

MASS MURDER: AMERICAN UNEXCEPTIONALISM, D.C. v. HELLER, AND “REASONABLENESS”

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ABSTRACT

Lower courts have used a variety of techniques to largely ignore *District of Columbia v. Heller* (2008) and *McDonald v. Chicago* (2010), primarily by defining various categories of gun ownership outside a narrow definition of the “core” of the right protected by the Second Amendment. Will this same approach be used by a future Supreme Court to effectively reverse *Heller* by declaring some weapons too effective for mass murder to be protected? Is mass murder exceptionally American? If so, can America’s relatively *laissez-faire* gun control laws be the cause? Could a narrow reading of the Second Amendment, post-*District of Columbia v. Heller*, qualify as “reasonable” or “rational” because of the social costs of this supposed American exceptionalism?

I. THE RELEVANCE OF MASS MURDER

While mass murders receive enormous media attention, they are actually very atypical of murder in the United States. USA Today’s survey of mass murders 2006-2010 observed that they are “only about 1% of all murders nationally.”¹ While each such incident is clearly catastrophic, it

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¹ Meaghan Hoyer & Brad Heath, *Mass Killings Occur in USA Once Every Two Weeks*, USA TODAY (Dec. 19, 2012), <http://www.gannett-cdn.com/GDContent/mass-killings/index.html#frequency> (emphasis in original).

makes little sense for rare events to drive public policy. Much of the current panic is about semiautomatic rifles such as the AR-15.² Not only are rifles of all types rarely used in murders in the United States (2.5% of all murders)³ but even among the highly publicized mass murders, “A third of mass killings didn’t involve guns at all,” and of the firearms used in mass murders, only 8.6% are semiautomatic rifles.”⁴ Thus, only about 5.7% of mass murders involve semiautomatic rifles, of which only some are the fearsome “assault weapons” that the courts of appeal increasingly regard as outside the Second Amendment’s “core” protections.

II. LOWER COURTS IGNORING DISTRICT OF COLUMBIA V. HELLER

District of Columbia v. Heller (2008) should have put an end to questions about whether the Second Amendment protected an individual right to keep and bear arms. However, some lower courts have simply ignored it, often by applying intermediate scrutiny to the question of whether a statute is contrary to the Second Amendment. As Nelson Lund points out, “courts usually invoke the notoriously manipulable standard of intermediate scrutiny.”⁵ Some courts adopt the standard of scrutiny from *Heller*’s dissenting opinion,⁶ even asserting that possession of some categories of firearms are not protected at all.⁷

As an example, in *Kolbe v. Hogan*, the Fourth Circuit upheld a Maryland ban on “assault weapons” and large capacity magazines by holding that the banned weapons are “like” automatic rifles (machine guns), and thus not protected by the Second Amendment.⁸ This claim is immediately

² Dan McKay, *Democratic Candidates for New Mexico Governor Back AR-15 Ban*, LAS CRUCES [N.M.] SUN NEWS (Mar. 29, 2018) (“But all three Democrats running for governor in New Mexico say they support a statewide ban on the sale of AR-15s — the style of semiautomatic rifle used in the killing of 17 people at a high school in Parkland, Fla., last month.”).

³ 2016 CRIME IN THE UNITED STATES, EXPANDED HOMICIDE DATA TABLE 4, FBI, <https://ucr.fbi.gov/crime-in-the-u.s/2016/crime-in-the-u.s.-2016/tables/expanded-homicide-data-table-4.xls> (last visited Sept. 30, 2018) (Total murders: 15,070; Rifles: 374).

⁴ Meaghan Hoyer & Brad Heath, *Mass Killings Occur in USA Once Every Two Weeks*, USA TODAY (Dec. 19, 2012), <http://www.gannett-cdn.com/GDContent/mass-killings/index.html#weapons>.

⁵ Nelson Lund, *The Right to Keep and Bear Arms in the Roberts Court*, in AMERICAN FEDERALISM AND PUBLIC POLICY 11 (Christopher P. Banks ed., 2018)

⁶ *Id.*

⁷ *Id.* at 12. See also, Robert J. Cottrol & George A. Mocsary, *Guns, Bird Feathers, and Overcriminalization: Why Courts Should Take the Second Amendment Seriously*, 14 GEO. J.L. & PUB. POL’Y 17, 31-36 (2016) (summarizing post-*Heller* decisions “have, at best, mildly confined government regulation of public carry.”).

⁸ Lund, *supra* note 6, at 12. See also, *Kolbe v. Hogan*, 849 F.3d 114, 135 (4th Cir. 2017) (“Because the banned assault weapons and large-capacity magazines are ‘like’ ‘M-16 rifles’ — ‘weapons that are most useful in military service’ — they are among those arms that the Second Amendment does not shield.”). *But see* *United States v. Staples*, 971 F.2d 608 (10th Cir. 1992) (conviction of

identifiable as false because federal law defines machine guns in a way that excludes the banned “assault weapons.”⁹ *Kolbe* admits that the “assault weapons” are not machine guns but are “like” them for purposes of Second Amendment analysis.¹⁰ In at least one decision, *Bridgeville Rifle & Pistol Club, Ltd. v. Small* (2017), the dissent ignores the holdings of both *Heller*¹¹ and *McDonald v. Chicago* (2010).¹² As discussed in section I, rifles of all types are seldom used for murders, even mass murders.

Intermediate scrutiny has not always emasculated *Heller*; *People v. Chairez* (2018) struck down an Illinois law using yet another standard of scrutiny: “All of this suggests that elevated intermediate scrutiny should apply.”¹³ Rational basis, strict scrutiny, intermediate scrutiny, “elevated intermediate scrutiny.” How many different standards of scrutiny will the courts find?

III. WHAT STANDARD OF SCRUTINY?

The wonderful thing about standards of scrutiny is that there are so many to choose from, with more added at the apparent whim of federal judges.¹⁴ Strict scrutiny requires a law in conflict with an explicit constitutional provision to satisfy three requirements: it must (1) serve a compelling governmental interest; (2) be narrowly tailored to meet that interest; and (3) employ the least restrictive means available.¹⁵ While widely perceived as a very high standard to meet, statistics show that only “30% of

defendant upheld because M16 parts were found in proximity to an AR-15 pattern rifle and which could therefore be assembled into a machine gun, requiring licensing.).

⁹ 26 U.S.C. § 5845(b) (2018) (“The term ‘machinegun’ means any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger.”).

¹⁰ *Kolbe* admits that “Although an M16 rifle is capable of fully automatic fire and the AR-15 is limited to semiautomatic fire, their rates of fire (two seconds and as little as five seconds, respectively, to empty a thirty-round magazine) are nearly identical.” 849 F.3d at 136. To paraphrase George Orwell’s *Big Brother*, “2=5.”

¹¹ *Bridgeville Rifle & Pistol Club, Ltd. v. Small*, 176 A.3d 632 (Del. 2017) (listing pre-*Heller* decisions that denied that the Second Amendment protected an individual right).

