

GUN EXCEPTIONALISM

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Gun violence is a major American public health problem. In the most recent decade for which there are good data (2005-2014), on an average day in the United States, over 290 people were shot, and more than eighty-five died.¹ More American civilians were killed by guns in that decade than American military personnel were killed in battle during World War II.² It is not only the direct gunshot victims and their families who suffer. Exposure to gun violence can have serious health consequences to anyone witnessing it,³ and gun violence can destroy entire communities by making people fearful to go out and companies less likely to locate there.⁴

Most Americans killed by gunfire were probably decent law-abiding citizens or a family member who used the home gun for suicide.⁵ Close to 60% of firearm deaths are self-inflicted,⁶ and the evidence is overwhelming that a gun in the home increases the risk of completed suicide for household members.⁷ However, while most firearm deaths are

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1. *Fatal Injury Reports, National and Regional, 1999-2014*, CTRS. FOR DISEASE CONTROL & PREVENTION, http://webappa.cdc.gov/sasweb/ncipc/mortrate10_us.html (last visited Oct. 31, 2016) (select: “all intents” option; then select “firearm” option; select “United States,” “all races,” “both sexes,” “2005-2014,” “all Hispanic origin,” “standard output”; then select “all ages”; submit request); see also *Nonfatal Injury Reports, 2001-2014*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://webappa.cdc.gov/sasweb/ncipc/nfirates2001.html> (last visited Oct. 31, 2016) (select: “all intents” option; then select “firearm” option; select “both sexes,” “2005-2014,” “all cases,” “standard output”; then select “all ages”; submit request). The number of deaths was divided by ten, which was then divided by 365.25 to equal 87.8 shooting deaths per year. The number of deaths was added to the number of injuries, which was divided by ten and then divided by 365.25 to equal the number of people shot per day.

2. NESE F. DEBRUYNE & ANNE LELAND, CONG. RESEARCH SERV., RL32492, AMERICAN WAR AND MILITARY OPERATIONS CASUALTIES: LISTS AND STATISTICS 2 tbl.1 (2015).

3. See Patrick J. Fowler et al., *Community Violence: A Meta-Analysis on the Effect of Exposure and Mental Health Outcomes of Children and Adolescents*, 21 DEV. & PSYCHOPATHOLOGY 227, 227–28 (2009); see also Suzanne Salzinger et al., *An Ecological Framework for Understanding Risk for Exposure to Community Violence and the Effects of Exposure on Children and Adolescents*, 7 AGGRESSION & VIOLENT BEHAV. 423, 424 (2002).

4. See David Hemenway, *Measuring the Cost of Injury: Underestimating the Costs of Street Violence*, 17 INJ. PREVENTION 289, 289 (2011).

5. See Renee M Johnson et al., *Who Are the Owners of Firearms Used in Adolescent Suicides?*, 40 SUICIDE & LIFE-THREATENING BEHAV. 609, 609 (2010).

6. See *Leading Cause of Death Reports, National and Regional, 1999-2014*, CTRS. FOR DISEASE CONTROL & PREVENTION, http://webappa.cdc.gov/sasweb/ncipc/leadcaus10_us.html (select: “United States,” “all races,” “both sexes,” “2005-2014,” “all Hispanic origin,” “standard output”; submit request) (59.5%).

7. See Matthew Miller et al., *Suicide Mortality in the United States: The Importance of Attending to Method in Understanding Population-Level Disparities in the Burden of Suicide*, 33

self-inflicted, most people who are shot are shot by someone else, during assaults and robberies.⁸

Compared to the other two dozen high-income Organisation for Economic Cooperation and Development (OECD) countries (e.g., Australia, Canada, France, Germany, Italy, Japan, New Zealand, Spain, Sweden, Switzerland, United Kingdom), the United States has average rates of crime.⁹ Where the United States is different is with regard to lethal crime, which is largely gun crime. Compared to the other high-income countries, the United States has many more guns, particularly handguns, and more permissive gun laws.¹⁰ Not surprisingly, the United States has far greater rates of gun death, including gun homicide. Thus, the United States has far greater overall homicide rates.¹¹

In the United States, virtually every gun starts out as a legal gun, manufactured legally and initially sold by a federally licensed retailer that, at least since 1994, is required to conduct a federal background check on the purchaser.¹² Yet each year hundreds of thousands of guns “leak” into the secondary gun market where individuals who could not pass the federal background check can obtain firearms.¹³

To make it more difficult for high-risk individuals to obtain firearms, federal background checks could be made stronger (e.g., by prohibiting those with violent misdemeanor convictions from legally purchasing a new firearm).¹⁴ Policies could also make it more difficult for individuals

ANN. REV. PUB. HEALTH 393, 398–99 (2012); see also Matthew Miller et al., *Firearms and Suicide in the United States: Is Risk Independent of Underlying Suicidal Behavior?*, 178 AM. J. EPIDEMIOLOGY 946, 946 (2013).

