

# CONNECTICUT LAW REVIEW

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VOLUME 46

MAY 2014

NUMBER 4

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## Article

### The Shooting Cycle

JOSH BLACKMAN & SHELBY BAIRD

*The pattern is a painfully familiar one. A gunman opens fire in a public place, killing many innocent victims. After this tragedy, support for gun control surges. With a closing window for reform, politicians and activists quickly push for new gun laws. But as time elapses, support decreases. Soon enough, the passions fade, and society returns to the status quo.*

*We call this paradigm “the shooting cycle.” This Article provides the first qualitative and quantitative analysis of the shooting cycle, and explains how and why people and governments react to mass shootings.*

*This Article proceeds in five parts. First, we bring empirical clarity to the debate over mass shootings. Contrary to popular opinion, they are fairly rare, and are not occurring more frequently. Second, relying on cognitive biases such as the availability heuristic, substitution effect, and cultural cognition theory, we demonstrate why the perception of risk and reaction to these rare and unfamiliar events are heightened. Third, we chronicle the various stages of the shooting cycle: tragedy, introspection, action, divergence, and return to the status quo. During the earlier stages, emotional capture sets in, allowing politicians and activists to garner support for reform. But, after the spike, support for reform fades and regresses to a decreasing mean. Fifth, with this framework, we view the year following the horrific massacre in Newtown through the lens of the shooting cycle. We conclude by addressing whether the shooting cycle can be broken.*



**ARTICLE CONTENTS**





# The Shooting Cycle

JOSH BLACKMAN\* & SHELBY BAIRD<sup>†</sup>

*“The notion that 2 months or 3 months after something as horrific as what happened in Newtown happens and we’ve moved on to other things, that’s not who we are. That’s not who we are. Now, I want to make sure every American is listening today. Less than 100 days ago that happened, and the entire country was shocked. And the entire country pledged we would do something about it and that this time would be different. Shame on us if we’ve forgotten. I haven’t forgotten those kids. Shame on us if we’ve forgotten.”*

—President Barack Obama<sup>1</sup>

## I. INTRODUCTION

The pattern is a painfully familiar one. News breaks that an unknown number of victims were killed by gunfire at a school, store, or other public place. The perpetrator wantonly takes the lives of innocent people. After the police arrive, the perpetrator is soon captured or killed, often by suicide. Sadness for the losses soon gives way to an emotional fervor for change. Different proposals for gun control are advanced—some ideas that were proposed earlier, but never obtained popular support, and other ideas that are developed in response to the recent tragedy. Politicians and advocates are optimistic for reform. However, as time elapses, support for these laws fades. Perhaps some laws are adopted, but nothing close to what the immediate emotional tugging after the killing would have predicted. As more time elapses, the memories of the dead, though never truly forgotten, fade from our collective minds, and things return to business as usual. This is the *shooting cycle*.

This Article offers a sober look at what we label the shooting cycle, and assesses how people and governments respond to mass killings. We do not offer any normative judgment on whether gun regulations hinder or contribute to gun violence, nor do we discuss the constitutional arguments regarding the Second Amendment. Rather, our Article aims to

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<sup>†</sup> Yale University, B.A. in political science, 2014. The authors would like to thank Dan Kahan, Ian Millhiser, David Schraub, and Adam Winkler.

<sup>1</sup> Remarks on Gun Violence, 2013 DAILY COMP. PRES. DOC.192, at 2 (Mar. 28, 2013).

describe this phenomenon, offer observations about how people and governments react—or do not respond—to these tragedies, and draw conclusions on how, if at all, this cycle can be changed.

We address this important issue in five parts. In Part II, we define the term “mass shooting,” and quantify how frequently they occur. Mass shootings, labeled “mass murder[s]” by the FBI, are killings where “four or more [murders] occur[] during the same incident, with no distinctive time period between the murders.”<sup>2</sup> These statistics exclude the overwhelming majority of homicides-by-firearms, though mass shootings capture the most popular attention. Contrary to public opinion, mass shootings are not nearly as common as the media suggests and not occurring more frequently. Rather, the rate has remained roughly constant over the last four decades.<sup>3</sup> [NEW FOOTNOTE]

In Part III, we rely on heuristics and cognitive biases to explain why these horrible, but rare, events hold such a prevalent place in the American *zeitgeist*. The availability heuristic leads people to overweigh the prominence of events that are easily retrievable from memory.<sup>4</sup> [NEW FOOTNOTE] In addition, people tend to consider unfamiliar events to which they cannot relate as riskier than those with which they are familiar.<sup>5</sup> [NEW FOOTNOTE] Further, those who have preexisting views on a certain topic are more likely to view harm in a way that gratifies their predisposition.<sup>6</sup> [NEW FOOTNOTE] These heuristics help to explain the media attention to, and political salience of, mass shootings.

In Part IV, we chronicle what we refer to as the shooting cycle. This painfully familiar pattern begins with a *tragedy*, as news breaks that a deranged gunman at some public place has inflicted mass casualties. The *tragedy* gives way to *introspection* as society attempts to make sense of what happened, and resolves to make sure it never happens again. With that resolve, society turns to *action*, as politicians, fueled by the emotions of the tragedy, offer solutions to stop not only mass shootings, but also are aimed at the broader problem of gun violence. Soon consensus for change

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<sup>2</sup> BEHAVIORAL ANALYSIS UNIT, FED. BUREAU OF INVESTIGATION, SERIAL MURDER: MULTI-DISCIPLINARY PERSPECTIVES FOR INVESTIGATORS 8 (2005) [hereinafter SERIAL MURDER SYMPOSIUM], available at <http://www.fbi.gov/stats-services/publications/serial-murder/serial-murder-1#two>.

<sup>3</sup> [NEW FOOTNOTE] See James Alan Fox & Monica J. DeLateur, *Mass Shootings in America: Moving Beyond Newtown*, 18 HOMICIDE STUD. 125, 129–30 (2014) (suggesting that there has not been an increase in mass shootings); see also Andrew J. Wistrich, *The Evolving Temporality of Lawmaking*, 44 Conn. L. Rev. 737, 813 (2012) (defining the availability heuristic as “a tendency to assume that a highly salient event is more common or typical than it actually is”).

<sup>4</sup> [NEW FOOTNOTE] DANIEL KAHNEMAN, THINKING, FAST AND SLOW 129 (2011).

<sup>5</sup> [NEW FOOTNOTE] See RESOLVING DISPUTES: THEORY, PRACTICE, AND LAW 51 (Folberg et al. eds., 2d ed. 2010) (discussing “loss aversion” where people tend to place a higher value on what they have to lose, as opposed to gaining something of equal value).

<sup>6</sup> [NEW FOOTNOTE] See *id.* at 52 (discussing “selective perception,” where people are more likely to screen out information that does not support a preformed hypothesis).

is fractured by *divergence*, as the emotions from the tragedy fade, support dwindles for reform, and opposition grows. With time, the *divergence* brings us back to the *status quo*, as support for reform regresses to the mean and returns to the pre-tragedy level.

In Part V, we consider several concepts that help explain the changes during the shooting cycle. We begin by measuring the support for stricter gun control laws over the past two decades according to five polling firms. The graph created shows an overall downward trend of support, with the exception of brief spikes in support following mass shootings at Columbine, Virginia Tech, and Newtown.<sup>7</sup>[NEW FOOTNOTE] After each spike, there is an even steeper decline, as support returns to the *ex ante* status quo.<sup>8</sup>[NEW FOOTNOTE]

We explain the spikes as a result of a phenomenon we refer to as *emotional capture*. During this period, emotions following the tragedy cause a heightened level of support for gun control. Politicians rely on this support to advance legislative agendas that would not have succeeded before the tragedy. But this support is short-lived. We explain the decline after the spike, in part, as an incidence of *regression to the mean*, whereby sentiments return to their pre-tragedy level as emotions fade. Our research also shows that the mean is in fact declining. In other words, after each spike subsides, support for gun control is even lower than it was before the shooting. These data help to explain why politicians seek to enact reforms quickly during the period of emotional capture before the passions fade.

Part VI turns from the theoretical to the experiential. We trace the sequence of events along the shooting cycle in the year following the horrific massacre at Sandy Hook Elementary in Newtown, Connecticut, on December 14, 2012. This period begins with the tragedy and the shock to our national conscience. From this tragedy, Americans became introspective and, with emotions high, the administration proposed a plan of action that included several gun control reforms. Time was of the essence, and supporters wanted to move as quickly as possible. Yet, following the trend of shootings before, emotional fervor subsided, causing a *divergence* in which support for gun control weakened, followed by the defeat of new federal legislation. On the one-year anniversary of Newtown, society returned to the *status quo*.

This Article peels back much of the rhetoric surrounding gun violence, and, distant from the passions, explores how people and the government react to these tragedies.

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<sup>7</sup> [NEW FOOTNOTE] See *infra* Figure X (providing a graphical analysis of the trend of support for gun control).

<sup>8</sup> [NEW FOOTNOTE] *Id.*

## II. MASS SHOOTING

The media frequently uses the terms *shooting* and *mass shooting* interchangeably,<sup>9</sup> often failing to define what these terms mean. In this Part we offer generally-accepted definitions of mass shootings, measure how frequently they occur in comparison to other forms of gun homicides, and quantify whether they are occurring more frequently over time. In short, mass shootings are extremely rare and are not increasing in frequency.<sup>10</sup> [NEW FOOTNOTE] One of the goals of this Article is to clarify the definitions of these tragedies and offer a neutral vocabulary to explore these difficult topics.<sup>11</sup>

### A. *Defining the Mass Shooting*

“Mass Shooting” is not considered a term of art among criminologists. The government does not keep statistics focusing specifically on “mass shootings.” As *PolitiFact* observed when, despite reading through the FBI’s Uniform Crime Report<sup>12</sup> and the Bureau of Justice Statistics’ National Crime Victimization Study,<sup>13</sup> they could not “find any published statistics on mass shootings.”<sup>14</sup> The closest approximation is the “mass murder.” The FBI defines a “mass murder,” as distinguished from a “serial murder,” as “a number of murders (four or more) occurring during the same incident, with no distinctive time period between the murders.”<sup>15</sup> Two of the leading scholars on mass murder, Professors James Alan Fox and Jack Levin, define mass murder more precisely, as the “slaughter of

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<sup>9</sup> See Josh Blackman, *Arapahoe Shooter “Committed Suicide when He Realized a Deputy Assigned to the School and Security Guard Were Closing In,”* JOSH BLACKMAN’S BLOG (Jan. 3, 2014), <http://joshblackman.com/blog/2014/01/03/arapahoe-shooter-committed-suicide-when-he-realized-a-deputy-assigned-to-the-school-and-a-security-guard-were-closing-in/> (noting that a headline used the phrase “mass shooting” whereas the article referred to killings with at least one death).

<sup>10</sup> [NEW FOOTNOTE] Fox & DeLateur, *supra* note 3, at 130.

<sup>11</sup> See Dan M. Kahan & Donald Braman, *More Statistics, Less Persuasions: A Cultural Theory of Gun-Risk Perception*, 151 U. PA. L. REV. 1291, 1324 (2003) (“Our plea is that scholars of gun control turn their attention to the project of constructing a new expressive vocabulary for carrying such deliberations forward. As the persistent and persistently vituperative character of the gun debate demonstrates, the emergence of a pertinent, civilized, and constructive discussion of the cultural values that inform the gun debate cannot be taken for granted.”).

<sup>12</sup> See Press Release, Fed. Bureau of Investigation, FBI Releases Preliminary Semiannual Crime Statistics for 2010 (Dec. 20, 2010), available at [http://www.fbi.gov/news/pressrel/press-releases/prelimsemiucr\\_122010](http://www.fbi.gov/news/pressrel/press-releases/prelimsemiucr_122010) (announcing the release of the Preliminary Semiannual Crime Statistics for 2010, which is based on data compiled from over 12,000 law enforcement agencies).

<sup>13</sup> See generally Jennifer Truman & Michael Rand, *Bureau of Justice Statistics Bulletin: Criminal Victimization, 2009* (Oct. 2010), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/cv09.pdf> (compiling statistics of criminal victimization in the United States).

<sup>14</sup> Louis Jacobson, “*This Week*” Report Says Hundreds Have Died in Multiple-Victim Shootings, POLITIFACT.COM (Jan. 11, 2011, 9:00 AM), <http://www.politifact.com/truth-o-meter/statements/2011/jan/11/pierre-thomas/week-report-says-hundreds-have-died-multiple-victi/>.

<sup>15</sup> SERIAL MURDER SYMPOSIUM, *supra* note 2, at 8.

four or more victims by one or a few assailants within a single event, lasting but a few minutes or as long as several hours.”<sup>16</sup> As Fox and Levin noted, “In striking contrast to the expanding scholarly interest in serial homicide, mass killings—the slaughter of victims during a single act or a short-lived crime spree—have received relatively little consideration.”<sup>17</sup> We will rely on the definition of mass murder as defined by Professors Fox and Levin and use the term “mass shooting” interchangeably.

### B. Mass Shooting Trends

Contrary to popular perceptions,<sup>18</sup> mass shootings are rare, constituting a tiny share of gun homicides.<sup>19</sup> [NEW FOOTNOTE] The progressive magazine *Mother Jones* offers a detailed, comprehensive list of mass shootings between 1982 and the present, counting sixty-seven mass shootings.<sup>20</sup> The *New Republic*, building on the *Mother Jones* report, counted seventy mass shootings between 1982 and 2012.<sup>21</sup> Though each loss of life is tragic, these deaths constitute a very, very small percentage of gun homicides. For example, the Bureau of Justice Statistics found that in 2011 mass shootings constituted 0.165% of all homicide incidents.<sup>22</sup> If the threshold is decreased to three victims, that rate rises to 0.658%.<sup>23</sup>

Mass killings, including those with and without a firearm, constitute a small share of total homicides. From 2002-2011, 95% of total homicide incidents involved a single fatality, 4% involved two victims, .6% involved 3 victims, and .02% involved four or more victims. In 2011, 91% of these mass killings with for or more victims involved a firearm. Therefore,

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<sup>16</sup> James Alan Fox & Jack Levin, *Multiple Homicide: Patterns of Serial and Mass Murder*, 23 CRIME & JUST. REV. RES. 407, 429 (1998).

<sup>17</sup> *Id.* at 430.

<sup>18</sup> See Jacobson, *supra* note 14 (noting a news report stating that mass shootings have become commonplace since 2007).

<sup>19</sup> [NEW FOOTNOTE] See Bruce Drake, *Mass Shootings Rivet National Attention, but Are a Small Share of Gun Violence*, PEW RES. CENTER (Sept. 17, 2013), <http://www.pewresearch.org/fact-tank/2013/09/17/mass-shootings-rivet-national-attention-but-are-a-small-share-of-gun-violence/> (“While there have been a string of mass shootings over the past two years that have grabbed the public’s attention, they represent a relatively small share of firearm homicides.”).

<sup>20</sup> See Mark Follman et al., *US Mass Shootings, 1982–2012: Data from Mother Jones’ Investigation*, MOTHER JONES (Dec. 28, 2012), <http://www.motherjones.com/politics/2012/12/mass-shootings-mother-jones-full-data> (listing information about each of the sixty-seven shootings).

<sup>21</sup> Amy Sullivan, *Mass Shootings Are on the Rise—And 2012 Has Been Deadlier than Ever Before*, NEW REPUBLIC (Dec. 14, 2012), <http://www.newrepublic.com/blog/plank/111149/why-are-mass-shootings-the-rise#>.

<sup>22</sup> See ERICA L. SMITH & ALEXIA COOPER, U.S. DEP’T OF JUSTICE, HOMICIDE IN THE U.S. KNOWN TO LAW ENFORCEMENT, 2011, at 14 tbl.5 (Dec. 2013), available at <http://www.bjs.gov/content/pub/pdf/hs11.pdf> (showing that, in 2011, 25 out of 13,750 homicide incidents had four or more victims, and that 90.8% of such homicides involved a firearm).

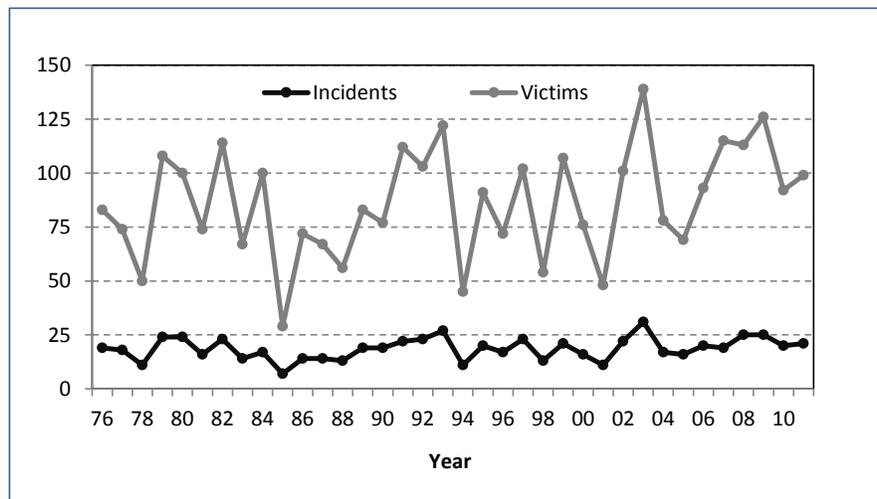
<sup>23</sup> See *id.* (showing that, in 2011, 110 out of 13,750 homicide incidents had four or more victims, and that 82.3% of such homicides involved a firearm).

incidents with four or more victims, where a firearm is involved, constitute roughly .02% of total homicides. Another study performed between 1976 and 2005 yields similar results—“less than 1/5 of 1% (0.18%) of all murders in the United States involved four or more victims.”<sup>24</sup>

Even among mass murders, the “indiscriminate slaughter of strangers”—what is commonly portrayed in the media as a mass shooting—“is the exception to the rule.”<sup>25</sup> In other words, even among the small number of mass shootings, an even smaller share is made up of indiscriminate killings of strangers in public places, such as schools or movie theaters. As a total percentage of unfortunate bloodshed, mass shootings are a small, small sliver that nonetheless captures a huge percentage of the public fascination. Further, contrary to what the *zeitgeist* may suggest, mass shootings are not on the rise. Professor James Alan Fox has found that “[d]espite the huge media coverage devoted to them, crime statistics show that there is no upward trend in mass killings.”<sup>28</sup> Fox and DeLateur offer an alternate analysis based on the FBI’s Supplementary Homicide Reporting Program from 1976 to 2011, which reflects “all 672 mass shootings with at least four fatalities reported to local law enforcement authorities.”<sup>29</sup>

FIGURE 1<sup>30</sup>

MASS SHOOTINGS IN THE UNITED STATES, 1976–2011



<sup>25</sup> Fox & Levin, *supra* note 16, at 438.

<sup>25</sup> Fox & Levin, *supra* note 16, at 438.

<sup>28</sup> Laura Smith-Spark, *Are Mass Killings on the Increase? Criminologist Says No*, CNN (Apr. 3, 2012), <http://www.cnn.com/2012/04/03/us/us-mass-killings/>.

<sup>29</sup> Fox & DeLateur, *supra* note 3, at 129.

<sup>30</sup> *Id.*

Fox and DeLateur observe that over the past four decades, “there have been, on average, nearly 20 mass shootings a year in the United States,” most of which were nowhere near “as deadly” as Newtown or Aurora.<sup>31</sup> [NEW FOOTNOTE] The authors conclude, “Without minimizing the pain and suffering of the hundreds of those who have been victimized in recent attacks, the facts clearly say that there has been no increase in mass shootings and certainly no epidemic.”<sup>32</sup> [NEW FOOTNOTE] Instead, the only conclusion that is clear from the data is the “largely random variability in the annual counts.”<sup>33</sup> [NEW FOOTNOTE] Fox stressed, “[T]he risk of this type of crime is significantly less than a wide array of other catastrophes that we confront every day.”<sup>34</sup> [NEW FOOTNOTE]

According to another *PolitiFact* analysis, which considered these events over the past three decades, there is no clear trend in the number of annual mass shootings: 1976–1980 (20.6 incidents annually), 1981–1985 (16.8), 1986–1990 (18.2), 1991–1995 (23.0), 1996–2000 (20.0), 2001–2005 (21.0), and 2006–2009 (25.5).<sup>35</sup> *PolitiFact* rated a statement that the recent shootings in Tucson, Arizona reflect a “disturbing trend” as half true.<sup>36</sup> [NEW FOOTNOTE] Rather than a “disturbing trend,” *PolitiFact* observed that the number of mass shootings barely changed between 2007 (23), 2008 (29), and 2009 (27); it was “statistical noise.”<sup>37</sup> This reflects Professors Fox and DeLateur’s findings.

Noted criminologist Gary Kleck remarked that “[i]t would be misleading to suggest that there was some long-term upward trend in mass shootings since 1976.”<sup>38</sup> [NEW FOOTNOTE] He added:

The exact number are highly unstable, but ignoring small, year-to-year fluctuations, there was no trend one way or the other from 1976 to 2009. Further, if these figures were computed on a per-capita basis, taking into account population increases, the long-term trend in the rate would be

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<sup>31</sup> [NEW FOOTNOTE] *Id.* at 129–30.

<sup>32</sup> [NEW FOOTNOTE] *Id.* at 130.

<sup>33</sup> [NEW FOOTNOTE] *Id.*

<sup>34</sup> [NEW FOOTNOTE] James Alan Fox, *Mass Murder—Unpredictable and Unpreventable*, BOSTON.COM (Jan. 9, 2011), [http://boston.com/community/blogs/crime\\_punishment/2011/01/mass\\_murder\\_-\\_unpredictable\\_a.html](http://boston.com/community/blogs/crime_punishment/2011/01/mass_murder_-_unpredictable_a.html).

<sup>35</sup> Jacobson, *supra* note 14.

<sup>36</sup> [NEW FOOTNOTE] *Id.*

<sup>37</sup> *Id.*; see also Mark B. Melter, *The Kids Are Alright; It's the Grown-Ups Who Scare Me: A Comparative Look at Mass Shootings in the United States and Australia*, 16 GONZ. J. INT'L L. 33, 37 n.35 (2012) (“There were on average 22.25 incidents and 108.75 victims from 2006–2009. By contrast, there were on average 18.46 incidents and 84.46 victims between 1976–2010.”).

<sup>38</sup> [NEW FOOTNOTE] Jacobson, *supra* note 14 (quoting statement of Gary Kleck).

downward.<sup>39</sup>

These numbers even hold true throughout most of the twentieth century, as “mass murder”—slightly different from mass shootings—“was nearly as common during the 1920s and 30s as it has been since the mid-1960s.”<sup>40</sup> Further, as Professor Mark Melter points out, “the mass shooting rate has remained relatively stable over the past forty years” as compared with “the rates of homicide and serious violent crime [which] have dropped significantly during the same period.”<sup>41</sup> The rate of mass shootings has remained nearly constant, notwithstanding numerous other changes in our increasingly safer society.

