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## Disarming the Dangerous: Preventing Extraordinary and Ordinary Violence

M. Fan

University of Washington School of Law, mdfan@uw.edu

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# Disarming the Dangerous: Preventing Extraordinary and Ordinary Violence

MARY D. FAN\*

*Mass shootings at Navy Yard, Newtown, Aurora, and elsewhere have jolted Congress and the states into considering gun violence prevention. More than 1500 gun-related bills have been introduced since 2013, after the slaughter in Newtown of twenty elementary-school children and six adults. Legislation and debates are shaped by the specter of a heavily armed, mentally ill individual hunting in public places such as schools, businesses, and workplaces. In the states, the most successful type of legislation involves firearms restrictions for the mentally ill. In Congress, the legislation that garnered the most debate was a ban on assault weapons and large-capacity magazines. While the national attention to firearms violence prevention is salutary, for law and policy to tackle the core of the problem it is important to address two empirical questions: Who are the dangerous individuals committing most firearms homicides, and why do the law's current screens miss them?*

*This Article draws on data from the National Violent Death Reporting System to answer the crucial foundational questions of who poses a danger and why the dangerous slip through existing legal screens. Presenting data on the most prevalent place of shooting, the victim-shooter relationship, and the shooter's prior history, this Article shows that prevention of extraordinarily devastating firearms violence calls for attention to how the nation addresses "ordinary" violence. By ordinary violence, this Article means violence that is often viewed as mundane, such as altercations between family members, friends, and intimates in the home. Many perpetrators of firearms homicide have a history of such prior events—yet a substantially smaller proportion of these violent episodes have been adjudicated, thereby slipping through existing screens for firearms restrictions. Based on these findings, the Article discusses how executive action steering scene-of-assault procedure and discretion in dealing with ordinary violence can improve detection of the dangerous regardless of whether proposed firearms restrictions survive the gauntlet that besets new gun laws.*

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\* Henry M. Jackson Professor of Law, University of Washington School of Law. Thanks to Sarah Buel, Cynthia Godsoe, Martin Guggenheim, Greg Hicks, Dean Kawamoto, Melissa Schiff, and Jonathan Todres for insightful comments, and to the excellent librarians at the University of Washington, especially Cheryl Nyberg and Mary Whisner. Many thanks also to Sarah Andrzejczak and S. Joseph Stephens for excellent editing. This Article was selected by a call-for-papers competition for presentation at the 2014 AALS Annual Meeting. I am grateful to audience participants for helpful insights.

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#### INTRODUCTION

In the nation's nightmares come true, a man with a gun hunts and kills outside the home.<sup>1</sup> A stranger to many of his victims, he is mentally disturbed.<sup>2</sup> Bent on mass killing, he has assault weapons and many rounds of ammunition.<sup>3</sup> Suicidal as well as homicidal, the threat of future penalties is no deterrent because he does not

1. *E.g.*, *From al-Shabaab to al-Nusra: How Westerners Joining Terror Groups Overseas Affect the Homeland: Hearing Before the H. Comm. on Homeland Sec.*, 113th Cong. 38 (2013) (statement of Stephanie Sanok Kostro, Senior Fellow and Acting Director, Homeland Security and Counterterrorism Program, Center for Strategic and International Studies) (noting that attackers “need a soft target, such as shopping malls, theaters, concerts, sporting events, or transportation systems” and referring to “soft targets, such as the 2011 parking lot shooting in Tucson, the 2012 Aurora theater incident, and the various school shootings from the 1999 Columbine massacre to the 2007 Virginia Tech rampage to last year’s tragedy in Sandy Hook”); WHITE HOUSE, NOW IS THE TIME: THE PRESIDENT’S PLAN TO PROTECT OUR CHILDREN AND OUR COMMUNITIES BY REDUCING GUN VIOLENCE 2–3 (2013), *available at* [http://www.whitehouse.gov/sites/default/files/docs/wh\\_now\\_is\\_the\\_time\\_full.pdf](http://www.whitehouse.gov/sites/default/files/docs/wh_now_is_the_time_full.pdf) [hereinafter WHITE HOUSE, GUN VIOLENCE REDUCTION PLAN] (discussing galvanizing incidents involving the schoolhouse shootings in Newtown; the movie theater shootings in Aurora, Colorado; the shooting at a Sikh Temple in Oak Creek, Wisconsin; and the shootings at a Tucson, Arizona grocery store).

2. *See, e.g.*, *What Should America Do About Gun Violence?: Hearing Before the S. Comm. on the Judiciary*, 113th Cong. (2013) [hereinafter *Cruz Statement*] (statement of Sen. Ted Cruz, Member, S. Comm. on the Judiciary) *available at* <http://www.judiciary.senate.gov/imo/media/doc/1-30-13CruzStatement.pdf> (discussing Newtown killings and bipartisan agreement that the mentally ill should not have guns); Michael S. Schmidt, *Gunman Said Electronic Brain Attacks Drove Him to Violence, FBI Says*, N.Y. TIMES, Sept. 26, 2013, at A17 (discussing mental troubles of shooter who killed twelve and injured three in Washington, DC’s Navy Yard); Jonathan Zimmerman, Op-Ed., *Stand Up to the Biggest Bully in the Room: Mental Illness*, CHRISTIAN SCI. MONITOR, Sept. 25, 2013, at 18 (discussing mental disturbances of schoolhouse shooters).

3. *See, e.g.*, *What Should America Do About Gun Violence?: Hearing Before the S. Comm. on the Judiciary*, 113th Cong. (2013) [hereinafter *Kelly Statement*] (statement of Capt. Mark E. Kelly, U.S. Navy, Retired, Americans for Responsible Solutions), *available at* <http://www.judiciary.senate.gov/imo/media/doc/1-30-13KellyTestimony.pdf> (“Dangerous people with weapons specifically designed to inflict maximum lethality upon others have turned every corner of our society into places of carnage and gross human loss.”); 159 CONG. REC. S288–91 (daily ed. Jan. 24, 2013) (statement of Sen. Dianne Feinstein) (discussing use of semiautomatic assault weapons and large-capacity ammunition magazines or drums at mass shootings at Sandy Hook; Aurora, Colorado; Virginia Tech; and Tucson, Arizona).

envision a future.<sup>4</sup> In just the brief span of a year, he has struck again and again, catapulting the nation into the fractious debate over firearms regulation.<sup>5</sup>

The man's face and crimes shift forms on a rapid reel. Eyes bulging from a gaunt young face, he is Adam Lanza massacring twenty-six people—twenty of them children—at Sandy Hook Elementary School in Newtown, Connecticut.<sup>6</sup> Smiling in uniform from happier days past, he is Christopher Dorner, who put California on high alert after he gunned down a young couple, shot at police officers, and vowed to hunt down officers who he believed wronged him.<sup>7</sup> Head shorn bare, with fixed stare, he is Aaron Alexis, who shot to death twelve people in Washington, DC's Navy Yard, while blocks away legislators prepared to mourn the anniversary of the Newtown shootings and stalled firearm regulation legislation.<sup>8</sup> Eyes unfocused, lips pursed, he is John Zawahri, who gunned down his father and brother and then students at Santa Monica College, leaving six people dead and scores more injured.<sup>9</sup>

These are just the shootings that made the national news in the last few months. Since the schoolhouse shooting in Newtown in December 2012, there have been at least sixteen mass shootings involving four or more fatalities.<sup>10</sup> Since 2006, there

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4. See, e.g., Karen E. Dill, Richard E. Redding, Peter K. Smith, Ray Surette & Dewey G. Cornell, *Recurrent Issues in Efforts To Prevent Homicidal Youth Violence in Schools: Expert Opinions*, NEW DIRECTIONS FOR YOUTH DEV., Spring 2011, at 113, 114 (“For those youth who have decided to kill themselves as part of their attack, deterrence may seem moot.”); Jeffrey Fagan, *Death and Deterrence Redux: Science, Law and Causal Reasoning on Capital Punishment*, 4 OHIO ST. J. CRIM. L. 255, 277 (2006) (noting limited possibility of deterrence among murder-suicides); see also BRYAN VOSSEKUIL, ROBERT A. FEIN, MARISA REDDY, RANDY BORUM & WILLIAM MODZELESKI, THE FINAL REPORT AND FINDINGS OF THE SAFE SCHOOL INITIATIVE 11, 21–22 (2004) (noting that seventy-eight percent of schoolhouse attackers studied had attempted suicide or had suicidal thoughts before the attack).

5. See, e.g., Philip Rucker & Sari Horwitz, *Newtown Seen as ‘Tipping Point’ for the President*, WASH. POST, Dec. 24, 2012, at A1 (discussing how the massacre of twenty schoolchildren in Newtown by a shooter who then committed suicide spurred President Obama to advocate for firearms regulation reform); *Senate Judiciary Committee Hearing on Gun Violence on Jan. 30, 2013 (Transcript)*, WASH. POST, (Jan. 30, 2013), [http://www.washingtonpost.com/politics/senate-judiciary-committee-hearing-on-gun-violence-on-jan-30-2013-transcript/2013/01/30/1f172222-6af5-11e2-af53-7b2b2a7510a8\\_story.html](http://www.washingtonpost.com/politics/senate-judiciary-committee-hearing-on-gun-violence-on-jan-30-2013-transcript/2013/01/30/1f172222-6af5-11e2-af53-7b2b2a7510a8_story.html) [hereinafter *Gun Violence Hearing Transcript*] (unofficial transcript of *What Should America Do About Gun Violence?: Hearing Before the S. Comm. on the Judiciary*, 113th Cong. (2013)) (discussing buildup of galvanizing firearms mass murders prompting legislative reform).

6. James Barron, *Gunman Massacres 20 Children at School in Connecticut; 28 Dead, Including Killer*, N.Y. TIMES, Dec. 15, 2012, at A1.

7. Tami Abdollah, *For 6 Days, Fugitive Former Police Officer Hid Near Command Post of Calif. Manhunt*, WASH. POST, Feb. 17, 2013, at A13.

8. 159 CONG. REC. S6495–96 (daily ed. Sept. 17, 2013) (statement of Sen. Richard Blumenthal) (discussing how the mourning of the Newtown anniversary and the demise of gun regulation was delayed because of the Senate closure due to the shooting blocks away); see also Michael D. Shear & Michael S. Schmidt, *12 Shot to Death by Lone Gunman at a Naval Base*, N.Y. TIMES, Sept. 17, 2013, at A1 (chronicling shootings).

9. Robin Abcarian, Jessica Garrison & Martha Groves, *Gunman’s Troubled Past*, L.A. TIMES, June 11, 2013, at A1.

10. Katy Hall, Ethan Fedida & Jan Diehm, *There Have Been More Mass Shootings*

have been at least 180 mass killings involving firearms—the weapon of choice in more than seventy-five percent of mass killings, defined as homicides involving four or more victims.<sup>11</sup> In 2012, the most recent year for which national data is available, firearms were involved in sixty-nine percent of all homicides.<sup>12</sup>

Many of the mass killings that have rocked the nation in recent years have a commonality: they are homicide-suicides.<sup>13</sup> Also referred to as dyadic death or murder-suicide, homicide-suicides generally involve a two-stage act in which the perpetrator kills one or more people and commits suicide shortly thereafter.<sup>14</sup> The interval between homicide and suicide is often brief—just twenty-four hours or less—though some definitions include an interval of up to a week to be more complete.<sup>15</sup> Homicide-suicides are especially horrifying because they defy the usual constraints on carnage, such as self-interest in avoiding detection or heightened penalties for wreaking greater harm.<sup>16</sup> Salient cases of homicide-suicide are so branded into the national memory and discourse that they can be invoked with just one or two words, becoming part of our national vocabulary of horror: Columbine, Virginia Tech, Navy Yard, Newtown.<sup>17</sup>

The recent tragedies at Newtown and Navy Yard sparked efforts to pass new laws shaped by the specter of the heavily armed, mentally disturbed mass killer.<sup>18</sup>

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*Since Newtown Than You've Heard About*, HUFFINGTON POST (Sept. 17, 2013, 5:31 PM), [http://www.huffingtonpost.com/2013/09/17/mass-shootings-2013\\_n\\_3941889.html](http://www.huffingtonpost.com/2013/09/17/mass-shootings-2013_n_3941889.html).