¹² *Id.* at 678 (“The Supreme Court of the United States held on multiple occasions that the first eight amendments did not apply to the states.”)

¹³ *People v. Chairez*, 2018 IL 121417, ¶ 50 (2018) (striking down a state law that banned firearms possession within 1000 feet of a park).

¹⁴ *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 93 (2d Cir. 2012) (“We do not believe, however, that heightened scrutiny must always be akin to strict scrutiny when a law burdens the Second Amendment. . . . Although we have no occasion to decide what level of scrutiny should apply to laws that burden the ‘core’ Second Amendment protection identified in *Heller*, we believe that applying less than strict scrutiny when the regulation does not burden the ‘core’ protection of self-defense in the home makes eminent sense in this context and is in line with the approach taken by our sister circuits.”).

¹⁵ Johan Rabe, *Equality, Affirmative Action and Justice* 48-49 (2001).

all applications of strict scrutiny - nearly one in three - result in the challenged law being upheld.”¹⁶

At the other end of the spectrum stands rational basis scrutiny, which requires courts decide whether a law has “some rational basis within the knowledge and experience of the legislators.”¹⁷ Defining whether the legislators had a “rational basis” for a given law is clearly second-guessing the legislators’ intent or knowledge. This seems a very low standard. The Court overturned a state constitutional amendment passed by the voters of Colorado¹⁸ by asserting that the amendment’s limitation on governmental power “lacks a rational relationship to legitimate state interests.”¹⁹ Apparently, the voters of Colorado were not rational, or at least a majority of the justices on the Supreme Court believed that *their* opinion on this subject was more rational than a majority of Colorado voters.²⁰

In between these two standards of scrutiny lies a variety of variations on intermediate scrutiny, two of which were adopted on the model of First Amendment case law, which allows lower standards of scrutiny for actions that are not at the core of the fundamental right.²¹

During *Heller’s* oral arguments, the whole question of what standard of review should apply was raised. Chief Justice Roberts commented on the phrasing used in strict scrutiny: “Well, these various phrases under the different standards that are proposed, ‘compelling interest,’ ‘significant interest,’ ‘narrowly tailored,’ none of them appear in the Constitution; and I wonder why in this case we have to articulate an all-encompassing

¹⁶ Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 796 (2006).

¹⁷ *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938).

¹⁸ *Romer v. Evans*, 517 U.S. 620, 623 (1996).

¹⁹ *Id.* at 631.

²⁰ See generally *id.*

²¹ *United States v. Marzzarella*, 614 F.3d 85, 96-97 (3d Cir. 2010) (“Strict scrutiny is triggered by content-based restrictions on speech in a public forum but content-neutral time, place, and manner restrictions in a public forum trigger a form of intermediate scrutiny. Regulations on non-misleading commercial speech trigger another form of intermediate scrutiny In sum, the right to free speech, an undeniably enumerated fundamental right is susceptible to several standards of scrutiny, depending upon the type of law challenged and the type of speech at issue. We see no reason why the Second Amendment would be any different.”) (citations omitted); *Ezell v. City of Chicago*, 651 F.3d 684, 708 (7th Cir. 2011) (“Labels aside, we can distill this First Amendment doctrine and extrapolate a few general principles to the Second Amendment context. First, a severe burden on the core Second Amendment right of armed self-defense will require an extremely strong public-interest justification and a close fit between the government’s means and its end. Second, laws restricting activity lying closer to the margins of the Second Amendment right, laws that merely regulate rather than restrict, and modest burdens on the right may be more easily justified. How much more easily depends on the relative severity of the burden and its proximity to the core of the right.”). The aforementioned reasoning was cited approvingly in *Ezell v. City of Chicago*, 846 F.3d 888, 893 (7th Cir. 2017), which struck a Chicago shooting range ban.

standard.”²² He also gave reason to be suspicious of applying the First Amendment’s scrutiny standard:

I mean, these standards that apply in the First Amendment just kind of developed over the years as sort of baggage that the First Amendment picked up. But I don’t know why when we are starting afresh, we would try to articulate a whole standard that would apply in every case?²³

IV. THE HAZARDS OF UPWARD MOBILITY

The unwillingness of lower court judges to enforce existing precedent, or at least to find ways to subvert it through incorrect use of scrutiny standards, would merely be an unfortunate problem if the U.S. Supreme Court would consistently overturn these errors. In at least one case, the Court did exactly that: *Caetano v. Massachusetts* (2016).²⁴ This is especially concerning because *Heller* is a very recent and highly controversial precedent, one that appears to have been largely subverted by most circuits, with little or no apparent interest by the Court in correcting them.²⁵

Because justices in recent times have always been lower court judges before appointment to the Court, it seems a real possibility that some of these judges who apparently ignore or effectively disable *Heller* and *McDonald* may someday be in a position to do unappealable, irreparable harm to both decisions. Overturning precedent is not unprecedented, of course, but there are more subtle ways to render *Heller* and *McDonald* moot.

One such method is the primary focus of this article: using “reasonableness” to narrow the right through the mechanism of moving significant parts of the right outside the “core” of the right. While the First Amendment’s guarantees are fundamental rights, there are some exceptions where conduct is outside the core of that right (e.g. child pornography,²⁶

²² Transcript of Oral Argument at 44, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290).

²³ *Id.*

²⁴ See *Caetano v. Massachusetts*, 136 S. Ct. 1027 (2016) (per curiam) (overturning a state law prohibiting stun guns).

²⁵ Nelson Lund, *The Right to Keep and Bear Arms in the Roberts Court*, in *AMERICAN FEDERALISM AND PUBLIC POLICY* 11 (Christopher P. Banks ed., 2018) (“In the years since *Heller* and *McDonald* were decided, most federal circuit court decisions have had more in common with Breyer’s *Heller* dissent than with Scalia’s majority opinion.”). George A. Mocsary, *Defying the Supreme Court in Kolbe v. Hogan*, *LAW AND LIBERTY* (Dec. 20, 2017), <http://www.libertylawsite.org/2017/12/20/defying-the-supreme-court-in-Kolbe-v-Hogan/> (exploring the 4th Circuit’s defiance of *Heller* and the Supreme Court’s apparent reluctance to correct it).

²⁶ *New York v. Ferber*, 458 U.S. 747, 763 (1982) (“There are, of course, limits on the category of child pornography which, like obscenity, is unprotected by the First Amendment.”).

incitement to riot,²⁷ libelous or slanderous speech²⁸). Similarly, the Second Amendment might be interpreted to exclude firearms that pose unusual risks to civilized society by the claim that some firearms are outside the core of that right. A number of appellate court judges who recently treated the Second Amendment harshly might also be reluctant to apply strict scrutiny to a fundamental human right to self-defense if they move up the ladder to the Supreme Court. Thus, a future Court might be willing to overturn *Heller* or narrow the Second Amendment's protections with respect to the categories of protected arms.