Mass shootings on college campuses are also not as common as popular culture would suggest. Professor Fox observed, “Overall in this country, there is an average of 10 to 20 murders across campuses in any given year.”<sup>42</sup> Note that single homicides are roughly 99% more frequent than mass murders.<sup>43</sup> Fox continued, “Compare [10-20] murders to over 1,000 suicides and about 1,500 deaths from binge drinking and drug overdoses” annually.<sup>44</sup> A 2011 study looking into the causes of death of college students—conducted across 157 four-year institutions and comprising 1,361,304 students—found that the annualized mortality rates per 100,000 students, ranked from highest to lowest, were the following:

- (1) Suicide (6.17);
- (2) Non-alcohol related vehicular injury (3.51);
- (3) Alcohol-related vehicular injury (3.37);
- (4) Unknown cause (3.00);
- (5) Non-alcohol related non-traffic injury (2.39);
- (6) Cancer (1.94);
- (7) Alcohol related non-traffic injury (1.49); and
- (8) Homicide (0.53).<sup>45</sup>

Homicide—of which mass shootings are a miniscule part—trails far, far

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<sup>39</sup> *Id.*

<sup>40</sup> Grant Duwe, *A Circle of Distortion: The Social Construction of Mass Murder in the United States*, 6 W. CRIMINOLOGY REV. 59, 59–60 (2005).

<sup>41</sup> Melter, *supra* note 37, at 38.

<sup>42</sup> Smith-Spark, *supra* note 28 (quoting statement of Professor Fox).

<sup>43</sup> See SMITH & COOPER, *supra* note 22, at 14 (“From 2002 to 2011, the majority (95%) of homicide incidents involved the killing of a single victim . . . . During the same period, about . . . 0.2% involved four or more victims.”).

<sup>44</sup> Smith-Spark, *supra* note 28 (quoting statement of Professor Fox).

<sup>45</sup> James C. Turner & Adrienne Keller, *Leading Causes of Mortality Among American College Students at 4-Year Institutions*, AM. PUB. HEALTH ASS’N slide 10 (2011), available at <https://apha.confex.com/apha/139am/webprogram/Paper241696.html>.

behind as a cause of death. For every 200,000 college students, roughly one dies per year due to homicide, while roughly twelve die from suicide and seven die from drunk driving.<sup>46</sup> **[NEW FOOTNOTE]**

Similar trends hold true for safety in K-12 schools, which garnered a significant amount of attention in the wake of the tragedies in Columbine and Newtown. According to two reports by the Centers for Disease Control, the probability of a child “dying in school in any given year from homicide or suicide was less than one in 1 million between 1992 and 1994 and slightly greater than one in 2 million between 1994 and 1999.”<sup>47</sup>

A 2013 study performed by *USA Today* quantified the number of *mass killings*, rather than *mass shootings*, which include incidents where four or more people are killed by any means, including a gun shot, fire, stabbing, strangulation/suffocation, blunt force, and drowning.<sup>48</sup> And two days after the release of the study, *USA Today* qualified that its investigation on mass killings was “hampered by the FBI’s voluntary reporting system.”<sup>50</sup> **[NEW FOOTNOTE]** While there are many methodological deficiencies with this study, *USA Today’s* conclusion is consistent with nearly all other metrics—“the number of mass killings has not increased in recent years.”<sup>51</sup>

Another report, from the Advanced Law Enforcement Rapid Response Training (ALERRT) Center at Texas State University, found an increase from 2000 to 2012 in the number of “active shootings in public settings where the primary motive appeared to be mass murder and at least *one* of the victims was unrelated to the suspect.”<sup>52</sup> But these active shooter

<sup>46</sup> **[NEW FOOTNOTE]** See *id.* (finding that the homicide rate is 0.53 per 100,000, while the suicide and the alcohol-related vehicular death rates are 6.17 and 3.37 per 100,000, respectively).

<sup>47</sup> David J. Harding et al., *Studying Rare Events Through Qualitative Case Studies: Lessons from a Study of Rampage School Shootings*, 31 SOC. METHODS RES. 174, 174 (2002); see Mark Anderson et al., *School-Associated Violent Deaths in the United States, 1994–1999*, 286 J. AM. MED. ASS’N 2695, 2697 (2001) (showing homicide rate of .058 and suicide rate of .010 per 100,000, respectively); **[ILL]** S. Patrick Kachur et al., *School-Associated Violent Deaths in the United States, 1992 to 1994*, 275 J. AM. MED. ASS’N 1729 (1996).

<sup>48</sup> Meghan Hoyer & Brad Heath, *Mass Killings Occur in USA Once Every Two Weeks*, USA TODAY (Dec. 2, 2013), <http://www.usatoday.com/story/news/nation/2012/12/18/mass-killings-common/1778303/>.

<sup>50</sup> **[NEW FOOTNOTE]** Paul Overberg et al., *USA TODAY Research Reveals Flaws in FBI Data*, USA TODAY, Dec. 4, 2013, at 2A.

<sup>51</sup> Paul Overberg et al., *USA TODAY Research Reveals Flaws in Mass-Killing Data*, USA TODAY (Dec. 3, 2013), <http://www.usatoday.com/story/news/nation/2013/12/03/fbi-mass-killing-data-inaccurate/3666953/>.

<sup>52</sup> Jason Sickles, *Spike in Mass Shootings Creates Demand for Different Police Approach*, YAHOO! NEWS (Jan. 2, 2014), <http://news.yahoo.com/spike-in-mass-shootings-creates-demand-for-different-police-approach-132625638.html> (emphasis added); see J. Pete Blair et al., *Active Shooter Events from 2000 to 2012*, FED. BUREAU INVESTIGATION (Jan. 7, 2014), <http://leb.fbi.gov/2014/january/active-shooter-events-from-2000-to-2012> (“The rate at which these events occurred went from approximately 1 every other month between 2000 and 2008 (5 per year) to more than 1 per month between 2009 and 2012 (almost 16 per year). The authors’ tracking also indicates that this increased rate has continued into 2013 . . . .”); see also *id.* (“The dotted trendline

situations are not mass shootings, as they include incidents with a single, rather than four or more, deaths.<sup>53</sup> [NEW FOOTNOTE]

These statistics should dispel many of the common perceptions about the prevalence and frequency of deaths by mass shootings. In addition, it should provide an opportunity to reconsider why these rare deaths garner so much attention from the media, politicians, and society. The next Part will address this subject.

### III. HEURISTICS AND PERCEPTIONS OF SHOOTINGS

If mass shootings are rare, constitute a tiny percentage of gun homicides, and have not been occurring more frequently, why are they so salient today? While a comprehensive answer to this question is far beyond the scope of this Article, an exploration of several heuristics and innate cognitive biases may shed light on this very understudied question. As well, they may help explain why some mass shootings trigger the shooting cycle, while others do not.

Heuristics and cognitive biases, simply defined, are mental “rule[s] of thumb[] to make a difficult judgment” that is mentally taxing.<sup>55</sup> More precisely, they refer to the various thought processes by which people go about making tough decisions.<sup>56</sup> Behavioral economists have identified several important heuristics.

First, the *availability heuristic* leads people to overweigh the prominence of events that are easily retrievable from our memories. Mass shootings that receive widespread media attention dominate our collective consciousness, more so than other gun deaths that receive less coverage. Therefore, people perceive that they occur more frequently than they actually do. Second, people tend to weigh the risks of unfamiliar, unknown events more heavily than those with which they are familiar. This is referred to as the *unfamiliar-event heuristic*. For example, a person may perceive that the risk of being killed in a (thankfully) unfamiliar tragedy like a mass shooting is greater than the risks of other, more known forms of death, such as an accidental drowning in a pool. Third, people with preexisting views toward certain issues are more likely to see events

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shows a definite increase [of active shooter events] over the past 12 years.”)

<sup>53</sup> [NEW FOOTNOTE] See Blair et al., *supra* note 52 (allowing incidents in which less than four victims were killed to be included in data that comprise active shooter events).

<sup>55</sup> KAHNEMAN, *supra* note 4, at 7.

<sup>56</sup> See Gregory Mitchell, *Mapping Evidence Law*, 2003 MICH. ST. L. REV. 1065, 1072 n.6 (“Kahneman and Tversky suggest that people rely on a number of simplifying strategies, or rules of thumb, in making decisions. These simplifying strategies are called heuristics. They are the standard rules that implicitly direct our judgment. They serve as a mechanism for coping with the complex environment surrounding our decisions. In general, heuristics are helpful, but their use can sometimes lead to severe errors.” (quoting MAX BAZERMAN, JUDGMENT IN MANAGERIAL DECISION MAKING 5 (4th ed. 1998)) (internal quotation marks omitted)).

that result in harm through a lens that gratifies their own predispositions. These views are referred to as *cultural predispositions*. Stated simply, people amplify the extent of tragedies that jibe with their views of the world. Fourth, *in-group bias* helps to describe why people tend to favor victims of their own group over dissimilar outsiders.<sup>57</sup> **[NEW FOOTNOTE]** All of these heuristics provide insight into popular perceptions of mass shootings.

#### A. *The Availability Heuristic*

The “availability heuristic,” or “availability effect” helps to explain why rare mass shootings occupy such a prominent place in the American *zeitgeist*. The availability heuristic refers to the “process of judging frequency by ‘the ease with which instances come to mind.’”<sup>58</sup> Nobel Prize Laureate Daniel Kahneman explained that “instances of the class will be retrieved from memory, and if retrieval is easy and fluent, the category will be judged to be large.”<sup>59</sup> In other words, if some class of events is readily available in your memory, and it is easy to retrieve, you will overestimate its prevalence because it is *available*.

Kahneman, along with his long-time colleague, the late Amos Tversky, observed that people implicitly utilize the availability heuristic when making decisions: “[P]eople assess the frequency of a class or the probability of an event by the ease with which instances or occurrences can be brought to mind.”<sup>60</sup> Professor Dan Kahan notes that the related “availability effect” refers “to the tendency of people to overestimate the incidence of risks involving highly salient or emotionally gripping events relative to less salient, less sensational ones.”<sup>61</sup> Salience is as important as familiarity for this heuristic.

Let’s place the statistics about shootings discussed in the previous Section into context through the lens of the availability heuristic. Mass shootings are very, very rare.<sup>62</sup> **[NEW FOOTNOTE]** Yet, due to extensive media coverage on the twenty-four-hour news cycle and attention given to them by politicians, these events remain fresh in our

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<sup>57</sup> **[NEW FOOTNOTE]** Miles Hewstone et al., *Intergroup Bias*, 53 ANN. REV. PSYCHOL. 575, 576 (2002).

<sup>58</sup> KAHNEMAN, *supra* note 4, at 129.

<sup>59</sup> *Id.*

<sup>60</sup> Amos Tversky & Daniel Kahneman, *Heuristics and Biases: Judgment Under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124, 1127 (1974).

<sup>61</sup> Dan Kahan, *Who Sees Accidental Shootings of Children as Evidence in Support of Gun Control & Why? The “Cultural Availability” Effect*, CULTURAL COGNITION PROJECT (May 3, 2013, 9:08 AM), <http://www.culturalcognition.net/blog/2013/5/3/who-sees-accidental-shootings-of-children-as-evidence-in-sup.html>.

<sup>62</sup> **[NEW FOOTNOTE]** See *supra* Part II.B (providing statistics with respect to mass shooting instances over the past thirty years).

memories and are very salient. In comparison, the overwhelming majority of gun homicides receive a tiny fraction of this coverage.<sup>63</sup> [NEW FOOTNOTE] These attributes make deaths by mass shootings—as opposed to the other 99.8% of gun deaths we seldom hear about—much more “retrievable.” Based on the availability heuristic, people tend to think that mass shootings are much more prominent than they actually are.

For example, a spate of shootings in 2011 and 2012—the shooting of Representative Gabby Giffords in Tucson, the shooting at a movie theater in Aurora, a shooting at a Sikh Temple in Milwaukee, and the shooting at Newtown—had almost no similarities in means or motives other than the fact that they were mass casualties by gunfire.<sup>64</sup> [NEW FOOTNOTE] But, the recency and salience of these events leads people to lump them together into the larger umbrella of gun violence.<sup>65</sup>

### B. *Weighing Risks of Unfamiliar Events*

A related heuristic focuses on how people weigh unfamiliar events. This heuristic is more intuitive: the fear of the unknown is greatest. More precisely, people often overweigh the risk of unfamiliar events. Consider the related topic of accidental shootings of young children (primarily where a child uses the firearm to kill him or herself). Though these events are horrible and avoidable tragedies, like mass shootings, they are also very uncommon. Professor Dan Kahan’s observations, which are not limited to children, show that there are on average fewer than 1,000 accidental gun homicides per year.<sup>66</sup> In comparison, there are roughly 3,500 drowning deaths per year.<sup>67</sup>

When looking specifically at the causes of death of children, the ratios are roughly similar. In 2010, children ages one to fourteen were more than three times as likely to die by unintentional drowning than by becoming

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<sup>63</sup> [NEW FOOTNOTE] See *infra* discussion of Los Angeles homicides with no national attention.

<sup>64</sup> [NEW FOOTNOTE] See Joel Best, *How Should We Classify the Sandy Hook Killings?*, REASON.COM (June 16, 2013, 1:00 PM), <http://reason.com/archives/2013/06/16/the-politics-of-gun-violence> (noting that the weapons used in the mentioned mass shooting varied); Katherine Ramsland, *Mass Murder Motives*, PSYCHOL. TODAY (July 20, 2012), <http://www.psychologytoday.com/blog/shadow-boxing/201207/mass-murder-motives> (“In truth, there are many different types of motive for mass murder . . .”).

<sup>65</sup> See Best, *supra* note 63 (noting that the media tends to classify “incidents” as “instance[s] of a larger problem”). “But the Newtown shootings followed a number of other high-profile shooting incidents outside of schools, including the 2011 shooting of Rep. Gabrielle Giffords (D-Ariz.) and some 2012 incidents at a movie theater near Denver, a Sikh temple outside Milwaukee, and a Minneapolis factory, settings with little in common.” *Id.*

<sup>66</sup> Kahan, *supra* note 61.

<sup>67</sup> *Id.*

the victims of a homicide by firearm.<sup>68</sup> [NEW FOOTNOTE] We stress, as does Professor Gary Kleck, that “[t]he point is not that guns are safe because they cause accidental death less often than” more familiar causes, such as drownings, but to provide a “meaningful point of reference.”<sup>69</sup>

Research performed by Professors Hertwig, Barron, Weber, and Erev demonstrates that people make different decisions when drawing from the description of risky prospects they are unfamiliar with rather than from their own experiences.<sup>70</sup> When people make “decisions from description,” that is something unfamiliar they have never experienced personally, they tend to overweigh the probability of rare events.<sup>71</sup> [NEW FOOTNOTE]

In contrast, when people make choices from familiar experiences, so called “decisions from experience,” they underweigh the probability of rare events.<sup>72</sup> In other words, people will underweigh the risk of something they are familiar with—for example, death by drowning in a pool. After all, most people have been in a pool, seen a lifeguard, and are aware of the possibility of children drowning. But, they will overweigh the risk of something they only learn about from descriptions—such as media reports about death by firearm violence. These are rare tragedies that (thankfully) impact very few people personally.

Professor Kahan questions why these accidental shootings “get so much media coverage relative to the other things that kill children.”<sup>73</sup> The answer, in part, is based on how we perceive death of a child by accidental gunfire and death of a child by accidental drowning. Most people are roughly familiar with a swimming pool and may have faced incidents where they had trouble swimming—perhaps in their childhood. The risk of drowning, though horrific, is somewhat familiar and perhaps even acceptable. A colleague who strongly supports gun control described the death of a child by drowning as a “legitimate” accident.

When asked why it was “legitimate,” she explained that death by drowning was “understandable,” while death by gun was not. She said it was more acceptable to leave a child unsupervised near a swimming pool,

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<sup>68</sup> [NEW FOOTNOTE] *10 Leading Causes of Injury Deaths by Age Group Highlighting Unintentional Injury Deaths, United States—2010*, CENTERS FOR DISEASE CONTROL AND PREVENTION, [http://www.cdc.gov/injury/wisqars/pdf/10LCID\\_Unintentional\\_Deaths\\_2010-a.pdf](http://www.cdc.gov/injury/wisqars/pdf/10LCID_Unintentional_Deaths_2010-a.pdf) (last visited Mar. 8, 2014).

<sup>69</sup> [ILL] GARY KLECK, POINT BLANK: GUNS AND VIOLENCE IN AMERICA 272 (2005). Also, as Professor Kleck points out, in 1980, “[t]he accidental death rate for motor vehicles [was] 15 times as high as for guns when based on the number of” households that own both guns and vehicles, and “29 times as high when based on number of devices in existence.” [ILL] *Id.* For trends in fatal gun accidents in the U.S. between 1933 and 1987, see *id.* at 306 tbl.7.1.

<sup>70</sup> Ralph Hertwig et al., *Decisions from Experience and the Effect of Rare Events in Risky Choice*, 15 PSYCHOL. SCI. 534, 536–37 (2004).

<sup>71</sup> [NEW FOOTNOTE] *Id.* at 535.

<sup>72</sup> *Id.*

<sup>73</sup> Kahan, *supra* note 61.

than to leave a child unsupervised near a gun. But is this the case? While it is certainly true that to an adult, a swimming pool—designed for leisure instead of harm—is exponentially safer than a gun, the same does not hold true for a child. To a toddler, crawling unsupervised alongside a large in-ground swimming pool is just as, if not more, lethal than the same toddler playing alone with a gun (equipped with a safety, and heavy trigger pull).

It is not inconceivable for most that a child could fall into a pool while playing alone or wander into a neighbor's yard and try to go swimming. These notions are familiar. In contrast, thankfully, very few people are familiar with the idea of a child recklessly playing with a loaded gun. Even among gun owners, it is unthinkable for a child to access a loaded gun unsupervised and shoot himself. The disparity in perceptions can be explained in part by the heuristic that people will overweigh the risk of unfamiliar events and underweigh the risk of familiar events.

Further, rare events that we are unfamiliar with rouse uncertainty and increase cautious reactions and reliance on prior beliefs.<sup>74</sup> As a result, people are more concerned about preventing and dealing with the unknown, more so than events that are likely to occur on a frequent basis. This helps explain why after a shooting there is an inherent need to take steps to prevent future deaths by enacting gun control legislation but less need to do so after drownings in pools. In fact, only a handful of states require the installation of fences around swimming pools in homes with small children.<sup>75</sup>

Professor Kahan retells an unintentionally accurate example of the impact of this heuristic:

In one scene of Michael Moore's movie *Bowling for Columbine*, the "documentary" team rushes to get footage from the scene of a reported accidental shooting only to discover when they arrive that television news crews are packing up their gear. "What's going on? Did we miss it," Moore asks, to which one of the departing TV reporters answers, "no, it was a false alarm—just a kid who drowned in a pool." One would suspect Moore of trying to make a point—that the media's responsiveness to the public

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<sup>74</sup> William H. Starbuck, *Cognitive Reactions to Rare Events: Perceptions, Uncertainty, and Learning*, 20 ORG. SCI. 925, 929 (2009).

<sup>75</sup> See, e.g., ARIZ. REV. STAT. ANN. § 36-1681 (2012) (requiring the installation of fences for homes with children under the age of six). I know this is not what you're looking for, but this is the best I could find. [http://en.wikipedia.org/wiki/Pool\\_fence#United\\_States](http://en.wikipedia.org/wiki/Pool_fence#United_States) Also [https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&ved=0CFoQFjAC&url=https%3A%2F%2Fwww.cpsc.gov%2Fen%2Fmedia%2Fdocuments%2Fsafety-education%2Fsafety-guides%2Fsports-and-recreation%2Fpool-and-spa%2Fpool%2F&ei=8UNbU83uJsJlsASKl4KgCQ&usg=AFQjCNFmthlNhLdnLYDOqsWDnck3JqUr\\_A&sig2=ksBJ4IOcMHPGM8WSDiupkQ&bvm=bv.65397613,d.cWc&cad=rja](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&ved=0CFoQFjAC&url=https%3A%2F%2Fwww.cpsc.gov%2Fen%2Fmedia%2Fdocuments%2Fsafety-education%2Fsafety-guides%2Fsports-and-recreation%2Fpool-and-spa%2Fpool%2F&ei=8UNbU83uJsJlsASKl4KgCQ&usg=AFQjCNFmthlNhLdnLYDOqsWDnck3JqUr_A&sig2=ksBJ4IOcMHPGM8WSDiupkQ&bvm=bv.65397613,d.cWc&cad=rja)

obsession with gun accidents contributes to the public's inattention to the greater risk for children posed by swimming pools—if the movie itself were not such an obvious example of exactly this puzzling, and self-reinforcing distortion. Apparently, it was just one of those rare moments when 1,000 monkeys mindlessly banging on typewriters (or editing film) surprise us with genuine literature.<sup>76</sup>

Here, the media was only interested in covering the loss of a child if it was in a tragic, misunderstood, and headline-grabbing way. The availability heuristic helps to explain “why people seem so much more concerned about the risk of an accidental shooting of a child than the accidental drowning of one.”<sup>77</sup> Kahan concludes that “[t]he pool comparison, though, does show how the ‘culture war’ over guns creates not only a very sad deformation of political discourse but also a weird selective[] attention to empirical evidence.”<sup>78</sup> **[NEW FOOTNOTE]** This is a point we will return to later, in our discussion of the motivations of why the media and politicians focus so heavily on the rare, but tragic, deaths resulting from mass shootings.

### C. Cultural Predispositions

The availability and unfamiliar-event heuristics still do not completely explain why certain events are more salient than others. Professor Kahan's “cultural cognition theory” offers more assistance. This theory states that “the cultural congeniality of seeing instances of harm that gratify one's cultural predispositions,” helps explain “what accounts for the selective salience of various risks.”<sup>79</sup> Stated more simply, people pay closer attention to bad things that jibe with their previous views of the world. For example, an environmentalist is more likely to see a heat wave as a result of global warming, which supports climate change legislation. Or, a free-market advocate who opposes President Obama's economic agenda is more likely to view a downturn in the stock market as a reflection of the President's regulatory policies and lobby for deregulation.

These heterogeneous predispositions “generate systematic differences in perceptions of risk among people with different values.”<sup>80</sup> Kahan explains that:

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<sup>76</sup> Dan Kahan, *Cultural Cognition as a Conception of the Cultural Theory of Risk* 30 n.3 (Yale Law Sch. Pub. Law Working Paper No. 222, 2008), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1123807](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1123807).

<sup>77</sup> Kahan, *supra* note 61.

<sup>78</sup> **[NEW FOOTNOTE]** *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

If people are more likely to notice risk-related contingencies congenial to their cultural predispositions, to assign them significance consistent with their cultural predispositions, and recall instances of them when doing so is supportive of their cultural predispositions, then the availability effect will generate systematic individual differences among culturally diverse individuals.<sup>81</sup>

Cultural cognition theory applies to both sides of the gun debate. Kahan explains that those predisposed not to like guns, those who feel “revulsion and disgust” toward guns, are more likely to focus their attention onto gun deaths, as opposed to other more common forms of death.<sup>82</sup> For example, a person predisposed to favor gun control is likely to fixate on deaths by firearms, rather than other types of deaths (such as by accidental drowning), and see these losses as a reason to strengthen gun controls. Conversely, a person who is predisposed to favor gun rights is likely to minimize deaths by firearm, and focus on their role in preventing crime. Kahan concludes, “[I]ndividuals’ attitudes toward gun control are derivative of the type of social order they prize.”<sup>83</sup>

Further, the decision of the media to cover various accidents is, as Kahan notes, “a (market-driven) reflection of the public demand for news relating to that very type of accident.”<sup>84</sup> This coverage is what people want to see. There is both a supply and demand element to this issue. Recall how the film crew packed up when they learned that a child died by drowning, and not by gunfire. What does it say about us as a society that, on some level, we *desire* to see coverage of horrible tragedies? This observation, we are sure, made you feel uncomfortable. As a society, we have a disturbed collective sub-consciousness. We ogle at gruesome car wrecks.<sup>85</sup> We watch violent movies.<sup>86</sup> We enjoy violent sports.<sup>87</sup> We are

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<sup>81</sup> Kahan, *supra* note 76, at 31.