11. Paul Overberg, Meghan Hoyer, Mark Hannan, Jodi Upton, Barbie Hansen & Erin Durkin, *Explore the Data on U.S. Mass Killings Since 2006*, USA TODAY, Dec. 2, 2014, <http://www.usatoday.com/story/news/nation/2013/09/16/mass-killings-data-map/2820423/>.

12. Criminal Justice Div., Fed. Bureau of Investigation, *Expanded Homicide Data Table 7: Murder, Types of Weapons Used*, UNIFORM CRIME REP.: CRIME IN THE U.S. 2012, [http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/offenses-known-to-law-enforcement/expanded-homicide/expanded\\_homicide\\_data\\_table\\_7\\_murder\\_types\\_of\\_weapons\\_used\\_percent\\_distribution\\_by\\_region\\_2012.xls](http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/offenses-known-to-law-enforcement/expanded-homicide/expanded_homicide_data_table_7_murder_types_of_weapons_used_percent_distribution_by_region_2012.xls).

13. See, e.g., Petula Dvorak, *Will These Deaths Be the Ones To Finally Force a New Assault-Weapons Ban?*, WASH. POST, Sept. 17, 2013, at A11 (discussing murder-suicides that have galvanized the nation, from Virginia Tech to Newtown to Navy Yard); Andrew Solomon, Op-Ed., *Anatomy of a Murder-Suicide*, N.Y. TIMES, Dec. 23, 2012, at SR1 (discussing murder-suicides that have horrified the nation, from the Newtown shootings to suicide bombers).

14. Marieke Liem, Catherine Barber, Nora Markwalder, Martin Killias & Paul Nieuwebeerta, *Homicide-Suicide and Other Violent Deaths: An International Comparison*, 207 FORENSIC SCI. INT'L 70, 70–71 (2011); Peter M. Marzuk, Kenneth Tardiff & Charles S. Hirsch, *The Epidemiology of Murder-Suicide*, 267 J. AM. MED. ASS'N 3179, 3179–80 (1992).

15. Yekeen A. Aderibigbe, *Violence in America: A Survey of Suicide Linked to Homicides*, 42 J. FORENSIC SCI. 662, 663 (1997). Compare Craig Campanelli & Thomas Gilson, *Murder-Suicide in New Hampshire, 1995–2000*, 23 AM. J. FORENSIC MED. & PATHOLOGY 248, 248–49 (2002) (up to one week), with Donna Cohen, Maria Llorente & Carl Eisdorfer, *Homicide-Suicide in Older Persons*, 155 AM. J. PSYCHIATRY 390 (1998) (within twenty-four hours).

16. See *supra* note 4 and accompanying text.

17. September 11—another homicide-suicide—has a similar economy of meaning in our national vocabulary.

18. See, e.g., 159 CONG. REC. S6496 (daily ed. Sept. 17, 2013) (statement of Sen. Richard Blumenthal) (arguing for unity to pass new legislation after the Newtown and Navy Yard mass shootings and urging, “Let us make a mental health initiative a centerpiece of this

Proposed legislation in Congress would ban semiautomatic assault weapons and high-capacity ammunition magazines, expand background checks, and raise penalties for firearms crimes.<sup>19</sup> Among the flurry of proposed state legislation in the year after the Newtown killings, the most successful type of firearms restriction involved restrictions and monitoring of people with mental and behavioral health issues.<sup>20</sup> The public also fixated on mental illness: according to a national Gallup poll, eighty percent of Americans believed that the failure of the mental health system to identify dangerous individuals is a “great deal” or “fair deal” to blame for mass shootings.<sup>21</sup>

The reinvigorated attention to firearms violence prevention is salutary and important. In guiding both law and executive action, however, two important empirical questions need to be addressed: (1) who are the dangerous individuals that the law’s current screens miss and (2) why do the screens miss them? This Article draws on data from the National Violent Death Reporting System (NVDRS) to answer the crucial questions of who poses a danger and why the dangerous slip through current legal screens. This Article shows that prevention of both extraordinary homicidal-suicidal violence and firearms homicides generally calls for attention to how the nation addresses “ordinary” violence. By ordinary violence, this Article means violence viewed as “normal” or mundane everyday altercations, such as domestic disturbances or assaults, especially in the home among family members, friends, and intimates.<sup>22</sup>

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renewal and reinvigoration of our effort to stop gun violence.”); 159 CONG. REC. S288–89 (daily ed. Jan. 24, 2013) (statement of Sen. Feinstein) (discussing mass shootings at Sandy Hook; Aurora, Colorado; Virginia Tech; and Tucson, Arizona prompting legislation and that the “common thread running through all of these shootings is that the gunman used a semiautomatic assault weapon or large capacity ammunition magazine or drum”).

19. *E.g.*, Fix Gun Checks Act of 2013, S. 374, 113th Cong. (2013) (expanding background check requirement to private sellers); Gun Trafficking Prevention Act of 2013, S. 179, 113th Cong. (2013) (criminalizing sale of firearms for prohibited purposes); Assault Weapons Ban of 2013, H.R. 437, 113th Cong. (2013) (prohibiting the importation, sale, manufacture, transfer, or possession of a semiautomatic assault weapon or large-capacity ammunition-feeding device); Assault Weapons Ban of 2013, S. 150, 113th Cong. (2013) (prohibiting the importation, sale, manufacturing, transfer, or possession of semiautomatic assault weapons or large-capacity ammunition-feeding devices); Stop Illegal Trafficking in Firearms Act of 2013, S. 54, 113th Cong. (2013) (directly criminalizing straw purchases of firearms for prohibited persons or activities); Fix Gun Checks Act of 2013, H.R. 137, 113th Cong. (2013) (expanding background checks to cover sales by private actors).

20. *E.g.*, CAL. WELF. & INST. CODE §§ 8100, 8105 (West 2014) (requiring psychotherapists to report credible violent threats and extending the prohibition on firearms ownership by persons making such threats to five years); N.Y. CRIM. PROC. LAW §§ 330.20, 380.96 (McKinney 2014) (adding procedures restricting firearms possession by mentally ill individuals and the certain criminally convicted individuals); TEX. HEALTH & SAFETY CODE ANN. § 573.001 (West 2014) (providing for firearms seizures from the mentally ill). For an overview of the laws passed in the states since Newtown, see *State Gun Laws Enacted in the Year Since Newtown*, 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> [hereinafter *State Gun Laws Report*].

21. *Poll on Factors To Blame in Mass Shootings*, GALLUP (Sept. 17–18, 2013), <http://www.gallup.com/poll/1645/guns.aspx#2>.

22. *See, e.g.*, S. REP. NO. 103-108, at 37–38 (1993) (discussing reluctance to intervene in violence within the home); S. REP. NO. 102-197, at 35–46 (1991) (summarizing testimony

While the current regulatory focus is on preventing violence from the armed deranged stranger hunting in schools, businesses, and on the street, nearly half of all incidents of firearms-related homicide take place in the home.<sup>23</sup> The majority of firearms homicides with known victim-perpetrator circumstances are perpetrated by people the victim knew.<sup>24</sup> Even when it comes to the seemingly most extreme form of extraordinary violence—the homicidal-suicidal—the clearest warning signs entail incidents of ordinary violence.<sup>25</sup> This Article presents data revealing that a substantial proportion of high-risk actors who go on to commit homicide-suicides have a history of assaults and domestic disturbances but have never been in court.<sup>26</sup> In contrast, a much smaller proportion of homicidal-suicidal shooters could have been caught by focusing on mental-health red flags.<sup>27</sup>

Firearms possession laws prevent individuals convicted of crimes of domestic violence or placed under court-issued restraining orders from possessing firearms.<sup>28</sup> The problem is that many perpetrators never come to the attention of a court.<sup>29</sup> Based on these findings regarding what current legal screens miss, this Article discusses how executive action steering law enforcement procedures at the scenes of assaults can help prevent seemingly “ordinary” violence from erupting into homicidal violence.

Passing new firearms laws is excruciatingly hard.<sup>30</sup> For example, federal firearms regulations stalled amid a fierce hailstorm of opposition by gun proponents and the National Rifle Association (NRA) despite public support for universal background checks and a sharp spike in support for stricter gun laws after Newtown.<sup>31</sup> Yet even the NRA is on record arguing that the government should

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on trivialization of violence within the home); S. REP. NO. 101-545, at 31–34 (1990) (documenting problems with neglect of familial violence); Joanne Belknap, *Law Enforcement Officers' Attitudes About the Appropriate Responses to Woman Battering*, 4 INT'L REV. VICTIMOLOGY 47, 47–55 (1995) (finding tendency among law enforcement to view claims of battered women as not credible, trivial, and unworthy of police time). For an excellent history of normalization of the violence, see, e.g., Reva Siegel, “*The Rule of Love*”: *Wife Beating As Prerogative and Privacy*, 105 YALE L.J. 2117, 2150–205 (1996).

23. For the data, see *infra* Part II.A, Table 2.

24. For the data, see *infra* Part II.A, Table 1 and note 93.

25. For a discussion, see *infra* Part II.

26. See *infra* Part II.C and Table 3.

27. See *infra* Part II.C and Table 4.

28. See 18 U.S.C. § 922(g)(1), (8)–(9) (2012) (forbidding firearms possession by felons, persons convicted of domestic violence misdemeanors, or persons subject to restraining orders for harassing, stalking, or threatening an intimate partner or child of an intimate partner or other conduct putting the intimate partner in “reasonable fear of bodily injury”).

29. See *infra* Part II.C and Table 3.

30. For an account of the pitched warfare over attempts to regulate firearms, see, e.g., Philip J. Cook, *The Great American Gun War: Notes from Four Decades in the Trenches*, 42 CRIME & JUST. 19, 27–28 (2013). For a history, see, e.g., ADAM WINKLER, *GUNFIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA* 253–58 (2011).

31. See, e.g., 159 CONG. REC. S7987 (daily ed. Nov. 13, 2013) (statement of Sen. Chris Murphy) (noting that for “6 months since the failure of our commonsense anti-gun violence bill this spring” he has brought to the Senate floor a chart showing more deaths in hopes of restarting debates); 159 CONG. REC. S291 (daily ed. Jan. 24, 2013) (statement of Sen. Dianne Feinstein) (“Do we let the gun industry take over and dictate policy to this country?”); Robert Draper, *Inside the Power of the N.R.A.*, N.Y. TIMES MAG., Dec. 12, 2013, at 48 (discussing the NRA’s role in blocking firearms legislation despite national momentum after

focus on enforcing existing laws to disarm the dangerous, albeit focusing on the mentally ill or violent criminals.<sup>32</sup> This Article presents data regarding how to define and screen for the dangerous and discusses how executive action regarding scene of assault procedure can improve firearms violence prevention regardless of whether new laws are added to the books.

The Article proceeds in three parts. Part I discusses the recent spate of gun legislation and debates focused on extraordinary violence by a heavily armed, mentally ill stranger hunting in public as the paradigm of danger. Part II presents data from the NVDRS on perpetrator-victim relationship, place of death, and perpetrator history in firearms homicides.

Countering the focus on the unhinged outsider, Part II shows that the main risk factors and patterns of firearms homicides involve violence within the home by people known to the slain. This Part also presents data showing that even in the context of extraordinary violence by the homicidal-suicidal, the major early red flags and risk factors involve seemingly ordinary smaller-scale assaults and domestic disturbances. Perpetrators are very likely to have committed interpersonal violence in the month before the homicide—yet never entered the legal system, thereby evading current firearms-restrictions screens triggered by adjudications.<sup>33</sup>

Part III concludes by discussing how police practices in responding to seemingly mundane ordinary violence can improve the law's ability to identify and disarm the potentially dangerous. This Part proposes a remedy that can be pursued as a matter of executive action regardless of whether proposed new legislation falters in the gauntlet of hurdles that beset attempts at firearms regulation.