V. BRANDEIS BRIEFS AND "REASONABLENESS"

Eventual U.S. Supreme Court Associate Justice Louis Brandeis is often remembered for his seminal "Brandeis Brief" in *Muller v. Oregon* (1908),²⁹ which placed legal arguments second to social science claims and arguments. Brandeis's view was that "judges must decide on statutory rather than on constitutional grounds."³⁰ As part of that process, "In a democracy social policy is made by legislatures, not by judges, and the Constitution must be read as requiring the Court to exercise judicial restraint."³¹ Thus, in the absence of certain conflicts with the Constitution, social science could inform judges on the "reasonableness" of a statute to solve a specific social problem.

The Brandeis Briefs may well be submitted in future cases arguing that various types of firearms regulations can be considered "reasonable" because the United States is exceptional with respect to both firearms regulation and mass murder, creating a causal connection (a *post hoc ergo propter hoc* error). Such reasoning therefore might allow a narrower reading of the

²⁷ *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) ("[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.")

²⁸ *Beauharnais v. Illinois*, 343 U.S. 250, 255-56 (1952) ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous..."). *But see* *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (Freedom of the press includes "vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.")

²⁹ *Muller v. Oregon*, 208 U.S. 412 (1908) (At issue was a statute prohibiting women from working more than a certain number of hours per week.)

³⁰ Philippa Strum, *Brandeis and the Living Constitution*, in *BRANDEIS AND AMERICA* 121 (Nelson L. Dawson ed., 1989).

³¹ *Id.* The conflict with *current* progressive judicial reasoning should be obvious. Social policy made by legislatures is regularly overturned by the Supreme Court on constitutional grounds. *See* *Lawrence v. Texas*, 539 U.S. 558 (2003) (overturning Texas' sodomy law); *Roe v. Wade*, 410 U.S. 113 (1973) (overturning Texas' abortion law); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (striking down Connecticut's ban on providing contraceptives); *Romer v. Evans*, 517 U.S. 620, (1996) (overturning a vote of the people to limit passage of antidiscrimination statutes and ordinances to protect homosexuals from discrimination).

Second Amendment’s protections with respect to particular classes of firearms arguably outside the core protections of the Second Amendment in order to reduce a great social evil (mass murder) that these weapons can supposedly create.

This leads to a very important question: is “reasonableness” the same as the rational basis standard of review? “Reasonableness,” a significant component of the Brandeis Brief’s social science arguments, seems to have largely vanished from decisions of the Court since 1989.³² “Rational” is defined by the Oxford English Dictionary as “Based on or in accordance with reason or logic.”³³ It is hard to see how they are not identical.

Under *existing* precedents, reasonableness would not be sufficient. *FCC v. Beach Communications* (1993) clearly protects “fundamental constitutional rights” from rational basis scrutiny.³⁴ The best-known decision is likely *United States v. Carolene Products Co.* (1938), which argued for a more demanding standard of scrutiny than rational basis with respect to explicit constitutional protections.³⁵

This higher standard is not a new concept. Well back into the 19th century, the Court has used “reasonableness” as a standard when evaluating whether a statute might violate the 14th Amendment’s protections.³⁶ *District of Columbia v. Heller* appears to have recognized the Second Amendment as

³² Searching court decisions for the words “reasonableness” and “test” on scholar.google.com shows more than 312,000 matches, of which the most recent is *Graham v. Connor*, 490 U.S. 386, 396 (2018) (Blackmun, J., concurring), (“The Court’s inquiry into the ‘reasonableness’ of the conduct at issue was based on a ‘balancing [of] the need to search [or seize] against the invasion which the search [or seizure] entails.’”).

³³ 10 OXFORD ENGLISH DICTIONARY (2d ed. 1989)

³⁴ *FCC v. Beach Commc’ns*, 508 U.S. 307, 313 (1993) (“In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.”); For an explanation of the continuing debate about the limits of rational basis scrutiny, see *Dandridge v. Williams*, 397 U.S. 471, 520 (1970) (Douglas, J., dissenting) (“The extremes to which the Court has gone in dreaming up rational bases for state regulation in that area may in many instances be ascribed to a healthy revulsion from the Court’s earlier excesses in using the Constitution to protect interests that have more than enough power to protect themselves in the legislative halls.”).

³⁵ *United States v. Carolene Prods Co.*, 304 U.S. 144, 152 n.4 (1938) (“There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.”).

³⁶ *Gulf, Colo. & Santa Fe Ry. Co. v. Ellis*, 165 U.S. 150, 155 (1897) (“These are distinctions which do not furnish any proper basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.”); *Slaughter-House Cases*, 83 U.S. 36, 109 (1873) (“[B]ut as all by-laws must be reasonable, the common council cannot make a by-law which shall permit one person to carry on the dangerous business and prohibit another who has an equal right from pursuing the same business.”) (quoting *Mayor of Hudson v. Thorne*, 7 Paige Ch. 261 (N.Y. Ch. 1874)); *Yick Wo v. Hopkins*, 118 U.S. 356, 371 (1886) (overturning a San Francisco laundry ordinance clearly aimed at Chinese hand laundries).

protecting a fundamental right.³⁷ *McDonald v. Chicago* more clearly held this to be a fundamental right.³⁸ Nonetheless, precedents are, like the proverbial piecrust, “Easily made, easily broken.” As discussed in section III, above, moving some categories of currently legal weapons outside the core of the Second Amendment allows the use of the notoriously manipulable intermediate scrutiny standard.

This article therefore seeks to demonstrate that the United States is neither exceptional in its firearm mass murder problem, nor exceptional in its mass murder problem for all types of weapons, thus rendering any social science use of “reasonableness” irrelevant.

VI. THE CLAIM OF AMERICAN EXCEPTIONALISM

In 2015, after a mass murder at a church in Charleston, South Carolina, President Barack Obama expressed a widely held belief: “At some point, we as a country will have to reckon with the fact that this type of mass violence does not happen in other advanced countries. It doesn't happen in other places with this kind of frequency.”³⁹

Almost immediately, critics pointed out that the first sentence was clearly incorrect: “Over the decade and a half studied, the researchers found 23 incidents of mass shootings in the other 10 countries, resulting in 200 dead and 231 wounded. In the United States over the same period, there were 133 incidents that left 487 dead and 505 wounded.”⁴⁰ While the second sentence might be read as correct if looking only at number of incidents, the more commonly accepted measure of crime is events per 100,000 population or dead per 100,000; even then, the United States is only fourth on the list of mass murder firearms deaths per 100,000 (0.15) compared to Finland (0.34), Norway (1.3), and Switzerland (1.7) for the period 2000-2014.⁴¹

³⁷ *District of Columbia v. Heller*, 554 U.S. 570, 593-94 (2008) (“By the time of the founding, the right to have arms had become fundamental for English subjects. Blackstone . . . cited the arms provision of the Bill of Rights as one of the fundamental rights of Englishmen.”) (citations omitted).