<sup>82</sup> Kahan & Braman, *supra* note 11, at 1323.

<http://www.culturalcognition.net/blog/2013/5/3/who-sees-accidental-shootings-of-children-as-evidence-in-sup.html> (“revulsion and disgust”).

<sup>83</sup> Kahan & Braman, *supra* note 11, at 1323.

<sup>84</sup> Kahan, *supra* note 76, at 30 n.3.

<sup>85</sup> See Mark Rahner, *Gawking: Here’s Why We Rubberneck on the Road*, SEATTLE TIMES (June 10, 2002), <http://community.seattletimes.nwsourc.com/archive/?date=20020610&slug=gawk10> (discussing the phenomenon of gawking and its effect on traffic).

<sup>86</sup> See *What Attracts People to Violent Movies?*, SCI. DAILY (Mar. 28, 2013), <http://www.sciencedaily.com/releases/2013/03/130328091750.htm> (“[P]eople are more likely to watch movies with gory scenes of violence if they felt there was meaning in confronting violent aspects of real life.”).

<sup>87</sup> See JAY COAKLEY, *SPORTS IN SOCIETY: ISSUES AND CONTROVERSIES* 198 (2008), available at [http://highered.mcgraw-hill.com/sites/dl/free/007337654x/673624/Coakley10e\\_ch07.pdf](http://highered.mcgraw-hill.com/sites/dl/free/007337654x/673624/Coakley10e_ch07.pdf) (“Violence in sports comes in many forms, and it is grounded in social and cultural factors related to the sport ethic,

drawn into gory, graphic video games that involve brutal murders.<sup>88</sup> And this is not new. A long, long time ago, parents read to their children the gory books of the Brothers Grimm.<sup>89</sup>

Professors Fox and Levin recount, with disappointment, “[m]ore recently, we have extended our celebration to what some consider our new antiheroes, those who have distinguished themselves in the worst possible ways by reaching the pinnacle of ‘success’ as murderers.”<sup>90</sup> The reasons behind this hardwired morbid curiosity are beyond the scope of this Article, but we suspect there is something deeper in the human psyche to help explain the phenomenon of reactions to mass shootings. Further, following Professor Kahan’s theories, we suspect that some in society fixate on these rare, but violent, mass shootings because they are emboldened by their cultural predispositions to support gun control.

#### D. *In-Group Bias*

Another way to explain this duality in perception is through “in-group” bias. Under this heuristic, people tend to favor members of their own group over outsiders.<sup>91</sup> Because “people tend to be more helpful, more willing to allocate resources, and more supportive of policies advocated by members of their own group,”<sup>92</sup> [FN MOVED] it is not surprising that

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commercialization, gender ideology and ideas about masculinity, the dynamics of social class and race, and the strategies used in sports.”).

<sup>88</sup> See Sami Yenigun, *Video Game Violence: Why Do We Like It, and What’s It Doing to Us?*, NAT’L PUB. RADIO (Feb. 11, 2013), <http://www.npr.org/2013/02/11/171698919/video-game-violence-why-do-we-like-it-and-whats-it-doing-to-us> (“[V]iolent games tap into a primal instinct.”).

<sup>89</sup> Brown v. EMA (2011) (“Certainly the *books* we give children to read—or read to them when they are younger—contain no shortage of gore. Grimm’s Fairy Tales, for example, are grim indeed. As her just deserts for trying to poison Snow White, the wicked queen is made to dance in red hot slippers “till she fell dead on the floor, a sad example of envy and jealousy.” The Complete Brothers Grimm Fairy Tales 198 (2006 ed.). Cinderella’s evil stepsisters have their eyes pecked out by doves. *Id.*, at 95. And Hansel and Gretel (children!) kill their captor by baking her in an oven. *Id.*, at 54.”). Josh Blackman, *Instant Analysis: Brown (Formerly Schwarzenegger) v. EMA*, JOSH BLACKMAN’S BLOG (June 27, 2011), <http://joshblackman.com/blog/2011/06/27/instant-analysis-brown-formerly-schwarzenegger-v-ema/> (quoting Scalia’s discussion of the gory nature of Grimm’s Fairy Tales).

<sup>90</sup> JAMES ALAN FOX & JACK LEVIN, *EXTREME KILLING: UNDERSTANDING SERIAL AND MASS MURDER* 6 (2005) (“Hero worship has always been an integral part of popular culture. Over the decades, we have celebrated those members of society who have reached the pinnacle of success in their fields by honoring them in movies, in documentaries, in magazine profiles, and even on trading cards.”).

<sup>91</sup> See Lee Epstein et al., *Do Justices Defend the Speech They Hate? In-Group Bias, Opportunism, and the First Amendment* 3 (Amer. Pol. Science Assoc. Annual Meeting Paper, 2013), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2300572](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2300572) (“More than four decades ago, social scientists noticed the tendency of individuals to favor members of their own group over outsiders.”); see also Josh Blackman, *Do Justices Vote for Those They Can Relate to?*, JOSH BLACKMAN’S BLOG (Aug. 7, 2013), <http://joshblackman.com/blog/2013/08/07/do-justices-vote-for-those-they-can-relate-to/> (discussing in-group bias).

<sup>92</sup> Epstein et al., *supra* note 91, at 3.

these relatable tragedies warrant more attention than the overwhelming majority of homicides—many of which are gang-, drug-, or street violence-related. Or, stated differently, people are more likely to fear tragedies that could happen to them (anyone can be in a school or a movie theater), but less likely to fear tragedies that they are less likely to experience. Many may have trouble fathoming being involved in drug- or gang-related violence.

Think about the locales of shootings that rise to the national level of consciousness: schools, college campuses, movie theaters, supermarkets and elsewhere. These are places that can be related to, where people can picture themselves being. Satirist Andy Borowitz spun some dark humor on the loci of mass shootings with his article headline in *The New Yorker*, “*Study: Americans Safe from Gun Violence Except in Schools, Malls, Airports, Movie Theatres, Workplaces, Streets, Own Homes.*”<sup>93</sup>

But in contrast, places that many people never visit, on the proverbial wrong side of town, do not warrant as much notice. For example, forty-six people were shot in Chicago during a seventy-two-hour period around the six-month anniversary of Sandy Hook.<sup>94</sup> Yet these deaths garnered very little attention. Or, in the month preceding an October 2013 shooting at Los Angeles International Airport that killed one TSA agent and wounded six, the *Los Angeles Police Department* reported 11 homicides in the area,<sup>95</sup> and 246 murders were committed throughout the entirety of 2013, as of December 21.<sup>96</sup> While the incident at LAX garnered national attention that dominated the news cycle for an entire day—a Google News search at the time for “LAX Shooting” yielded 250,000+ results—we were not able to find any national headlines beyond the local media about these other deaths in the same geographic area, many involving the deaths of young children.

And, unfortunately, we suspect there is a racial angle here. A post at the liberal blog, *ThinkProgress* discusses a mass shooting in the gambling room in the back of a Detroit Barber shop, which occurred shortly after the shooting at LAX. This event garnered very little coverage in the media:

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<sup>93</sup> Andy Borowitz, *Study: Americans Safe from Gun Violence Except in Schools, Malls, Airports, Movie Theaters, Workplaces, Streets, Own Homes*, NEW YORKER (Nov. 6, 2013), <http://www.newyorker.com/online/blogs/borowitzreport/2013/11/study-americans-safe-from-gun-violence-except-in-schools-malls-airports-movie-theatres-workplaces-st.html?mobify=0>.

<sup>94</sup> Rebecca Leber, *46 People Were Shot in Chicago in Less than 72 Hours This Weekend*, THINK PROGRESS (June 17, 2013, 1:00 PM), <http://thinkprogress.org/justice/2013/06/17/2165931/>.

<sup>95</sup> *Showing 43 Homicides in October 2013*, L.A. TIMES (Oct. 2013), <http://projects.latimes.com/homicide/date/2013/10/>. <http://joshblackman.com/blog/wp-content/uploads/2014/04/LAPD-stats.pdf>

<sup>96</sup> See Maria Cramer, *Mixed Picture on City Crime; Homicides Down 4th Year in Row: Shootings, Flow of Guns Unabated*, BOS. GLOBE, Dec. 31, 2013, at A1 (“[I]n Los Angeles, there were 246 homicides [in 2013] through Dec. 21.”).

What makes this shooting different? Several things. First, it happened in Detroit, a city with a staggeringly high murder rate. Second, the reported gunman had a criminal history, and may have had a longstanding feud with some of the victims. *And, third, it happened in a space where many people can't imagine themselves: a gambling session in the back room of a barber shop. . . .* Sadly, the relative media ignorance of the shooting tracks with a common theme: Gun crimes often occur in low-income neighborhoods with largely non-white victims, but, from the news, you'd think every shooting put the white and affluent at risk of violence. There's an obvious reason from a producer's perspective: They want traffic, or viewers, and think they can get more if more well-off news consumers are self-concerned with the story. But it doesn't reflect the reality of gun violence in the United States, where black people are far more likely to be victims of gun homicides compared to their white counterparts.<sup>97</sup>

This is akin to what has been dubbed "Missing White Woman Syndrome,"<sup>98</sup> which shows that the media overwhelmingly covers missing white girls more than missing black girls.<sup>99</sup>

There are many unexplored reasons why certain shootings become salient. This analysis begins a discussion on this question.

#### IV. THE SHOOTING CYCLE

The shooting cycle begins. The first stage is *tragedy*. News flash: There is a gunman on the loose in a school, a store, a movie theater, or elsewhere. Initial reports start trickling in, announcing casualties. Another account reports that the gunman has been killed, but not before he inflicted mass carnage. The media descends on the site of the shooting and

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<sup>97</sup> Annie-Rose Strasser, *A Mass Shooting Happened Yesterday but You Didn't Hear Anything About It*, THINK PROGRESS (Nov. 8, 2013, 11:03 AM), <http://thinkprogress.org/justice/2013/11/08/2915581/detroit-barber-shop-shooting/> (emphasis added); see also Ashley Woods, *A Mass Shooting Happened This Week in Detroit, but You Probably Didn't Hear About It*, HUFFINGTON POST (Nov. 11, 2013, 7:54 AM), [http://www.huffingtonpost.com/2013/11/11/mass-shooting-detroit\\_n\\_4250706.html](http://www.huffingtonpost.com/2013/11/11/mass-shooting-detroit_n_4250706.html) ("Shootings involving low-income people don't often become national media stories . . .").

<sup>98</sup> See Tara McKelvey, *Cleveland Abductions: Do White Victims Get More Attention?*, BBC NEWS MAG. (May 9, 2013), <http://www.bbc.co.uk/news/magazine-22441124> (describing "Missing White Woman Syndrome" as the tendency of the media to privilege white women as victims over other minority women).

<sup>99</sup> See Sonia Ayanna Stovall, *Why Do We Seldom Hear About Missing Black Children?*, DENVER POST, Feb. 17, 2013, at 5D (explaining that missing African American children are underrepresented in the media).

investigates all aspects of what happened: who was the gunman, why did he do it, how did he gain access to the guns, who knew about his plans, and why did no one stop him? Sadness sets in as the victims are identified, and the national mourning begins. This melancholy gives way to anger.

The second stage is *introspection*. As a society, we try to understand what happened. We try to make sense of how such a horrible thing could have occurred. Doctors on cable news psychoanalyze the shooter by reading through his manifesto and social media profiles. He is dubbed a loner who kept to himself, but not someone who anyone ever thought would be a mass-murderer. Security analysts query how he could have gained access to his guns—almost always, they were legally obtained, but brought into a place that banned guns, and then were used in an illegal and lethal manner. Experts, through hindsight glasses, identify all the telltale signs that this person would inflict such bloodshed, and question why no one intervened. Pundits opine on how we can stop such a senseless act of crime again. In the end, we are left with more questions than answers. This growing uncertainty gives way to resolve to act.

The third stage is *action*. A movement emerges to change the law to make sure this crime is not repeated. We have to do something, they say. Politicians, often flanked by family members of the victims, declare that the deaths of loved ones will not be in vain, and that we as a society need to take action. The shooter should not have been allowed to inflict such a toll on the innocent. Efforts to try to understand why the shooter in this case did what he did, and how he obtained his weapons, are soon put aside. What is important is not just preventing a repeat of the tragedy that happened, but fixing the broader issue of gun violence in America. How can we stand by and do nothing, they ask? Remember how we felt when we learned of the tragedy? If we wait too long, we may miss our window for change.

The fourth stage is *divergence*. As time elapses, the fervor for change has begun to subside. Attention has moved on to other issues. Before the tragedy, there was little momentum toward gun control. With distance from the tragedy, and nudging from special interest groups, society has regressed to the mean. Despite this tapering, those seeking legislative change persist. The shooting is viewed as a galvanizing force to open eyes and awaken the American consciousness of how guns can lead to bloodshed. Proposed gun control laws, that were perhaps shelved or defeated in the past, are dusted off and reintroduced. They are viewed as part of a “comprehensive” and “common sense” set of reforms to eliminate gun violence writ large, and not just mass shootings. Whether or not these laws would have stopped the initial shooting is now secondary. We have to do something. Remember how you felt when you learned of the tragedy. We cannot do nothing, they say.

The fifth stage is *status quo*. By this point, support for change has

dwindled even further, as those who perhaps were supportive of gun control reform become suspicious. Urged on by lobbying groups, they ask themselves if the purpose of these legislative moves was to stop the actual crime that occurred or to advance a broader agenda with which they may be uncomfortable. Even among median voters, who were amenable to some change, support weakens. Raw emotions fade, the movement tapers, and people move on. On each anniversary of the shooting—one month, two months, three months, six months, one year—the memory of the tragedy becomes just that. A memory. Support abates back to levels before the tragedy. The supporters of reform shake their heads, disappointed. They ask themselves, what happened, what changed? For everyone else, life goes on as it did before the tragedy occurred. That is, until the cycle begins anew with the next tragedy.

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The pattern that we call the shooting cycle is all too familiar.<sup>100</sup> [NEW FOOTNOTE] Others have remarked on the cyclical nature of these tragedies.<sup>101</sup> [NEW FOOTNOTE] Professor Robert Spitzer, in *The Politics of Gun Control*, contended that gun politics follow a “cycle of outrage, action, and reaction.”<sup>102</sup> Professor Kristin Goss wrote, “In the cycle, a high-profile shooting outrages regular Americans; they act by proposing stricter gun controls; and this action causes gun rights supporters to react by, among other tactics, suggesting that gun regulation is just the first step down the slippery slope to fascism or totalitarianism.”<sup>103</sup> *The Wall Street Journal* has also characterized the cycle:

Someday soon, we are likely to awake to news of yet another rampage shooting, one that perhaps will rival the infamous events at Columbine, Virginia Tech, Aurora and Newtown. As unknowable as the when and who and where of the next tragedy is the certainty that there will be one, and of what will follow: The tense initial hours as we watch the body count tick higher. The ashen-faced news anchors with

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<sup>100</sup> [NEW FOOTNOTE] See Ed Krayewski, *Life After the Aurora Shooting*, REASON.COM (July 25, 2012), <http://reason.com/archives/2012/07/25/life-after-the-aurora-shooting> (“Tragedies like these follow a familiar cycle. Because they are disruptive and out-of-the-ordinary, they receive an abundance of media coverage, which in turn gives life to stalled agendas while birthing new ones. The president addresses the nation, articulating feelings many people share. We mourn the victims, even though they are strangers to us. We ask why it happened, and what can we do to keep it from happening again. We have been doing all of this for a very long time.”).

<sup>101</sup> [NEW FOOTNOTE] See Kristin A. Goss, *Policy, Politics, and Paradox: The Institutional Origins of the Great American Gun War*, 73 *FORDHAM L. REV.* 681, 682 (2004) (explaining that the gun control debate is cyclical and begins with a high-profile shooting).

<sup>102</sup> ROBERT SPITZER, *THE POLITICS OF GUN CONTROL* 12 (5th ed. 2012).

<sup>103</sup> Goss, *supra* note 101, at 682.

pictures of stricken families. Stories and images of the fatal minutes. Reports on the shooter's journals and manifestos. A weary speech from the president. Debates about guns and mental health. . . . The perverse truth is that this senselessness is just the point of mass shootings: It is the means by which the perpetrator seeks to make us feel his hatred.<sup>104</sup>

Others have written about a similar pattern in the wake of a terrorist attack.<sup>105</sup> An unfortunately accurate headline from the satirical newspaper, *The Onion*, sardonically characterizes this dynamic: "Let's Just Go Ahead and Assume We've Learned the Lessons of the Gabrielle Gifford's Shooting."<sup>106</sup>

## V. UNDERSTANDING THE SHOOTING CYCLE

There are two concepts that help explain shifts during the shooting cycle: *emotional capture* and *regression to the mean*. Emotional capture is a term we use to describe the intrinsic shift in emotions following a tragedy, and the concomitant shift in policy views during this time toward stricter gun laws. But the emotional capture is limited by the societal regression to the mean. Regression to the mean refers to the natural

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<sup>104</sup> Ari N. Schulman, *Review—What Mass Killers Want*, WALL ST. J., Nov. 9, 2013, at C1.

<sup>105</sup> See, e.g., LAURA K. DONOHUE, *THE COST OF COUNTERTERRORISM: POWER, POLITICS, AND LIBERTY* 2 (2008) ("This pattern is a common one. In the aftermath of a terrorist attack, the immediate assumption is that the incident occurred because the state lacked the information and authority necessary to avert it. The executive branch therefore seeks broader powers. And the political stakes are high: legislators are loath to be seen as indifferent to the latest atrocity or, worse, as soft on terror. Accordingly, the legislature grants the executive broader authorities, often under abbreviated procedures and without careful inquiry into what went wrong. Government officials claim that the new powers will be applied only to terrorists. To make the most extreme provisions more palatable, the legislature appends sunset clauses. But in the rush to pass new measures, legislators rarely incorporate sufficient oversight authorities. New powers end up being applied to nonterrorists—often becoming part of ordinary criminal law. And temporary provisions rarely remain so—instead, they become a baseline on which future measures are built. At each point at which the legislature would otherwise be expected to push back—at the introduction of the measures, at the renewal of the temporary provisions, and in the exercise of oversight—its ability to do so is limited.").

<sup>106</sup> See Ellen Crawford-Price, *Let's Just Go Ahead and Assume We've Learned the Lessons of the Gabrielle Giffords Shooting*, ONION (May 24, 2011), <http://www.theonion.com/articles/lets-just-go-ahead-and-assume-weve-learned-the-les,20525/> ("On Jan. 8, 2011, we as a society were shocked and dismayed when 19 people, including Rep. Gabrielle Giffords, a Democratic congresswoman from Arizona's 8th District, were shot during a public meeting outside a local supermarket. Six people were killed and Rep. Giffords suffered a near-fatal head wound. In the wake of this national tragedy, there seemed to be a clarion call to have an open dialogue about gun control, a thoughtful conversation about the way this country treats its mentally ill, and a long overdue discussion about the consequences of overly inflammatory political rhetoric. *Well, seeing as I haven't heard so much as a word about any of those topics in the past three months, I'm going to go ahead and assume that at some point we thoroughly explored those complex issues, resolved them, and are now living our lives based on the lessons we learned from the in-depth conversations I assume we had.*" (emphasis added)).

reversion to the *ex ante* status quo, of how people viewed certain policy issues before the tragedy.

To use an example, gun control legislation that could not be passed prior to the shooting, and that would not be passed after society regresses to the status quo, can only be enacted during the time of emotional capture. During this period, time is of the essence, and engaged politicians and interest groups supporting the law must move as quickly as possible before emotions subside. Opponents of the laws stall, and wait for sentiments to return to their pre-shooting state. Looking at public opinion polling over the last twenty years reflects both of these phenomena—emotional capture, followed by regression to the mean—after mass shootings.

#### A. *Decreasing Support for Stricter Gun Laws*

To measure the shooting cycle, we produced a graph that plots the percentage of Americans that supported stricter federal gun control laws from 1993 through 2013.<sup>107</sup> [NEW FOOTNOTE] We produced this graph by compiling the polling data over the last two decades<sup>108</sup> from five leading polling organizations: (1) NBC News/Wall Street Journal; (2) CNN/ORC; (3) ABC News/Washington Post; (4) Gallup; and (5) Pew Research. Four of these polling organizations framed the question about whether there should be stricter gun laws in roughly the same fashion.<sup>109</sup> The fifth, Pew Research, framed the question slightly differently in terms of controlling gun ownership,<sup>110</sup> but we deemed it substantially similar to include it in the same graph. On the graph, we also highlighted five of the highest profile mass shootings that occurred between 1993 and 2013: Columbine, Virginia

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<sup>107</sup> Our analysis only focuses on federal gun laws, and does not consider reform at the state level.

<sup>108</sup> There was not sufficient polling data on this question prior to 1990.

<sup>109</sup> See HART RESEARCH ASSOCS./PUB. OP. STRATEGIES, NBC NEWS/WALL STREET JOURNAL SURVEY, STUDY #13528, at 27 (2013), available at [http://msnbcmedia.msn.com/i/MSNBC/Sections/A\\_Politics/\\_Today\\_Stories\\_Teases/13528%20December%20NBC-Wsj%20Final%20Filled-InCORRECTED.pdf](http://msnbcmedia.msn.com/i/MSNBC/Sections/A_Politics/_Today_Stories_Teases/13528%20December%20NBC-Wsj%20Final%20Filled-InCORRECTED.pdf) (“In general, do you feel that the laws covering the sale of firearms should be made more strict, less strict, or kept as they are now?”); CNN/ORC POLL (2013), available at <http://i2.cdn.turner.com/cnn/2013/images/12/04/cnn.poll.gun.control.pdf> [hereinafter CNN POLL] (“Do you favor or oppose stricter gun control laws?”); ABC NEWS/WASH. POST, SOME GUN MEASURES BROADLY BACKED BUT THE POLITICS SHOW AN EVEN SPLIT (Mar. 12, 2013), available at <http://www.langerresearch.com/uploads/1147a2GunControl.pdf> (“Do you favor or oppose stricter gun control laws in this country? Do you feel that way strongly or somewhat?”); *Guns*, GALLUP, <http://www.gallup.com/poll/1645/guns.aspx#1> (last visited Mar. 25, 2014) [hereinafter GALLUP POLL] (“In general, do you feel that the laws covering the sale of firearms should be made more strict, less strict, or kept as they are now?”).

<sup>110</sup> PEW RESEARCH CTR., GUN RIGHTS PROponents MORE LIKELY TO VOTE ON ISSUE: BROAD SUPPORT FOR RENEWED BACKGROUND CHECKS BILL, SKEPTICISM ABOUT ITS CHANCES 13 (2013), available at <http://www.people-press.org/files/legacy-pdf/5-23-13%20Gun%20Policy%20Release.pdf> (“What do you think is more important—to protect the right of Americans to own guns, OR to control gun ownership?”).