#### I. THE HEAVILY ARMED, MENTALLY ILL PARADIGM OF DANGER IN GUN LEGISLATION

The recent spate of proposals to reform firearms regulation are shaped by fears of a mentally disturbed individual targeting public places such as schools, parking lots, and workplaces.<sup>34</sup> For legislators supporting more rigorous firearms

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the Newtown and Navy Yard mass shootings); *see also Americans Wanted Gun Background Checks To Pass Senate*, GALLUP (Apr. 29, 2013), <http://www.gallup.com/poll/162083/americans-wanted-gun-background-checks-pass-senate.aspx> (showing that sixty-five percent of Americans polled supported the universal background checks measure that did not pass in the Senate); *Poll on Public Opinion Regarding Strictness of Gun Laws*, GALLUP (Dec. 19–22, 2012), <http://www.gallup.com/poll/1645/guns.aspx#1> (finding a sharp, albeit ultimately temporary, spike in support for strict gun laws after the Newtown killings).

32. David Sherfinski, *NRA Chief LaPierre: Enforce Existing Gun Laws*, WASH. TIMES, Dec. 23, 2012, at A1.

33. *See infra* Part II.C, Tables 3–5, and discussion at notes 131–135.

34. *See, e.g.*, 159 Cong. Rec. S288–91 (daily ed. Jan. 24, 2013) (statement of Sen. Dianne Feinstein) (invoking memory of mass shootings at Sandy Hook; Aurora, Colorado; Virginia Tech; and Tucson, Arizona in presenting assault-weapons ban bill in the Senate); *Gun Violence Hearing Transcript*, *supra* note 5 (statement of Sen. Patrick Leahy) (opening discussion of gun trafficking, background checks, and assault-weapons ban bills by invoking the mass shootings at Newtown, Aurora, Oak Creek, and Tucson and explaining the legislation is aimed at keeping “guns out of the hands of those who will use them to commit mass murder”); *Cruz Statement*, *supra* note 2, at 1, 5 (inaugurating firearms legislation debates by invoking the memory of Newtown and discussing bipartisan agreement that the mentally disordered should not have guns).

regulation, the national shock over the Newtown mass shooting seemed like it might be a tipping point.<sup>35</sup> Shortly after school started at Sandy Hook Elementary School on December 14, 2012, Adam Lanza shot his way into the school through the plate glass panel next to the school's locked front doors.<sup>36</sup> Lanza, age twenty, "was undoubtedly afflicted with mental health problems," according to the people who knew him.<sup>37</sup> That morning, Lanza had executed his mother with four shots to the head before proceeding to the elementary school.<sup>38</sup> He was heavily armed with a Bushmaster rifle, Glock 20 10-mm pistol, Sig Sauer 9-mm pistol, and many rounds of ammunition.<sup>39</sup> In just about eleven minutes, Lanza murdered twenty children and six adults, including the principal, a school psychologist, and multiple school teachers and behavioral therapists.<sup>40</sup> He then shot and killed himself.<sup>41</sup>

The nation watched in horror as sobbing children evacuated, wounded people and dead bodies emerged from the school, and frantic parents and teachers waited in the parking lot.<sup>42</sup> Inside the school, children were bleeding to death amid the bodies of their already-dead classmates.<sup>43</sup> Trying to escape impending death, teachers had barricaded their students in their classrooms.<sup>44</sup> There were scenes of futile heroism in the tableau of fallen bodies, such as when a fifty-two-year-old staff member tried to shield a student from gunfire with her body.<sup>45</sup> Both died.<sup>46</sup>

Responding to a national outcry over the violence, President Obama released a plan to reduce gun violence through a package of new laws introduced in 2013.<sup>47</sup>

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35. Rucker & Horwitz, *supra* note 5.

36. STATE OF CONN., DIV. OF CRIMINAL JUSTICE, REPORT OF THE STATE'S ATTORNEY FOR THE JUDICIAL DISTRICT OF DANBURY ON THE SHOOTINGS AT SANDY HOOK ELEMENTARY SCHOOL AND 36 YOGANANDA STREET, NEWTOWN, CONNECTICUT ON DECEMBER 14, 2012, at 5, 9 (2013) [hereinafter CONNECTICUT STATE'S ATTORNEY'S FINDINGS ON SANDY HOOK SHOOTING].

37. *Id.* at 29.

38. *Id.* at 2, 27.

39. *Id.* at 9.

40. *Id.* at 5, 9–10.

41. *Id.* at 5.

42. See, e.g., James Barron, *Pupils Were All Shot Multiple Times with a Semiautomatic, Officials Say*, N.Y. TIMES, Dec. 16, 2012, at A1.

43. Ray Rivera, *Reliving Horror and Faint Hope at Massacre Site*, N.Y. TIMES, Jan. 29, 2013, at A1.

44. Kenneth Garger & Laura Italiano, *Time Has Not Healed Newtown's Wounds*, N.Y. POST, Dec. 13, 2013, at A1.

45. CONNECTICUT STATE'S ATTORNEY'S FINDINGS ON SANDY HOOK SHOOTING, *supra* note 36, at 10.

46. *Id.*

47. WHITE HOUSE, GUN VIOLENCE REDUCTION PLAN, *supra* note 1; see also Fix Gun Checks Act of 2013, S. 374, 113th Cong. (2013) (expanding background checks requirement to private sellers); Gun Trafficking Prevention Act of 2013, S. 179, 113th Cong. (2013) (criminalizing sale of firearms for prohibited purposes); Assault Weapons Ban of 2013, H.R. 437, 113th Cong. (2013) (prohibiting the importation, sale, manufacture, transfer, or possession of a semiautomatic assault weapon or large-capacity ammunition-feeding device); Assault Weapons Ban of 2013, S. 150, 113th Cong. (2013) (prohibiting the importation, sale, manufacturing, transfer, or possession of semiautomatic assault weapons or large-capacity ammunition-feeding devices); Stop Illegal Trafficking in Firearms Act of 2013, S. 54, 113th Cong. (2013) (directly criminalizing straw purchases of firearms for

The President's three-pronged approach would (1) expand and improve background checks of gun purchasers, (2) ban military-style assault weapons and high-capacity ammunition magazines, and (3) heighten penalties for illegal firearms trafficking while directly criminalizing the use of "straw purchasers" to buy guns for prohibited persons or purposes.<sup>48</sup> In addition, the President announced twenty-three executive actions to improve enforcement and data sharing regarding mental-health issues and other matters.<sup>49</sup> The President also directed the Attorney General "to review the laws governing who is prohibited from having guns and make legislative and executive recommendations to ensure dangerous people aren't slipping through the cracks."<sup>50</sup>

By presidential memorandum, Obama also lifted the freeze on funding for gun violence research that had impoverished the gun debate of data.<sup>51</sup> The freeze had been in place since 1996, when Congress eliminated gun-violence research funds from the budget of the Centers for Disease Control and Prevention (CDC) and added a rider that "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."<sup>52</sup> While the scope of the congressional limitation was unclear, funding for gun violence research was effectively eliminated because funding officials would not risk losing their jobs or budgets by testing the freeze's limits.<sup>53</sup> President Obama's presidential memorandum directed the CDC to fund gun violence research, thereby removing some of the risk and doubt while providing cover to open up funding.<sup>54</sup>

Change by executive action is swifter and surer than change by seeking new laws—especially in the firearms context.<sup>55</sup> Firearms regulation is a perilous area for

prohibited persons or activities); Fix Gun Checks Act of 2013, H.R. 137, 113th Cong. (2013) (expanding background checks to cover sales by private actors).

48. WHITE HOUSE, GUN VIOLENCE REDUCTION PLAN, *supra* note 1, at 4–8.

49. *Id.*

50. *Id.* at 4–5.

51. Presidential Memorandum from the White House to the Secretary of Health and Human Services, Engaging in Public Health Research on the Causes and Prevention of Gun Violence, 78 Fed. Reg. 4295 (Jan. 16, 2013); *see also* WHITE HOUSE, GUN VIOLENCE REDUCTION PLAN, *supra* note 1, at 8 (discussing history of freeze); Arthur L. Kellermann & Frederick P. Rivara, *Silencing the Science on Gun Research*, 309 J. AM. MED. ASS'N 549, 549–50 (2013) (discussing research consequences of the funding freeze).

52. Department of Health and Human Services Appropriations Act, 1997, Pub. L. No. 104-208, tit. II, 110 Stat. 3009, 3009-244 (1996).

53. Kellermann & Rivara, *supra* note 51, at 549–50.

54. *See, e.g.*, Press Release, Nat'l Institute of Health, NIH Calls for Research Projects Examining Violence: Particular Consideration to Be Given to Firearm Violence (Sept. 27, 2013), available at <http://www.nih.gov/news/health/sep2013/nih-27.htm>; *Research on the Health Determinants and Consequences of Violence and Its Prevention, Particularly Firearm Violence (R01), Funding Opportunity Announcement Number PA-13-363*, DEP'T OF HEALTH & HUMAN SERVS. (Sept. 27, 2013), <http://grants.nih.gov/grants/guide/pa-files/PA-13-363.html>.

55. For a discussion of the use of executive action to achieve change despite legislative inaction, *see, e.g.*, Phillip J. Cooper, *The Law: Presidential Memoranda and Executive Orders: Of Patchwork Quilts, Trump Cards, and Shell Games*, 31 PRESIDENTIAL STUD. Q. 126 (2001); Michael Sant' Ambrogio, *The Extra-Legislative Veto*, 102 GEO. L.J. 351, 355–56 (2014); Parker Rider-Longmaid, Comment, *Take Care That the Laws Be Faithfully*

legislators to venture into because of deep cultural conflicts over the scope and meaning of the right to bear arms.<sup>56</sup> A gun is a powerful shape-shifting metaphor in the patchwork of American cultures—a symbol of self-defense, self-sufficiency, empowerment, and virility as well as an implement of mass violence, death, mortal threat, and danger.<sup>57</sup> Whether firearms regulation prevents violence or hinders people in self-protection is also fiercely debated on the rhetorical, anecdotal, and sometimes (despite the deprivation of research funding) empirical level.<sup>58</sup>

The scope of permissible regulation in light of the Second Amendment's guarantee of the right to bear arms is also contested and was narrowed after the Supreme Court's decisions in *McDonald v. City of Chicago* and *District of Columbia v. Heller*.<sup>59</sup> Addressing the more extreme pole of firearms restrictions, *McDonald* and *Heller* invalidated near-absolute bans on handgun possession.<sup>60</sup> As with other constitutional rights, however, the Second Amendment is not absolute.<sup>61</sup> The Court emphasized that the decisions did not put in doubt “longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.”<sup>62</sup>

Because gun-control opponents tend to be rugged individualists who value self-sufficiency and oppose government interference, attempts to enact federal firearms restrictions are particularly fractious.<sup>63</sup> An example comes from one of the

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*Litigated*, 161 U. PA. L. REV. 291, 296–97 (2012); Jessica M. Stricklin, Comment, *The Most Dangerous Directive: The Rise of Presidential Memoranda in the Twenty-First Century as a Legislative Shortcut*, 88 TUL. L. REV. 397, 404–07 (2013).

56. See, e.g., Dan M. Kahan, *The Cognitively Illiberal State*, 60 STAN. L. REV. 115, 134–36 (2007) (discussing rifts in worldviews from a cultural cognition perspective).

57. See, e.g., GARY KLECK, TARGETING GUNS: FIREARMS AND THEIR CONTROL 82–85 (1997) (discussing cultural and regional meanings of guns).