³⁸ *McDonald v. Chicago*, 561 U.S. 742, 767 (2010) (“We now turn directly to the question whether the Second Amendment right to keep and bear arms is incorporated in the concept of due process. In answering that question, as just explained, we must decide whether the right to keep and bear arms is fundamental to our scheme of ordered liberty Our decision in *Heller* points unmistakably to the answer. Self-defense is a basic right, recognized by many legal systems from ancient times to the present day.”).

³⁹ Kevin Liptak & Brenna Williams, *Watch Obama React to Mass U.S. Shootings*, CNN (June 12, 2016, 4:00 PM), <https://www.cnn.com/2015/06/18/politics/obama-shootings-esponses/index.html>.

⁴⁰ Keeley Herring & Louis Jacobson, *Is Barack Obama Correct That Mass Killings Don't Happen in Other Countries?*, POLITIFACT (June 11, 2015, 10:54 AM), <https://www.politifact.com/truth-o-meter/statements/2015/jun/22/barack-obama/barack-obama-correct-mass-killings-dont-happen-oth/>.

⁴¹ *Id.*

VII. WHY RATES MATTER

The first question that might be asked is, “Why do population rates matter instead of raw counts of such incidents?” The reason is that many mass murders (as well as the far more common individual murders) are committed by persons with severe mental illness problems, whose actions are clearly a consequence of those problems.⁴² Some of the recent and widely publicized examples include:

- Russell Eugene Weston, Jr., after shooting two U.S. Capitol police officers to death in 1999, explained his actions to a court-appointed psychiatrist as an attempt to prevent the spread of a disease by cannibals.⁴³ Like many of the schizophrenics who become local, national, or even international headlines, Weston had a long history of mental illness well known to family, mental health workers, and police, but he had not been hospitalized for any great length of time.⁴⁴
- An employee of the Postal Service, Jennifer Sanmarco, was removed from her Goleta, California workplace in 2003 and placed on psychological disability because she was acting strangely. Thereafter, she moved to Milan, New Mexico, where her neighbors described her as “crazy as a loon.” A local businessman said on occasion he had to bring her inside from the cold where she would kneel and pray for hours, in a trance. She returned to the Goleta mail sorting facility in January 2006—and murdered five employees, before taking her own life.⁴⁵
- In October 2005, the family of David W. Logsdon of Kansas City, Missouri, contacted police over Logsdon’s deteriorating mental condition. (Logsdon had a history of mental illness and alcoholism.) The police took Logsdon to a mental hospital for treatment, concerned that he was suicidal. He was released six hours later. In April 2007, Logsdon beat his neighbor to death and stole her late husband’s rifle. At a nearby

⁴² See Clayton E. Cramer, *Mental Illness and the Second Amendment*, 46 CONN. L. REV. 1301, 1310-14 (2014) (listing high-profile mass murders clearly caused by severe mental illness); *id.* at 1303-10 (collecting studies on mental illness and murder correlations).

⁴³ Bill Miller, *Capitol Shooter’s Mind-Set Detailed*, WASH. POST (Apr. 23, 1999), <https://www.washingtonpost.com/wp-srv/national/longterm/shooting/stories/weston042399.htm>.

⁴⁴ See Clayton Cramer, *Madness, Deinstitutionalization & Murder*, FEDERALIST SOCIETY: ENGAGE (Mar. 2012), <https://fedsoc.org/commentary/publications/madness-deinstitutionalization-murder> for another detailed list of such murders.

⁴⁵ Martin Kasindorf, *Woman Kills 5, Self at Postal Plant*, USA TODAY (Feb. 1, 2006), https://usatoday30.usatoday.com/news/nation/2006-01-31-postal-shooting_x.htm; Dan Frosch, *Woman in California Postal Shootings Had History of Bizarre Behavior*, N.Y. TIMES (Feb. 3, 2006), <https://www.nytimes.com/2006/02/03/us/woman-in-california-postal-shootings-had-history-of-bizarre-behavior.html>

shopping mall, he shot and killed two people at random, wounding four others.⁴⁶ The remarkable, early arrival of police, who shot Logsdon to death, prevented a larger massacre.⁴⁷

- That same month, Seung-Hui Cho murdered thirty-two students and faculty before taking his own life. At least some of his professors noticed he was acting strangely, and he was briefly hospitalized after a stalking incident. The special judge who determined Seung-Hui's competency concluded that he should be involuntarily committed because he was a danger to others. The next day, Seung-Hui left the hospital, apparently not constrained by the supposed involuntary commitment ordered by the judge. Soon he was back on campus, living in a world of paranoid schizophrenia. Because he was not involuntarily committed to a hospital (or at least because that information failed to get to the national background check system), Seung-Hui was able to legally purchase handguns that he used in the largest gun mass murder in U.S. history up to that point.⁴⁸
- In April 2009, Jiverly Wong murdered thirteen people at a Binghamton, New York immigrant-assistance center. Letters written by Wong to local news media demonstrated what "Dr. Vatsal Thakkar, assistant professor of psychiatry at NYU's Langone Medical Center" described as "major mental illness, quite possibly paranoid schizophrenia."⁴⁹
- In January 2011, Jared Lee Loughner opened fire on a crowd at a town hall meeting of United States Representative Gabrielle Giffords and her constituents, killing six and injuring thirteen. Loughner had a history of police contacts involving death threats and was expelled from college for bizarre actions that clearly established his mental illness. In spite of his frightening behavior, he was never hospitalized, even for observation – until he made himself nationally famous.⁵⁰ A series of disturbing web

⁴⁶ James Klatell, *Police ID Kansas City Mall Shooter*, CBS NEWS (Apr. 30, 2007), <https://www.cbsnews.com/news/police-id-kansas-city-mall-shooter/>

⁴⁷ Maria Sudekum Fisher, *Shooter Planned to "Cause Havoc" at Mall, Police Say*, SEATTLE TIMES (May 1, 2007) <https://www.seattletimes.com/nation-world/shooter-planned-to-cause-havoc-at-mall-police-say/>.

⁴⁸ *Close the Loophole Cho Sneaked Through*, HAMPTON ROADS VIRGINIAN-PILOT (Apr. 25, 2007), https://pilotonline.com/opinion/editorial/article_dedcba32-4996-5fd1-bfb4-c70bb2182b44.html; Michael Welner, *Cho Likely Schizophrenic, Evidence Suggests*, ABC NEWS (Apr. 17, 2007), <https://abcnews.go.com/Health/VATech/cho-schizophrenic-evidence-suggests/story?id=3050483>.

⁴⁹ Austin Fenner, Kirsten Fleming & Dan Mangan, *I Am Shooting—Have a Nice Day*, N.Y. POST (Apr. 7, 2009), <https://nypost.com/2009/04/07/i-am-shooting-have-a-nice-day/>.