Tech, Tucson, Aurora, and Newtown.<sup>111</sup> **[NEW FOOTNOTE]** Finally, we added an aggregate trend line that averages the polling data at each date along the graph to show the general direction of American sentiments.

**FIGURE X**

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<sup>111</sup> *See infra* Figure X.



By plotting all of these data points, a picture of Americans' reactions to gun violence becomes clear. First, the trend line in favor of stricter gun support is decreasing, from a high of roughly 64% in 1993 to roughly 48% in late 2013. In other words, over time, Americans have become less supportive of stricter gun laws. The aggregate line has an r-squared value of 0.58. The r-squared value shows how well the data points fit a regression line.<sup>112</sup> **[FOOTNOTE MOVED]** Specifically, it indicates what percentage of the data's variation is explained by the linear model. In this case, 58% of the variation is explained by the regression line. This demonstrates a moderately good fit for the data.<sup>113</sup> In other words, the decreasing trend toward less support for gun laws explains the statistical changes in American sentiments. The inflection point came in approximately April 2010 when a Pew Research poll found that Americans more strongly favored gun rights (49%) than restricting gun ownership (45%).<sup>114</sup> This decreasing support for gun laws provides a baseline against which to measure spikes in support following shootings (emotional capture), followed by a dip after that emotion subsides (regression to the mean).<sup>115</sup> **[NEW FOOTNOTE]**

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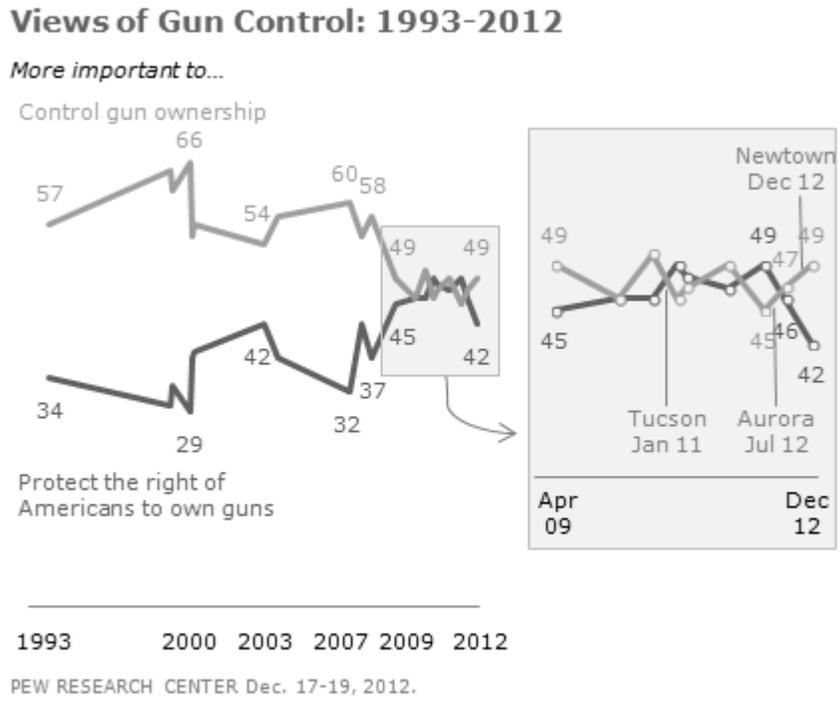
<sup>112</sup> Lester Brickman, *Effective Hourly Rates of Contingency-Fee Lawyers: Competing Data and Non-Competitive Fees*, 81 WASH. U. L.Q. 653, 681 n.87 (2003) ("The definition of r-squared is the square of r; r is often referred to as the 'coefficient of correlation,' and is a widely used statistic for describing the relationship between two variables. The value of r ranges from -1.00 to 1.00; an r measurement of 1.00 indicates a perfect positive relationship whereas 0.00 indicates the complete absence of a relationship. The square of r, 'r-squared,' also known as the 'coefficient of determination,' ranges from 0 to 1.00 and indicates how much of the change in a dependent variable is explained by the change in a second, independent variable. However, r-squared does not necessarily indicate a causal relationship between the two variables. Both variables may themselves be linked to a third, unknown variable which influences changes in both." (citations omitted)).

<sup>113</sup> *See id.* ("An r value of 0.5 is generally regarded as a moderate indicator of a relationship between two variables, whereas an r value of 0.75 or higher is generally regarded as a strong indicator of a relationship. An r of 0.5 equals an r-squared of 0.25; expressed as a percent, the r-squared value is 25%. That is, 25% of the variance in one variable is accounted for by the variance of the other variable. An r of 0.75, which equals an r-squared of 0.5625, indicates that 56.25% of the variance of one variable is accounted for by the variance of another variable. While there is no simple method of determining how high r-squared must be for the fit to be satisfactory, an r-squared of .50 (i.e., an r of .71) or higher may generally be considered a good indicator of a relationship between two variables." (citation omitted)).

<sup>114</sup> Mark Blumenthal, *Gun Control Polls Show Longterm Decline in Support, Despite Columbine Bump*, HUFFINGTON POST (July 20, 2012), [http://www.huffingtonpost.com/2012/07/20/gun-control-polls-aurora-shooting\\_n\\_1690169.html](http://www.huffingtonpost.com/2012/07/20/gun-control-polls-aurora-shooting_n_1690169.html).

<sup>115</sup> **[NEW FOOTNOTE]** *See supra* Figure X (charting the spikes and dips in gun control views from 1993–2012, particularly focusing on the times before a shooting, and then the corresponding change once some time has passed).

FIGURE X



## B. *Emotional Capture*

We use the phrase emotional capture to refer to the *natural* shift in policy preferences following a mass shooting. Emotional capture applies to the occurrence of any tragic, unexpected event that results in the loss of life. Our data demonstrate that in the aftermath of a mass shooting that captures the national consciousness, such as Columbine or Virginia Tech, there is a spike in support for stricter gun control laws.<sup>116</sup> [NEW FOOTNOTE] The most pronounced jump was in the two-year span from January 2011 to December 2012, which included Tucson, Aurora, and Newtown.<sup>117</sup> [NEW FOOTNOTE]

A few examples will demonstrate this spike. The tragic shooting at Columbine High School was the most watched public interest story in 1999.<sup>118</sup> 68% of Americans polled reported that they followed the story very closely.<sup>119</sup> A Gallup Poll taken shortly after the shooting showed 66% of Americans said the sale of firearms should be restricted, a 6% increase from earlier that year.<sup>120</sup> A Pew Research poll found that 65% of Americans favored new restrictions on owning firearms—an 8% increase since 1993.<sup>121</sup>

A CBS/New York Times poll released on January 20, 2011 in the aftermath of the shooting in Tucson, Arizona, showed “that Americans have moved slightly in favor of stricter laws in light of the incident.”<sup>122</sup> The percentage of Americans who wanted stricter gun laws increased from 40% in April 2010 to 46% in January 2011.<sup>123</sup> A Washington Post-ABC News survey showed that 55% of respondents were optimistic that Congress would be able to pass gun control legislation, up seven points from an ABC News-Yahoo News survey taken before the shooting.<sup>124</sup>

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<sup>116</sup> [NEW FOOTNOTE] See *supra* Figure X (displaying the fluctuations of gun control views and showing spikes in the support for tighter regulation in the periods following a highly publicized shooting).

<sup>117</sup> [NEW FOOTNOTE] See *supra* Figure X (depicting the most prominent shifts in gun control views, notably January 2011–December 2012, which involved three highly-publicized shootings within that span).

<sup>118</sup> *Columbine Shooting Biggest News Draw of 1999*, PEW RES. CENTER (Dec. 28, 1999), <http://www.people-press.org/1999/12/28/columbine-shooting-biggest-news-draw-of-1999/>.

<sup>119</sup> *Id.*

<sup>120</sup> Jeffrey M. Jones, *Record-Low 26% in U.S. Favor Handgun Ban*, GALLUP (Oct. 26, 2011), <http://www.gallup.com/poll/150341/record-low-favor-handgun-ban.aspx> (follow “View methodology, full question results, and trend data” hyperlink).

<sup>121</sup> *Bradley Boxes Out Political Center*, PEW RES. CENTER (May 20, 1999), <http://www.people-press.org/1999/05/20/bradley-boxes-out-political-center/>.

<sup>122</sup> Lucy Madison, *Poll: Americans Remain Split on Gun Control*, CBS NEWS (Jan. 20, 2011), <http://www.cbsnews.com/news/poll-americans-remain-split-on-gun-control/>.

<sup>123</sup> *CBS News/New York Times Poll: The Economy, the Budget Deficit and Gun Control*, CBS NEWS (Jan. 20, 2011, 6:30 PM), [http://www.cbsnews.com/htdocs/pdf/Jan11\\_Econ.pdf](http://www.cbsnews.com/htdocs/pdf/Jan11_Econ.pdf).

<sup>124</sup> Dan Balz & Jon Cohen, *Poll Shows High Marks for Obama on Tucson, Low Regard for Political Dialogue*, WASH. POST, Jan. 18, 2011, at A01.

Further, support for the enactment of an assault weapon ban increased from 54% in 2009 to 63% in 2011.<sup>125</sup> **[NEW FOOTNOTE]**

But not all mass shootings result in spikes. For example, a poll taken ten days after the shooting at a movie theater in Aurora, Colorado revealed no significant change in public views on gun control and gun rights. On July 30, 2012, “47% [said] it is more important to control gun ownership, while 46% [said] it is more important to protect the rights of Americans to own guns. That [was] virtually unchanged from a survey earlier [that] year in April, when 45% prioritized gun control and 49% gun rights.”<sup>126</sup>

What explains the spikes? In the immediate aftermath of a shooting, there are no new revelations about the effectiveness of gun control laws, as these studies have been debated for decades. There are seldom police reports showing that if stricter certain gun control laws had been in place, the tragedy would have been prevented (often police reports show that the guns were legally obtained).<sup>127</sup> **[NEW FOOTNOTE]** So what changes to result in the spike?

We contend that a driving, but not sole factor, is the emotional outburst resulting from reflecting on the deaths of the victims. It is the force that tugs at our hearts after seeing innocent lives taken so viciously. Some who in the past moderately supported stricter gun laws now strongly support it, while some who in the past moderately opposed stricter gun laws will now moderately support them. Many move up in their support of gun laws. This is the emotional capture.

We note that the dynamic of emotional capture is not only at play in the context of gun violence. Much has been written about these types of reactions following a terrorist attack, such as 9/11, and the resulting legislative response.<sup>128</sup> **[NEW FOOTNOTE]** Professor Donohue has written that in the aftermath of a terrorist attack, “[m]oral outrage and emotional fervor reach a crescendo . . . [and] [t]he newsworthiness of the types of events . . . ensures wide publicity.”<sup>129</sup> The people, fearful of what

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<sup>125</sup> **[NEW FOOTNOTE]** *CBS News/New York Times Poll: The Economy, the Budget Deficit and Gun Control*, *supra* note 103.

<sup>126</sup> *Views on Gun Laws Unchanged After Aurora Shooting*, PEW RES. CENTER (July 30, 2012), <http://www.people-press.org/2012/07/30/views-on-gun-laws-unchanged-after-aurora-shooting/>.

<sup>127</sup> **[NEW FOOTNOTE]** Often police reports show that guns involved in a shooting were legally obtained. *See, e.g.*, 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 2 (2013) [hereinafter SANDY HOOK FINAL REPORT], available at [http://www.ct.gov/csao/lib/csao/Sandy\\_Hook\\_Final\\_Report.pdf](http://www.ct.gov/csao/lib/csao/Sandy_Hook_Final_Report.pdf) (“All of the firearms were legally purchased by the shooter’s mother. Additionally, ammunition of the types found had been purchased by the mother in the past, and there is no evidence that the ammunition was purchased by anyone else, including the shooter.”).

<sup>128</sup> **[NEW FOOTNOTE]** *See* DONOHUE, *supra* note 105, at 12 (discussing generally the legislative response and reactions following a terrorist attack).

<sup>129</sup> *Id.*

happened, call on politicians to do something to keep them safe. With this heightened attention, “political leaders initiate media campaigns to demonstrate that they *are* doing something.”<sup>130</sup> Politicians always say, we have to do something, we cannot do nothing.<sup>131</sup> **[NEW FOOTNOTE]**

Following the attacks on September 11th, the Bush Administration “sought significantly broader powers and insisted on *haste*.”<sup>132</sup> Part of the haste no doubt could be attributed to wanting to take quick actions to stop imminent terrorist attacks. The exigencies were also based, however, on the notion that the President had to strike while the iron was hot, and the memories of the victims of 9/11 were still raw, to minimize opposition to what would come.<sup>133</sup> **[NEW FOOTNOTE]** The Patriot Act was introduced in the House of Representatives on October 24, 2001, and passed the same day by a vote of 357 to 66.<sup>134</sup> **[NEW FOOTNOTE]** On October 25, 2001, the Act passed the Senate by a vote of 98 to 1.<sup>135</sup> **[NEW FOOTNOTE]** The President signed it into law the next day.<sup>136</sup> Had the bill been passed one, two, or maybe three months later, the margin of victory, as well as the contents of the law, would have likely been quite different.

An inevitable consequence of passing legislation during emotional capture is mission creep. That is, once the people are emotionally committed to some sort of change, those in power can subtly add issues to the agenda. As former White House Chief of Staff Rahm Emanuel famously said, “Rule one: Never allow a crisis to go to waste . . . . They

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<sup>130</sup> *Id.*

<sup>131</sup> **[NEW FOOTNOTE]** See, e.g., David Jackson, *Biden to Mayors: “We Have to Act” on Guns*, USA TODAY, Jan. 18, 2013, at 3A (quoting Vice President Joe Biden as saying “[w]e have to do something” about gun violence).

<sup>132</sup> DONOHUE, *supra* note 105, at 1 (emphasis added). Professor Laura Donohue captures the haste of this legislative barrage in her description of the passage of the USA Patriot Act. See *id.* at 1–2 (“In the Senate, the administration’s bill bypassed committee markup and went straight behind closed doors. The House held only one hearing, at which Attorney General Ashcroft served as the sole witness. At 3:45 a.m. on October [24], the morning of the vote, the final bill reached print. The 342-page document amended fifteen federal statutes. Legislators, many of whom were unable even to read the text, were given only the opportunity to vote thumbs up or thumbs down—with no chance of further amendment. Dennis Hastert, the Speaker of the House, ruled out of order the one legislator who tried to debate parts of the act. Nevertheless, the legislation commanded nearly 80 percent of the vote: 337 Representatives voted for the measure, and only 79 objected. The numbers in the Senate were even more extreme: 96 cast their vote in favor, whereas only 1—Russ Feingold, a Democrat from Wisconsin—objected.” (footnotes omitted)).

<sup>133</sup> **[NEW FOOTNOTE]** See *id.* at 12 (explaining that since “no politician wants to be seen as responsible for the next, possibly more lethal attack” and since “public sentiment also plays a crucial role,” politicians tend to appeal to the public sentiment in order to generate support).

<sup>134</sup> **[NEW FOOTNOTE]** 147 CONG. REC. 20,461, 20,466 (2001).

<sup>135</sup> **[NEW FOOTNOTE]** 147 CONG. REC. 20,669, 20,742 (2001).

<sup>136</sup> Remarks on Signing the USA PATRIOT ACT of 2001, 2 PUB. PAPERS 1306–07 (October 26, 2001).

are opportunities to do big things.”<sup>137</sup> The context of this quotation is often lost. According to the *New York Times*, Emanuel was addressing “[t]he idea of turning the auto industry’s crisis into a chance to enact changes with energy and environmental benefits.”<sup>138</sup> In other words, the government should use momentum to legislate around an emergency of limited scope (the auto crisis) to address tangentially related goals that would otherwise lack support (the environment and energy reform). Elsewhere, Emanuel elaborated: “Things that we had postponed for too long, that were long-term, are now immediate and must be dealt with. This crisis provides the opportunity for us to do things that you could not do before.”<sup>139</sup> To this view, crises give politicians the opportunity to accomplish things that have been rejected many times before (that’s what waiting “long-term” means in Washington), but now are “immediate and must be dealt with.”<sup>140</sup> **[NEW FOOTNOTE]**

While Professors Eric A. Posner and Adrian Vermeule suggest that making decisions based on emotions, such as fear, after tragedies, can cause people to “discard old assumptions and complacent ways of thinking and to address problems with new vigor,”<sup>141</sup> it is more often the case that old ideas are just recycled, without any changed assumptions. Many of these proposals may have been previously rejected, or at the least would be nonstarters without the emotional capture. But now without opposition, they are in play. Professor Donohue observed that in a “heated atmosphere” after a terrorist attack, “measures previously rejected, or considered unnecessary, often pass.”<sup>142</sup> For example, “efforts after the Oklahoma City bombing in 1995 to expand the FBI’s investigative powers died—only to be successfully revived after 9/11.”<sup>143</sup> Further, “roving wiretaps, rejected in the 1996 Antiterrorism and Effective Death Penalty Act, were incorporated into the 2001 USA PATRIOT Act.”<sup>144</sup> Defeated politicians have very good memories.

In the aftermath of a mass shooting, the perennially introduced, and perennially defeated assault weapons bill—which expired in 2004—is brought back to the fore of the debate. Representative Carolyn McCarthy

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<sup>137</sup> Jeff Zeleny, *Obama Reviewing Bush’s Use of Executive Powers*, N.Y. TIMES, Nov. 10, 2008, at A0.

<sup>138</sup> *Id.*

<sup>139</sup> Gerald F. Seib, *In Crisis, Opportunity for Obama*, WALL ST. J., Nov. 21, 2008, at A2 (internal quotation marks omitted).

<sup>140</sup> **[NEW FOOTNOTE]** *Id.*

<sup>141</sup> ERIC A. POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* 63 (2007).

<sup>142</sup> DONOHUE, *supra* note 105, at 12.

<sup>143</sup> *Id.* at 13.

<sup>144</sup> *Id.*

has introduced an assault weapons ban in the House in 2003,<sup>145</sup> 2005,<sup>146</sup> and 2007,<sup>147</sup> each year's legislation failing to make it past committee.<sup>148</sup> **[NEW FOOTNOTE]** Gallup polling shows that support for a ban on assault weapons dipped from 57% in 1996, 59% in 2000, and 50% in 2004, to 44% in 2012.<sup>149</sup> The Senate failed to pass the Protection of Lawful Commerce in Arms Act in 2004, after Senator Dianne Feinstein attached a renewal of the assault weapons ban.<sup>150</sup> **[NEW FOOTNOTE]** However, the Act passed in 2005 without the amendment.<sup>151</sup> **[NEW FOOTNOTE]** In January 2013 after Newtown, Senator Feinstein reintroduced the bill.<sup>152</sup> It was subsequently voted down by a vote of sixty to forty in April 2013.<sup>153</sup>

Professors Posner and Vermeule argue that governing based on fear, after a terrorist attack, is not necessarily a bad thing.<sup>154</sup> In fact, they argue that a key aspect of rational decision-making—deliberation—may in fact be a negative. “[F]ear provides motivation. Where a fully rational person spends time deliberating, the fearful person acts quickly. Both of these factors suggest that fear can play a constructive role during emergencies.”<sup>155</sup> To this view, deliberation and time to consider laws is a negative, not a positive.

Perhaps a different approach to responding to tragedies is that taken by

<sup>145</sup> Assault Weapons Ban and Law Enforcement Protection Act of 2003, H.R. 2038, 108th Cong. (2003).

<sup>146</sup> Assault Weapons Ban and Law Enforcement Protection Act of 2005, H.R. 1312, 109th Cong. (2005).

<sup>147</sup> Assault Weapons Ban and Law Enforcement Protection Act of 2007, H.R. 1022, 110th Cong. (2007).

<sup>148</sup> **[NEW FOOTNOTE]** H.R. 1022, 110th Cong. (2007); H.R. 1312, 109th Cong. (2005); H.R. 2038, 108th Cong. (2003).

<sup>149</sup> 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>.

<sup>150</sup> **[NEW FOOTNOTE]** Protection of Lawful Commerce in Arms Act, S. 1805, 108th Cong. (2004).

<sup>151</sup> **[NEW FOOTNOTE]** Protection of Lawful Commerce in Arms Act, S. 397, 109th Cong. (2005).

<sup>152</sup> *See Lawmakers Renew Call to Restore Federal Assault Weapons Ban Following Newtown School Massacre*, CBS N.Y. (Dec. 16, 2012), <http://newyork.cbslocal.com/2012/12/16/lawmakers-renew-call-to-restore-federal-assault-weapons-ban-following-newtown-school-massacre/> (reporting that Senator Dianne Feinstein stated that she would be submitting a bill to reinstate the assault weapons ban).

<sup>153</sup> *See* Richard Simon, *Senate Votes Down Feinstein's Assault Weapons Ban*, L.A. TIMES (Apr. 17, 2013), <http://articles.latimes.com/2013/apr/17/news/la-pn-dianne-feinstein-assault-weapons-vote-20130417> (reporting that Senator Feinstein's bill had been rejected in the Senate by a margin of forty votes for and sixty against).

<sup>154</sup> *See* POSNER & VERMEULE, *supra* note 141, at 61 (“The civil libertarian view depends heavily on a particular theory of fear, a theory that implies that fear interferes with cognition and judgment. However, fear is a complex emotion, and generalizing about its relationship to cognition is hazardous.”); *see also id.* at 59 (“[F]ear does not play an unambiguously negative role in decisionmaking.”).

<sup>155</sup> *Id.* at 62.

Colorado. Nearly five months after the shooting in Aurora, Colorado, Governor John Hickenlooper noted that enough time had elapsed to assess the topic of gun regulations with clarity: “I wanted to have at least a couple of months off after the shooting in Aurora to let people process and grieve and get a little space, but it is, I think, now is [sic] the time is right.”<sup>156</sup> In a surreal twist of ironic timing, the very next day, the Sandy Hook shooting took place.<sup>157</sup> [NEW FOOTNOTE]

### C. Regression to the Mean

To comprehend the drops in support for stricter gun control laws following the post-shooting-spike, we have to understand the natural statistical notion of *regression to the mean*. This concept holds that “whenever the correlation between two scores is imperfect, there will be regression to the mean.”<sup>158</sup> Stated more simply, “extremes are exceptions—over time, results return to the norm.”<sup>159</sup> For example, students who take an examination in a class will fall naturally along a standard bell curve. There will be a few students at the top of the curve, a few students at the bottom, and the rest clustered somewhere along the middle. If a student consistently performs in the middle of the curve, and then suddenly scores in the 90th percentile, should we expect the student to perform that high again on the following exam? Probably not. That surge was likely an aberration, and the student will usually return to his or her usual average score (mean) on the middle of the bell curve—or will *regress to the mean*. This is the concept of regression to the mean.

To use another example, think of an average athlete who has a sudden breakout performance, but after some time he or she returns to previous mediocrity.<sup>160</sup> “Since athletic ‘performances at different times are imperfectly correlated,’ it is ‘due to regression alone [that] we can expect an extraordinarily good performance to be followed, on the average, by a

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<sup>156</sup> See Ivan Moreno & Kristen Wyatt, *Governor Hickenlooper: “The Time Is Right” to Talk Gun Laws*, HUFFINGTON POST (Dec. 13, 2012), [http://www.huffingtonpost.com/2012/12/13/governor-hickenlooper-say\\_n\\_2294609.html](http://www.huffingtonpost.com/2012/12/13/governor-hickenlooper-say_n_2294609.html) (internal quotation marks omitted).

