bureau of Investigation (FBI),¹⁰⁷ the ATF¹⁰⁸ and the Bureau of Justice Statistics¹⁰⁹, that don't fall under the Department of Human and Health Services, collect their

¹⁰³ Redirecting funds to another research area essentially had the same outcome for CDC that cutting funding for NIH had under the Dickey Amendment.

¹⁰⁴ See page 12. See also Skibba *supra* note 20.

¹⁰⁵ David B. Mustard, Culture Affects Our Beliefs About Firearms, But Data Are Also Important, 151 U. Pa. L. Rev. 1387, 1394 (2003).

¹⁰⁶ Arthur Kellermann and Frederick Rivara, *supra* note 76.

¹⁰⁷ See Crime in the U.S. on FBI website: <https://ucr.fbi.gov/crime-in-the-u.s/> (Accessed on November 12, 2018).

¹⁰⁸ See Data and Statistics on ATF website: <https://www.atf.gov/resource-center/data-statistics> (Accessed on November 12, 2018).

¹⁰⁹ See Homicide Trends in the United States on Bureau of Justice Statistics website: <https://www.bjs.gov/index.cfm?ty=pbse&sid=31> (Accessed on November 12, 2018).

own surveillance reports on homicides and violent crimes, as they are not restricted by the express provisions in the ACA.

Even with the availability of all this information and the Sandy Hook elementary school shooting in 2012, a memo from President Barack Obama was circulated through all government agencies that directed the Secretary of DHHS to conduct or sponsor research into the causes of gun violence and ways to prevent them.¹¹⁰ This act expressly opened the channel for agencies such as the CDC and NIH to resume and survey research on guns.¹¹¹

One of the biggest problems that currently exist as far as keeping records of licenses is concerned is the loophole in obtaining a license.¹¹² Private sellers and third party buyers, especially at gun shows, are not required to have a license.¹¹³ In the absence of required licenses, many buyers are able to slip through the cracks and obtain guns that are technically “registered”. This, obviously does not show up in research, and it always makes harder for researchers to provide an estimate on how many guns are truly in the United States, which is an important step in conducting research on guns.

Conclusion

A buckshot approach to tackle improved research strategies would be to include physicians and other healthcare providers (such as psychiatrists), law enforcement, and society at large.¹¹⁴ NRA’s recent attempts to force doctors not to delve in the gun debate has thus far been

¹¹⁰ Memorandum from the Administration of Barack Obama to the Secretary of Health and Human Services, on Engaging in Public Health Research on the Causes and Prevention of Gun Violence (January 16, 2013).

¹¹¹ Id.

¹¹² McClurg *supra* note 31, at 790.

¹¹³ Id.

¹¹⁴ See Michael Hiltzik, *supra* note 27.

unsuccessful, as doctors have maintained the safety of their patients is their primary concern.¹¹⁵

This is important in research for guns, as direct involvement by doctors would again bring the gun debate into the public health arena. If treated like a public health issue again, this may garner more research through CDC and NIH. This is important because Conclusions like these make strict gun laws difficult to pass through Congress, especially when there is lack of substantial evidence.

CDC and NIH's decision not to conduct research has clearly not hindered any research. Perhaps if CDC and NIH contributed to research on gun violence, there would be more significant information on the topic. Additionally, the gap created by the lack of publicly funded research (assuming that there is a gap that has not already been filled by private research), can easily be bridged after President Obama's executive memo. Moreover, there are always existing databases and systems that can be further improved to provide better and more comprehensive data. Congressional reports have suggested that the NICS should be improved, and the Congress has also been provided with options.¹¹⁶ The FBI and ATF also continue to collect data on import/export of firearms, and keep a record of all the available federal licensees in the United States. Perhaps a better strategy would not be to create new databases for research, but improve existing ones to be more effective and efficient.

¹¹⁵ See Frances Stead Sellers, The NRA told doctors to 'stay in their lane.' Doctors took to Twitter to say no. Chicago Tribune, November 11, 2018. <https://www.chicagotribune.com/news/nationworld/ct-nra-doctors-guns-20181111-story.html>

¹¹⁶ See *supra* note 59.