⁵⁰ Tim Steller, *Man Linked to Giffords Shooting Rampage Called "Very Disturbed"*, ARIZ. DAILY STAR (Jan. 8, 2011), https://tucson.com/news/local/crime/man-linked-to-giffords-shooting-rampage-called-very-disturbed/article_91db5db4-1b74-11e0-ba23-001cc4c002e0.html (Loughner had previously made death threats and been contacted by police); *College Asked ATF About Loughner Before Rampage*, CBS NEWS (May 20, 2011, 4:07 AM), <http://www.cbsnews.com/2100-201162-20064455.html> (His behavior was described by school administrators as "bizarre" and

postings and YouTube videos also confirmed that Loughner’s grasp on reality was severely impaired.⁵¹ Court-ordered psychiatric evaluations concluded that Loughner was suffering from schizophrenia and incompetent to stand trial.⁵²

- Certainly, the most disturbing of these recent mass murders was in Newtown, Connecticut. Adam Lanza had some sort of psychiatric disorder, but his childhood diagnosis of Asperger’s Syndrome is not professionally considered associated with mass murder.⁵³ Some reports describe Lanza as suffering from sensory integration disorder (SID), where sensory inputs overwhelm the brain.⁵⁴ There is sizable overlap between the description of SID and the sensory problems that appear to be part of schizophrenia in expert opinion,⁵⁵ enough to wonder if Lanza was edging into schizophrenia, or if Lanza’s psychiatrist was reluctant to give this devastating diagnosis until he was certain. Early reports

“intimidating”; laughing and ranting inappropriately; ordered by the college to get a mental health evaluation before returning to campus).

⁵¹ David A. Fahrenthold & Clarence Williams, *Tucson Shooting Suspect Jared Loughner Appears To Have Posted Bizarre Messages*, WASH. POST (Feb. 26, 2011) https://www.washingtonpost.com/national-politics/tucson-shooting-suspect-jared-loughner-appears-to-have-posted-bizarre-messages/2011/01/08/AB0xFkD_story.html?utm_term=.9a28c9cbd22e (Loughner left “a series of postings and homemade videos that laid out a fervent, though largely incoherent, set of political views.” One quote from Loughner: “I can’t trust the current government because of the ratifications: the government is implying mind control and brainwash on the people by controlling grammar.”). Some of Loughner videos were still available two years later. See Classitup10, *INTRODUCTION: JARED LOUGHNER*, YOUTUBE (Dec. 15, 2010), <http://www.youtube.com/watch?v=nHoaZaLbqB4>.

⁵² Michael Martinez & Ted Rowlands, *Judge Rules Loughner Not Competent to Stand Trial*, CNN (May 26, 2011), <http://www.cnn.com/2011/CRIME/05/25/arizona.loughner.competency/index.html>.

⁵³ Daniel C. Murrie, Janet I. Warren, Marianne Kristiansson, & Park E. Dietz, *Asperger’s Syndrome in Forensic Settings*, 1 INT’L J. FORENSIC MED. 60-61 (2002) (reviews existing studies which argue whether Asperger’s patients are disproportionately violent, but also points to one study that suggests such violence is not premeditated); Barbara G. Haskins & J. Arturo Silva, *Asperger’s Disorder and Criminal Behavior: Forensic-Psychiatric Considerations*, 34 J. AM. ACAD. PSYCHOL. & L. 376-78 (2006) (furthering the active debate about disproportionate violence, but again arguing that violence by Asperger’s patients was the result of inability to read social cues and narrowly focused interests).

⁵⁴ Adam Clark Estes, *Revelations About Adam Lanza’s Mental Health Still Don’t Explain the Violence*, ATLANTIC WIRE (Feb. 19, 2013), <http://www.theatlanticwire.com/national/2013/02/revelations-about-adam-lanzas-mental-health-still-dont-explain-violence/62317/>.

⁵⁵ Peter Falkai, Andrea Schmitt, & Tyrone D. Cannon, *Pathophysiology of Schizophrenia*, in SCHIZOPHRENIA: CURRENT SCIENCE AND CLINICAL PRACTICE 42 (Wolfgang Gaebel, ed., 2011) (discussing dysfunction “of the cortico-cerebellar-thalamic-cortical neuronal circuit” and its role in filtering sensory information); Anthony J. Rissling & Gregory A. Light, *Neurophysical Measures of Sensory Registration, Stimulus Discrimination, and Selection in Schizophrenia Patients in Behavioral Neurobiology of Schizophrenia and Its Treatment* 284-86 (Neal R. Swerdlow, ed., 2010) (discussing the relationship between sensory input processing and schizophrenia).

indicate that Lanza's mother was attempting to have him hospitalized, and his discovery of this may have provoked the crime.⁵⁶

The Secret Service published a report in 2018 analyzing mass murders with three or more dead and concluded:

Nearly two-thirds of the attackers (n = 18, 64%) experienced mental health symptoms prior to their attacks. The most common symptoms observed were related to psychosis (e.g., paranoia, hallucinations, or delusions) and suicidal thoughts.... Further, some attackers (n = 7, 25%) had been hospitalized for treatment or prescribed psychiatric medications prior to their attacks.⁵⁷

The mental illness often present in these tragedies, schizophrenia, is a genetic disease affecting about 1% of the population.⁵⁸ Therefore, a nation of one million people will have ten times more schizophrenics than a nation of 100,000. A measure relative to population, as with most measures of criminal behavior, is clearly the only sensible evaluative method.

Obviously, not all mass murders fit into the mental illness category. The second large category of mass murder (seldom given much public attention) are domestic violence where usually the father kills his entire family. The third category are acts of terrorism. A few fit no existing pattern; the recent mass murder in Las Vegas seems to be a "Black Swan" crime (one so atypical that we may never see a similar one anytime soon): a multimillionaire who engaged in meticulous planning with devastating loss of life.⁵⁹ (This mass murder still killed less than at least four other U.S. mass murders in the last three decades).⁶⁰

⁵⁶ Jana Winter, *Fear Of Being Committed May Have Caused Connecticut Gunman To Snap*, FOX NEWS (Dec. 18, 2012), <http://www.foxnews.com/us/2012/12/18/fear-being-committed-may-have-caused-connecticut-madman-to-snap/> (An acquaintance of the family reported that Adam Lanza had found out about his mother's "petitioning the court for conservatorship and [her] plans to have him committed" and that this set him off; "[a] senior law enforcement official involved in the investigation" confirmed that Lanza's anger over these plans was being looked at "as a possible motive.").

⁵⁷ United States Secret Service, *Mass Attacks in Public Spaces – 2017*, MENTAL ILLNESS POL'Y ORG (Mar. 2018), https://mentalillnesspolicy.org/wp-content/uploads/secret_service_64_attacks_MI.pdf

⁵⁸ International Schizophrenia Consortium et al., *Common Polygenic Variation Contributes to Risk of Schizophrenia and Bipolar Disorder*, 460 NATURE 748-52 (2009) (discusses research demonstrating the location of the genes responsible for schizophrenia.)