8. See *Leading Cause of Death Reports, National and Regional, 1999-2014*, supra note 6.

9. See FRANKLIN E. ZIMRING & GORDON HAWKINS, *CRIME IS NOT THE PROBLEM: LETHAL VIOLENCE IN AMERICA* 7–8 & fig.1.3 (1997).

10. DAVID HEMENWAY, *PRIVATE GUNS, PUBLIC HEALTH* 7 (2006).

11. Erin Grinshteyn & David Hemenway, *Violent Death Rates: The U.S. Compared with Other High-Income OECD Countries*, 129 AM. J. MEDICINE 266, 266 (2016).

12. See *Background Check Procedures*, LAW CTR. TO PREVENT GUN VIOLENCE, <http://smartgunlaws.org/gun-laws/policy-areas/gun-dealer-sales/background-check-procedures/> (last visited Oct. 31, 2016).

13. Cf. Philip J. Cook et al., *Regulating Gun Markets*, 86 J. CRIM. L. & CRIMINOLOGY 59, 87–90 (1995) (discussing ways in which individuals manage to obtain firearms through the secondary market).

14. Garen J. Wintemute, *Broadening Denial Criteria for the Purchase and Possession of Firearms: Need, Feasibility and Effectiveness*, in *REDUCING GUN VIOLENCE IN AMERICA: INFORMING POLICY WITH EVIDENCE AND ANALYSIS* 88 (Daniel W. Webster & Jon S. Vernick eds., 2013). As discussed above, it is likely that most shooters in gun deaths have a legal right to own a firearm. While I could not find any study directly on this subject, probably most gun suicides and accidents involve legally owned firearms. It also appears that a good number of gun homicides are committed by individuals who could pass the NICS background check. Cook, Ludwig, & Braga found that the large majority of homicide perpetrators in Chicago had long arrest records, but most did not have felony convictions. In other words, most killers, even in a place like Chicago, probably could have passed the federal background check. See Philip J. Cook et al., *Criminal*

who could not pass the current background check to obtain firearms.

Guns get into hands of those who cannot pass a background check in a variety of ways. These ways include the sale of used guns without a background check (e.g., at gun shows, flea markets and over the internet),¹⁵ straw purchases,¹⁶ and gun theft.¹⁷ It is estimated that hundreds of thousands of guns are stolen each year.¹⁸

Professor Andrew McClurg makes the case that U.S. negligence laws, with respect to firearm storage, are instrumental in allowing this huge level of gun theft. Unlike many other high-income countries, the United States does not have a federal law that requires that guns be stored and locked,¹⁹ and only one U.S. state (my state, Massachusetts) has such a requirement.²⁰ I was on a task force advising the Massachusetts speaker of the House about firearm issues,²¹ and as best we could make out, the Massachusetts safe storage law is rarely if ever enforced.

Overall, Massachusetts has stronger gun laws than most U.S. states, with many of the laws designed to reduce the leakage of guns to criminals.²² Trace data indicate that most offenders in Massachusetts do not get their guns from Massachusetts. The guns typically come from nearby states with permissive gun laws such as New Hampshire and Maine, and up I-95 from southeastern states with permissive gun laws such as Georgia and Florida.²³

Records of Homicide Offenders, 294 JAMA 598, 600 (2005). Vittes, Vernick, and Webster found that 60% of inmates in state prisons for gun offenses could have passed an NICS check immediately before their most recent arrest. See Katherine A. Vittes et al., *Legal Status and Source of Offenders' Firearms in States with the Least Stringent Criteria for Gun Ownership*, 19 INJ. PREVENTION 26, 29 (2013) (noting that 40% of offenders were in possession of the gun illegally).

15. Kate Masters, *Just How Many People Get Guns Without a Background Check? Fast-Tracked Research is Set to Provide an Answer*, THE TRACE (Oct. 21, 2015), <https://www.thetrace.org/2015/10/private-sale-loophole-background-check-harvard-research/>.

16. See *Gun Trafficking & Straw Purchases*, LAW CTR. TO PREVENT GUN VIOLENCE, <http://smartgunlaws.org/gun-laws/policy-areas/investigating-gun-crimes/gun-trafficking-straw-purchases/> (last visited Oct. 31, 2016).

17. See Brian Freskos, *Up to 600,000 Guns are Stolen Every Year in the U.S.—That's One Every Minute*, THE GUARDIAN (Sept. 21, 2016), <https://www.theguardian.com/us-news/2016/sep/21/gun-theft-us-firearm-survey>.

18. See *id.*

19. *Safe Storage & Gun Locks*, LAW CTR. TO PREVENT GUN VIOLENCE, <http://smartgunlaws.org/gun-laws/policy-areas/consumer-child-safety/safe-storage-gun-locks/> (last visited Oct. 25, 2016).