<sup>157</sup> [NEW FOOTNOTE] SANDY HOOK FINAL REPORT, *supra* note 127, at 1.

<sup>158</sup> KAHNEMAN, *supra* note 4, at 181.

<sup>159</sup> Derek E. Bambauer, *Shopping Badly: Cognitive Biases, Communications, and the Fallacy of the Marketplace of Ideas*, 77 U. COLO. L. REV. 649, 687 (2006).

<sup>160</sup> One example is former New York Knicks basketball player Jeremy Lin. See Josh Blackman, *Jeremy Lin and Regression to the Mean*, JOSH BLACKMAN’S BLOG (Feb. 9, 2012), <http://joshblackman.com/blog/2012/02/09/jeremy-lin-and-regression-to-the-mean/> (commenting on Jeremy Lin’s success in terms of the statistical concept of regression to the mean); Nate Kornell, *Why Is Jeremy Lin So Good?*, PSYCHOL. TODAY: EVERYBODY IS STUPID EXCEPT YOU BLOG (Feb. 15, 2012), <http://www.psychologytoday.com/blog/everybody-is-stupid-except-you/201202/why-is-jeremy-lin-so-good> (explaining Jeremy Lin’s success based on the concept of regression to the mean, and predicting that he will come off of his hot streak at some point).

somewhat less extraordinary performance.”<sup>161</sup> In other words, if an athlete is usually mediocre, and performs very well for some brief period, that brief period is an outlier, and we can expect a return to normalcy at some point soon.

This simple concept can help explain the shooting cycle. The spike in support for gun control after a tragedy is, in part, an aberration spurred by the emotional capture of the event. Once that capture wears off, and the emotions fade, parts of society will naturally regress to the mean. That is, to where they were before the tragedy struck.

Scholars have observed this trend following previous mass shootings. For example, Professor Kristin Goss wrote that the “aftermath of Columbine looked a lot like the aftermath of many other high-profile shootings in American history: collective outrage, followed by a momentary flurry of unorganized calls and letters and donations from thousands of individuals, and then a quick return to the status quo.”<sup>162</sup> Polling found that the “post-Columbine bump had faded about a year later, and support for stricter gun laws remained roughly constant over the next eight years.”<sup>163</sup>

President Obama observed this “pull of our collective attention,”<sup>165</sup> [NEW FOOTNOTE] as he labeled it, after the shooting in Aurora, Colorado:

[W]hen there is an extraordinarily heartbreaking tragedy like the one we saw, there’s always an outcry immediately after for action. . . . [T]here’s talk of new reforms, and there’s talk of new legislation. And too often, those efforts are defeated by politics and by lobbying and eventually by the *pull of our collective attention elsewhere*.<sup>166</sup>

While politics and lobbying certainly account for a significant part of the change, this “pull” reflects an underlying natural return to what people are actually concerned about, rather than tragedies that stir up emotions.

A CNN poll, which measured the intensity of support for stricter gun laws following Newtown, illustrates this regression.<sup>167</sup>

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<sup>161</sup> Bambauer, *supra* note 159, at 688 (quoting THOMAS GILOVICH, HOW WE KNOW WHAT ISN’T SO: THE FALLIBILITY OF HUMAN REASON IN EVERYDAY LIFE 26 (1991) [ILL]).

<sup>162</sup> KRISTIN A. GOSS, DISARMED: THE MISSING MOVEMENT FOR GUN CONTROL IN AMERICA 1–2 (2006).

<sup>163</sup> Blumenthal, *supra* note 114.

<sup>165</sup> [NEW FOOTNOTE] Remarks at the National Urban League Conference in New Orleans, Louisiana, 2012 DAILY COMP. PRES. DOC. 597 (July 25, 2012).

<sup>166</sup> *Id.* (emphasis added).

<sup>167</sup> CNN POLL, *supra* note 109.

	Jan. 14–15, 2013	Apr. 5–7, 2013	Nov. 18–20, 2013
Strongly Favor ("A")	37%	36%	31%
Moderately Favor ("B")	18%	17%	18%
Moderately Oppose ("C")	17%	16%	18%
Strongly Oppose ("D")	27%	29%	32%
No Opinion	1%	2%	1%

To build on the example used earlier<sup>168</sup> [NEW FOOTNOTE] of the grade breakdown on a normal distribution curve, let's assign grades to people based on their level of support for stricter gun laws: an "A" to those who strongly favor stricter gun laws, a "B" those who moderately favor them, a "C" to those who moderately oppose them, and a "D" to those who strongly oppose them. (Of course, we offer no normative judgment on the respective positions, but we use these sequential grades for simplicity's sake.) First, let's establish the ex ante status quo before Newtown. Unfortunately, CNN did not offer polling data of the ex ante status quo before Newtown. But, we can assume, based on the general patterns associated with the shooting cycle discussed earlier,<sup>169</sup> [NEW FOOTNOTE] that there was a general spike in the numbers from December to January and that the share of Bs and Cs who were moderate on the issues remain roughly the same over time. So, presumably, before Newtown the survey sample was composed of fewer than 37% As, and more than 27% Ds.

However, after Newtown, the composition shifts quickly.<sup>170</sup> [NEW FOOTNOTE] Suddenly, on January 14, 2013, there is a surge of A students. Many who were previously B students (moderately favored gun control laws) instantly become more engaged, and jump up on the curve. A smaller number of C students (who moderately opposed the laws) now earn a B, and moderately favor new laws. Even a small number of D students break from their old habits, and pull a C, moderately, but not

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<sup>168</sup> [NEW FOOTNOTE] See *supra* notes 162–64 and accompanying text (detailing the regression of outlying extremes to the mean of a bell curve).

<sup>169</sup> [NEW FOOTNOTE] See *supra* Part IV (discussing the stages of the shooting cycle, which is characterized by a sudden increase, followed by the slow decline, of support for stricter gun control laws).

<sup>170</sup> [NEW FOOTNOTE] See GALLUP POLL, *supra* note 113 (demonstrating a fifteen percent increase in a "more strict" response when persons were asked, "[i]n general, do you feel that the laws covering the sale of firearms should be made more strict, less strict, or kept as they are now," between October 6–9, 2011, and December 19–22, 2012—less than a week after the Newtown school shooting).

strongly opposing gun laws. The upward progression of everyone stands as a persuasive theory to explain how the number of Bs and Cs throughout the entire year remains the same. The composition is now 37% A, 18% B, 17% C, and 27% D.<sup>171</sup> [NEW FOOTNOTE]

This surge to the top of the curve may seem impressive to the novice teacher, who can view it as a mandate that there are many more A students than he or she thought before. That is, suddenly the class became, on the whole, more supportive of stricter gun laws. But the veteran grader knows what is going on. This surge is a temporary aberration. A natural statistical regression to the mean is inevitable. The B, C, and D students did not suddenly learn something new to change their views, or have a fundamental shift in their views. This change was spurred by something ephemeral—here, emotion.

The next examination on April 5 confirms this suspicion. The share of As dips somewhat from 37% to 36%.<sup>172</sup> [NEW FOOTNOTE] Some of the A students strongly committed to change now only moderately favor these laws. Some of those B students (who were probably C students to begin with), score a C, and now moderately oppose the laws. And some of the C students (who were D students to begin with) return to their normal positions as strong opponents of these laws. Support for gun control laws is still strong, but is tapering.

But, for the final examination on November 18, we see a stark change. The percentage of A students drops down to 31% from a high of 37% eleven months earlier.<sup>173</sup> [NEW FOOTNOTE] The number of D students increased from 27% to 32%.<sup>174</sup> [NEW FOOTNOTE] The class lost 6% at the top of the curve, and gained 5% at the bottom of the curve. It roughly equaled out.<sup>175</sup> [NEW FOOTNOTE] What happened? We see that the total numbers of Bs and Cs (like on any bell curve) remains roughly the same, which means that students at each level of the curve bumped down. A students became B students. B students became C students. And C students became D students. Whatever gains were made in December receded to the status quo. We can assume that the grade distribution in November 2013 roughly reflects what the grades would have been in November 2012, with a nearly-complete regression to the mean.

In society, there are blocks of people who vigorously favor stricter gun laws, and those who vigorously oppose them. These blocks at either end of the spectrum are likely fairly fixed in their ways. Emotional capture,

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<sup>171</sup> [NEW FOOTNOTE] CNN POLL, *supra* note 109, at 2.

<sup>172</sup> [NEW FOOTNOTE] *Id.*

<sup>173</sup> [NEW FOOTNOTE] *Id.*

<sup>174</sup> [NEW FOOTNOTE] *Id.*

<sup>175</sup> [NEW FOOTNOTE] *See id.* (showing only a one percent difference between those who “strongly favor” stricter gun control laws and those who “strongly oppose” stricter gun control laws).

however, plays on those in the middle. There are people who may moderately favor gun control laws but, after seeing innocent children killed at Newtown, are affected by the emotional capture phenomenon and begin to strongly favor those laws.<sup>176</sup> [NEW FOOTNOTE] There are people who moderately opposed stricter gun laws who, after seeing the tragedy unfold at Sandy Hook, tepidly endorse stricter gun laws. These people may be opposed to many proposed laws, but will endorse more moderate provisions. There may even be those who strongly opposed gun laws who, after the shooting, soften their stance, and now only moderately oppose gun control. They may not support any gun control laws, but will not vociferously oppose them, temporarily at least.

With time, people turn to the priorities that existed before the tragedy. Stuart Rothenberg, the editor and publisher of the *Rothenberg Political Report*, commented on this shift, suggesting:

So much of the support for gun control is emotional, following the Newtown tragedy . . . . The longer you get away from there, people start thinking of other issues. They start thinking about terrorism or jobs or immigration, and not surprisingly, then some of the momentum behind gun control starts to fade.<sup>177</sup>

Americans did not become more callous or heartless in the year after Newtown. They returned to what mattered beforehand. These subtle changes, in just a few months, are evidence of the regression to the mean.

#### D. *The Mean Is Declining*

In the previous section, we explained that after the emotional capture fades, society regresses to the ex ante status quo that existed before the tragedy began. But that is not the whole story. What is most fascinating about the graph discussed above is that support for stricter gun control does not just return to the pre-tragedy level. In fact, the post-tragedy level of support for stricter gun laws is *even* lower. Simply put, after the emotions settle from each mass shooting, support for stricter gun control laws is *lower* than it was before the tragedy (this finding makes us more confident about the assumptions we made in Part C). [NEW FOOTNOTE] To put a finer point on it, following tragedies, we have regression to a *decreasing* mean. This trend has been constant over the past two decades, following Columbine and Virginia Tech, and post-Newtown polling data confirms

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<sup>176</sup> [NEW FOOTNOTE] See *supra* Part V.B (describing the role of emotional capture in the shooting cycle).

<sup>177</sup> Susan Page, *Support for New Gun-Control Law Falls Below 50%*, USA TODAY, Apr. 23, 2013, at 3A (quoting Stuart Rothenberg).

it.<sup>178</sup> [NEW FOOTNOTE]

According to a two-decade long Gallup survey, the percentage of Americans who want to keep gun laws as they are now are—in other words, maintain the status quo—has been trending upward.<sup>179</sup> [NEW FOOTNOTE] The percentage of Americans who want to make gun laws less strict has been trending slightly upward, with the exception of several sudden valleys that can be correlated with mass shootings (the inverse of the corresponding spikes up for “more strict” laws).<sup>180</sup> [NEW FOOTNOTE] But the percentage of people who want to have stricter gun laws has been trending downward.<sup>181</sup> [NEW FOOTNOTE] These numbers show a cultural trend toward more permissive gun laws, with only mere blips in the aftermaths of mass shootings that reach the collective consciousness of Americans. After these spikes, views regress toward the mean, with less than a majority seeking change, and the other half favoring either the status quo or less strict gun laws.<sup>182</sup> There is a decreasing mean for stronger gun laws after each mass shooting.

When viewed in context, this trend is even more significant. In 1994, the Assault Weapons Ban was enacted, representing the modern-day apogee of federal gun control laws.<sup>183</sup> [NEW FOOTNOTE] Yet, in the years after 1994, support for stricter gun control laws continued to decrease.<sup>184</sup> [NEW FOOTNOTE] In 2004, the Assault Weapons Ban expired, bringing us to the current level of federal gun laws.<sup>185</sup> [NEW FOOTNOTE] Even with much more lax gun laws, there was no plateau, , suggesting a sweet-spot was reached, or reversal of trends.

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<sup>178</sup> [NEW FOOTNOTE] See GALLUP POLL, *supra* note 109 (showing a generally decreasing approval of “more strict” laws covering the sale of firearm, from a 78% approval of stricter laws in September 1990 to a 49% approval of stricter laws in October 2013).

<sup>179</sup> [NEW FOOTNOTE] See *id.* (showing that while 17% of those polled in 1990 thought laws covering sales of firearms should be kept as they are now, this number increased to 37% in 2013).

<sup>180</sup> [NEW FOOTNOTE] See *id.* (showing a 15% increase in public approval for stricter firearm sales laws in the week following the Newtown school shooting, which corresponded with a 5% decrease in public support for less strict firearm sales laws and a 10% decrease in public support for maintaining current laws).

<sup>181</sup> [NEW FOOTNOTE] See *id.* (showing that from September 1990 to October 2013, the percentage of individuals polled that favor stricter gun laws gradually decreased from 78% to 49%).

<sup>182</sup> See *id.* (reporting that ten months after the Newtown school shooting, “more strict” support decreased by 9%, while “less strict” support increased by 7% and “kept as now” support increased by 3% in comparison to the responses provided when the question was asked in the week following the Newtown school shooting).

<sup>183</sup> [NEW FOOTNOTE] Public Safety and Recreational Firearms Use Protection Act, Pub. L. No. 103-322, §§ 110101–110106, 108 Stat. 1996, 1996–2010 (1994) (repealed 2004). [CHECK]

<sup>184</sup> [NEW FOOTNOTE] See GALLUP POLL, *supra* note 109 (showing a 62% approval rating for stricter firearm sales laws in April 1995 and a 49% approval rating for stricter firearm sales laws in October 2013).

<sup>185</sup> [NEW FOOTNOTE] See § 110105, 108 Stat. at 2000 (“This subtitle and the amendments made by this subtitle—(1) shall take effect on the date of the enactment of this Act; and (2) are repealed effective as of the date that is 10 years after that date.”).

In fact, support for stricter gun control laws continued to drop. Even though a significant gun control law expired in 2004, Americans were still not content and wanted even more relaxed gun laws. Preliminary data in 2013 shows that, following the defeat of federal laws introduced after Newtown,<sup>186</sup> [NEW FOOTNOTE] Americans still want fewer gun laws.<sup>187</sup> [NEW FOOTNOTE] This trend has continued despite successful and unsuccessful efforts to pass federal gun control legislation.

These numbers are instructive for those seeking to implement gun control laws. There is a short window during the spike, where support for new laws is stronger than it was before. However, if laws are not passed quickly, once emotions fade, their chances of success are even *lower* than they were before. This last point may be somewhat surprising, but it helps to explain why support for federal gun control laws seems to fade after each mass shooting. Even state gun control laws enacted in the wake of Newtown are increasingly unpopular, and mandatory registrations regimes are being met with widespread disobedience.<sup>188</sup> Society becomes desensitized from witnessing the carnage of mass shootings, and the threshold for moral outrage becomes higher. Less support for gun control laws after tragedies has become the *normal* reaction to mass shootings. Not the other way around.

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<sup>186</sup> [NEW FOOTNOTE] See Jonathan Weisman, *Gun Control Drive Blocked in Senate; Obama, in Defeat, Sees "Shameful Day,"* N.Y. TIMES, Apr. 17, 2013, at A1 ("In rapid succession, a bipartisan compromise to expand background checks for gun buyers, a ban on assault weapons and a ban on high-capacity gun magazines all failed to get the 60 votes needed under an agreement between both parties.").

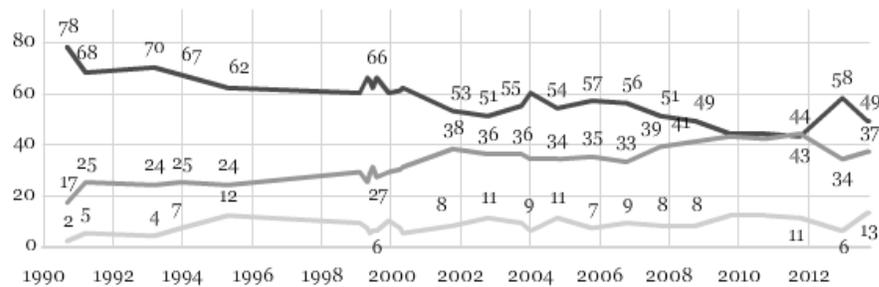
<sup>187</sup> [NEW FOOTNOTE] See GALLUP POLL, *supra* note 109 (showing a 9% increase in disapproval for a law that would "[r]equire background checks for all gun purchases," a 6% increase in disapproval for a reinstatement of the Assault Weapons Ban, and a 2% increase in disapproval for limiting ammunition magazine sales to ten rounds or less from January 2013 to April 2013).

<sup>188</sup> <http://joshblackman.com/blog/2014/04/17/what-happens-when-1-million-new-yorkers-refuse-to-register-their-guns/> (noting that over one million New Yorkers are flouting new gun laws, and Connecticut has not been able to enforce their laws).

FIGURE X<sup>189</sup>

*In general, do you feel that the laws covering the sale of firearms should be made more strict, less strict, or kept as they are now?*

■ % More strict   ■ % Kept as now   ■ % Less strict



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#### E. Interest Groups and the Mean

To this point, we have intentionally omitted in our discussion the role that interests groups play in stimulating emotional capture to pull people away from (or change) the mean, and in downplaying those concerns to push society back toward the mean. Groups such as the Brady Campaign to Prevent Gun Violence and the National Rifle Association are responsible for stimulating both of these dynamics. Gun control groups are adept at assembling the passions after a tragedy to deepen the scope of emotional capture. On the other end of the debate, gun rights groups have proven proficient at nudging society back to the mean, by raising alternate proposals, dismissing the concerns of gun control groups, and flat-out rejecting any reform. Opposing the status quo is much tougher than maintaining it.

It is impossible to entirely disentangle the natural phenomenon of emotional capture and regression to the mean from the political influence

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of these groups. Stated differently, we cannot calculate what percentage of the shift in either direction is due to natural tendencies of people to react and disengage from tragedies, and what percentage is due to interest groups stimulating either phenomenon through advocacy, outreach, and lobbying. In this Article, we do not attempt to untie this Gordian knot, except to say that our analysis only focuses on the *natural deviations* in society with respect to emotional capture and regression to the mean. We focus solely on the people's reactions and the related governmental decisions to move quickly in order to ride, or stem the tide of waning emotions. We concede that this tells an incomplete portion of the narrative, yet the movement of popular opinion independent from the lobby groups has been under-discussed in the academic literature and in contemporary reports.

Concerning the drop in support for these laws, Professor Adam Winkler observed that the “[l]awmakers in Congress see these [public opinion] numbers—especially senators in competitive districts or those worried about a primary challenge from the right.”<sup>190</sup> When the percentage of Americans who strongly support these laws dips below the percentage of Americans who strongly oppose them, the debate becomes much clearer than simply labeling the NRA as the sole reason why these changes occur. Our analysis only begins the study of this question.

## VI. ONE YEAR FROM NEWTOWN

After describing the shooting cycle and how support for change waxes with emotion and wanes with time, we now dissect the legislative responses to Newtown. We stress that none of this analysis is to suggest that attention to mass shootings is not warranted, or that emotion and sentiments toward these tragic losses are misplaced. Further, we accept that our analysis only explains this period in part. Rather, we aim to place these events of the year following Newtown into context through the lens of innate behavioral heuristics that impact how we all see the world, and government in particular. We do not attempt to pigeonhole the events that followed from Newtown into the five phases we identified. Like any model, the fit is not precise, though there is a strong congruence.

### A. *Gun Control Before Newtown*

Before we begin our discussion of Newtown, we have to establish the *ex ante* status quo baseline. Prior to December 14, 2012, federal gun

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<sup>190</sup> Adam Winkler, *Who Killed Gun Control? The Gun-Control Bill Is Dead. Why?*, NEW REPUBLIC (Apr. 17, 2013), <http://www.newrepublic.com/article/112946/gun-control-failure-2013-who-responsible>.

control legislation was not on the national radar.<sup>191</sup> [NEW FOOTNOTE] During his first term in office, President Obama failed to make gun control part of his agenda, much to the consternation of many gun-control advocates.<sup>192</sup> [NEW FOOTNOTE] Following the shooting in Tucson, President Obama “mentioned gun safety only in passing.”<sup>193</sup> Even in the wake of the shooting in Aurora, Colorado in July, 2012, neither President Obama, nor his opponent Governor Mitt Romney “push[ed] for new laws . . . to prevent similar attacks.”<sup>194</sup> This inaction disappointed gun control advocates, such as then-New York City mayor Michael Bloomberg, who opined that “[s]oothing words are nice, but maybe it’s time that the two people who want to be president of the United States stand up and tell us what they are going to do about it, because this is obviously a problem across the country.”<sup>195</sup> The topic of gun control was notoriously absent from the 2012 election—barely one month before Newtown.

But after Newtown, and before President Obama was even inaugurated, he suddenly made guns the centerpiece of his second term. Shortly before he read his speech to mark the tragedy, “Obama convened a group of top aides in the Oval Office and informed them that passing gun legislation would now take priority in his already-cluttered second-term agenda.”<sup>196</sup>

### B. *The Tragedy*

On the morning of December 14, 2012, Adam Lanza entered Sandy Hook Elementary School in Newtown, Connecticut.<sup>197</sup> [NEW FOOTNOTE] Using a Bushmaster Model XM15-E2S, he shot and killed twenty first graders and six members of the school’s staff.<sup>198</sup> [NEW FOOTNOTE] After spending fewer than eleven minutes in the building,

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<sup>191</sup> [NEW FOOTNOTE] See GALLUP POLL, *supra* note 109 (reporting 49% of participants favored stronger gun control laws in January 2011, while 50% opposed stronger gun control laws).

<sup>192</sup> [NEW FOOTNOTE] Devin Dwyer & Mary Bruce, *Obama Ready for “Meaningful Action” on Gun Control*, ABC NEWS (Dec. 15, 2012), <http://abcnews.go.com/Politics/president-obama-ready-meaningful-action-gun-control/story?id=17977115> (“Following the deadly school shooting at a Newtown, Conn., elementary school, President Obama may now be poised to push for new gun control measures after keeping relatively quiet about the issue during his first term. . . . The Brady Campaign to Prevent Gun Violence, a nonprofit advcoacy [sic] group, in 2010 awarded Obama an ‘F’ on gun control, citing ‘extraordinary silence and passivity.’”).

<sup>193</sup> Tom Cohen, *Candidates Show Little Appetite for New Gun Control Laws*, CNN (July 26, 2012), <http://www.cnn.com/2012/07/26/politics/gun-control-debate/>.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* (quoting Michael Bloomberg, New York City Mayor).

<sup>196</sup> Robert Draper, *Inside the Power of the N.R.A.*, N.Y. TIMES, Dec. 15, 2013, at MM48.