⁵⁹ Larry Buchanan, C. J. Chivers, & Thomas Gibbons-Neff, *Inside the Las Vegas Gunman's Mandalay Bay Hotel Suite*, N.Y. TIMES (Oct. 4, 2017), <https://www.nytimes.com/interactive/2017/10/04/us/vegas-shooting-hotel-room.html>.

⁶⁰ *September 11th Terror Attacks Fast Facts*, CNN (Sep. 3, 2018), <https://www.cnn.com/2013/07/27/us/september-11-anniversary-fast-facts/index.html> (2977 dead); Joan Mower, Associated Press, *Dupont Plaza Fire Survivors Still Trying to Come to Terms With Tragedy*, L.A. TIMES (Mar. 8, 1987), http://articles.latimes.com/1987-03-08/news/mn-13410_1_dupont-plaza (96 dead); Larry Celona et al., *Fire Kills 87 People at the Happy Land Social Club in the Bronx in 1990*, N.Y. DAILY

VIII. NON-FIREARM MASS MURDERS IN THE U.S. AND ELSEWHERE

For many people, it is a surprise to find out that there are numerous mass murders committed with weapons other than firearms. *USA Today* gathered data on mass murders (“defined [as] killing four or more victims”) committed in the United States from 2006 through 2010, finding, “[a] third of mass killings didn’t involve guns at all. In 15 incidents, the victims died in a fire. In 20 others, the killer used a knife or a blunt object.”⁶¹

Other countries, with more restrictive gun control laws, also have non-firearm mass murders, such as the five stabbed to death in Calgary, Alberta, in 2013.⁶² Matthew de Groot, the perpetrator of the previously mentioned crime, was found not criminally responsible because of “a mental disorder.”⁶³

Australia is sometimes given as an example of the effectiveness of gun control for preventing mass murders, such as the 1996 Port Bryant mass murder.⁶⁴ However, Australia still has mass murders, such as the mass stabbing that killed eight siblings in Queensland, Australia,⁶⁵ and mass murders with blunt objects, such as the killing of five people in Sydney in 2009.⁶⁶ Are these other categories of mass murder not public safety concerns?

NEWS (Mar. 17, 2015), <https://www.nydailynews.com/new-york/nyc-crime/dozens-die-fire-illegal-bonx-social-club-1990-article-1.2152091>; Jayson Blair, *A Nation Challenged: Oklahoma City Bombing*, N.Y. TIMES (Mar. 25, 2002), <https://www.nytimes.com/2002/03/25/nyregion/nation-challenged-oklahoma-city-bombing-advice-task-rebuilding-mayor-who-knows.html> (168 dead).

⁶¹ Meaghan Hoyer & Brad Heath, *Mass Killings Occur in USA Once Every Two Weeks*, USA TODAY (DEC. 19, 2012), <https://www.usatoday.com/story/news/nation/2012/12/18/mass-killings-common/1778303/>; See *Explore the Data: U.S. Mass Killings Since 2006*, USA TODAY, <http://www.gannett-cdn.com/GDContent/mass-killings/index.html#explore> (last updated Feb. 22, 2018) (click buttons “SHOOTING”, “STABBING”, “BLUNT FORCE”, or “SMOKE INHALATION/BURNS” for the totals).

⁶² Jason Van Rassel, *Police Officer’s Son Charged in City’s Worst Mass Murder*, CALGARY [ALBERTA] HERALD (Apr. 17, 2014), <http://www.calgaryherald.com/Police+officer+charged+city+worst+mass+murder/9739998/story.html>.

⁶³ *Matthew de Groot Found Not Criminally Responsible for Stabbing Five People to Death at Calgary Party*, NATIONAL [CANADA] POST (May 26, 2016), *Matthew de Groot Found Not Criminally Responsible for Stabbing Five People to Death at Calgary Party*.

⁶⁴ Will Oremus, *In 1996, Australia Enacted Strict Gun Laws. It Hasn’t Has a Mass Shooting Since.*, SLATE, (Dec. 16, 2012). http://www.slate.com/blogs/crime/2012/12/16/gun_control_after_connecticut_shooting_could_australia_s_laws_provide_a.html (the article was formerly titled “How Many Shootings Will It Take for America to Control Its Guns?”).

⁶⁵ Jonathan Pearlman, *Eight Children Murdered In Mass Stabbing In Australia*, [U.K.] TELEGRAPH (Dec. 19, 2014), <https://www.telegraph.co.uk/news/worldnews/australiaandthepacific/australia/11302916/Eight-children-murdered-in-mass-stabbing-in-Australia.html>.

⁶⁶ Jamelle Wells, *Robert Xie Trial: Lin Family ‘Murdered With Hammer Bought From \$2 Shop*, A.B.C. [AUSTRALIA] (May 12, 2014), [http://www.abc.net.au/news/2014-05-12/robert-xie-lin-family-murdered-with-hammer-bought-from-\\$2-shop/5446870](http://www.abc.net.au/news/2014-05-12/robert-xie-lin-family-murdered-with-hammer-bought-from-$2-shop/5446870).

Mass murders by arson are also a problem in countries with pervasive gun control, as they are in the United States. Childers, Queensland's Palace Backpackers Hostel, was intentionally burned in 2000, killing fifteen.⁶⁷ Also in Australia, the 2011 Quakers Hill Nursing Home fire killed eleven, set by a nurse after police questioned him about drug abuse.⁶⁸

Japan is often pointed to as a paragon of a safe, gun-free society, but it, too, has mass murders. In 1995, a sarin poison gas attack killed thirteen and injured 6,200 others.⁶⁹ In 2016, a former employee of a nursing home stabbed to death nineteen of the patients.⁷⁰ Other mass murders (often involving knives) have taken place in recent years: eight students were stabbed to death at an Osaka school in 2001;⁷¹ a combination vehicle and stabbing incident killed seven in Tokyo in 2008;⁷² a father burned his wife and five children to death in Tokyo in 2017;⁷³ and a 2008 arson suicide attempt killed fifteen others in a Tokyo adult theater.⁷⁴

China, another society with very strict gun laws, also has mass murders. A 2014 terrorist attack in Kunming left thirty-three dead and 143 injured.⁷⁵ A series of school attacks from 2010-2012 killed at least twenty-five, total. While not all of these school attacks were mass murders (five or more killed in one attack), some meet the criteria: eight schoolchildren were murdered

⁶⁷ *A Decade On, Childers Remembers Hostel Fire Tragedy*, BRISBANE [AUSTRALIA] TIMES (June 23, 2010), <https://www.brisbanetimes.com.au/national/queensland/a-decade-on-childers-remembers-hostel-fire-tragedy-20100623-ywgx.html>.