58. See, e.g., DAVID HEMENWAY, PRIVATE GUNS, PUBLIC HEALTH 1203–81 (2004) (discussing contested data and interpretations); Ian Ayres & John J. Donohue III, *Shooting Down the ‘More Guns, Less Crime’ Hypothesis*, 55 STAN. L. REV. 1193, 1203–95 (2003) (summarizing controversies and empirically evaluating the more guns, less violence claim).

59. *McDonald v. City of Chicago*, 561 U.S. 742, 790–91 (2010) (holding that there is a Second Amendment right to possess a handgun in the home that applies in the states as well as to the Federal Government); *District of Columbia v. Heller*, 554 U.S. 570, 628–29, 636 (2008) (invalidating a law that banned possessing a handgun in the home). For a sampling of the vigorous debate on the scope of permissible regulation, see, e.g., Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1164 (1991); Carl T. Bogus, *The History and Politics of Second Amendment Scholarship: A Primer*, 76 CHI.-KENT L. REV. 3, 5–8 (2000); Adam Winkler, *Heller’s Catch-22*, 56 UCLA L. REV. 1551, 1574 (2009); cf. Joseph Blocher, *Firearm Localism*, 123 YALE L.J. 82, 86 n.15 (2013) (describing the question of whether the Second Amendment protects an individual right to gun ownership unconnected to militia purposes as “long the central battle in Second Amendment law and scholarship”).

60. *McDonald*, 130 S. Ct. at 3048 (holding that the City of Chicago’s ordinances effectively banning firearms possession by most private citizens within the city violates the Second Amendment); *Heller*, 554 U.S. at 626 (holding that DC’s ban on firearms possession within the home violates the Second Amendment).

61. *Heller*, 554 U.S. at 626.

62. *Id.* at 626–27; accord *McDonald*, 130 S. Ct. at 3047 (plurality opinion).

63. Dan M. Kahan, *The Gun Control Debate: A Culture-Theory Manifesto*, 60 WASH.

last major federal firearms restrictions enacted, the aging 1993 Brady Bill.<sup>64</sup> The Brady Bill required background checks on gun purchasers from commercial sellers, who must be federally licensed.<sup>65</sup> The NRA and other gun-control opponents waged a fierce campaign to punish legislators who voted in favor of the Brady Bill, ultimately shifting the balance of power in Congress from Democratic control to Republican control.<sup>66</sup> Because of such intense political difficulties, much of the action in experimenting with firearms restrictions in recent years has been piecemeal at the state level, despite the need for data sharing and uniformity to improve screens for the dangerous.<sup>67</sup>

After Newtown, however, numerous firearms bills implementing the President's three-pronged plan were introduced in Congress.<sup>68</sup> One form of legislation introduced would extend the Brady Bill's background check requirement to gun shows and private, as well as commercial, gun sellers, thus closing a major gap in screening purchasers.<sup>69</sup> Another form of legislation heightened penalties for using "straw purchasers" to illegally buy firearms for prohibited persons, such as felons, or for prohibited purposes, such as to commit drug-trafficking crimes.<sup>70</sup> The legislation that sparked the most debate was an attempt to ban the sale, manufacturing, and importation of military-style assault weapons and large-capacity ammunition magazines, with exceptions for weapons used by military or law enforcement officials.<sup>71</sup> An earlier law, enacted around the time of the Brady Bill, had imposed a partial assault-weapons ban, but the law sunset without renewal in 2004.<sup>72</sup>

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& LEE L. REV. 3, 6 (2003).

64. Omnibus Consolidated Appropriations Act of 1997, Pub. L. 104-208, § 658, 110 Stat. 3009, 3009-371 to 3009-372 (codified at 18 U.S.C. §§ 921-22, 925 (2012)).

65. *Id.*

66. See Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 227-28 (2008) (providing history).

67. Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1128 (2014); Philip J. Cook, *The Great American Gun War: Notes from Four Decades in the Trenches*, 42 CRIME & JUST. 19, 27 (2013).

68. Fix Gun Checks Act of 2013, S. 374, 113th Cong. (2013) (expanding background checks requirement to private sellers); Gun Trafficking Prevention Act of 2013, S. 179, 113th Cong. (2013) (criminalizing sale of firearms for prohibited purposes); Assault Weapons Ban of 2013, H.R. 437, 113th Cong. (2013) (prohibiting the importation, sale, manufacture, transfer, or possession of a semiautomatic assault weapon or large-capacity ammunition-feeding device); Stop Illegal Trafficking in Firearms Act of 2013, S. 54, 113th Cong. (2013) (directly criminalizing straw purchases of firearms for prohibited persons or activities); Assault Weapons Ban of 2013, S. 150, 113th Cong. (2013) (prohibiting the importation, sale, manufacturing, transfer, or possession of semiautomatic assault weapons or large-capacity ammunition-feeding devices); Fix Gun Checks Act of 2013, H.R. 137, 113th Cong. (2013) (expanding background checks to cover sales by private actors).

69. Fix Gun Checks Act of 2013, S. 374, 113th Cong. (2013); Stop Illegal Trafficking in Firearms Act of 2013, S. 54, 113th Cong. (2013); Gun Checks Act of 2013, H.R. 137, 113th Cong. (2013).

70. Gun Trafficking Prevention Act of 2013, S. 179, 113th Cong. (2013).

71. Assault Weapons Ban of 2013, S. 150, 113th Cong. (2013).

72. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, tit. XI, 108 Stat. 1796, 1996 (1994) (codified at 18 U.S.C. § 921-22 (1994)); see also 159 CONG. REC. S289 (daily ed. Jan. 24, 2013) (statement of Sen. Feinstein) (discussing criticisms of the earlier assault-weapons ban); Sheryl Gay Stolberg, *Effort To Renew*

The bill's cosponsor, Senator Levin, spoke about shootings in malls, movie theaters, and schools, urging, "We must not wait for the next madman to easily and legally purchase a military-style assault weapon and a high capacity magazine."<sup>73</sup> Introducing the assault-weapons bill on the Senate floor, Senator Feinstein invoked the memory of the mass shootings in schools and movie theaters, stating, "Let me say it as plainly as I can: weapons of war do not belong on our streets, in our schools, in our malls, in our theaters, or in our workplaces. We know the common denominator in these deadly massacres and these daily shootings: easy access to killing machines designed for the battlefield."<sup>74</sup>

Speaking for opponents, Senator Ted Cruz rebutted that the assault weapons legislation merely banned "scary-looking guns" and was "ineffective show legislation—sound and fury, signifying nothing."<sup>75</sup> Senator Cruz stated that the focus should be on enforcing existing laws to keep guns out of the hands of the dangerous—violent criminals and individuals with dangerous mental illnesses.<sup>76</sup> Similarly, another opponent of the proposed firearms restrictions, Representative Mike Rogers, argued the better discussion should be "[h]ow do we target people with mental illness who use firearms?"<sup>77</sup>

Despite the deep fracture over whether new gun restriction laws are needed, what is striking is the common paradigm of danger in the debates—a heavily armed, mentally ill individual stalking public places. When evaluating risks and danger, people tend to focus on emotion-laden salient events.<sup>78</sup> By focusing on the salient rather than prevalent risks, regulatory strategies become framed for the high-horror event rather than harms that are more likely to occur.<sup>79</sup> This tendency to focus on salience rather than prevalence is a particular challenge when it comes to firearms-violence prevention law and policy efforts because reform efforts are often jolted into action by gripping horror stories.<sup>80</sup> The deep divide over firearms regulation intensifies this effect, driving reformers to use emotionally resonant imagery to try to build a coalition for reform.<sup>81</sup>

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*Weapons Ban Falters on Hill*, N.Y. TIMES, Sept. 9, 2004, at A1 (discussing how intense lobbying by the NRA during an election year led to the demise of attempts to extend the assault weapons ban).

73. 159 CONG. REC. S757–58 (daily ed. Feb. 14, 2013) (statement of Sen. Carl Levin).

74. 159 CONG. REC. S288–91 (daily ed. Jan. 24, 2013) (statement of Sen. Dianne Feinstein).

75. *Cruz Statement*, *supra* note 2, at 2.

76. *Id.*

77. Richard A. Friedman, *In Gun Debate, a Misguided Focus on Mental Illness*, N.Y. TIMES, Dec. 18, 2012, at D5.

78. For an overview of the social psychology literature on salience and affect, see, e.g., Paul Slovic, Melissa L. Finucane, Ellen Peters & Donald G. MacGregor, *Risk as Analysis and Risk as Feelings: Some Thoughts About Affect, Reason, Risk, and Rationality*, 24 RISK ANALYSIS 311 (2004).

79. For a canonical statement of the problem in the regulatory arena, see, e.g. Cass R. Sunstein, *Probability Neglect: Emotions, Worst Cases, and Law*, 112 YALE L.J. 61, 62–70 (2002).

80. For a discussion, see, e.g., Mary D. Fan, *Beyond Budget-Cut Criminal Justice: The Future of Penal Law*, 90 N.C. L. REV. 581, 627–30 (2012) (discussing how criminal-justice legislation is jolted by tragedies and giving examples).

81. For discussions of the deep rift in cultural worldviews that polarize firearms debates, see, e.g., WINKLER, *supra* note 30, at 8–14; Donald Braman & Dan M. Kahan, *Overcoming the Fear of Guns, the Fear of Gun Control, and the Fear of Cultural Politics: Constructing A Better*

This focus on the salient rather than prevalent source of danger may lead to blind spots and missed opportunities for more achievable firearms-violence prevention. Addressing blind spots, the next Part presents data on risk factors for firearms violence in general and for the extraordinary violence of homicide-suicides. Understanding the risk factors can also help identify dangers that current and proposed regulations miss. The next Parts show, that potentially dangerous actors slip through legal screens because a substantial amount of violence that would trigger restrictions if adjudicated never makes it into the legal system.

## II. TO PREVENT EXTRAORDINARY VIOLENCE, FOCUS ON “ORDINARY” VIOLENCE

To effectively address firearms violence, it is important to understand perpetration patterns and risk factors. Until the establishment of the National Violent Death Reporting System (NVDRS) in 2003, an accurate national picture of the context of firearms violence was difficult to attain because the nation lacked a national violent-death surveillance system.<sup>82</sup> In public-health parlance, “surveillance” means systematic aggregation and dissemination of timely data to people charged with protecting the nation’s health and safety.<sup>83</sup> While the NVDRS is not yet nationally representative, its approach of mining official reports from contributing states is still a major advance.<sup>84</sup> Recognizing the need for data-guided violence-prevention efforts, the NVDRS compiles information from death certificates, medical examiner or coroner records, law-enforcement records, and crime-laboratory records in participating states.<sup>85</sup> The most recent publicly available data is from 2011 and includes data from seventeen states.<sup>86</sup>

The collection of data permits a closer look at the circumstances surrounding violent death, such as place of death and perpetrator-victim relationship. This enables the identification of risk factors to improve the aim and focus of law and policy crafted in hopes of preventing firearms violence. NVDRS data can also be supplemented with information from the FBI’s Uniform Crime Reports (UCR) and the CDC’s Web-Based Injury Statistics Query and Reporting System (WISQARS).<sup>87</sup> FBI data comes from more than 18,000 law-enforcement agencies voluntarily participating in the crime-reporting program.<sup>88</sup> WISQARS fatal-injury

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*Gun Debate*, 55 EMORY L.J. 569, 570–72, 577–87 (2006); Kahan, *supra* note 63, at 4–10.

82. Liem et al., *supra* note 14, at 70–71.

83. See, e.g., Stephen B. Thacker, *Historical Development*, in PRINCIPLES AND PRACTICE OF PUBLIC HEALTH SURVEILLANCE 1, 1–8 (2d ed. 2000).