<sup>197</sup> [NEW FOOTNOTE] SANDY HOOK FINAL REPORT, *supra* note 127, at 9.

<sup>198</sup> [NEW FOOTNOTE] *Id.* at 5.

the shooter took his own life with a handgun.<sup>199</sup> [NEW FOOTNOTE] Before traveling to the school, Lanza killed his mother, Nancy Lanza, in their home.<sup>200</sup> [NEW FOOTNOTE] In total he carried four firearms—the Bushmaster rifle, two pistols, and a shotgun which was found in his car.<sup>201</sup> [NEW FOOTNOTE] All of the guns were legally owned by his mother.<sup>202</sup> [NEW FOOTNOTE]

The Sandy Hook Final Report, which was filed by the State’s Attorney, determined that Lanza acted alone and thoroughly planned his crimes.<sup>203</sup> [NEW FOOTNOTE] Further, he was known to have significant mental health issues and had an obsession with mass murder, particularly the Columbine High School shootings.<sup>204</sup> [NEW FOOTNOTE] Despite an extensive investigation of materials and information on the shooter, the report concluded that there was no clear indication of a motive.<sup>205</sup>

The same day of the shooting, President Obama delivered a gut-wrenching address from the White House. The President labored emotionally over the speech, crossing out lines from an early draft, saying “I can’t read that, . . . I won’t be able to get through them.”<sup>206</sup> Fighting back tears, the President said, “We’ve endured too many of these tragedies in the past few years.”<sup>207</sup> He continued:

As a country, we have been through this too many times. Whether it’s an elementary school in Newtown or a shopping mall in Oregon or a temple in Wisconsin, or a movie theater in Aurora or a street corner in Chicago, these neighborhoods are our neighborhoods, and these children are our children.<sup>208</sup>

From these tragedies, he identified a sense of resolve and issued a call for action: “And we’re going to have to come together and take *meaningful action* to prevent more tragedies like this, regardless of the politics.”<sup>209</sup> [NEW FOOTNOTE] But, as the *New York Times* noted, “the president stopped short of detailing any new initiatives, like restrictions on

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<sup>199</sup> [NEW FOOTNOTE] *Id.*

<sup>200</sup> [NEW FOOTNOTE] *Id.* at 24.

<sup>201</sup> [NEW FOOTNOTE] *Id.* at 36–37. A fifth firearm, a bolt action rifle that was also legally purchased by Nancy Lanza, was found at the Lanza home and discovered to be the firearm used in Nancy Lanza’s murder. *Id.*

<sup>202</sup> [NEW FOOTNOTE] *Id.* at 36.

<sup>203</sup> [NEW FOOTNOTE] *Id.* at 3.

<sup>204</sup> [NEW FOOTNOTE] *Id.*

<sup>205</sup> See *id.* at 43 (“Many people have asked why the shooter did what he did on December 14, 2012. Or, in the vernacular of the criminal justice system, ‘Did he have a motive to do what he did?’ This investigation, with the substantial information available, does not establish a conclusive motive.”).

<sup>206</sup> Draper, *supra* note 196.

<sup>207</sup> Winkler, *supra* note 190.

<sup>208</sup> Remarks on the Shootings in Newtown, Connecticut, 2013 DAILY COMP. PRES. DOC. 946, at 1 (Dec. 14, 2012).

<sup>209</sup> [NEW FOOTNOTE] *Id.* (emphasis added).

high-capacity ammunition magazines or stricter bans on gun buyers with a history of mental illness.”<sup>210</sup> Earlier that day, White House Press Secretary Jay Carney declined a reporter’s fervent questioning about passing gun-control laws, saying, “I think that day will come, but today’s not that day, especially as we are awaiting more information about the situation.”<sup>211</sup>

Others were not content with calls for mere “meaningful action”: The *New York Times* noted that the President’s “words were cautious and were immediately criticized for being too timid.”<sup>212</sup> Leading the charge was Mayor Michael Bloomberg, who called for immediate action: “President Obama rightly sent his heartfelt condolences to the families in Newtown. But the country needs him to send a bill to Congress to fix this problem. Calling for ‘meaningful action’ is not enough. We need *immediate action*.”<sup>213</sup> After faulting the White House’s lack of leadership, Bloomberg said, “This is a national tragedy and it demands a national response. My deepest sympathies are with the families of all those affected, and my determination to stop this madness is stronger than ever.”<sup>214</sup> **[NEW FOOTNOTE]**

The Newtown shooting would shock the conscience like few other tragedies in recent memory. According to the Associated Press, a poll of U.S. editors and news directors showed that the massacre at Sandy Hook Elementary, along with other mass shootings, was the top story of 2012 (even though it occurred only three weeks before the New Year).<sup>215</sup> A December 2012 USA Today/Gallup poll showed that half of respondents “[said] they ha[d] been following the news of the Newtown shooting very closely and another 37% [were] following it somewhat closely.”<sup>216</sup> Gallup observed:

The combined 87% is in the top 10 of more than 200 news stories for which Gallup has measured Americans’ attentiveness since 1991, putting it on par with the 2010 Gulf of Mexico oil spill, the start of the 1991 U.S. ground war in

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<sup>210</sup> Mark Landler & Erica Goode, *Obama’s Cautious Call for Action Sets Stage to Revive Gun Debate*, N.Y. TIMES, Dec. 15, 2012, at A1.

<sup>211</sup> Rachel Weiner, *Carney: Today Not the Day to Discuss Gun Control*, WASH. POST (Dec. 14, 2012), <http://www.washingtonpost.com/blogs/post-politics/wp/2012/12/14/carney-today-not-the-day-to-discuss-gun-control/?print=1>.

<sup>212</sup> Landler & Goode, *supra* note 210.

<sup>213</sup> *Statements of Mayors Against Illegal Guns Co-Chairs on Newtown, Connecticut Shooting*, MIKE BLOOMBERG (Dec. 14, 2012), <http://www.mikebloomberg.com/index.cfm?objectId=9B3D95C5-C29C-7CA2-F2B8B2290775FBA9> (emphasis added).

<sup>214</sup> **[NEW FOOTNOTE]** *Id.*

<sup>215</sup> *Poll Ranks Top 10 News Stories of 2012*, USA TODAY (Dec. 20, 2012), <http://www.usatoday.com/story/news/2012/12/20/year-top-news/1783303/>.

<sup>216</sup> Lydia Saad, *Parents’ Fear for Children’s Safety at School Rises Slightly*, GALLUP (Dec. 28, 2012), <http://www.gallup.com/poll/159584/parents-fear-children-%20safety-school-rises-slightly.aspx>.

Iraq, and the death of Princess Diana in 1997.<sup>217</sup> [NEW FOOTNOTE]

The shooting at Sandy Hook pierced the collective psyche, and affected nearly all Americans.

The time for change would come soon enough. On December 19, “5 days since the heartbreaking tragedy in Newtown, Connecticut,” the President issued a call for action.<sup>218</sup> He stressed that “this time, the words need to lead to action. . . . I will use all the powers of this office to help advance efforts aimed at preventing more tragedies like this.”<sup>219</sup> Gun control would become “a central issue” of his presidency.<sup>220</sup> [NEW FOOTNOTE] The President announced that Vice President Joe Biden would lead a task force that would propose specific new laws by January 2013, “proposals that [Obama] then intend[ed] to push without delay.”<sup>221</sup> “[T]he fact that this problem is complex can no longer be an excuse for doing nothing,” Obama explained.<sup>222</sup> [NEW FOOTNOTE] The President “urge[d] the new Congress to hold votes on these new measures [the] next year, in a timely manner.”<sup>223</sup>

The administration-wide effort was made a priority and the President planned to submit legislative proposals within the following month.<sup>224</sup> [NEW FOOTNOTE] In the next few weeks, Biden’s group held twenty-two meetings and reportedly collected proposals from 229 organizations, including gun-control associations like the Brady Campaign, gun-rights groups such as the NRA, and representatives from the video-game industry.<sup>225</sup> [NEW FOOTNOTE]

Still, advocates of gun-control were not pleased because the very act of appointing a task force delayed the process.<sup>226</sup> [NEW FOOTNOTE] Here, it is alleged, the President didn’t move *fast enough*. Professor Winkler observed:

All of the major proposals of the Biden commission, were well known to anyone who has followed the gun debate: universal background checks, bans on assault weapons, and restrictions on high-capacity magazines. For this hardly

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<sup>217</sup> [NEW FOOTNOTE] *Id.* (emphasis omitted).

<sup>218</sup> The President’s New Conference, 2012 DAILY COMP. PRES. DOC. 957, at 1 (Dec. 19, 2012).

<sup>219</sup> *Id.* at 1–2.

<sup>220</sup> [NEW FOOTNOTE] *Id.* at 9.

<sup>221</sup> *Id.* at 1.

<sup>222</sup> [NEW FOOTNOTE] *Id.*

<sup>223</sup> *Id.* at 2.

<sup>224</sup> [NEW FOOTNOTE] Michael D. Shear, *Obama Vows Fast Action Pressing for Gun Control*, N.Y. TIMES, Dec. 20, 2012, at A1.

<sup>225</sup> [NEW FOOTNOTE] Philip Rucker & Peter Wallsten, *Gun Task Force Heard All Sides but Kept Goal in Sight*, WASH. POST, Jan. 20, 2013, at A3.

<sup>226</sup> [NEW FOOTNOTE] Winkler, *supra* note 190.

innovative set of reforms, Obama didn't need to wait three weeks. Gun control groups like the Brady Center and Mayors Against Illegal Guns could have offered him draft legislation on these reforms within days.<sup>227</sup>

What does it say about support for a piece of legislation if waiting a few weeks—from December to January—for its introduction was too long? One point to stress is that supporters did not favor speed because it would result in better legislation, or reflect a wider consensus. Rather, speed was necessary to strike while the iron was hot, before sentiments turned. Before society regressed to the mean.

### C. *Introspection and Action*

#### 1. *The Proposal*

Upon gathering the information from the Biden task force, on January 16, 2013, President Obama unveiled his gun-control proposals.<sup>228</sup> [NEW FOOTNOTE] These recommendations included criminal background-check requirements for all gun sales, an assault weapons ban, a ten-round limit on ammunition magazines, a ban on armor-piercing bullets, a measure to provide mental-health services in schools, an increase in funding to hire police officers, and the passage of a federal gun-trafficking statute.<sup>229</sup> The President sent these measures to Congress.<sup>230</sup> [NEW FOOTNOTE] The administration supplemented these legislative proposals with twenty-three executive orders increasing incentives for states to share information with the federal background-check system, reviewing gun-lock and gun-safe standards, nominating an ATF director, maximizing efforts to prosecute gun crimes, issuing a memorandum directing the CDC to research the causes and prevention of gun crimes, increasing incentives for schools to procure resource officers, and launching a national discussion on mental health led by Secretaries Sebelius and Duncan.<sup>231</sup>

In the spring of 2013 Senator Joe Manchin, a Democrat from West Virginia, searched for a pro-gun rights Republican as a partner for

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<sup>227</sup> *Id.*

<sup>228</sup> [NEW FOOTNOTE] Sam Stein & John Rudolf, *Obama Gun Control Proposals Unveiled, Marking Biggest Legislative Effort in a Generation*, HUFFINGTON POST (Jan. 17, 2013), [http://www.huffingtonpost.com/2013/01/16/obama-gun-control-proposals\\_n\\_2486919.html](http://www.huffingtonpost.com/2013/01/16/obama-gun-control-proposals_n_2486919.html).

<sup>229</sup> *Id.*

<sup>230</sup> [NEW FOOTNOTE] Peter Baker & Michael Shear, *Obama to "Put Everything I've Got" into Gun Control*, N.Y. TIMES, Jan. 17, 2013, at A1.

<sup>231</sup> Rick Ungar, *Here Are the 23 Executive Orders on Gun Safety Signed Today by the President*, FORBES (Jan. 16, 2013), <http://www.forbes.com/sites/rickungar/2013/01/16/here-are-the-23-executive-orders-on-gun-safety-signed-today-by-the-president/>.

legislation that expanded background checks.<sup>232</sup> [NEW FOOTNOTE] He convinced Pennsylvania Republican Pat Toomey to join his efforts.<sup>233</sup> [NEW FOOTNOTE] Both senators were favorites of the NRA and had earned “A” ratings from the organization in the past.<sup>234</sup> [NEW FOOTNOTE] In April the pair announced that they had reached a bipartisan deal that would expand gun background checks to purchases at gun shows and online. Unlike the Democratic plan, these checks would not cover sales between family members and neighbors, and most importantly, prohibited the creation of any firearm registry.<sup>235</sup> The measure was offered as an amendment to the Senate’s gun bill and was seen as crucial for any larger bipartisan agreement.<sup>236</sup>

## 2. *Time Is of the Essence*

In the wake of Sandy Hook, the popular support seemed to be behind the President as a “newfound momentum”—known as the “Connecticut effect”—spurred support for gun-control advocacy groups.<sup>237</sup> Others called Newtown a “game changer.”<sup>238</sup> This shift is demonstrated by public opinion polling. Pew Research showed a jump in the number of Americans supporting stricter gun-control laws from 47% in July 2012, to 49% in December 2012, to 51% in January 2013.<sup>239</sup> For the first time during the Obama presidency, more people prioritized gun control (49%) than gun rights (42%).<sup>240</sup> Professor Winkler observed that at the time “it looked as if new federal gun laws were inevitable.”<sup>241</sup>

However, this support is not permanent. A corollary of emotional capture is that time is of the essence for passing laws during this period of heightened support: “After Newtown,” Professor Winkler remarked, “it

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<sup>232</sup> [NEW FOOTNOTE] Jennifer Steinhauer, *Senator’s Search for Ally Keeps Gun Bill Alive*, N.Y. TIMES, Apr. 11, 2013, at A1.

<sup>233</sup> [NEW FOOTNOTE] *Id.*

<sup>234</sup> [NEW FOOTNOTE] Dana Milbank, *On Gun Bill, Senators Cower in NRA’s Sights*, WASH. POST, Apr. 18, 2013, at A2; Jennifer Steinhauer, *Senator’s Search for Ally Keeps Gun Bill Alive*, N.Y. TIMES, Apr. 11, 2013, at A1.

<sup>235</sup> Steinhauer, *supra* note 232.

<sup>236</sup> Lucy Madison, *As Manchin-Toomey Amendment Falters, GOP Offers Alternate Gun Proposal*, CBS NEWS (Apr. 17, 2013, 12:56 PM), <http://www.cbsnews.com/news/as-manchin-toomey-amendment-falters-gop-offers-alternate-gun-proposal/>.

<sup>237</sup> Sarah Childress, *How the Gun-Rights Lobby Won After Newtown*, FRONTLINE (Dec. 10, 2013), <http://www.pbs.org/wgbh/pages/frontline/social-issues/newtown-divided/how-the-gun-rights-lobby-won-after-newtown/>.

<sup>238</sup> Erica Goode, *In Gun Debate, Divide Grows as Both Sides Dig In for Battle*, N.Y. TIMES, Sept. 16, 2013, at A12.

<sup>239</sup> *In Gun Control Debate, Several Options Draw Majority Support*, PEW RESEARCH CENTER FOR PEOPLE & PRESS 2 (Jan. 14, 2013), available at <http://www.people-press.org/files/legacy-pdf/01-14-13%20Gun%20Policy%20Release.pdf>.

<sup>240</sup> *Id.*

<sup>241</sup> Winkler, *supra* note 190.

was clear to everyone on the gun control side that speed was of the essence. The longer it took to move a bill to the floor for a vote, the harder it would be to win.”<sup>242</sup> In January 2013, the supporters of gun control legislation understood the importance of haste. If they waited too long, the window for reform would close. “Gun control advocates,” the *New York Times* reported, “have urged the White House and lawmakers to move rapidly to enact new gun control measures before the killings in Connecticut fade from the public’s consciousness.”<sup>243</sup>

Why? Because the “president ha[d] just a small window in which to persuade Congress to back a series of gun control measures that [would] come up for a vote in the Senate early [the following] month.”<sup>244</sup> [NEW FOOTNOTE] Why was the window small? Emotional capture helps to explain these shifting positions. Senator Manchin, who championed the gun-control legislation in the Senate, was optimistic about passage due to:

[A] confluence of factors at the time [that] favored his efforts: a newly re-elected Democratic president personally stung by the gun tragedies that took place on his watch . . . and the forceful but sympathetic lobbying presence of Gabrielle Giffords, the former congresswoman who had been shot in the head in Tucson, along with the voices of the Newtown parents whose children were killed.<sup>245</sup>

In other words, what made this situation different from previous opportunities to enact gun-control reform was the depth of the emotional capture. In Manchin’s mind, it was not newly discovered facts or statistics about gun control that would make this situation different, but the emotions that would charge the reform.<sup>246</sup> [NEW FOOTNOTE] It was necessary to pass the laws before passions returned to the status quo.

The President’s rhetoric reflects this imperative. During his speeches, the President kept the emotions strong, and reminded us how we felt in December. His entreaties for support were raw appeals to emotions. For example, on January 16, 2013, the President implored “every day we wait, [the] number [killed by guns] will keep growing.”<sup>247</sup> We need to honor the memories of the victims, the President urged, by reforming the law:

Over the month since the tragedy in Newtown, we’ve heard from so many, and obviously, none have affected us more

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<sup>242</sup> *Id.*

<sup>243</sup> Shear, *supra* note 224.

<sup>244</sup> [NEW FOOTNOTE] Jeremy W. Peters & Peter Baker, *Months After Massacre, Obama Seeks to Regain Momentum on Gun Laws*, N.Y. TIMES, Mar. 29, 2013, at A21.

<sup>245</sup> Draper, *supra* note 196.

<sup>246</sup> [NEW FOOTNOTE] See *id.* (explaining how “Manchin’s outlook changed” after the “unique horror” of Sandy Hook).

<sup>247</sup> Remarks on Gun Violence, 2013 DAILY COMP. PRES. DOC. 18, at 3 (Jan. 16, 2013).

than the families of those gorgeous children and their teachers and guardians who were lost. And so we're grateful to all of you for taking the time to be here and recognizing that we honor their memories in part by doing everything we can to prevent this from happening again.<sup>248</sup>

It would be against this emotional backdrop that any legislative change would be made.

Referencing the label "emotional blackmail,"<sup>249</sup> President Obama even addressed indirectly what we label emotional capture in his April 17 statement following the defeat of the Manchin-Toomey Bill:

I've heard folks say that having the families of victims lobby for this legislation was somehow misplaced. "A prop," somebody called them. "Emotional blackmail," some outlet said. Are they serious? Do we really think that thousands of families whose lives have been shattered by gun violence don't have a right to weigh in on this issue? Do we think their emotions, their loss is not relevant to this debate?<sup>250</sup>

Certainly their emotions are relevant to the debate, but the President's goal was to make the emotions dispositive to passing the bill in this culture war.

### 3. *From Mass Shootings to Gun Violence*

Once emotional capture sets in, the goals of legislative action quickly expand into other realms related to the tragedy. This creep is reflected in the rhetoric of the President. To address his developing legislative agenda, the President appointed Vice President Biden to head a task force "to help prevent mass shootings, [and] to *reduce the broader epidemic of gun violence* in this country."<sup>251</sup> Notice the pivot between the two clauses: the goal is not merely to prevent "mass shootings," but to "reduce the broader epidemic of gun violence in this country." As Mark Glaze, Director of Mayors Against Illegal Guns noted, "Mass shootings . . . are the tragedies that capture the public's attention[.] . . . But every day, 33 Americans are

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<sup>248</sup> *Id.* at 2.

<sup>249</sup> See, e.g., *Krauthammer's Take: Gun-Control Push Consisted of "Emotional Blackmail,"* NAT'L REV. ONLINE (Apr. 17, 2013), <http://www.nationalreview.com/corner/345880/krauthammers-take-gun-control-push-consisted-emotional-blackmail> (reporting on comments made by Charles Krauthammer, who supports gun control: "If you're going to make all of these emotional appeals . . . you've gotta show that if this had been law, it would have stopped Newtown. It would not have. It's irrelevant. I wouldn't have objected, I might've gone the way of McCain or Toomey on this, but it's emotional blackmail to say 'You have to do it for the children.' Not if there's no logic in this, and that I think is what's wrong with the demagoguery that we've heard out of the president on this issue.").

<sup>250</sup> Remarks on Senate Action on Gun Control Legislation, 2013 DAILY COMP. PRES. DOC. 252, at 2 (Apr. 17, 2013).

<sup>251</sup> Remarks on Gun Violence, *supra* note 247, at 3 (emphasis added).

being killed, mostly with handguns and distressingly often, by a family member or intimate partner.”<sup>252</sup> The shock and awe of the mass shooting, and support to stop those tragedies, soon give way to address the broader issue of gun deaths.

The President put these numbers explicitly: “In the month since 20 precious children and 6 brave adults were violently taken from us at Sandy Hook Elementary, more than 900 of our fellow Americans have reportedly died at the end of a gun—900 in the past month.”<sup>253</sup> **[NEW FOOTNOTE]** Note here how the President has moved beyond mass shootings, and seeks to address the broader problem of gun violence. By merging the emotion and tragedy Americans felt after Newtown, with the circumstances of the deaths of the 900—which most people probably have no recollection of due to the availability heuristic—the President seeks to deepen the emotional capture.

Similarly, during his State of Union address on February 12, 2013, the President made the point of integrating the mass shooting in Newtown with the reduction of gun violence: “It has been 2 months since Newtown. I know this is not the first time this country has debated how to reduce gun violence.”<sup>254</sup> **[NEW FOOTNOTE]** Again, relying on the availability heuristic, the President merged the rare incidences of mass shooting into the broader umbrella of gun violence. This decision obviates the need to establish that specific gun-control reforms would have stopped Newtown, or would stop future mass shootings. Rather, anything aimed at the larger category of gun violence would now suffice.

This is not to suggest in the least that it is inappropriate to attempt to address broader issues of gun violence through legislation after mass shootings. Instead, our point is that there was no momentum for this legislation before December 2012. The 900 people who were killed from December 2012 to January 2013 was likely not different from those killed during the previous month.<sup>255</sup> Yet, there was no national movement to legislate following the earlier deaths. There was no electoral mandate to support new gun-control laws during the presidential election, only one month earlier. This momentum was only discovered after December 12, 2012. All that happened was the shooting at Sandy Hook Elementary. It was only because of the Newtown killings that the opportunity arose to

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<sup>252</sup> Kevin A. Kepple et al., *Mass Shootings Toll Exceeds 900 in Past Seven Years*, USA TODAY (Dec. 2, 2013), <http://www.usatoday.com/story/news/nation/2013/02/21/mass-shootings-domestic-violence-nra/1937041/>.

<sup>253</sup> **[NEW FOOTNOTE]** Remarks on Gun Violence, *supra* note 247, at 3.

<sup>254</sup> **[NEW FOOTNOTE]** Address Before a Joint Session of Congress on the State of the Union, 2013 DAILY COMP. PRES. DOC. 90, at 10 (Feb. 12, 2013).

<sup>255</sup> **[NEW FOOTNOTE]** I could not find any recent statistics either. I think it would suffice to cite the CDC data, and show on average about 900 people in any given month (perhaps December 2011) were killed by a firearm.

pass gun control laws aimed at the broader issue of gun violence. This is the essence of mission creep during emotional capture.