⁶⁸ Candace Sutton, *Man Who Murdered 11 People in Nursing Home Fire 'Frothed at The Mouth' From Drugs And 'Put Nails In Tyres And Poured Paint' Over Boss's Car, Inquest Hears*, [U.K.] DAILY MAIL (Sep. 8, 2014), <https://www.dailymail.co.uk/news/article-2747402/Roger-Dean-murdered-11-people-nursing-home-fire-frothed-mouth-drugs-nails-tyres-poured-paint-bosss-car-inquest-hears.html>.

⁶⁹ *Japan Launches Website on Aum Cult in Bid to Raise Public Awareness of Splinter Groups*, JAPAN TIMES (Feb. 27, 2018), <https://www.japantimes.co.jp/news/2018/02/27/national/japan-launches-website-aum-cult-bid-raise-public-awareness-splinter-groups/>.

⁷⁰ Simon Lewis, *A History of Mass Killings in Japan*, TIME (July 26, 2016), <https://www.yahoo.com/news/history-mass-killings-japan-071621535.html>.

⁷¹ Doug Struck, *Diminished sense of safety in Japan: Stabbing Spree Shocks Nation*, WASH. POST, June 9, 2001.

⁷² David Dolan, *Man Stabs Shoppers in Tokyo Street, Killing Seven*, REUTERS (June 7, 2008), <https://www.reuters.com/article/us-japan-stabbing/man-stabs-shoppers-in-tokyo-street-killing-seven-idUST27752620080608>.

⁷³ AFP, *Five Children, Woman Dead in Japan 'Arson Attack': Reports*, THE HINDU (Oct. 6, 2017), [https://www.thehindu.com/news/international/five-children-woman-dead-in-japan-arson-attack-reports/article19806892.ece?_escaped_fragment_="](https://www.thehindu.com/news/international/five-children-woman-dead-in-japan-arson-attack-reports/article19806892.ece?_escaped_fragment_=)

⁷⁴ *Fire at Japanese Adult Video Theater Kills 15*, FOX NEWS (Oct. 1, 2008), <https://www.foxnews.com/story/fire-at-japanese-adult-video-theater-kills-15>.

⁷⁵ Dan Bloom & Kieran Corcoran, *Chinese Authorities Say Two WOMEN Were Part of Knife-Wielding Terror Gang Which Left at Least 33 Dead and 143 Wounded After Attacking a Train Station in China*, DAILY MAIL (Mar. 2, 2014), <https://www.dailymail.co.uk/news/article-2570996/At-27-dead-109-injured-gang-knife-wielding-men-attack-train-station-China.html>.

with a knife in Nanping in March 2010; and nine were killed in Hanzhong with a meat cleaver in May 2010.⁷⁶

Explosive mass murders have also been common in countries with restrictive gun laws. Some specific incidents include: (1) twenty-two people were killed with explosives in Manchester, England;⁷⁷ (2) two terrorists killed thirty-three people at an airport and subway station in Brussels, Belgium with bombs;⁷⁸ (3) there was an arson mass murder killing five in Leicester, England;⁷⁹ and (4) in Paris, France, terrorists murdered ninety at the Bataclan concert hall, with firearms and grenades.⁸⁰

In the last few years, there have been multiple motor-vehicle mass murders in Europe and Australia (eighty-four murdered with truck in Nice, France,⁸¹ twelve in Berlin, Germany with a truck,⁸² three with a SUV and one by stabbing in London,⁸³ five with a truck in Stockholm,⁸⁴ thirteen with truck in Barcelona, Spain,⁸⁵ and eight with a truck and knives in London.⁸⁶ While these were terrorist mass murders, others have been related to mental health

⁷⁶ Qi Yingjun cut 22 students Chinese 36-year-old man Ying Yingjun arrested, (Dec. 15, 2012), <http://www.china-xian.com/sh/fzsh/201212/1534635.htm>; China Knife Attack 'Kills Eight', BBC (May 9, 2010), <http://news.bbc.co.uk/2/hi/8670662.stm>; 28 Kindergarten Children Injured in Knife Attack, China.org.cn (Apr. 29, 2010), http://www.china.org.cn/wap/2010-04/29/content_19933751.htm; Chris Bodeen, 9 Killed in Latest Attack at China School, Associated Press (May 12, 2010), <https://web.archive.org/web/20100516024406/https://www.google.com/hostednews/ap/article/ALeqM5gbb3SvwJW0F1Te35LxNwJdk2UBnQD9FL8K000>.

⁷⁷ *UK Police: 22 Confirmed Dead After Terror Incident at Ariana Grande Concert*, CBS NEWS (May 23, 2017), <https://www.cbsnews.com/news/ariana-grande-concert-manchester-arena-explosion/>.

⁷⁸ Andrew Higgins & Kimiko De Freytas-Tamura, *In Brussels Bombing Plot, a Trail of Dots Not Connected*, N.Y. TIMES (Mar. 26, 2016), <https://www.nytimes.com/2016/03/27/world/europe/in-brussels-bombing-plot-a-trail-of-dots-not-connected.html>.

⁷⁹ Andrew Parker, *LEICESTER BLAST: Three Men Accused of Using Petrol to Start Leicester Shop Explosion Which Killed Five People*, [U.K.] SUN (Mar. 6, 2018), <https://www.thesun.co.uk/news/5733996/three-men-used-petrol-to-start-leicester-shop-explosion-which-killed-five-people/>.

⁸⁰ Gregor Aisch et al., *Three Hours of Terror in Paris, Moment by Moment*, N.Y. TIMES (Nov. 9, 2016), <https://www.nytimes.com/interactive/2015/11/13/world/europe/paris-shooting-attacks.html>.

⁸¹ Angela Dewan, Jason Hanna & Euan McKirdy, *Attack in Nice: Truck Driver Identified as 31-Year-Old Tunisia Native*, CNN (July 16, 2016), <https://edition.cnn.com/2016/07/15/europe/nice-france-truck/index.html>.

⁸² *Anschlag in Berlin Zahl der Verletzten liegt bei 56*, BERLINER ZEITUNG (MAR. 6, 2017), [HTTPS://WWW.BERLINER-ZEITUNG.DE/BERLIN/POLIZEI/ANSCHLAG-IN-BERLIN-ZAHL-DER-VERLETZTEN-LIEGT-BEI-56-26147624](https://www.berliner-zeitung.de/berlin/polizei/anschlag-in-berlin-zahl-der-verletzten-liegt-bei-56-26147624).

⁸³ *'No evidence' Khalid Masood Had Links to IS or al-Qaeda*, B.B.C. (Mar. 27, 2017), <https://www.bbc.com/news/uk-39408786>.

⁸⁴ Simon Johnson, Niklas Pollard, & Rebecka Roos, *Uzbek Suspect in Swedish Attack Sympathized with Islamic State: Police*, REUTERS (Apr. 9, 2017), <https://www.reuters.com/article/us-sweden-attack/sweden-questioning-seven-people-over-deadly-truck-attack-police-idUSKBN17B089>.

⁸⁵ *Barcelona Attack: Four Suspects Face Court After Van Driver is Shot Dead*, [U.K.] GUARDIAN (Aug. 21, 2017), <https://www.theguardian.com/world/2017/aug/21/police-searching-barcelona-van-driver-shoot-man>.