84. See Catherine W. Barber, Deborah Azrael, David Hemenway, Lenora M. Olson, Carrie Nie, Judy Schaechter & Sabrina Walsh, *Suicides and Suicide Attempts Following Homicide: Victim-Suspect Relationship, Weapon Type, and Presence of Antidepressants*, 12 HOMICIDE STUD. 285, 286–87 (2008) (discussing the genesis and utility of the NVDRS).

85. L. J. Paulozzi, J. Mercy, L. Frazier Jr. & J. L. Annett, *CDC’s National Violent Death Reporting System: Background and Methodology*, 10 INJ. PREVENTION 47, 49 (2004).

86. *National Violent Death Reporting System Information*, CDC, <http://www.cdc.gov/violenceprevention/nvdrs/>.

87. *Uniform Crime Reports*, FED. BUREAU OF INVESTIGATION, <http://www.fbi.gov/about-us/cjis/ucr/ucr>; *Injury Prevention & Control: Data & Statistics (WISQARS)*, CDC, <http://www.cdc.gov/injury/wisqars/index.html>.

88. *Uniform Crime Reports*, *supra* note 87.

data comes from death certificates reported to the National Vital Statistics System.<sup>89</sup> WISQARS nonfatal-injury data comes from reports by U.S. hospitals and emergency departments submitted to the National Electronic Injury Surveillance System.<sup>90</sup> Both data sources have the advantage of national coverage but the disadvantage of less finely grained detail than data offered through the NVDRS. The richest nationally based source of data is from the FBI's National Incident-Based Reporting System, which includes information on victim-offender relationships and crime locations by crime category, albeit not by weapon type.<sup>91</sup> The Parts below present data from the NVDRS contextualizing firearms violence, supplemented with WISQARS and FBI data.

#### *A. Firearms Violence at Home, Among Family and Friends*

While recent firearms-restrictions legislation and debates have focused on violence from deranged strangers hunting in public, NVDRS data reveals that firearms homicides tend to take place at home, among friends and family. Table 1 presents data on the victim-perpetrator relationship in firearms homicides from 2011, the most recently available year, from seventeen NVDRS states.<sup>92</sup> The victim-perpetrator relationship data was derived from examining all cases with known circumstances of homicide by each perpetrator relationship type, and in combination.

Table 1. Victim-perpetrator relationship, firearms homicides, seventeen NVDRS states, 2011

	Count	Percent (%) <sup>*</sup>
Family or intimates	406	21
Intimate of relative	13	0.6
Friends or acquaintances	331	17
Strangers, gang members	191	10
Other relationships	255	13
Shot by law enforcement	34	2
Relationship unknown	714	37
<i>Total</i>	1944	100

89. *Injury Prevention & Control: Data & Statistics (WISQARS)*, *supra* note 87.

90. *Id.*

91. *Uniform Crime Reports Publications*, FED. BUREAU OF INVESTIGATION, <http://www.fbi.gov/about-us/cjis/ucr/ucr-publications>.

92. Currently, there are eighteen participating NVDRS states: Alaska, Colorado, Georgia, Kentucky, Maryland, Massachusetts, Michigan, New Jersey, New Mexico, North Carolina, Oklahoma, Ohio, Oregon, Rhode Island, South Carolina, Utah, Virginia, and Wisconsin. By 2011, the most recently available data year, seventeen of the eighteen states had the capacity to contribute information. CENTERS FOR DISEASE CONTROL AND PREVENTION, DIV. OF VIOLENCE PREVENTION, NAT'L CTR. FOR INJURY PREVENTION & CONTROL, *LINKING DATA TO SAVE LIVES* (2013), *available at* <http://www.cdc.gov/violenceprevention/pdf/nvdrstimeline-a.pdf>; *State by State*, NAT'L VIOLENCE PREVENTION NETWORK, <http://www.preventviolence.net/statebystate/statebystate.html>.

\*Victim-perpetrator relationship classification is available for 1944 of 2975 homicides by firearms in the seventeen NVDRS states with data publicly accessible in 2011. The denominator for the proportion is the 1944 deaths for which classification is available.

As summarized in Table 1, killings by family, intimates, friends, or acquaintances accounted for at least 38% of all the firearms homicides in the seventeen NVDRS states for which victim-perpetrator relationship was categorized. This number likely underreports the proportion of firearms homicides by family, intimates, friends, or acquaintances because it does not include the 37% of cases where the relationship is categorized as unknown. Relationships are listed as unknown if the suspected perpetrator relationship has not been listed in reports. Such missing data is likely due to either differences in data-reporting practices or pending investigations. If cases where the relationship is unknown are excluded from the denominator, the proportion of firearms homicides by family, intimates, friends, or acquaintances rises to 61% of all the homicides by firearm for which victim-perpetrator relationship is categorized.<sup>93</sup>

Table 2 presents data on the place of firearms homicide by all relationship types based on NVDRS data. As summarized below, nearly half of all firearms-related homicides in the seventeen NVDRS states occurred in the home.

Table 2. Place of firearms homicides, seventeen NVDRS states, 2011

	Count	Percent (%)
Home*	1429	48
Highway, street, road	754	25
Other transportation†	302	10
Recreational area	32	1
Commercial area	217	7
Natural area	52	2
Other‡	91	3
Unknown	95	3
<i>Total</i>	2975§	100

\*Includes house or apartment and the curtilage (driveway, porch, or yard) as well the interior of the home

†Includes the interior of motor vehicles

‡Other specified places, including schools, sports fields, or athletics arenas

§The total equals 2975 rather than 2972 because it includes the numbers of deaths in residential institutions, including a shelter or prison, which are suppressed in NVDRS line-item reporting because they are fewer than ten.

Indeed, the adage “[h]ome is [w]here the [v]iolence [i]s”<sup>94</sup> proves to be true among violent-crime cases generally. National FBI data shows that 63% of all

93. The precise figure is obtained from dividing the 750 firearms homicides by friends, intimates, family, or acquaintances by the 1230 deaths where relationship information is reported, excluding the category where the relationship is categorized as unknown, yielding 61%. See *supra* Table 1.

94. JEANNINE BELL, HATE THY NEIGHBOR: MOVE-IN VIOLENCE AND THE PERSISTENCE OF

crimes against persons in 2012, including assaults, homicides, abductions, and sex offenses, occurred in a home or residence.<sup>95</sup> Among assaults, 62% occurred in a home or residence.<sup>96</sup> Among homicides, 55% occurred in a home or residence.<sup>97</sup>

Nationally, between 2008 and 2012, firearms were used in about 68% of all homicides.<sup>98</sup> While much debate has centered on military-style assault weapons, the main type of firearm used in homicide between 2008 and 2012 was the less lurid but nonetheless deadly handgun.<sup>99</sup> Among firearms homicides, 71% of the killings were committed using a handgun.<sup>100</sup> In 2012, the most frequently recorded known circumstance involved in a homicide by firearm was an argument.<sup>101</sup>

The data and discussion presented thus far has focused on firearms-related violence generally. As discussed in Part I, a motivating concern in the recent spate of firearms legislation has been a particular form of extraordinary firearms violence—mass killings, often by a homicidal-suicidal perpetrator.<sup>102</sup> The NVDRS provides an even closer look at the risk factors for homicide-suicides, one form of extraordinary violence, because data on the history of persons who commit suicide are also collected. The next Parts present data showing that even when it comes to the extraordinary violence of homicide-suicides, the risk factors and prior history of perpetrators involve seemingly mundane “ordinary” violence and disputes. Many of these altercations never make it into the criminal-justice system, thus evading existing screens for removing firearms from people convicted of certain offenses.

#### *B. Rare but Devastating Harm: Homicide-Suicide*

Newtown, Navy Yard, Virginia Tech, Santa Monica College—these site names that turned into shorthand for mass killings share a commonality. All of these mass shootings and many other mass killings that have shocked the nation into concern over firearms violence prevention involve homicide-suicides.<sup>103</sup> Homicide-suicides

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RACIAL SEGREGATION IN AMERICAN HOUSING 4 (2013) (illustrating adage in the context of move-in violence).

95. See *Crimes Against Persons Offenses: Offense Category by Location, 2012*, FED. BUREAU OF INVESTIGATION, <http://www.fbi.gov/about-us/cjis/ucr/nibrs/2012/table-pdfs/crimes-against-persons-offenses-offense-category-by-location-2012> (giving offense counts; percentages are calculated from the counts).

96. See *id.* (giving offense counts; percentages are calculated from the counts).

97. See *id.* (giving offense counts; percentages are calculated from the counts).

98. See *Uniform Crime Reports, Expanded Homicide Data Table 8, Murder Victims by Weapon, 2008-2012*, FED. BUREAU OF INVESTIGATION, [http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/offenses-known-to-law-enforcement/expanded-homicide/expanded\\_homicide\\_data\\_table\\_8\\_murder\\_victims\\_by\\_weapon\\_2008-2012.xls](http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/offenses-known-to-law-enforcement/expanded-homicide/expanded_homicide_data_table_8_murder_victims_by_weapon_2008-2012.xls) (providing counts of weapons used in homicides; percentages are calculated from the counts).

99. *Id.*

100. See *id.* (providing counts; percentages are calculated from the counts).

101. See *Uniform Crime Reports, Expanded Homicide Data Table 11, Murder Circumstances by Weapon, 2012*, FED. BUREAU OF INVESTIGATION, [http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/offenses-known-to-law-enforcement/expanded-homicide/expanded\\_homicide\\_data\\_table\\_11\\_murder\\_circumstances\\_by\\_weapon\\_2012.xls](http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/offenses-known-to-law-enforcement/expanded-homicide/expanded_homicide_data_table_11_murder_circumstances_by_weapon_2012.xls) (providing counts by circumstances and weapon type).

102. See *supra* notes 1–17, 34–46 and accompanying text.

103. *Id.*

strike particular fear because criminal law's traditional artillery for deterring crime, such as higher penalties for causing more harm, are immaterial to someone who plans on dying after killing others.<sup>104</sup> Perpetrators who kill multiple people rather than one expose themselves to heavier penalties, including the death penalty, in many jurisdictions.<sup>105</sup> But someone who thinks he will die tomorrow only goes out in a greater blaze of fame and glory—a motivation among many rampage shooters—if more people are killed.<sup>106</sup>

Despite salient events that may lead to overestimation of probability, homicide-suicide rates have been low and generally stable over time.<sup>107</sup> Estimates of homicide-suicide prevalence in the United States vary, ranging from 0.2 per 100,000 up to 0.5 per 100,000 of the population.<sup>108</sup> In the United States, homicide-suicides constitute about 5–6% of homicides.<sup>109</sup> Homicide-suicides claim an estimated 1000 to 1500 American lives per year, averaging about twenty to thirty violent deaths per week.<sup>110</sup> The homicide-suicide mortality figure is similar to

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104. See, e.g., Dill et al., *supra* note 4, at 114 (“For those youth who have decided to kill themselves as part of their attack, deterrence may seem moot.”); Fagan, *supra* note 4, at 277 (noting limited possibility of deterrence among murder-suicides); see also VOSSEKUIL ET AL., *supra* note 4, at 22 (noting that 78% of schoolhouse attackers studied had considered or attempted suicide).

105. See, e.g., ALA. CODE § 13A-5-40(a)(10) (2005) (defining murder “wherein two or more persons are murdered by the defendant” as a capital offense); KAN. STAT. ANN. § 21-5401(6) (Supp. 2013) (defining “intentional and premeditated killing of more than one person” as a ground for capital murder); VA. CODE ANN. § 18.2-31(7) (2014) (defining the “willful, deliberate, and premeditated killing of more than one person as a part of the same act or transaction”).

106. See, e.g., Roger W. Byard, *Murder-Suicide*, 3 FORENSIC PATHOLOGY REV. 337, 343 (2005) (discussing “blaze-of-glory” as a type of motivation among murder-suicides); Adam Lankford & Nayab Hakim, *From Columbine to Palestine: A Comparative Analysis of Rampage Shooters in the United States and Volunteer Suicide Bombers in the Middle East*, 16 AGGRESSION & VIOLENT BEHAV. 98, 99, 105 (2011) (discussing fame and glory as a motivation among many rampage shooters).