20. *Id.*

21. See COMM. TO REDUCE FIREARM VIOLENCE, STRATEGIES FOR REDUCING GUN VIOLENCE 10 (2013).

22. See *Safe Storage & Gun Locks*, *supra* note 19.

23. *Top 15 Source States for Firearms with a Massachusetts Recovery*, BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, <https://www.atf.gov/docs/163556-maatfwebsite15pdf/download> (last visited Oct. 25, 2016).

Professor McClurg shows that gun owners in the United States are unlikely to be held negligent if they store their guns carelessly and the guns fall into the wrong hands. His conclusion is that

[d]espite the fact that hundreds-of-thousands of guns are stolen each year and that a high percentage of crime guns are the product of theft, the U.S. legal system is bankrupt of tools to deter dangerous, unreasonable firearms security. The law imposes virtually no obligation on the most efficient cost-avoider in the equation: possessors of firearms.²⁴

Surveys find that many gun owners do not store their guns in ways that will reduce the likelihood of theft.²⁵

As Professor McClurg emphasizes, the treatment of gun owner negligence is just one example among many where there are special policies to protect gun manufacturers, gun dealers, gun owners and gun users. For example, guns are one of the few products whose safety is not regulated by any federal agency. While the Consumer Product Safety Commission can regulate toy guns and gun safes, it has no jurisdiction over the guns themselves.²⁶ In addition, an act of Congress has made it difficult to successfully sue gun manufacturers.²⁷ Congress has also in many ways deliberately hampered the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), which regulates gun retailers, such as prohibiting it from computerizing some of its information.²⁸ Moreover, some states, such as Florida, have Stand Your Ground laws which widen the latitude for gun use against others.²⁹ Florida is also trying to reduce the likelihood that physicians talk to their patients about the dangers of

24. Andrew Jay McClurg, *The Second Amendment Right to Be Negligent*, 68 FLA. L. REV. 1, 46 (2016) (footnotes omitted).

25. See Andrew Jay McClurg, *Armed and Dangerous: Tort Liability for the Negligent Storage of Firearms*, 33 CONN. L. REV. 1189, 1191 (2000); see also HEMENWAY, *supra* note 10, at 83–84.

26. See Consumer Product Safety Commission Improvements Act of 1976, Pub. L. No. 94-284, § 3 90 Stat. 503 (1976) (codified as amended at 15 U.S.C. §§ 2051–2089 (2012)).

27. See 15 U.S.C. §§ 7901–7903 (2012).

28. See Anthony A. Braga & Peter L. Gagliardi, *Enforcing Federal Laws Against Firearm Traffickers: Raising Operational Effectiveness by Lowering Enforcement Obstacles*, in REDUCING GUN VIOLENCE IN AMERICA: INFORMING POLICY WITH EVIDENCE AND ANALYSIS 147–152 (Daniel W. Webster & Jon S. Vernick eds., 2013); see also Alan Berlow, *How the NRA Hobbled the ATF*, MOTHER JONES (Feb. 11, 2013), <http://www.motherjones.com/politics/2013/02/atf-gun-laws-nra>; Dan Friedman, *The ATF's Nonsensical Non-Searchable Gun Databases, Explained*, THE TRACE (Aug. 24, 2016), <https://www.thetrace.org/2016/08/atf-ridiculous-non-searchable-databases-explained/>.

29. See Cheng Cheng & Mark Hoekstra, *Does Strengthening Self-Defense Law Deter Crime or Escalate Violence?: Evidence from Expansions to Castle Doctrine*, 48 J. HUM. RESOURCES 821, 821–22 (2013).

firearms in the home.³⁰

The unusual treatment of firearms extends to data collection and research. Much information about firearms that should be collected is not being collected, and much data that are collected are not readily available to researchers. For example, the Centers for Disease Control and Prevention (CDC) conducts a large annual survey of over 400,000 Americans on health issues: the Behavioral Risk Factor Surveillance System.³¹ After 2004, it stopped asking any questions about firearms in the home, so now it is difficult to determine the percentage of households with guns at the state level.³² CDC's National Violent Death Reporting System (NVDRS), which provides detailed, consistent and comparable information across states and over time on all violent deaths, was created over fifteen years ago but data are still not being collected from many states.³³ While the ATF collects gun-tracing data, it is difficult for researchers and others to obtain the primary data.³⁴ Similarly, while many states collect information on concealed carry permits, these data are rarely available to researchers.³⁵

Government funding for firearms research has been reduced and kept at a low level. The CDC, our premier public health agency, funds almost no outside firearms research.³⁶ I have been at many injury prevention

30. See Dahlia Lithwick & Sonja R. West, *The Absurd Logic Behind Florida's Docs vs. Glocks Law*, SLATE (Jan. 8, 2016), http://www.slate.com/articles/news_and_politics/jurisprudence/2016/01/florida_s_docs_vs_glocks_bans_doctors_from_discussing_guns.html.