#### D. *Divergence*

By March 28, 2013, following the three-month anniversary of the Newtown shooting, the President worried, in impromptu remarks, that post-Newtown momentum had faded.<sup>256</sup> [NEW FOOTNOTE] The *New York Times* reported that his comments were “delivered in an impassioned and off-script manner, [and] were aimed at reviving the impetus that gun-control advocates fear they are losing as more time passes since the shootings.”<sup>257</sup> The President challenged the American people, saying “The notion that 2 months or 3 months after something as horrific as what happened in Newtown happens and we’ve moved on to other things [is] not who we are.”<sup>258</sup> The *New York Times* noted President Obama “seemed to speak extemporaneously much of the time and expressed irritation in a way that he generally does not. At some moments, he paused and took a breath as if collecting himself and circled back to some of his points for emphasis.”<sup>259</sup>

The President spoke from the heart:

I want to make sure every American is listening today. Less than 100 days ago [the Newtown tragedy] happened, and the entire country was shocked. And the entire country pledged we would do something about it and that this time would be different. Shame on us if we’ve forgotten. I haven’t forgotten those kids. Shame on us if we’ve forgotten.

Answering his own question, Obama challenged who we are as a people, “That’s not who we are. That’s not who we are.” [NEW FOOTNOTE]. He concluded:

We need everybody to remember how we *felt* 100 days ago and make sure that what we said at that time wasn’t just a bunch of platitudes, that we meant it.<sup>260</sup> [NEW FOOTNOTE]

The *New York Times* aptly captured the President’s motivations: “Mindful of the fact that passions are rising among gun rights activists as they seem to be ebbing in the other direction, Mr. Obama sought to draw

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<sup>256</sup> [NEW FOOTNOTE] See Remarks on Gun Violence, *supra* note 1, at 2 (stating that “as time goes on after Newtown, somehow, people start moving on and forgetting”).

<sup>257</sup> Peters & Baker, *supra* note 244.

<sup>258</sup> Remarks on Gun Violence, *supra* note 1, at 2.

<sup>259</sup> Peters & Baker, *supra* note 244.

<sup>260</sup> [NEW FOOTNOTE] Remarks on Gun Violence, *supra* note 1, at 2–3.

on the emotion and revulsion around the Newtown shooting.”<sup>261</sup> In other words, he sought to recapture the fading emotions. The President’s impassioned plea rested on two flawed assumptions: (1) that emotional capture to support his reform would not regress to the mean, and (2) that failing to support his gun-control proposals means people have forgotten the death of the children at Newtown.

### 1. *Support Regresses to the Mean*

First, the President assumes Americans’ emotional fervor to pass gun-control laws remained constant following the events at Newtown. That is not correct. Polling data shows that in the three months following Newtown, support for stricter gun laws dropped almost as quickly as it spiked.<sup>262</sup> [NEW FOOTNOTE] This is evidence of regression to the mean. A Pew Research report, which found a “return to Pre-Newtown Levels” for stricter gun-control laws, shows the regression very clearly.<sup>263</sup> By May of 2013, Pew concluded, “the overall trend on whether it is more important to control gun ownership or protect gun rights has edged back in the direction of gun rights.”<sup>264</sup>

Before Newtown, in July 2012, the breakdown of support for gun control and gun rights was 47% and 46%, respectively.<sup>265</sup> [NEW FOOTNOTE] After Newtown, it departed widely with 49% for gun control and 42% for protecting gun rights in December.<sup>266</sup> [NEW FOOTNOTE] This was the spike. By January, when the President introduced proposed reforms, support for new legislation increased somewhat, with 51% for gun control and 45% for gun rights.<sup>267</sup> [NEW FOOTNOTE] (Our earlier discussion of the shifts in those who strongly and moderately favor stricter gun controls explains and breaks down this shift.<sup>268</sup> [NEW FOOTNOTE]) In February, the gap started to narrow, with 50% for control measures and 46% for protecting rights.<sup>269</sup> [NEW FOOTNOTE] By May, the gap closed to 50% for control and 48% for protecting rights.<sup>270</sup> [NEW FOOTNOTE] With each day that passed, support for new gun control regulations weakened.

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<sup>261</sup> Peters & Baker, *supra* note 244.

<sup>262</sup> [NEW FOOTNOTE] PEW RESEARCH CTR., *supra* note 110, at [NEED PINCITE].

<sup>263</sup> *Id.*

<sup>264</sup> *Id.*

<sup>265</sup> [NEW FOOTNOTE] *Id.*

<sup>266</sup> [NEW FOOTNOTE] *Id.*

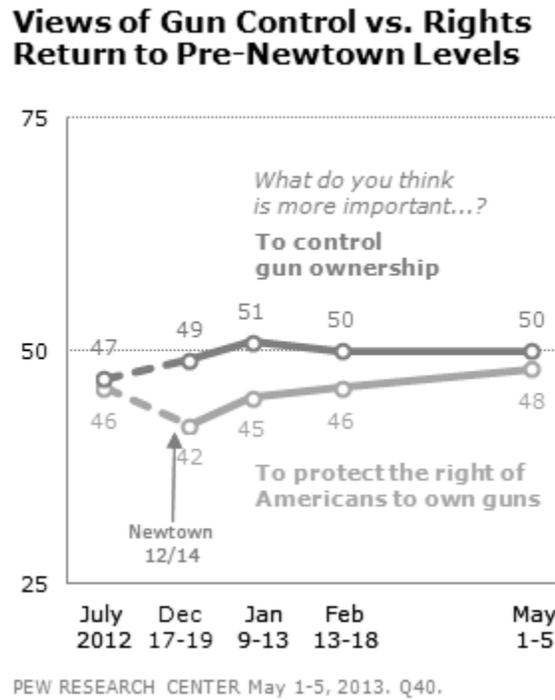
<sup>267</sup> [NEW FOOTNOTE] *Id.*

<sup>268</sup> [NEW FOOTNOTE] See *supra*, Part VI.C.2 (describing shift in support for gun laws).

<sup>269</sup> [NEW FOOTNOTE] PEW RESEARCH CTR., *supra* note 110, at [NEED PINCITE].

<sup>270</sup> [NEW FOOTNOTE] *Id.*

FIGURE X



Other polls found similar regressions. In late April 2013, *USA Today* reported that “Americans are more narrowly divided on the issue than in recent months, and backing for a bill has slipped below 50%.”<sup>271</sup> [NEW FOOTNOTE] Specifically, in *NBC News/Wall Street Journal* polls, support dropped from 61% in February to 55% in early April to only 49% in late April.<sup>272</sup> A December 2013 *CNN/ORC International* survey found that “49% of Americans say they support stricter gun control laws, with 50% opposed. The 49% support is down six percentage points from the 55%” following Newtown.<sup>273</sup> All public opinion polls reflect the same regression to the mean in the months after Newtown. The President astutely noted that the momentum had faded, and expressed helplessness about stemming the tide.<sup>274</sup> [NEW FOOTNOTE]

The concept of regression to the mean answers a primary question

<sup>271</sup> [NEW FOOTNOTE] Page, *supra* note 177.

<sup>272</sup> *Id.*

<sup>273</sup> *CNN Poll: Support for Stricter Gun Control Fades*, CNN (Dec. 4, 2013, 1:38 PM), <http://politicalticker.blogs.cnn.com/2013/12/04/cnn-poll-support-for-stricter-gun-control-fades/>.

<sup>274</sup> [NEW FOOTNOTE] Peters & Baker, *supra* note 244.

asked by the President: How was it possible that “two months or three months after something as horrific as . . . Newtown happens [Americans have] moved on to other things?”<sup>275</sup> The answer is that the spike in support for gun control was the anomalous data point, and the outlier. As time elapses, society naturally regressed to the mean. Professor Kahneman explains that “[w]hen our attention is called to an event, associative memory will look for its cause.”<sup>276</sup> For example, when popular support for gun control spikes after a shooting, our minds try to rationalize this change. The President, and no doubt others, assumed this spike was the result of a shift in how Americans view the gun-control issues. “[O]ur mind is strongly biased toward causal explanations” Professor Kahneman observes, “and does not deal well with ‘mere statistics.’”<sup>277</sup> But often, statistical anomalies explain the changes, not a quantum shift in views toward guns.

More germane to the biases of politicians, Kahneman adds, “activation will automatically spread to any cause that is already stored in memory.”<sup>278</sup> [NEW FOOTNOTE] In the case of those who support gun control, seeing this outpouring of support triggers preexisting views on how Americans think about the issue. Many wrongly assumed that this shift in popular opinion was caused by an actual change in American sympathies toward guns. But this assumption suffers from the regression to the mean fallacy. Kahneman explains, “Causal explanations will be evoked when regression is detected, but they will be wrong because the truth is that regression to the mean has an explanation but does not have a cause.”<sup>279</sup> [NEW FOOTNOTE] Stated more simply, just because there was a correlation between a shooting and a change in popular opinion about gun control, does not mean there is causation. With time, the correlation fades naturally. There was no surge in actual support for gun-control laws. It was ephemeral.

## 2. *Remembering the Loss but Opposing the Change*

The second point is perhaps more emotional. The President implied that if the American people did not support his agenda, they had forgotten those murdered in Newtown. Recall that he scolded the American people: “Shame on us if we’ve forgotten. I haven’t forgotten those kids. Shame on us if we’ve forgotten.”<sup>280</sup> [NEW FOOTNOTE] The President even suggested that those who opposed his legislation did not care about protecting children from gun violence: “The point is those who care deeply

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<sup>275</sup> *Id.*

<sup>276</sup> KAHNEMAN, *supra* note 4, at 182.

<sup>277</sup> *Id.*

<sup>278</sup> [NEW FOOTNOTE] *Id.*

<sup>279</sup> [NEW FOOTNOTE] *Id.*

<sup>280</sup> [NEW FOOTNOTE] Remarks on Gun Violence, *supra* note 1, at 2.

about preventing more and more gun violence will have to be as passionate, and as organized, and as vocal as those who blocked these common-sense steps to help keep our kids safe.”<sup>281</sup> His targeted comments personalize, polarize, and demonize those who oppose gun-control legislation as evil people intent on allowing children to be killed.

Reasonable minds can differ about the efficacy of different gun-control laws. Even Senator Manchin, who championed the background-check bill, conceded that it “would not have prevented the Newtown killings, because the shooter, Adam Lanza, used firearms that were legally purchased by his mother.”<sup>282</sup> Certainly, reasonable minds can differ about the impact a ban on assault weapons would have on gun violence, in light of the fact that the overwhelming majority of gun deaths are from handguns, not rifles.<sup>283</sup> [NEW FOOTNOTE] Professor Winkler states it plainly: “Even if the [assault weapon ban] could be passed, it wouldn’t have made any dent in gun violence statistics because these guns are rarely used in crime.”<sup>284</sup> [NEW FOOTNOTE] This proposal had “only one certain outcome . . . : It was guaranteed to stimulate the fiercest opposition.”<sup>285</sup> [NEW FOOTNOTE] In fact, California Governor Jerry Brown vetoed a bill that would have banned all semi-automatic rifles with detachable magazines.<sup>286</sup> In his veto message, he said, “I don’t believe that this bill’s blanket ban on semi-automatic rifles would reduce criminal activity or enhance public safety enough to warrant this infringement on gun owners’ rights.”<sup>287</sup>

Reasonable minds can differ about whether banning magazines that hold more than ten bullets—the overwhelming majority of semiautomatic

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<sup>281</sup> Jonathan Cohn & Eric Kingsbury, *The Angriest Obama We’ve Ever Seen: After the Senate Failed to Expand Gun Background Checks, the President Flashes Anger*, NEW REPUBLIC (Apr. 17, 2013), <http://www.newrepublic.com/article/112949/senate-fails-expand-gun-background-checks-obama-gets-angry>. Other U.S. leaders have sought to equate their political and legislative opposition with aiders and abettors of the nation’s enemies in times immediately following great tragedy and violence. See DONOHUE, *supra* note 105, at 2 (recounting that, following the introduction of the USA PATRIOT Act in the U.S. Senate, Attorney General John Ashcroft testified, “[T]o those who scare peace-loving people with phantoms of lost liberty, my message is this: your tactics only aid terrorists, for they erode our national unity and diminish our resolve. They give ammunition to America’s enemies, and pause to America’s friends. They encourage people of good will to remain silent in the face of evil.”).

<sup>282</sup> Draper, *supra* note 196.

<sup>283</sup> [NEW FOOTNOTE] Winkler, *supra* note 190.

<sup>284</sup> [NEW FOOTNOTE] *Id.*

<sup>285</sup> [NEW FOOTNOTE] *Id.*

<sup>286</sup> S.B. 374, 2013–2014 Reg. Sess. (Cal. 2013).

<sup>287</sup> Letter from Edmund G. Brown Jr., Governor of Cal., to California State Senate (Oct. 11, 2013), available at, [http://gov.ca.gov/docs/SB\\_374\\_2013\\_Veto\\_Message.pdf#page=1&zoom=auto,0,563](http://gov.ca.gov/docs/SB_374_2013_Veto_Message.pdf#page=1&zoom=auto,0,563).

handguns have magazines of at least that size<sup>288</sup>—would be worth the cost. Support for this proposal dropped from 62% in December 2012<sup>289</sup> to 54% in January 2013<sup>290</sup> [NEW FOOTNOTE] to 51% in March 2013.<sup>291</sup> [NEW FOOTNOTE] A similar bill introduced in California never made it past the State Senate.<sup>292</sup> Such a bill was enacted in New York,<sup>293</sup> though it was quickly modified to allow people to possess large magazines, but they could not be filled up past the limit of seven.<sup>294</sup>

Remembering the losses of those killed by gun violence does not require supporting the gun-control legislation.<sup>295</sup> In a sense, there is a morbid dichotomy: those who support the policies are portrayed as the victim's advocates, and those who oppose the legislation have supposedly forgotten the deaths of innocent children. Simply put, opposing gun-control legislation is not the same thing as forgetting children killed by disturbed individuals in tragic circumstances. Suggestions to the contrary further polarize any debate about gun control and make it that much harder to persuade people who are perhaps inclined to support gun rights to change their positions. To use the example from earlier, using this rhetoric will not turn C students into B students.<sup>296</sup> [NEW FOOTNOTE]

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<sup>288</sup> [NEW FOOTNOTE] See *Large Capacity Ammunition Magazines Policy Summary*, L. CENTER TO PREVENT GUN VIOLENCE (May 31, 2013), <http://smartgunlaws.org/large-capacity-ammunition-magazines-policy-summary/> (explaining that magazines holding more than ten rounds of ammunition are “generally available for any semi-automatic firearm that accepts a detachable magazine”).

<sup>289</sup> Saad, *supra* note 149.

<sup>290</sup> [NEW FOOTNOTE] Lydia Saad, *Americans Back Obama's Proposals to Address Gun Violence*, GALLUP (Jan. 23, 2013), <http://www.gallup.com/poll/160085/americans-back-obama-proposals-address-gun-violence.aspx?version=print>.

<sup>291</sup> [NEW FOOTNOTE] *Poll: Support for Gun Control Measures*, FOX NEWS (Mar. 22, 2013), <http://www.foxnews.com/politics/interactive/2013/03/22/fox-news-poll-support-for-gun-control-measures/>.

<sup>292</sup> See S.B. 396, 2013–2014 Reg. Sess. (Cal. 2013) (proposing to limit the size of magazine capacity).

<sup>293</sup> N.Y. PENAL LAW § 265.00(23) (McKinney 2013).

<sup>294</sup> Thomas Kaplan & Danny Hakim, *Cuomo Favors Easing Part of Newly Passed Gun Law*, N.Y. TIMES, Mar. 21, 2013, at A25.

<sup>295</sup> We suspect that the connection between gun violence and gun control legislation may not be as automatic as we are conditioned to believe. For example, the level of support for legislative response before and after President Reagan's assassination attempt remained roughly the same: 38% in December 1980 and then 39% in April 1981, one week after the shooting. *Historical Trends*, GALLUP, <http://www.gallup.com/poll/1645/guns.aspx> (last visited Feb. 9, 2014). It should be noted that it was the near-killing of Reagan's press secretary, James Brady, that gave birth to the Brady Campaign to Prevent Gun Violence. Its mission focuses gun violence and gun control. *Jim and Sarah Brady*, BRADY CAMPAIGN TO PREVENT GUN VIOLENCE, <http://www.bradycampaign.org/jim-and-sarah-brady> (last visited Feb. 14, 2014). Further study of whether people have an innate reaction, to gun violence, as opposed to a conditioned reaction, is difficult to perform because of the lack of detailed polling data during this period.

<sup>296</sup> [NEW FOOTNOTE] Jonathan Weisman, *Senate Blocks Drive for Gun Control*, N.Y. TIMES, April 17, 2013, at A1.

### E. *Status Quo*

By April of 2013, society returned to the pre-Newtown statistical status quo. The Manchin-Toomey Bill, under an agreement reached by both parties, needed sixty votes to proceed.<sup>297</sup> [NEW FOOTNOTE] On April 17, 2013, Manchin-Toomey experienced the same fate as the other gun-control measures that came to a vote that day—the legislation failed to get the sixty votes that it needed to overcome a filibuster and move forward.<sup>298</sup> [NEW FOOTNOTE] The bill garnered 54 votes for and 46 votes against.<sup>299</sup> [NEW FOOTNOTE] Forty-eight Democrats supported the bill, joined by four republicans and two independents.<sup>300</sup> [NEW FOOTNOTE] Forty-one Republicans opposed the bill, joined by five democrats.<sup>301</sup> The bill needed sixty votes to invoke cloture.<sup>302</sup> [NEW FOOTNOTE] The assault weapons bill was defeated by a vote of sixty to forty.<sup>303</sup> [NEW FOOTNOTE] The proposed ban on large-capacity magazines failed forty-six to fifty-four, with ten Democrats breaking with the President.<sup>304</sup> [NEW FOOTNOTE]

#### 1. *Defeat*

The President gave an emotional speech on April 17, 2013 alongside families of the victims of Newtown, Gabrielle Giffords, and others.<sup>305</sup> [NEW FOOTNOTE] He began, “A few months ago, in response to too many tragedies, including the shootings of a United States Congresswoman, Gabby Giffords, who’s here today, and the murder of 20 innocent schoolchildren and their teachers, this country took up the cause of protecting more of our people from gun violence.”<sup>306</sup> [NEW FOOTNOTE] He continued:

When Newtown happened, I met with these families and I spoke to the community, and I said, something must be different right now. We’re going to have to change. That’s

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<sup>297</sup> [NEW FOOTNOTE] Jonathan Weisman, *Senate Blocks Drive for Gun Control*, N.Y. TIMES, April 17, 2013, at A1.

<sup>298</sup> [NEW FOOTNOTE] *Senate Vote 97 - Defeats Manchin-Toomey Background Checks Proposal*, N.Y. TIMES (Apr. 17, 2013), <http://politics.nytimes.com/congress/votes/113/senate/1/97>.

<sup>299</sup> [NEW FOOTNOTE] *Id.*

<sup>300</sup> [NEW FOOTNOTE] *Id.*

<sup>301</sup> *Id.*

<sup>302</sup> [NEW FOOTNOTE] Weisman, *supra* note 297.

<sup>303</sup> [NEW FOOTNOTE] *Senate Vote 101 - Rejects Feinstein Proposal to Reinstate Assault Weapons Ban*, N.Y. TIMES (Apr. 17, 2013), <http://politics.nytimes.com/congress/votes/113/senate/1/101>.

<sup>304</sup> [NEW FOOTNOTE] *Senate Vote 103 - Rejects Lautenberg Proposal to Limit Magazine Size*, N.Y. TIMES (Apr. 17, 2013), <http://politics.nytimes.com/congress/votes/113/senate/1/103>.

<sup>305</sup> [NEW FOOTNOTE] Remarks on Senate Action on Gun Control Legislation, *supra* note 250.

<sup>306</sup> [NEW FOOTNOTE] *Id.* at 1.

what the whole country said. Everybody talked about how we were going to change something to make sure this didn't happen again, just like everybody talked about how we needed to do something after Aurora. Everybody talked about we needed change something after Tucson. And I'm assuming that the emotions that we've all felt since Newtown, the emotions that we've all felt since Tucson and Aurora and Chicago—the pain we share with these families and families all across the country who've lost a loved one to gun violence—I'm assuming that's not a temporary thing. I'm assuming our expressions of grief and our commitment to do something different—to prevent these things from happening—are not empty words. I believe we're going to be able to get this done. Sooner or later, we are going to get this right. The memories of these children demand it. And so do the American people.<sup>307</sup> [NEW FOOTNOTE]

The regression to the mean does not eliminate the emotions we felt, but merely mitigates the desire for change. Desires to change after tragedies are not, in the President's words, a “temporary thing.” Any plans for action that came from that tragedy were borne from resolve. And with time, that resolve subsides, and people's previous policy preferences largely return. As one commentator noted, Newtown was the “moral panic that wasn't.”<sup>308</sup>

In the end, many were left wondering if the background-check bill would have been successful had it been voted on earlier, before the window closed. Shortly after the Biden Task Force released its recommendations, the *New York Times* reported that, though the NRA opposed universal background-check bill, the NRA lobbyists thought that a “there would be no political will to oppose it.”<sup>309</sup> Professor Winkler lamented this delay, and suggested that it backfired: “Gun control advocates who've sought universal background checks for decades, only to be disappointed time after time, have only to wonder what might have been.”<sup>310</sup> Whether this bill would have passed if the President only pursued background checks, and not more controversial provisions like the

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<sup>307</sup> [NEW FOOTNOTE] *Id.* at 3.

<sup>308</sup> Gene Healy, *Newtown: The Moral Panic that Wasn't*, WASH. EXAMINER (Jan. 13, 2014), <http://washingtonexaminer.com/newtown-the-moral-panic-that-wasnt/article/2542105>.

<sup>309</sup> Draper, *supra* note 196.

<sup>310</sup> See Winkler, *supra* note 190 (“Focusing on assault weapons played right into the hands of the NRA, which has for years been saying that Obama wanted to ban guns. Gun control advocates ridiculed that idea—then proposed to ban the most popular rifle in America. . . . Many gun owners might have supported background checks had they not been distracted by the assault weapons issue, which caused them to distrust gun control proponents even more than before.”).

assault weapons ban,<sup>311</sup> or ban on high-capacity magazines is impossible to know in hindsight.

But as we noted earlier, our theory tells an incomplete version of the events. Our analysis does not completely address the defeat of the Manchin-Toomey background-check bill, which garnered overwhelming popular support.<sup>312</sup> [NEW FOOTNOTE] This level of support would remain fairly constant, though it did drop somewhat from January to April 2013.<sup>313</sup> [NEW FOOTNOTE] Pew Research tracked the changes in views on background checks from President Obama's speech on January 16, 2013 to the vote on the Manchin-Toomey Bill on April 17, 2013.<sup>314</sup> The *New York Times/CBS News* poll showed a drop in support for the background-check bill from 92% in January, to 91% in February, to 90% in April, to 88% in May.<sup>315</sup> [NEW FOOTNOTE] Gallup showed a similar drop from 91% in January to 83% in May.<sup>316</sup> [NEW FOOTNOTE] Pew showed a drop from 85% in January to 83% in March, to 81% in May.<sup>317</sup> [NEW FOOTNOTE] The outlier was *Washington Post/ABC News*, which showed 88% in January, a bump to 91% in February, and a drop to 86% in May.<sup>318</sup> [NEW FOOTNOTE]

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<sup>311</sup> A colloquy from a meeting attended by Vice President Biden and several leading Second Amendment supporters is instructive of the scope of overreach:

On Jan. 10, 2013, Biden hosted a meeting in his Executive Office Building suite with several Second Amendment supporters, including the veteran N.R.A. lobbyist Jim Baker. When Biden asked if the N.R.A. would consider supporting a ban on assault weapons or high-capacity magazine clips, Baker's answer was a crisp "no." But when asked the same thing about universal background checks, Baker equivocated, saying, "I'd have to see what you're talking about."