107. Scott Eliason, *Murder-Suicide: A Review of the Recent Literature*, 37 J. AM. ACAD. PSYCHIATRY & L. 371, 371–73 (2009).

108. E.g., R. M. Bossarte, T. R. Simon & L. Barker, *Characteristics of Homicide Followed by Suicide Incidents in Multiple States, 2003–04*, 12 INJURY PREVENTION ii33, ii33, ii35 (2006) (noting prevalence estimates of between 0.2 and 0.38 per 100,000 persons annually and reporting homicide rate due to homicide-suicide of 0.238 per 100,000 persons in 2004); F. Stephen Bridges & David Lester, *Homicide-Suicide in the United States, 1968–1975*, 206 FORENSIC SCI. INT’L 185, 185–86 (2011) (noting reports of between 0.2 to 0.38 per 100,000 persons and finding 0.134 per 100,000 persons per year between 1968 to 1975); Julie E. Malphurs & Donna Cohen, *A Newspaper Surveillance Study of Homicide-Suicide in the United States*, 23 AM. J. FORENSIC MED. & PATHOLOGY 142, 142–43 (2002) (noting reports of between 0.2 to 0.3 per 100,000 persons and up to 0.4 to 0.5 per 100,000 persons).

109. Barber et al., *supra* note 84, at 286.

110. *Id.* at 285; Liem et al., *supra* note 14, at 70–71; J. Logan, Holly A. Hill, Michele Lynberg Black, Alex E. Crosby, Debra L. Karch, Jamar D. Barnes & Keri M. Lubell, *Characteristics of Perpetrators in Homicide-Followed-by-Suicide Incidents: National Violent Death Reporting System—17 US States, 2003–2005*, 168 AM. J. EPIDEMIOLOGY 1056, 1056 (2008).

the numbers of American lives lost due to afflictions such as tuberculosis, viral hepatitis, Hodgkin's lymphoma, influenza, or meningitis.<sup>111</sup>

The incidence rates seem to suggest that homicide-suicide is a relatively rare, aberrant event. Yet the impact of homicide-suicides has been devastating for communities and individuals with long-term traumatic effects.<sup>112</sup> Homicide-suicides are more likely than general homicides to involve multiple victims.<sup>113</sup> Firearms are even more likely to be used in homicide-suicides than homicides in general—89% compared to 65% according to one estimate.<sup>114</sup> The United States has higher homicide-suicide rates than peer countries such as England and Wales, the Netherlands, and Switzerland.<sup>115</sup> This may be due in part to the readier availability of firearms in the United States.<sup>116</sup>

While research into the treatment of diseases with similar mortality rates as homicide-suicides is advanced, homicide-suicide prevention research is in the earlier stage of assessing the scope of the problem.<sup>117</sup> What is known from homicide-suicide research to date is that this extreme form of violence particularly impacts women and children.<sup>118</sup> In contrast, homicides generally disproportionately impact adult men because of the predominance of male-on-male violence resulting in homicide.<sup>119</sup> The vast majority of homicide-suicides are “family affairs” involving killings of family members.<sup>120</sup> Studies indicate that 42–69% of homicide-suicides involve intimate partners, 18–47% involve familicide or filicide, and 12–26% involve extrafamilial homicide.<sup>121</sup> Thus, like firearms violence generally, most homicide-suicides are perpetrated by family and intimates.

Prior studies have found that intimate-partner conflict and domestic-violence history are major risk factors for homicide-suicides.<sup>122</sup> Several studies indicate that the typical perpetrator of homicide-suicide is male, married, and a domestic

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111. Barber et al., *supra* note 84, at 285; Liem et al., *supra* note 14, at 70–71; Marzuk et al., *supra* note 14, at 3179.

112. Barber et al., *supra* note 84, at 285; Logan et al., *supra* note 110, at 1056.

113. Liem et al., *supra* note 14, at 70–75.

114. Bridges & Lester, *supra* note 108, at 186.

115. *Id.* at 186–87 (nearly double the rate of England and Wales).

116. *Id.* at 188.

117. See, e.g., Aderibigbe, *supra* note 15, at 662–63 (discussing “severely limited” research on murder-suicides, in part for lack of a national surveillance system); Liem et al., *supra* note 14, at 70–71 (discussing challenges in studying homicide-suicide of small and geographically limited sample sets).

118. Liem et al., *supra* note 14, at 70–73; accord Bridges & Lester, *supra* note 108, at 186.

119. See, e.g., Janet L. Lauritsen & Karen Heimer, *The Gender Gap in Violent Victimization, 1973–2004*, 24 J. QUANTITATIVE CRIMINOLOGY 125, 133 fig.1 (2008) (graphing disparity in violence victimization between genders).

120. Bridges & Lester, *supra* note 108, at 186–87.

121. Logan et al., *supra* note 110, at 1056.

122. Mary Cooper & Derek Eaves, *Suicide Following Homicide in the Family*, 11 VIOLENCE & VICTIMS 99 (1996); Jane Koziol-McLain, Daniel Webster, Judith McFarlane, Carolyn Rebecca Block, Yvonne Ulrich, Nancy Glass & Jacquelyn C. Campbell, *Risk Factors for Femicide-Suicide in Abusive Relationships: Results from a Multisite Case Control Study*, 21 VIOLENCE AND VICTIMS 3 (2006); Logan et al., *supra* note 110.

abuser.<sup>123</sup> Even perpetrators of suicide-homicides involving nonpartners frequently had a history of intimate-partner conflicts.<sup>124</sup> A woman ending a relationship with a man may be at heightened risk for being the victim of a homicide-suicide by her former partner.<sup>125</sup> These findings are consistent with studies finding separation to be a risk factor for lethal violence, and a heightened risk of violence among separated women.<sup>126</sup> Studies have posited that pathological possessiveness and proprietariness, particularly over a woman attempting to leave, may give rise to the extraordinary violence of homicide-suicide.<sup>127</sup>

Existing federal law already prohibits individuals convicted of domestic violence or under a restraining order protecting an intimate partner or child from possessing firearms.<sup>128</sup> The 1996 Lautenberg Amendment added the specific prohibition on individuals convicted of a state or federal domestic-violence misdemeanor from possessing firearms.<sup>129</sup> In addition, many state laws also have similar or broader prohibitions on firearms possession by individuals convicted of domestic violence offenses or under a permanent restraining order.<sup>130</sup>

The nation has democratically agreed that batterers should not be armed because of the risk of escalation of violence to homicide. So what is the problem? The next

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123. *E.g.*, Aderibigbe, *supra* note 15, at 663; Barber et al., *supra* note 84, at 290–92; Liem et al., *supra* note 14, at 70–76; Logan et al., *supra* note 110, at 1058–60.

124. Logan et al., *supra* note 110, at 1060, 1062.

125. Aderibigbe, *supra* note 15, at 663; Eliason, *supra* note 107, at 371–73; Koziol-McLain et al., *supra* note 122, at 8, 15 tbl.2; Marzuk et al., *supra* note 14, at 3180.

126. *E.g.*, Douglas A. Brownridge, Ko Ling Chan, Diane Hiebert-Murphy, Janice Ristock, Agnes Tiwari, Wing-Cheong Leung & Susy C. Santos, *The Elevated Risk for Non-Lethal Post-Separation Violence in Canada: A Comparison of Separated, Divorced, and Married Women*, 23 J. INTERPERSONAL VIOLENCE 117 (2008); Douglas A. Brownridge, *Violence Against Women Post-Separation*, 11 AGGRESSION & VIOLENT BEHAVIOR 514 (2006); Jacquelyn C. Campbell, Daniel Webster, Jane Koziol McLain, Carolyn Block, Doris Campbell, Mary Ann Curry, Faye Gary, Nancy Glass, Judith McFarlane, Carolyn Sachs, Phyllis Sharps, Yvonne Ulrich, Susan A. Wilt, Jennifer Manganello, Xiao Xu, Janet Schollenberger, Victoria Frye & Kathryn Laughon, *Risk Factors for Femicide in Abusive Relationships: Results from a Multi-Site Case Control Study*, 93 AM. J. PUB. HEALTH 1089 (2003); Ruth M. Fleury, Cris M. Sullivan & Deborah I. Bybee, *When Ending the Relationship Does Not End the Violence: Women's Experiences of Violence by Former Partners*, 6 VIOLENCE AGAINST WOMEN 1363 (2000); Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 11, 63–64 (1991); Judith M. McFarlane, Jacquelyn C. Campbell, Susan Wilt, Carolyn J. Sachs, Yvonne Ulrich & Xiao Xu, *Stalking and Intimate Partner Femicide*, 3 HOMICIDE STUD. 300 (1999).

127. Campanelli & Gilson, *supra* note 15; Cooper & Eaves, *supra* note 122, at 99–112; M. Rosenbaum, *The Role of Depression in Couples Involved in Murder-Suicide and Homicide*, 147 AM. J. PSYCHIATRY 1036 (1990).

128. 18 U.S.C. §§ 921–22, 925 (2012).

129. Pub. L. No. 104-208, § 658, 110 Stat. 3009, 3009-371 to 3009-372 (codified at 18 U.S.C. §§ 921–22, 925 (2012)). A qualifying domestic violence offense must involve use or attempted use of physical force or threatened use of a deadly weapon against an intimate partner. 18 U.S.C. § 921(a)(33) (2012).

130. For a summary, see Elizabeth Richardson Vigdor & James A. Mercy, *Do Laws Restricting Access to Firearms by Domestic Violence Offenders Prevent Intimate Partner Homicide?*, 30 EVAL. REV. 313, 317–20 (2006).

subpart examines recent NVDRS data regarding the prior history of perpetrators of homicide-suicides to assess why high-risk persons may be slipping through the system's screens.

*C. Unadjudicated Assaults: Risk Factors That Current Legal Screens Miss*

To explore risk factors, this Article examines homicide-suicide data from NVDRS states between 2005–11. The time period from 2005 onward was chosen because the last major survey of NVDRS homicide-suicide data was for the years 2003–05.<sup>131</sup> The number of reporting states with publicly available information changed from sixteen to seventeen states between 2005–10 and 2011. For consistency of states over time, the data for the sixteen states that reported between 2005 and 2010 is shown for 2011. Table 3 shows that in these states, between 53% and 85% of persons suspected of a recent homicide-suicide had perpetrated interpersonal violence in the past month before escalating to their final killing. Yet despite high percentages of perpetration of interpersonal violence in the month before the homicide-suicide, the rates of criminal legal system contacts are much lower, at between 12% and 22%. The data suggests that red-flag violence is slipping through the cracks—coming to light too late during police investigations or coroner's inquests into a death that might have been prevented.

Table 3. Prevalence of interpersonal violence history and legal system contacts among homicide-suicide perpetrators, sixteen NVDRS states, 2005–11

	2005	2006	2007	2008	2009	2010	2011
Persons with known circumstances	165	142	135	133	157	166	167
Past history of violence							
Perpetrated interpersonal violence in past month	140 (85%)	110 (77%)	104 (77%)	88 (66%)	93 (59%)	99 (60%)	89 (53%)
Legal system contacts							
Recent criminal legal problem	30 (18%)	31 (22%)	26 (19%)	16 (12%)	35 (22%)	34 (20%)	29 (17%)
Other legal problems	11 (7%)	—*	—*	—*	—*	—*	12 (7%)

\*Because the number of deaths was five or fewer, the number was suppressed to retain confidentiality.

†In 2011, the number of states for which data was publicly available changed from sixteen to seventeen. For consistency, this table reports data from the sixteen states for which data is also available from 2005–10.