⁸⁶ Vikram Dodd, *London Bridge: More Arrests as Police Tell How Terrorists Wanted to Use Truck*, [U.K.] GUARDIAN (Jun. 10, 2017), <https://www.theguardian.com/uk-news/2017/jun/10/worse-terror-attack-on-london-bridge-foiled-by-chance-police-say>.

conditions. For example, six were murdered with a car in Melbourne, Australia by an individual with mental health issues.⁸⁷

IX. FIREARMS MASS MURDERS OUTSIDE THE U.S.

Firearms mass murders are not exceptionally American. Christian Dornier, age thirty-one, under treatment for “nervous depression,” murdered fourteen people in three villages in eastern France.⁸⁸ He was later found innocent by reason of insanity.⁸⁹ Eric Borel, age sixteen, murdered his family with a hammer and a baseball bat and went on a shooting rampage in the nearby town of Cuers, France in September 1995. He killed thirteen total, including himself.⁹⁰ In March 2002, Richard Durn murdered eight local city officials and wounded nineteen others in Nanterre, a suburb of Paris, France. Durn had “a long history of psychological problems” and was chronically unemployed. After his arrest, he was described as “calm but largely incoherent,” and then leaped to his death through a window.⁹¹

In April 2002, nineteen-year old Robert Steinhäuser went into a school from which he had been expelled in Erfurt, Germany and murdered eighteen people before killing himself.⁹² In April 2011, Wellington Menezes de Oliveira went into a school in Rio De Janeiro, Brazil, murdering twelve children, before killing himself. His suicide note was unclear.⁹³ Later the same month, Tristan van der Vlis went into a shopping mall in Alphen aan der Rijn, the Netherlands and shot six people, killing them. The Netherlands has very strict gun licensing laws; nonetheless, van der Vlis had a gun license despite a history of brief mental illness hospitalizations and suicide attempts.⁹⁴

⁸⁷ Holly McKay & Cassie Zervos, *Blackburn South Woman Dies in Hospital After Bourke St Rampage*, [Victoria, Australia] HERALD SUN (Jan. 30, 2017), <https://www.heraldsun.com.au/news/law-order/blackburn-south-woman-dies-in-hospital-after-bourke-st-rampage/news-story/5ff56444b07120c38af4620140e2e1c?nk=2e6f4a62c099afe89bfffac918de4acd0-1538534310>.

⁸⁸ *Gunman's Rampage in France Leaves 14 Dead*, L.A. TIMES (Jul. 13, 1989), http://articles.latimes.com/1989-07-13/news/mn-4502_1_half-hour-rampage.

⁸⁹ DAVID LESTER, *MASS MURDER: THE SCOURGE OF THE 21ST CENTURY* 106 (Nova Science Publishers 2004).

⁹⁰ *Teen-Age Gunman Kills Himself and 12 Others in France*, N.Y. TIMES (Sep. 25, 1995), <https://www.nytimes.com/1995/09/25/world/teen-age-gunman-kills-himself-and-12-others-in-france.html>.

⁹¹ James Graff, *Politics Under the Gun*, TIME, Mar. 31, 2002, <https://content.time.com/time/magazine/article/0,9171,221091,00.html>.

⁹² Nick Caistor, *Profile of a Teenage Killer*, BBC NEWS, Apr. 28, 2002, <http://news.bbc.co.uk/2/hi/europe/1956206.stm>; *18 Dead in German School Shooting*, BBC NEWS, Apr. 26, 2002, <http://news.bbc.co.uk/2/hi/europe/1952869.stm>.

⁹³ *Brazil mourns Rio school shooting victims*, BBC NEWS, Apr. 8, 2011, <https://www.bbc.com/news/world-latin-america-13020999>

⁹⁴ *Safety Council to Investigate Gun Laws*, DUTCHNEWS.NL (Apr. 12, 2011), http://www.dutchnews.nl/news/archives/2011/04/safety_council_to_investigate.php; *Schutter was*

Eight terrorist mass murder attacks in Paris, France resulted in 130 deaths, although only four of the incidents qualify as mass murders (fifteen dead at Le Carillion and Le Petit Cambodge restaurants, with firearms; five dead at *La Bonne Bière*; and ninety dead at the Bataclan concert hall, from firearms and grenades).⁹⁵

Some would argue that terrorist attacks are fundamentally acts of war and should not be treated the same way as “civilian” mass murders. Yet, supporters of gun control argue that the Terrorist Screening Database (popularly known as the “don’t fly” list) should be used to deny gun purchase,⁹⁶ even though the defects in how people are added and removed from that list has caused the ACLU to make an exceedingly rare alliance with the National Rifle Association.⁹⁷

X. SUMMARY

As the preceding sections demonstrate, there is nothing exceptionally American about mass murder or even firearms mass murder. While our rates of firearms mass murder are higher than most other developed nations, we are not at the top of the list of mass murder deaths per 100,000 people, and including non-firearm, mass murders might move us further down the list.

Even the fearsome, military-style semiautomatic rifles are rarely used in mass murders. To use a “reasonableness” basis as a means of narrowing the Second Amendment’s protections to exclude certain semiautomatic firearms based on claimed American exceptionalism is clearly unreasonable. There is nothing exceptional about American mass murder, or even the more narrow category of American mass murders with firearms.

The range of methods used for mass murder in other industrialized countries suggests that where murderous intent is present, mass murder is hard to prevent. Gun control may simply change the weapon.

al eerder suïcidaal, NOS NIEUWS, (Apr. 10, 2011), <http://nos.nl/artikel/232127-schutter-was-al-eerder-suïcidaal.html>.

⁹⁵ Gregor Aisch, Wilson Andrews, Larry Buchanan, et al., *Three Hours of Terror in Paris, Moment by Moment*, N.Y. TIMES (Nov. 19, 2016), <https://www.nytimes.com/interactive/2015/11/13/world/europe/paris-shooting-attacks.html>.

⁹⁶ Timothy Edgar, *Guns and the No-Fly List: Of Course We Shouldn't Allow Suspected Terrorists to Buy Firearms*, L.A. TIMES (Jun. 17, 2016), <http://www.latimes.com/opinion/op-ed/la-oe-edgar-watch-list-no-fly-guns-20160617-snap-story.html>.

⁹⁷ Hina Shamsi, *Until the No Fly List Is Fixed, It Shouldn't Be Used to Restrict People's Freedoms*, AMERICAN CIVIL LIBERTIES UNION (Dec. 7, 2015), <https://www.aclu.org/blog/national-security/discriminatory-profiling/until-no-fly-list-fixed-it-shouldnt-be-used-restrict> (“As we will argue to a federal district court in Oregon this Wednesday, the standards for inclusion on the No Fly List are unconstitutionally vague, and innocent people are blacklisted without a fair process to correct government error.”).