Draper, *supra* note 196.

<sup>312</sup> [NEW FOOTNOTE] See PEW RESEARCH CTR., *supra* note 110, at 4 (asserting that 73% of Americans supported Manchin-Toomey bill).

<sup>313</sup> [NEW FOOTNOTE] *Id.* at 6.

<sup>314</sup> *Id.*

<sup>315</sup> [NEW FOOTNOTE] *Id.*

<sup>316</sup> [NEW FOOTNOTE] *Id.*

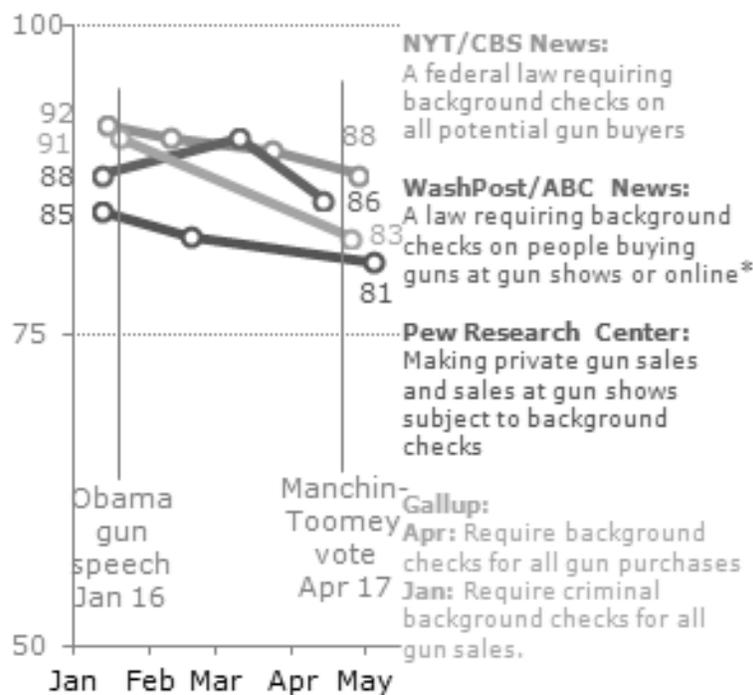
<sup>317</sup> [NEW FOOTNOTE] *Id.*

<sup>318</sup> [NEW FOOTNOTE] *Id.*

FIGURE X

## Across Surveys, 80% or More Favor Background Checks

Percent who favor...



PEW RESEARCH CENTER May 1-5, 2013. Q46a.

\* In January and March surveys, question did not include the "or online" language.

The President, in his speech, laid the blame for defeat on the NRA:

There were no coherent arguments as to why we wouldn't do this. It came down to politics: the worry that that vocal minority of gun owners would come after them in future elections. They worried that the gun lobby would spend a lot of money and paint them as anti-Second Amendment.<sup>319</sup>

We do not discount the role the NRA played in the defeat of the Manchin-Toomey Bill. Their role cannot be understated. President Obama would likely agree with Professor Robert Spitzer, who wrote, “The nature of interest-group politics is such that the energized and intense backers of the NRA have repeatedly proven the axioms that a highly motivated, intense minority operating effectively in the interest-group milieu will usually prevail in a political contest over a larger, relatively apathetic majority.”<sup>320</sup> The NRA came out in full force against the Manchin-Toomey compromise.

We suspect the theory of political ignorance, combined with the substitution heuristic, are also at play. Kahneman explains that people rely on the substitution heuristic when they are asked to make a tough judgment: “[T]hey substitute an evaluation of the evidence, without noticing that the question they answer is not the one they were asked. This process is guaranteed to generate predictions that are systematically biased; they completely ignore regression to the mean.”<sup>321</sup>

To put this into context, when people considered Manchin-Toomey, a proposed universal background-check bill that specifically did not provide for registration, they substituted that more difficult-to-assess provision with a simpler one: background checks that lead to registration. Even though they may have supported background checks in the abstract (as the data supports),<sup>322</sup> [NEW FOOTNOTE] they opposed a non-existent bill

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<sup>319</sup> Remarks on Senate Action on Gun Control Legislation, *supra* note 250, at 2.

<sup>320</sup> ROBERT SPITZER, *THE POLITICS OF GUN CONTROL* 141 (3d ed. 2004). See also Schuette v. BAMN (2014) (Scalia, J., concurring) (noting that “discreteness” and “insularity” are “political strengths” rather than “political insularities.”); Bruce Ackerman, *Beyond Carolene Products*, 98 Harv. L. Rev. 713, 723–724 (1985) (“Other things being equal, ‘discreteness and insularity’ will normally be a source of enormous bargaining advantage, not disadvantage, for a group engaged in pluralist American politics”); Josh Blackman, *The Burden of Judging*, 8 N.Y.U. J. of Law & Liberty \_\_ (forthcoming 2014).

<sup>321</sup> KAHNEMAN, *supra* note 4, at 188.

<sup>322</sup> [NEW FOOTNOTE] See *Most Gun Owners Favor Background Checks for Private Gun Sales*, PEW RES. CENTER (Feb. 13, 2013), <http://www.pewresearch.org/daily-number/most-gun-owners->

that did more. Here opponents of the law were being rationally ignorant, and substituting a difficult judgment for an easier judgment.<sup>323</sup> As Professor Ilya Somin explained in his book, *Democracy and Political Ignorance: Why Smaller Government Is Smarter*:

[T]he main informational barriers to majoritarian control of legislation on specific issues are the facts that (1) much legislation is completely unknown to most citizens and (2) even when this is not the case, the effects of much legislation are often sufficiently complex that voters cannot readily tell whether the legislation in question will advance their values and interests or not.<sup>324</sup>

This theory also only explains part of the defeat of Manchin-Toomey. It is not worth the time and effort to learn about the specifics of laws. For most people, it is easier to assume that an unexpectedly benign bill actually does something worse, and oppose it on those grounds. As Professor Somin noted, commenting our article, but for this rational ignorance, people could “do a better job of discerning which measures are actually effective in achieving that objective [of public safety] and which ones are not.”<sup>325</sup>

We concede that the shooting cycle does not explain all of the changes in the year after the tragedy at Newtown. Yet the role that public opinion plays, along with natural shifts in terms of emotional capture and regression to the mean, challenges the conventional narrative of the NRA’s role in stopping reform. It is often assumed, as reflected in the President’s remarks, that it is the NRA’s juggernaut-like influence alone that changes public opinion.<sup>326</sup> [NEW FOOTNOTE] But this only tells part of the

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favor-background-checks-for-private-gun-sales/ (asserting 85% of gun owners support making private gun sales and sales at gun shows subject to background checks).

<sup>323</sup> See Ilya Somin, *Gun Control, Mass Shootings, and Political Ignorance*, VOLOKH CONSPIRACY (Jan. 13, 2014, 5:54 PM), <http://www.volokh.com/2014/01/13/gun-control-mass-shootings-political-ignorance/> (“Political ignorance plays an important role in Blackman and Baird’s analysis in three separate ways. First, most people simply don’t think about the problem of mass shootings or are largely unaware of it until some high-profile tragedy occurs. Second, when a tragedy does occur, this leads many to be more supportive of gun control policies, despite the fact that mass shootings are extremely rare, are not increasing, and are highly unlikely to be prevented by the kinds of policies proposed by would-be reformers. Finally, public opinion reverts to the mean in the weeks and months following a tragedy, because voters start to forget about the event and to focus on other issues. . . . Voters who pay little or not [sic] attention to political issues, because it is not rational for them to do so, are easily influenced by high-profile dramatic events, in part because they may not know these events are unusual. Over time, they may also forget about the events, or at least stop thinking about them.”).

<sup>324</sup> ILYA SOMIN, *DEMOCRACY AND POLITICAL IGNORANCE: WHY SMALLER GOVERNMENT IS SMARTER* 159–60 (2013).

<sup>325</sup> <http://www.volokh.com/2014/01/13/gun-control-mass-shootings-political-ignorance/>

<sup>326</sup> [NEW FOOTNOTE] See Remarks on Senate Action on Gun Control Legislation, *supra* note 250, at 3 (calling on NRA households to reach out to leadership to adjust their stance on the issue).

story.

What is often ignored is that a natural broad shift in public opinion impacts what Congress and the NRA does. If the people display a weakening support for laws—and often do in the aftermath of tragedies—the other parties are likely to take notice and react accordingly. If the NRA knows that support for gun-control laws will naturally fade with time, they are able to take certain positions while emotions are high, and remain confident that their immediate dismissiveness of reform will soon become the mainstream view. There is a feedback loop, between the people, the government, and the interest groups, that powers the shooting cycle. It is not one-sided.

## 2. *One Year Later*

A *CNN* lead from December 2013 effectively summarizes the regression to the mean and return to the status quo in the year after the Newtown murders. “As memories fade from last December’s horrific school shooting in Newtown, Connecticut, a new national poll indicates that support for stricter gun-control laws appears to be fading, too.”<sup>327</sup> The *CNN/ORC International* poll found that support for stricter gun-control laws was at 49%, down from 55% who supported the laws in January 2013.<sup>328</sup> Further, in January 2013, the poll found that 37% of Americans *strongly* favored stricter laws, and 27% *strongly* opposed them.<sup>329</sup> *CNN* observed “that the intensity of opinion on the issue of gun control, once an advantage for gun-control advocates, no longer benefits either side. . . . Now that [the] 10-point difference has completely disappeared, . . . the number who strongly oppose and strongly favor stricter gun control [is] at essentially the same level.”<sup>330</sup> In other words, those who were driven to strongly favor these laws drifted back towards the mean—the B students became C students. A *Wall Street Journal/NBC News* Poll, conducted on the anniversary of the Newtown shooting tracked the return to the status quo.<sup>331</sup> Support from stricter gun laws went from 56% in January, to 61% in February, to 55% in April, to 52% in December.<sup>332</sup> The poll concluded, in comparison to the previous year, that “support for tighter restrictions is down.”<sup>333</sup>

We are back to the status quo. And if the decreasing trend line is any

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<sup>327</sup> *CNN Poll: Support for Stricter Gun Control Fades*, *supra* note 273.

<sup>328</sup> [NEW FOOTNOTE] *Id.*

<sup>329</sup> [NEW FOOTNOTE] *Id.*

<sup>330</sup> [NEW FOOTNOTE] *Id.*

<sup>331</sup> HART RESEARCH ASSOCS./PUB. OP. STRATEGIES, *supra* note 109.

<sup>332</sup> [NEW FOOTNOTE] *Id.*

<sup>333</sup> *Poll: Support for Strict Gun Control Drops to Pre-Newtown Levels*, NBC NEWS (Dec. 13, 2013, 12:02 AM), <http://www.nbcnews.com/politics/first-read/poll-support-strict-gun-control-drops-pre-newtown-levels-v21878758>.

any indication, it will be even tougher to enact gun-control laws going forward.

### 3. *Breaking the Cycle*

We conclude by asking whether the shooting cycle is permanent. Absolutely not. Changing it, ultimately, will have to involve inverting the downward slope of the trend line of Americans that support stricter gun controls. This is part of what Richard Hofstadter famously referred to as America's "gun culture."<sup>334</sup> [NEW FOOTNOTE] This means that for the line to slope upwards, our culture must change. Professor Adam Winkler similarly opined that modifying gun laws, such as banning concealed firearms on college campuses, would have little impact on safety. "What is really at stake is America's gun culture."<sup>335</sup> As one pundit noted after the shooting in Aurora, "The latest tragedy in Colorado may well produce another brief polling bump, but it is unlikely to shift in attitudes over the long term absent a more fundamental change in the gun policy debate."<sup>336</sup>

Professor Goss's work reflects the goal of changing American gun culture:

Thus, I argue that the true paradox is the discrepancy between what people tell pollsters ("We want strict gun control") and what people's actual behavior suggests ("We are indifferent"). The gun control paradox properly understood is: Why do Americans who want strict gun control not mobilize, in large numbers in a sustained way, to get it?<sup>337</sup>

Recent developments in the gun-control movement demonstrate such mobilization. The advent of gun-control groups seeking cultural change represent an emerging counterweight to NRA objectives. Brian Malte, the Mobilization Director for the Brady Campaign to Prevent Gun Violence, commented on the importance of Sandy Hook for the gun-control movement:

Newtown, from my perspective of being in this movement for 18 years, and gone through a lot of high-profile tragedies like Virginia Tech and Columbine, this was different in that many, many more people got involved. And the difference now is that the people who got involved because of Sandy

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<sup>334</sup> [NEW FOOTNOTE] Richard Hofstadter, *America as a Gun Culture*, AM. HERITAGE, Oct. 1970, at 82.

<sup>335</sup> Adam Winkler, Op-Ed., *The Guns of Academe*, N.Y. TIMES, Apr. 15, 2011, at A27 ("What is really at stake is America's gun culture.").

<sup>336</sup> Blumenthal, *supra* note 114.

<sup>337</sup> GOSS, *supra* note 162, at 7.

Hook, they're staying in the movement. Just because the legislation didn't succeed in the U.S. Senate in April, people didn't pack up their boxes and go home, they got really upset, reenergized, and are making a difference in their local community. The Brady Campaign chapters grew by 25 percent since Sandy Hook. And a lot of these advocates are in key congressional districts and states. I can't really identify one person who's come in since Sandy Hook who's left the movement, it was that big of a deal.<sup>338</sup>

On the other hand, as a counterweight, the NRA claimed they added 250,000 new members in the month after Newtown.<sup>339</sup> **[NEW FOOTNOTE]**

President Obama spoke of the need to organize and challenge the NRA: "Ultimately, you outnumber those who argued the other way. But they're better organized. They're better financed. They've been at it longer. And they make sure to stay focused on this one issue during election time."<sup>340</sup> Malte added that the process is long and recognized that reform is difficult, stating:

And I think [our perseverance] fights against the perception against a lot of those in the media, and on Capitol Hill, which is: Well, it's been a year since Sandy Hook, I guess your windows closed. I guess you weren't successful. Now what?" Now what? What do you mean? We've just begun. This is just the beginning. Change, especially on Capitol Hill, does not come easy. It's not quick and simple. It's something we all realize, and just like the Brady law, we're going to see it through.<sup>341</sup> **[NEW FOOTNOTE]**

The NRA is content to maintain the status quo and continue riding the downward sloping curve by employing their tried-and-true strategies. To change the shooting cycle, gun control advocates must change the gun culture. But to change the gun culture, gun-control advocates must

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<sup>338</sup> Lydia DePillis, *What's Next for the Gun Control Movement? A Brady Campaigner Lays It Out*, WASH. POST WONKBLOG (Dec. 13, 2013, 4:29 PM), <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/12/13/whats-next-for-the-gun-control-movement-a-brady-campaigner-lays-it-out/>.

<sup>339</sup> **[NEW FOOTNOTE]** See Nick Wing, *NRA: 250,000 New Members in Month Since Newtown Shooting*, HUFFINGTON POST (Jan. 15, 2013, 2:28 PM), [http://www.huffingtonpost.com/2013/01/15/nra-members\\_n\\_2480621.html](http://www.huffingtonpost.com/2013/01/15/nra-members_n_2480621.html) ("The National Rifle Association announced this week that the month following the Dec. 14 shooting in Newtown, Conn. has been fantastic for business. An NRA representative told U.S. News & World Report that 250,000 new members had joined the organization's ranks over that period, paying at least \$25 for a reduced rate on a one-year membership.").

<sup>340</sup> Remarks on Senate Action on Gun Control Legislation, *supra* note 250, at 3.

<sup>341</sup> **[NEW FOOTNOTE]** DePillis, *supra* note 338.

explain—or at least distance themselves from—the position that causes the fiercest opposition—that the Brady Campaign sees as its ultimate goal the criminalization of gun possession.<sup>342</sup> Nelson “Pete” Shields III, a founder of Handgun Control, Inc.—the aptly named progenitor of the Brady Center to Prevent Gun Violence—openly advocated for the elimination of all handguns:

‘We’re going to have to take this one step at a time. . . . Our ultimate goal—total control of all guns—is going to take time.’ The ‘final problem,’ he insisted, ‘is to make the possession of all handguns and all handgun ammunition’ for ordinary civilians ‘totally illegal.’<sup>343</sup>

John Hechinger, a sponsor of the Washington, D.C., handgun ban and a board member of Handgun Control, Inc., put it simply: “We have to do away with the guns.”<sup>344</sup> The same can be said for Michael Bloomberg’s group, Mayor Against Illegal Guns, which has as its ultimate goal confiscation of handguns.<sup>345</sup> Conservative columnist, Charles Krauthammer, accurately summarized the reasoning for these measures in 1996. He argued that the assault weapons ban would not result in a decrease in violence but would serve as an important symbolic step down the path to banning all guns, by desensitizing Americans to gun-control laws.<sup>346</sup> Krauthammer stated:

Ultimately, a civilized society must disarm its citizenry if it is to have a modicum of domestic tranquility of the kind enjoyed in sister democracies like Canada and Britain. Given the frontier history and individualist ideology of the United States, however, this will not come easily. It certainly cannot be done radically. It will probably take one, maybe two generations. It might be 50 years before the United States gets to where Britain is today.

Passing a law like the assault weapons ban is a symbolic—

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<sup>342</sup> [NEW FOOTNOTE] See ADAM WINKLER, *GUNFIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA* 35 (2011) (communicating an influential Brady Campaign activist’s expressed desire to make all guns in civilian hands illegal).

<sup>343</sup> *Id.*

<sup>344</sup> *Id.* at 15–16, 19.

<sup>345</sup> <http://www.ijreview.com/2014/02/113615-another-mayor-quits-bloombergs-mayors-illegal-guns-says-promotes-gun-confiscation-law-abiding-citizens/> (“It did not take long to realize that MAIG’s agenda was much more than ridding felons of illegal guns; that under the guise of helping mayors facing a crime and drug epidemic, MAIG intended to promote confiscation of guns from law-abiding citizens.”).

<sup>346</sup> Eugene Volokh, *Assault Weapons Bans, in the Words of Some of Their Supporters*, VOLOKH CONSPIRACY (Dec. 19, 2012, 9:22 PM), <http://www.volokh.com/2012/12/19/assault-weapons-bans-in-the-words-of-some-of-their-supporters/>.

purely symbolic—move in that direction. Its only real justification is not to reduce crime but to desensitize the public to the regulation of weapons in preparation for their ultimate confiscation. Its purpose is to spark debate, highlight the issue, make the case that the arms race between criminals and citizens is as dangerous as it is pointless.

De-escalation begins with a change in mentality. And that change in mentality starts with the symbolic yielding of certain types of weapons. The real steps, like the banning of handguns, will never occur unless this one is taken first, and even then not for decades . . . .<sup>347</sup> [NEW FOOTNOTE]

The way to accomplish this cultural shift of reversing the trend line is not through flaming fears following mass shootings, and trying to pass through the backdoor proposals that people did not want before.<sup>348</sup> This makes gun owners not trust gun controllers—with good reason. As Professor Winkler noted, “Many gun owners might have supported background checks had they not been distracted by the assault weapons issue, which caused them to distrust gun control proponents even more than before.”<sup>349</sup> Why should they? Every time there is a tragedy and support for background checks is strong, gun controllers aim high and try to reintroduce failed gun-control bills. Professor Winkler reminds us that the ultimate aim of “disarmament is an unrealistic goal.”<sup>350</sup> The fact that “[g]uns are permanent in America” is “perhaps the most important” fact that the “gun ban supporters failed to grasp.”<sup>351</sup> As long as this fear persists, and remains the obvious end-goal of these groups, the NRA’s fanning the flames of confiscation remains viable.<sup>352</sup>

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<sup>347</sup> [NEW FOOTNOTE] *Id.* (internal quotation marks omitted).

<sup>348</sup> See Dan Kahan, *Secular Cultural Trends Punctuated by Noisy, Emotional Peaks and Valleys: Surveying the Psychology Landscape of Mass Opinion, Mass Shootings, and Gun Control*, CULTURAL COGNITION PROJECT (Jan. 16, 2014, 9:10 AM), <http://www.culturalcognition.net/blog/2014/1/16/secular-cultural-trends-punctuated-by-noisy-emotional-peaks.html> (“Because of the psychology of gun risks, the prospect of scoring a decisive victory will thus continue to tantalize gun control supporters, who will respond with convulsive enthusiasm to the ‘opportunities’ episodically furnished by mass shooting tragedies.”).

<sup>349</sup> Winkler, *supra* note 190.

<sup>350</sup> WINKLER, *supra* note 342, at 19.

<sup>351</sup> *Id.* at 22.

<sup>352</sup> See Dan Kahan, *The NRA’s “Expressive-Rope-a-Dope-Trick,”* CULTURAL COGNITION PROJECT (Sept. 3, 2013, 11:57 AM), <http://www.culturalcognition.net/blog/2013/9/3/the-nras-expressive-rope-a-dope-trick.html> (“This assumes, of course, that the [gun-control] groups getting roped [by the NRA] really want to protect the quality of the science communication environment from culturally partisan meanings. Some of them likely value the chance to engage risk issues in a manner that fills the science communication environment with culturally partisan meanings. If so, then they aren’t being dopes when they snap at the bait and make their own contribution to the toxic fog of

## VII. CONCLUSION

Our goals for this article were modest. First, we aimed to bring some definitional and empirical clarity to the debate over mass shootings. In short, these tragedies are very rare, constitute a tiny sliver of gun deaths, and are not happening more frequently. Second, we ventured to offer several explanations as to why these rare deaths receive such heightened scrutiny in our society. Due to behavioral heuristics and innate cognitive biases, we tend to overweigh the risk of rare and unfamiliar events, especially when the impact of these events jibes with our cultural predispositions and affects those who are similar to us.

Third, we chronicled the various stages of the *shooting cycle*: tragedy, introspection, action, divergence, and return to the status quo. Fourth, we explained how concepts like emotional capture and regression to the mean illustrate why support for stricter gun control spikes after a mass shooting but fades naturally with time. Fifth, we documented the shooting cycle in the year after the horrific massacre in Newtown. During this time, as support for gun control waned, opposition to gun control waxed. This regression to the mean helps explain, in part, the defeat of the proposed federal gun-control legislation.

Emotional fervor after a tragedy causes sudden spikes in support of legislative responses to the event. Politicians and activists try to move as quickly as possible during this period of emotional capture, as time is of the essence. With time, however, sentiments fade, and society regresses to the mean, making it much more difficult to pass new laws, as there is a decreasing mean. We suspect this cycle applies to many other contexts outside of gun control.

This leaves us with a question we do not answer: can this cycle be broken? In other words, is it possible for support of gun-control laws among Americans to remain high enough, not just to pass something four months later, but to make Americans appreciate the law for years to come? Breaking the cycle will require a significant cultural shift. Only time will tell if this is possible.

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cultural recrimination surrounding the American gun question or other issues that feature persistent polarization over decision-relevant science.”).