The publicly available NVDRS data for perpetration of interpersonal violence does not separately report what percentage was domestic violence. Inferences can

131. Logan et al., *supra* note 110, at 1057.

be made based on the data regarding the perpetrators' history of problems prior to the killing. Table 4 summarizes perpetrator problem histories. Between 71% and 81% of homicide-suicide perpetrators during this period had a history of intimate-partner problems. In contrast, far fewer had a history of job, financial, other relationship, school, or physical health problems.

Table 4. History of problems by type and percentage among homicide-suicide perpetrators, NVDRS states, 2005–11

	2005	2006	2007	2008	2009	2010	2011 <sup>†</sup>
Persons with known circumstances	165	142	135	133	157	166	167
Intimate partner problem	133 (81%)	106 (75%)	109 (81%)	95 (71%)	118 (75%)	119 (72%)	127 (76%)
Crisis in two weeks before killing	146 (88%)	127 (89%)	123 (91%)	115 (86%)	121 (77%)	120 (72%)	108 (65%)
Other relationship problem	18 (11%)	16 (11%)	16 (12%)	23 (17%)	23 (15%)	31 (19%)	21 (13%)
Job problem	10 (6%)	—*	—*	11 (8%)	—*	—*	16 (10%)
Financial problem	16 (10%)	13 (9%)	—*	—*	18 (11%)	12 (7%)	15 (9%)
School problem	0 (0%)	0 (0%)	—*	0 (0%)	0 (0%)	0 (0%)	0 (0%)
Physical health problem	18 (11%)	8 (5%)	—*	—*	15 (10%)	10 (6%)	14 (8%)

\*Because the number of deaths was five or fewer, the number was suppressed to retain confidentiality.

<sup>†</sup>In 2011, the number of states for which data was publicly available changed from sixteen to seventeen. For consistency, this table reports data from the sixteen states for which data is also available from 2005–10.

As for mental-health issues, strikingly few of the homicide-suicide perpetrators had ever been treated for a mental problem or had a current mental health problem. Table 5 summarizes known mental-health circumstances of perpetrators. Only a small fraction of the perpetrators had ever been treated for mental health illness—ranging from a yearly count too low to report to a high of just 15% of the homicide-suicide perpetrators that year. Only a similarly small proportion of perpetrators were known to have had a current mental-health problem. If mental-health problems were used as the definition of the dangerous, the data indicates the criterion would miss the vast majority of perpetrators who escalate to homicide-suicide. Of course, mental-health issues may fester unidentified in some cases. This low prevalence of a known history of mental-health issues in homicide-suicide perpetrators is precisely why mental-health issues are a

substantially less suitable screen for the dangerous than the much more prevalent known circumstance of perpetration of interpersonal violence.<sup>132</sup>

Table 5. Mental health history among homicide-suicide perpetrators, NVDRS states, 2005–11

	2005	2006	2007	2008	2009	2010	2011 <sup>†</sup>
Persons with known circumstances	165	142	135	133	157	166	167
Current depressed mood	32 (19%)	18 (13%)	10 (7%)	17 (13%)	19 (12%)	24 (14%)	26 (16%)
Current mental health problem	26 (16%)	—*	—*	18 (14%)	24 (15%)	23 (14%)	22 (13%)
Current treatment for mental illness	15 (9%)	—*	—*	13 (10%)	15 (10%)	21 (13%)	13 (8%)
Ever treated for mental problem	21 (13%)	—*	—*	17 (13%)	20 (13%)	25 (15%)	17 (10%)
Disclosed intent to commit suicide	28 (17%)	14 (10%)	—*	13 (10%)	19 (12%)	19 (11%)	28 (17%)
History of suicide attempts	—*	—*	—*	—*	—*	—*	—*
Alcohol dependence	—*	—*	—*	—*	13 (8%)	13 (8%)	14 (8%)
Other substance problems	11 (7%)	—*	10 (7%)	—*	—*	15 (9%)	16 (10%)

\*Because the number of deaths was five or fewer, the number was suppressed to retain confidentiality.

<sup>†</sup>In 2011, the number of states for which data was publicly available changed from sixteen to seventeen, resulting in higher counts. The proportions of the total are still informative.

In sum, the data on perpetrator history summarized in Tables 3–5 above suggests that the perpetration of interpersonal violence and intimate-partner relationship problems are major risk factors among homicide-suicide perpetrators. As discussed in Part II.B, existing federal and state laws already reflect the democratic decision to disarm high-risk perpetrators of intimate-partner violence.<sup>133</sup> As the data on perpetrator history reveals, the problem is that a substantial number of perpetrators who committed interpersonal violence in the month before escalating to homicide-suicide had apparently not entered into the criminal legal system. The prior violence does not come to light until too late, in police investigations or coroners' inquests into a homicide. Without a conviction or at least a protection order, potentially dangerous individuals evade legal screens meant to disarm the dangerous.

132. See *supra* Table 3 and accompanying text.

133. See *supra* text accompanying notes 128–30.

### III. PREVENTING FIREARMS VIOLENCE THROUGH SCENE OF THE ASSAULT PROCEDURE

This Article's main aims were to determine the characteristics of potentially dangerous individuals who firearms-restrictions laws should be catching and why those individuals may be evading current legal screens. The data in Part II showed that though the paradigm of danger in current gun-restriction debates is a heavily armed, mentally ill stranger hunting in public, most firearms deaths are perpetrated at home by people the victim knows. The most prevalent risk factors are perpetration of interpersonal violence in the past month and intimate-partner relationship problems.<sup>134</sup> As Table 3 showed, a major reason why dangerous perpetrators evade current legal screens is that cases of interpersonal violence never make it into the legal system. This concluding Part proffers a potential way to address the problem through executive action rather than entering a bristling political minefield to seek new laws.

The drive for new laws has proved difficult—even perilous. Attempts to pass federal legislation have faltered in Congress after fierce campaigns with influential interventions by the National Rifle Association (NRA).<sup>135</sup> Many state efforts also stalled—and backlash led to loosening firearms restrictions in several states.<sup>136</sup> Moreover, the majority of Americans have preferred stricter enforcement of existing laws rather than passing new gun laws in every national Gallup poll since the question has been posed, beginning in 2000 and continuing until 2013—when support for passing new gun laws spiked to a record high of forty-seven percent after a spate of mass shootings.<sup>137</sup> Thus, this proposal focuses on executive action steering enforcement discretion at the scene of an assault rather than enacting more laws.

Despite revolutionary reforms to try to improve responses to assaults within the family in recent decades, many cases never proceed because of underreporting and victim reluctance.<sup>138</sup> Policies that mandate proceeding even if victims refuse to cooperate have proved immensely controversial, beset with allegations of coercing victims and exposing them to more violence.<sup>139</sup> In many cases, the only chance law

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134. See *supra* Table 3.

135. Ed O'Keefe & Philip Rucker, *Gun-Control Overhaul Is Defeated in Senate*, WASH. POST, Apr. 17, 2013, at A1.

136. See, e.g., *State Gun Laws Report*, *supra* note 20 (reporting in the year after Newtown, seventy of the 109 state firearms laws passed—sixty-four percent—loosened rather than tightened restrictions, often in backlash to proposed federal regulations, and only thirty-six percent of legislation successfully passed in the states tightened restrictions); Jack Healy, *Colorado Lawmakers Ousted in Recall Vote Over Gun Law*, N.Y. TIMES, Sept. 11, 2013, at A1 (reporting that two legislators in Colorado—site of two infamous mass shootings—who passed new firearms laws lost their jobs after a recall campaign bolstered by the NRA).

137. Lydia Saad, *Americans Want Stricter Gun Laws, Still Oppose Bans*, GALLUP (Dec. 27, 2012), <http://www.gallup.com/poll/159569/americans-stricter-gun-laws-oppose-bans.aspx>.

138. See, e.g., David Hierschel & Ira W. Hutchison, *The Relative Effects of Offense, Offender, and Victim Variables on the Decision to Prosecute Domestic Violence Cases*, 7 VIOLENCE AGAINST WOMEN 46, 47–49, 51–55 (2001) (discussing policies to try to improve criminal-justice enforcement in the domestic-violence context and continuing barriers to prosecution, including victim reluctance to proceed).

139. See, e.g., David A. Ford, *Coercing Victim Participation in Domestic Violence*

enforcement has to intervene in a case of assault by someone familiar to the victim is when responding to an emergency call to stop the immediate assault.<sup>140</sup>

There is a strong body of scholarship on how to improve procedures for disarming batterers after a legal-system intervention, such as the issuance of a protective order or criminal conviction.<sup>141</sup> But what happens if a perpetrator of interpersonal violence never makes it into the legal system, as the data presented in Part II revealed is a problem among those who escalate to homicide-suicide? The best alternative intervention point is during the police response to the emergency call.

But what should police do? One idea that some states have explored is to allow police to confiscate firearms at the scene of a domestic-violence assault.<sup>142</sup> At least

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*Prosecutions*, 18 J. INTERPERSONAL VIOLENCE 669, 669–70 (2003); Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1865–97 (2006).

140. Cf. Carolyn Hoyle & Andrew Sanders, *Police Response to Domestic Violence: From Victim Choice to Victim Empowerment?*, 40 BRIT. J. CRIMINOLOGY 14, 22–23 (2000) (discussing interviews with British victims of domestic violence; a majority of whom called police to stop the violence but did not want an arrest); Mary Beth Phelan, L. Kevin Hamberger, Clare E. Guse, Shauna Edwards, Suzanne Walczak & Amy Zosel, *Domestic Violence Among Male and Female Patients Seeking Emergency Medical Services*, 20 VIOLENCE & VICTIMS 187, 195 (2005) (discussing survey about calling the police in response to violence).

141. E.g., Emily J. Sack, *Confronting the Issue of Gun Seizure in Domestic Violence Cases*, 6 J. CENTER FOR FAM., CHILD. & CTS. 3 (2005); Katherine A. Vittes, Daniel W. Webster, Shannon Frattaroli, Barbara E. Claire & Garen J. Wintemute, *Removing Guns from Batterers: Findings from a Pilot Survey of Domestic Violence Restraining Order Recipients in California*, 19 VIOLENCE AGAINST WOMEN 602 (2013); Daniel W. Webster, Shannon Frattaroli, Jon S. Vernick, Chris O’Sullivan, Janice Roehl & Jacquelyn C. Campbell, *Women with Protective Orders Report Failure to Remove Firearms from their Abusive Partners: Results from an Exploratory Study*, 19 J. WOMEN’S HEALTH 93 (2010).

142. See, e.g., ARIZ. REV. STAT. ANN. § 13-3601(C) (2010) (“A peace officer may question the persons who are present to determine if a firearm is present on the premises. On learning or observing that a firearm is present on the premises, the peace officer may temporarily seize the firearm if the firearm is in plain view or was found pursuant to a consent to search and if the officer reasonably believes that the firearm would expose the victim or another person in the household to a risk of serious bodily injury or death.”); CAL. PENAL CODE § 13730(c)(3) (West 2010) (“Any firearm or other deadly weapon discovered by an officer at the scene of a domestic violence incident shall be subject to confiscation . . . .”); HAW. REV. STAT. ANN. §§ 134-7.5(a) (West 2008) (“Any police officer who has reasonable grounds to believe that a person has recently assaulted or threatened to assault a family or household member may seize all firearms and ammunition that the police officer has reasonable grounds to believe were used or threatened to be used in the commission of the offense. The police officer may seize any firearms or ammunition that are in plain view of the officer or were discovered pursuant to a consensual search, as necessary for the protection of the officer or any family or household member.”); IND. CODE § 35-33-1-1.5(b) (West 2012) (“A law enforcement officer may confiscate and remove a firearm, ammunition, or a deadly weapon from the scene if the law enforcement officer has: (1) probable cause to believe that a crime involving domestic or family violence has occurred; (2) a reasonable belief that the firearm, ammunition, or deadly weapon: (A) exposes the victim to an immediate risk of serious bodily injury; or (B) was an instrumentality of the crime involving domestic or family violence; and (3) observed the firearm, ammunition, or deadly weapon at the scene during the response.”).

eighteen states allow police to confiscate firearms at a domestic-violence scene.<sup>143</sup> Several of the laws use mandatory, rather than permissive, language requiring police to confiscate firearms.<sup>144</sup> The idea seems excellent. Unfortunately, however, studies evaluating the impact of such confiscation laws on homicide rates have generally found no statistically significant impact.<sup>145</sup> Whether this lack of effect is due to low enforcement or other reasons is not known.<sup>146</sup>

Worse, a leading study found that the existence of a confiscation law is associated with higher assault and burglary rates.<sup>147</sup> This finding raises the concern that the confiscation of weapons at the scene leads batterers to retaliate through nonlethal violence.<sup>148</sup> The available evidence suggests that, though confiscation-at-the-scene laws seem like a compelling approach, such laws may bring more pain without reducing firearms homicide rates.