31. See *Behavioral Risk Factor Surveillance System*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/brfss/>; see also Michael C. Monuteaux et al., *Firearm Ownership and Violent Crime in the U.S.: An Ecological Study*, 49 AM. J. PREVENTIVE MED. 207, 208 (2015).

32. *Compare 2004 Behavioral Risk Factor Surveillance System State Questionnaire*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/brfss/questionnaires/pdf-ques/2004brfss.pdf> (lasted updated Feb. 2004) (including a section of questions regarding firearms), with *2005 Behavioral Risk Factor Surveillance System Questionnaire*, CTRS. FOR DISEASE CONTROL & PREVENTION (Sept. 2, 2005), <http://www.cdc.gov/brfss/questionnaires/pdf-ques/2005brfss.pdf> (excluding a section of questions regarding firearms).

33. See *National Violent Death Reporting System*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/violenceprevention/nvdrs/> (last updated Oct. 13, 2016); see also David Hemenway et al., *Creating a National Violent Death Reporting System: A Successful Beginning*, 37 AM. J. PREVENTIVE MED. 68, 70 (2009).

34. See *Everytown for Gun Safety Seeks to Compel ATF to Release Trace Data Blocked by Gun Lobby*, EVERYTOWN (July 23, 2015), <http://everytown.org/press/everytown-for-gun-safety-seeks-to-compel-atf-to-release-trace-data-blocked-by-gun-lobby/>.

35. See Aaron Mackey, *Chart: Gun Permit Data Accessibility in All 50 States*, REPORTERS COMM. FOR FREEDOM OF THE PRESS, <https://www.rcfp.org/browse-media-law-resources/news-media-law/news-media-and-law-winter-2013/chart-gun-permit-data-access> (last visited Oct. 26, 2016).

36. C. C. Branas et al., *Getting Past the "F" Word in Federally Funded Public Health Research*, 11 INJ. PREVENTION 191, 191 (2005).

meetings over the past twenty years, and CDC personnel are afraid to even say the word “guns” or “firearms.” The director of the CDC virtually never discusses gun violence.³⁷ The National Institutes of Health (NIH) provides little funding for gun research.³⁸ Only a handful of foundations provide funding.³⁹ Not surprisingly, there are disproportionately few public health articles about firearms compared to the size of the problem and relatively little is known about many crucial firearm issues.⁴⁰

For example, even though gun theft appears to be an important way in which guns get into the wrong hands, as far as I can tell, there has not been a single peer-reviewed journal article focusing on gun theft. I have been unable to find any empirical studies of the effect of gun storage on gun theft. We know little about the “who, what, why, when and how” guns are stolen from households in the United States.

In conclusion, the United States regulates guns more permissively than do other high-income countries. The issues of gun storage and gun theft highlighted by Professor McClurg are part of a broader policy pattern. All the areas of special treatment for firearms deserve the careful and in-depth legal analysis that Professor McClurg has provided for firearm theft. Currently, protection for the gun industry and gun owners seems often to come at the expense of the entire population. It does not appear that the U.S. government is really serious about trying to solve the major public health problems associated with firearm use.

37. Elizabeth Cohen & John Bonifield, *What Happened to the CDC's Courage on Guns?*, CNN (Dec. 14, 2015), <http://www.cnn.com/2015/12/14/health/cdc-frieden-gun-research/>.

38. Kate Masters, *NIH Research Grants for Gun Violence Quietly Double—From Three to Six*, THE TRACE (Aug. 10, 2016), <https://www.thetrace.org/2016/08/nih-gun-violence-research-grants/>.

39. See Todd C. Frankel, *Why the CDC Still Isn't Researching Gun Violence, Despite the Ban Being Lifted Two Years Ago*, WASH. POST (Jan. 14, 2015), <https://www.washingtonpost.com/news/storyline/wp/2015/01/14/why-the-cdc-still-isnt-researching-gun-violence-despite-the-ban-being-lifted-two-years-ago/> (noting that studying firearms is “a field without a future”).

40. See Joseph A. Ladapo et al., *Scientific Publications on Firearms in Youth Before and After Congressional Action Prohibiting Federal Research Funding*, 310 JAMA 532, 532 (2013) (finding that for the ten leading causes of deaths among youth between 1991-2010, firearms accounted for 12.6% of deaths but only 0.3% of the Pubmed publications); see also Clare Foran, *The Missing Data on Gun Violence*, THE ATLANTIC (Jan. 21, 2016), <http://www.theatlantic.com/politics/archive/2016/01/gun-control-laws-research/424956/> (stating that “[m]any basic questions [about firearms] remain largely unanswered”).