More promisingly, studies have found that laws disarming batterers under restraining orders have a significant impact in reducing intimate-partner homicides.<sup>149</sup> There is also evidence that obtaining a protection order substantially reduces the risk of future violence.<sup>150</sup> Obtaining a restraining order and then securing weapons removal based on the order has the advantage of interposing a legally mandated distance between perpetrator and victim before the weapons are removed. This is a safer approach than confiscating weapons at the scene while leaving the enraged perpetrator—freshly bereft of expensive property—in proximity to the target of violence.

Because a protective-order proceeding is civil, rather than criminal, there is a less-intimidating standard of proof and process, thus exacting less of a toll on victims.<sup>151</sup> Still, many people experiencing intimate-partner violence do not obtain a protective order: surveys have found that only between seventeen percent and thirty-four percent of people experiencing intimate-partner violence obtained a protective order.<sup>152</sup> Many victims of assault who call police to stop the immediate

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143. For a list of states, see Vigdor & Mercy, *supra* note 130, at 318.

144. *Id.*

145. *Id.* at 337; April M. Zeoli & Daniel W. Webster, *Effects of Domestic Violence Policies, Alcohol Taxes and Police Staffing Levels on Intimate Partner Homicide in Large US Cities*, 16 *INJ. PREVENTION* 90, 92 (2010).

146. Vigdor & Mercy, *supra* note 130, at 340.

147. *Id.* at 335.

148. *Id.*

149. *Id.* at 337; Zeoli & Webster, *supra* note 145, at 92.

150. Victoria L. Holt, Mary A. Kernic, Thomas Lumley, Marsha E. Wolf & Frederick P. Rivara, *Civil Protection Orders and Risk of Subsequent Police-Reported Violence*, 288 *J. AM. MED. ASS'N* 589, 593 (2002); Victoria L. Holt, Mary A. Kernic, Marsha E. Wolf & Frederick P. Rivara, *Do Protection Orders Affect the Likelihood of Future Partner Violence and Injury?*, 24 *AM. J. PREVENTATIVE MED.* 16, 18 (2003); TK Logan & Robert Walker, *Civil Protective Order Effectiveness: Justice or Just A Piece of Paper?*, 25 *VIOLENCE & VICTIMS* 332, 344–45 (2010).

151. TK Logan, Lisa Shannon, Robert Walker & Teri Marie Faragher, *Protective Orders: Questions and Conundrums*, 7 *TRAUMA, VIOLENCE & ABUSE* 175, 180 (2006).

152. *E.g.*, PATRICIA TJADEN & NANCY THOENNES, *EXTENT, NATURE, AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE* 52 (2000), available at <https://www.ncjrs.gov/pdffiles1/nij/181867.pdf> (finding that only 17.1% of women physically assaulted by their intimate

violence do not go on to access social services available to abuse victims.<sup>153</sup> Reasons for not seeking further help and protective orders include fear of retaliation for going to court to get a protective order, lack of resources to secure an order, mistrust of the justice system, and a misperception regarding the effectiveness of protection orders.<sup>154</sup>

Among those who do seek a protection order, advice from police about this potential avenue of protection played an important role in enabling help seeking.<sup>155</sup> For many people subject to violence within the home, an officer intervening to stop the immediate violence during an emergency call may be the only opportunity for exposure to outside counsel. Thus, police can play a crucial role in dispensing information about protection orders. Systematizing police advice to assault victims regarding how to obtain a protection order may bring more potentially dangerous individuals to the attention of legal screens for firearms possession. To counteract the misimpression that protective orders do not matter, officers can underscore the preventive power of such interventions, including the fact that a protective order will make it easier to disarm the perpetrator. Of course, such advice would not substitute for legal guidance through the process of securing a restraining order against an assailant. But police officers can play an important role in informing potentially at-risk victims about the availability of protective orders and providing information about community resources to help people through the process.

Federal grants to law enforcement agencies can create incentives to make such scene-of-the-assault advice regarding protective orders a uniform practice. Indeed, by executive action, President Obama has used the power of the federal purse to incentivize state and local law enforcement to take action to improve firearms-violence prevention, such as providing information to the federal background check system.<sup>156</sup> While the national executive cannot commandeer state and local officials to do his bidding,<sup>157</sup> monetary incentives are frequently used to gain voluntary compliance to improve the uniformity of best practices.<sup>158</sup> Federal grants to strengthen local capabilities and enhance training can be used to systematize practices regarding identifying and advising victims in need of protection orders.<sup>159</sup>

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partners obtained a protection order); CDC, *Use of Medical Care, Police Assistance, and Restraining Orders by Women Reporting Intimate Partner—Massachusetts, 1996–1997*, 49 MORBIDITY & MORTALITY WKLY. REP. 485, 486 (2000) (thirty-four percent of people reporting partner violence in the preceding five years obtained a protective order); Holt et al., *Civil Protection Orders*, *supra* note 150, at 593 (2002) (twelve percent of women reporting partner violence to police received a protective order in the twelve-month follow-up period).

153. Daniel Brookoff, Kimberly K. O'Brien, Charles S. Cook, Terry D. Thompson & Charles Williams, *Characteristics of Participants in Domestic Violence: Assessment at the Scene of Domestic Assault*, 277 J. AM. MED. ASS'N 1369, 1371–72 (1997).

154. Logan et al., *supra* note 151, at 185.

155. *Id.* at 180.

156. WHITE HOUSE, GUN VIOLENCE REDUCTION PLAN, *supra* note 1, at 4.

157. *See, e.g.*, *Printz v. United States*, 521 U.S. 898, 913–19 (1997); *New York v. United States*, 505 U.S. 144, 160 (1992).

158. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2601–02 (2012) (discussing the use of monetary incentives to secure voluntary compliance).

159. *Cf. Matthew C. Waxman, Police and National Security: American Local Law Enforcement and Counterterrorism After 9/11*, 3 J. NAT'L SECURITY L. & POL'Y 377, 388–89

Law enforcement officers are well versed in the scope of their power when it comes to investigation, evidence seizure, and preservation and defusing of immediate violence.<sup>160</sup> Counseling of victims, in contrast, is less of a systematic area of emphasis.<sup>161</sup> Yet a well-established police role beyond ordinary criminal-law enforcement is protecting public safety.<sup>162</sup> Training police to inform at-risk victims about protection orders and to identify community resources that may help victims navigate the process is consistent with the police role of protecting public safety. Such an approach can also help close the gap—discussed in Part II—between the frequently observed risk factor of perpetration of interpersonal violence in the month before the firearms homicide and infrequent adjudication, which leads to blind spots in current laws disarming the dangerous.

#### CONCLUSION

After the national shock over mass shootings at Newtown, Navy Yard, Santa Monica College, Virginia Tech, and elsewhere, the nation is hungry to prevent firearms violence.<sup>163</sup> One in five Americans polled by the Kaiser Health Tracking Poll reported knowing someone who fell victim to gun violence—often a close loved one.<sup>164</sup> Four in ten Americans expressed at least some worry about being affected by gun violence personally.<sup>165</sup> Since 2013, after the mass slaughter of school children and teachers in Newtown, more than 1500 gun bills have been introduced in Congress and state legislatures.<sup>166</sup>

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(2009) (discussing examples of financial grants and training programs to coordinate law-enforcement practices).

160. *See, e.g.*, Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2535 (1996) (discussing sophisticated police training on rules regarding admissibility of evidence); *Training Materials*, POLICE L. INST., <http://www.policelaw.org/products/monthly-legal-review.html> (giving police monthly legal updates and online lessons).

161. *Cf.* Bruce J. Winick, *Applying the Law Therapeutically in Domestic Violence Cases*, 69 UMKC L. REV. 33, 84 (2000) (calling for a therapeutic reorientation of responses to domestic violence, including training of police in counseling skills to improve responses to domestic violence).

162. *See, e.g.*, *Brigham City v. Stuart*, 547 U.S. 398, 405 (2006) (responding to domestic disturbance); *Mich. Dep't of State v. Sitz*, 496 U.S. 444, 451 (1990) (addressing threat to public safety posed by drunk driving).

163. *See, e.g.*, CHELSEA PARSONS & ANNE JOHNSON, *YOUNG GUNS: HOW GUN VIOLENCE IS DEVASTATING THE MILLENNIAL GENERATION* 12 (2014) (reporting concerns among young people); *Kaiser Health Tracking Poll, Feb. 2013*, KAISER FAM. FOUND. (Feb. 27, 2013), <http://kff.org/disparities-policy/poll-finding/kaiser-health-tracking-poll-february-2013/> (reporting concerns in a national sample of people polled); *National Post-ABC News Poll, April 11–14, 2013*, WASH. POST. (May 22, 2013), [http://www.washingtonpost.com/page/2010-2019/WashingtonPost/2013/04/18/National-Politics/Polling/question\\_10456.xml?uuid=hWtQiKhyEeKeHLsPsMLt2Q](http://www.washingtonpost.com/page/2010-2019/WashingtonPost/2013/04/18/National-Politics/Polling/question_10456.xml?uuid=hWtQiKhyEeKeHLsPsMLt2Q) (reporting results of a national poll in which 52% of respondents surveyed believed enacting laws to limit gun violence should be a higher priority).

164. *Kaiser Health Tracking Poll, supra* note 163.

165. *Id.*

166. *State Gun Laws Report, supra* note 20.

The high-horror events that jolted the nation to address firearms violence may misguide the focus of attention, however, because of the tendency to focus on the salient and overlook the prevalent.<sup>167</sup> The paradigm of the dangerous in public opinion and legislative proposals is the heavily armed, mentally disordered stranger hunting in public.<sup>168</sup> Yet as the data presented in Part II showed, there was a low prevalence of known mental issues among perpetrators of homicide-suicides. Mental-health problems may have been festering but unidentified. This means that using mental-health problems as the key criterion for discerning the potentially dangerous would miss the majority of those at risk for homicide-suicides.

Instead, the main risk factors for both firearms homicides generally and extraordinary homicidal-suicidal violence feared by the public involve seemingly mundane violence at home and among people who know one another. Examining the history of perpetrators who escalate to extraordinary violence reveals that early warning signs involve interpersonal violence. In many cases, such incidents of violence are never addressed in the legal system, thereby evading existing firearms restrictions triggered by adjudication. To improve firearms-violence prevention, it is crucial to first understand who constitutes the dangerous missed by the law's current screens and why detection is undermined. This Article answered these questions using recent National Violent Death Reporting System data.

It may be tempting to try to address the problem of red-flag violence slipping through current firearms-restrictions laws by trying to expand legal restrictions to cover unadjudicated violence. However, such an approach of adding new firearms-restrictions laws faces major political hurdles.<sup>169</sup> A more attainable approach is to focus on executive action steering law-enforcement discretion. This Article proffers a proposal focused on scene-of-the-assault procedure that can be achieved through executive action regardless of whether new laws survive the formidable gauntlet for adding new firearms restrictions.

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167. *See supra* notes 78–81 and accompanying text.

168. *See supra* Part I.

169. *See supra* notes 135–137 and accompanying text.